CCH Trade CASES

1959



TRADE CASES

1959

Cited 1959 Trade Cases

Texts of decisions rendered by federal and state courts throughout the United States in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems, with table of cases and topical indexes

COMMERCE CLEARING HOUSE, INC.
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FOREWORD

TRADE CASES reports the full, official texts of all decisions rendered by the higher courts, state and federal, in cases involving antitrust, Federal Trade Commission, and other trade regulation law problems. In addition, the more important lower court decisions and attorney generals' opinions are included, either in full or in excerpt form. For good measure, Government antitrust consent decrees are included in full text.

The Sherman and Clayton Antitrust Acts, the Robinson-Patman Price Discrimination Act, and the Federal Trade Commission Act are the principal federal laws interpreted and applied by these decisions. The state fair trade acts (involving resale price maintenance), unfair practices acts (involving sales below cost), and price discrimination and basic antitrust laws are the state laws concerned in these cases.

In this volume, cited 1959 TRADE CASES, are reproduced all of the court decisions reported in TRADE REGULATION REPORTS from January 15, 1959, to February 5, 1960. These decisions appeared in the "Current Court Decisions" volume of the Tenth Edition of the CCH TRADE REGULATION REPORTER.

Since TRADE REGULATION REPORTS is an original reporter of the exact texts of official decisions as handed down by the courts, it follows as a matter of course that these bound volumes are also authoritative. Decisions appear in the chronological order of publication and are designated by paragraph numbers in numerical order. The paragraph numbers are the same as those used and referred to in the TRADE REGULATION REPORTER case tables and indexes, thus facilitating direct and cross reference.

Each decision is preceded by:

(a) The full name of the case.

(b) The name of the court, the docket number, and the date of the decision.

(c) Headnotes—accurate, succinct, and informative, with emphasis on the main issue.

(d) References to all paragraphs in the compilations of the Tenth Edition of the TRADE REGULATION REPORTER which are pertinent to the subject matter of the case.

(e) Names of attorneys representing the litigants, whenever available.

(f) References to any previously reported decisions in the same case.

In antitrust cases instituted by the Government, the case number (Blue Book number) by which the case is identified in the Antitrust Division of the Department of Justice is also included.

In cases involving a Federal Trade Commission complaint or order, the FTC Docket number is given.

Effective indexing is provided to afford quick and convenient contact with any case by reference to its paragraph number. The indexing system includes:

(a) Table of Cases. Alphabetical, with complete listings under plaintiffs' names and cross references under defendants' names. The official and national reporter citations are included when available.

(b) Indexes. Complete and detailed. In addition to the General Topical Index, covering all of the decisions in the volume, special indexes are provided for:

(i) Antitrust Consent Decrees

(ii) Attorney Generals' Opinions

(iii) Federal Trade Commission Cases

(iv) Robinson-Patman Act Cases

(v) State Fair Trade Act Cases

(vi) State Unfair Practices Act Cases

This thorough indexing affords instant contact with any case (a) by case name, and (b) by subject matter.

In planning and producing TRADE CASES, the aim of the publishers throughout is to make this volume of the utmost utility in the important and extensive field of trade regulation. The user's time is saved by concentration on the subject of trade regulation (no time is lost leafing through irrelevant cases); by the single reporting medium for courts of all jurisdictions; and by the explanatory headnotes—clearly stated captions written by specialists in trade regulation law.

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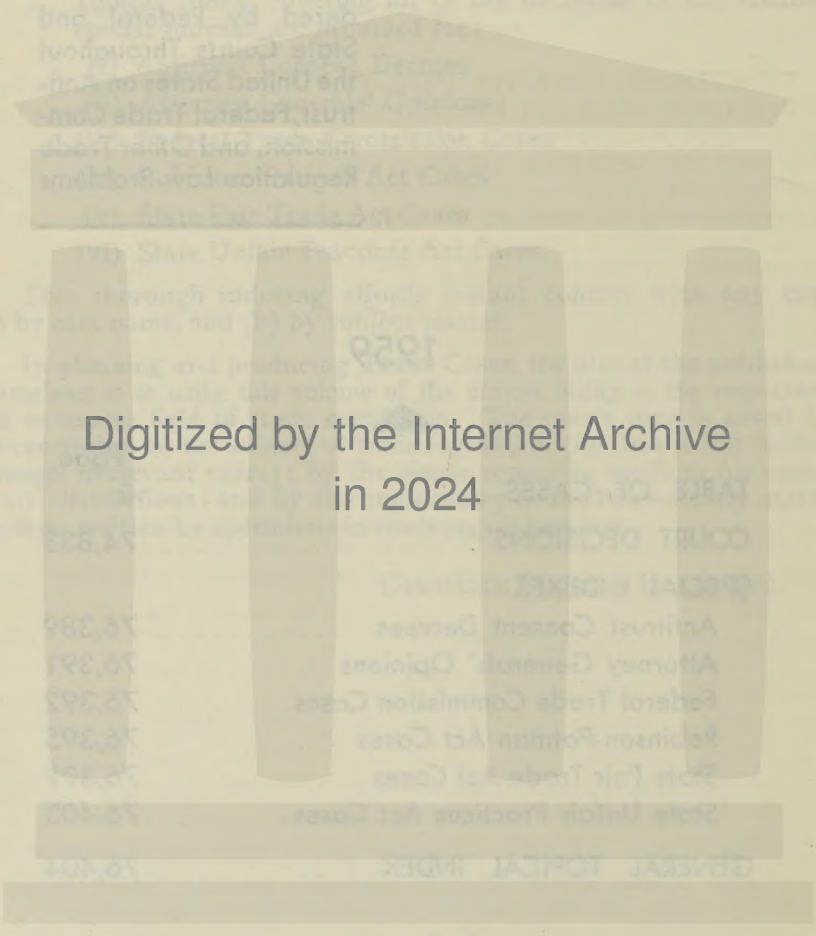
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COURT DECISIONS

—Cited 1959 Trade Cases—

[¶ 69,231] International Boxing Club of New York, Inc., International Boxing Club, Inc., et al. v. United States.

In the Supreme Court of the United States. October Term, 1958. No. 18. Dated January 12, 1959.

On Appeal from the United States District Court for the Southern District of New York. SYLVESTER J. RYAN, District Judge.

Case No. 1122 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Conspiracy To Monopolize—Monopolization—Practices—Acquisition of Control of Professional Boxers, Promoters, and Arenas—Legality.—Two corporations engaged in the promotion of professional championship boxing contests, a corporation engaged in the operation of an arena, and two individuals controlling the affairs of the corporations were properly found to have engaged in a combination and conspiracy in unreasonable restraint of trade in the promotion of professional world championship boxing contests in the United States, to have engaged in a combination and conspiracy to monopolize such trade, and to have monopolized such trade. The trial court had found that the intent of the defendants and the necessary result of their activities, including (1) their acquisition of contracts from champion boxers and leading contenders requiring them to box exclusively for the promotion corporations as a condition of participating in title bouts, (2) their acquisition of competing promoters of championship boxing contests, and (3) their acquisition of control of key arenas and stadia for the presentation of championship boxing contests, was to combine in order to obtain control of, and exclude others from, the promotion of championship boxing contests in the United States. Also, the defendants were found to have excluded others from the promotion of, exhibition of, and sale of television, radio, and motion picture rights to, championship boxing contests. The Supreme Court ruled that the decree adjudging the defendants to have violated Sections 1 and 2 of the Sherman Act must be affirmed since the defendants failed to sustain their burden of showing that the trial court's findings, or at least the basic ones, were "clearly erroneous."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.460, 2005.690, 2035.153, 2035.213, 2035.219; Monopolies, Vol. 1, ¶ 2510.275, 2510.500, 2520, 2610.120, 2610.300, 2610.800.

Combinations and Conspiracies—Monopolies—Relevant Market—Promotion of Professional Championship Boxing Contests—Reasonable Interchangeability Test.—The promotion of professional *championship* boxing contests, in contrast to *all* professional boxing contests, constituted the relevant market in an action charging violations of Sections 1 and 2 of the Sherman Act. The trial court found that there existed a "separate, identifiable market" for championship boxing contests. Among other things, the court found that the average revenue from all sources for defendants' championship bouts was $154,000, compared to $40,000 for their nonchampionship programs; television rights to one championship fight brought $100,000, in contrast to $45,000 for a nontitle fight seven months later between the same fighters; viewing ratings over a certain period were 74.9 per cent for the defendants' championship contests, and 57.7 per cent for their nonchampionship programs; although revenues from movie rights for six of the defendants' championship bouts totaled over $600,000, no full-length motion picture rights were sold to a nonchampionship contest; and spectators pay "substantially more" for tickets to championship fights than for nontitle fights. In view of such findings, it could not be said that the trial court was "clearly erroneous" in concluding that nonchampionship fights are not "reasonably interchangeable for the same purpose" as championship contests. A determination of the "part of the trade or commerce" encompassed by the Sherman Act involves distinctions in

degree as well as distinctions in kind. Championship boxing is the "cream" of the boxing business, and, as had been shown, is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes. The contention that the "physical identity of the products" requires them to be put in one and the same market was rejected.

See Combinations and Conspiracies, Vol. 1, ¶ 2005; Monopolies, Vol. 1, ¶ 2540.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Divestiture of Stock in Arena Corporation.—A decree ordering two individuals, who controlled corporations engaged in the promotion of professional championship boxing contests in Illinois and New York and controlled corporate boxing stadia located in the same states, to divest themselves, within a five-year period, of all stock which they owned "directly or indirectly" in the New York stadium corporation was affirmed by the Supreme Court. It had been found that the individuals, the boxing clubs, and the New York stadium corporation engaged in a conspiracy to restrain and to monopolize the promotion of professional championship boxing contests and monopolized the promotion of such boxing contests. "It may be that the stock in * * * [the New York stadium] was not the fruit of the conspiracy; but even if lawfully acquired it may be utilized as part of the conspiracy to effect its ends." It was the stock ownership and the individuals' control of stock voting power that the trial court found dictated the election of the officers and directors of the stadium corporation and gave to the individuals the control and management of its activities. Through the exercise of this power, the individuals elected the officers and board of directors of the New York boxing club—a joint board with the Illinois boxing club, which they also controlled through the Chicago arena corporation. The joint board was the bridge over which the conspiracy was made effective. Over it the control of the promotion of championship boxing contests was secured. The individuals continued to exercise their unlawful control long after they knew that the activity was within the coverage of the Sherman Act. Divestiture was the only effective means by which competition in championship events might be restored. It was intended to return the parties as near as possible to the *status quo* existing prior to the conspiracy.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.700.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Dissolution of Boxing Clubs.—A decree ordering the dissolution of two corporations engaged in the promotion of professional championship boxing contests was affirmed, where it had been found that such corporations, a corporation engaged in the operation of an arena, and two individuals controlling the affairs of the corporations engaged in a conspiracy to restrain and to monopolize the promotion of professional championship boxing contests and monopolized the promotion of such boxing contests. The boxing clubs were formed pursuant to and were the means used to effectuate the conspiracy. It is antitrust policy to decree dissolution "where the creation of the combination is itself the violation." Existing conditions confirmed the need for dissolution. The contention that dissolution is a useless act because the parent companies, under the decree, are left free to organize new corporations to handle boxing promotions was rejected. "New corporations, if formed, would start off with clean slates freed from numerous written and oral agreements and understandings now existent and known throughout the industry." There would be little inconvenience and nominal expense even if, as the defendants contended, they must form new corporations if they are to promote boxing contests.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.700.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Compulsory Leasing of Arenas.—A decree requiring the leasing of two arenas for championship boxing contests was affirmed, where it had been found that a corporation engaged in the operation of one of the arenas, two corporations engaged in the promotion of professional championship boxing contests, and two individuals controlling the affairs of the corporations engaged in a conspiracy to restrain and to monopolize the promotion of professional championship boxing contests and monopolized the promo-

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tion of such boxing contests. The trial court had found that one of the means used in effectuating the conspiracy was the ownership and control of arenas and stadia. The defendants' main objection to the compulsory leasing provision was the requirement that in the event the terms of a lease could not be agreed upon, the matter would be submitted to the trial court. They contended that the requirement was not only an undesirable but an impractical activity for a trial court. Obviously, such a provision might result in some disputes which must be settled. Until experience in the enforcement of the provision proves the reference is too burdensome, there is no reason to disturb it. If experience proves it unworkable, the parties, under the decree, may apply to the court for appropriate relief. The Supreme Court also noted that the defendants suggested no alternative to relieve the trial court of the burden.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.800.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Prohibition Against Exclusive Contracts for Professional Boxing Contests.—A provision of a decree prohibiting exclusive contracts for the promotion of boxing contests was affirmed by the Supreme Court, where two corporations engaged in the promotion of professional championship boxing contests, a corporation engaged in the operation of an arena, and two individuals controlling the affairs of the corporations engaged in a conspiracy to restrain and to monopolize the promotion of professional championship boxing contests and monopolized the promotion of such boxing contests. The defendants objected to the prohibition being applicable to all professional boxing contests and not being confined to professional championship boxing contests. "But human nature being what it is there is sound reason to say that exclusive contracts with boxers in nontitle contests would surely affect those same boxers when and if they arrived at the title." Such arrangements would give the defendants, so experienced in the boxing field, a decided advantage over the independent promoter. Such a prohibition is fully justified at least until the effects of the conspiracy are fully dissipated. For the same reason, a five-year prohibition against exclusive rights to a return bout was upheld. The trial court recognized that these prohibitions went beyond the relevant market which was considered for the purposes of determining the Sherman Act violations, but felt that the "relief here must be broader than the championship field because the evil to be remedied is broader." Sometimes relief, to be effective, must go beyond the narrow limits of the proven violation. The decree, which contained other prohibitions, was affirmed.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233, 8233.625.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Scope of Relief—Monopolization Cases.—A decree in a monopolization case should (1) put an end to the combination or conspiracy when that is itself the violation, (2) deprive the antitrust defendants of the benefits of their conspiracy, and (3) break up or render impotent the monopoly power which violates the law.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.100.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Modification.—In affirming a trial court decree, the Supreme Court noted that in the event experience proves that some of the provisions of the decree are so severe as to require modification or amendment, the parties may apply to the trial court as provided in the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.475.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decree—Review by Supreme Court.—In reviewing a trial court decree, the Supreme Court noted that it is not its function to sit as a trial court. The relief granted by a trial court in an antitrust case and brought to the Supreme Court on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of the Court. Though the records are usually most voluminous and their review exceedingly burdensome, the Court has painstakingly undertaken it to make certain that justice has been done. In the instant case, the Court concluded that the relief granted was not beyond

the allowable discretion of the trial court. Also, the Court noted that when relief beyond the narrow limits of the proven antitrust violation is granted, it must be especially wary lest the trial court over-step the correspondingly narrower limits of its discretion.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8235.

For the appellants: Kenneth C. Royall and John F. Caskey, New York, N. Y., for Madison Square Garden Corp. and International Boxing Club of New York, Inc.; and Charles Sawyer, Cincinnati, Ohio, for International Boxing Club, Inc.

For the appellee: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; and Charles H. Weston, Attorney, Department of Justice, Washington, D. C.

Affirming decisions of the U. S. District Court, Southern District of New York, 1957 Trade Cases ¶ 68,759 and 68,649. For prior opinions of the U. S. Supreme Court, see 1957 Trade Cases ¶ 68,849 and 1955 Trade Cases ¶ 67,941; and for a prior opinion of the U. S. District Court, Southern District of New York, see 1954 Trade Cases ¶ 67,758.

[*Prior Proceedings*]

MR. JUSTICE CLARK delivered the opinion of the Court [*In full text*].

This civil Sherman Act[1] case was here four years ago on direct appeal from a dismissal by the District Court, which had held that the Act did not apply to the business of professional boxing. We reversed, finding that "the complaint states a cause of action [under the Act] and that the Government is entitled to an opportunity to prove its allegations," and remanded the case for trial on the merits. *United States v. International Boxing Club* [1955 TRADE CASES ¶ 67,941], 348 U. S. 236 (1955). The complaint charged the appellants with a combination and conspiracy in unreasonable restraint of trade and commerce among the States in the promotion, broadcasting, and televising of professional world championship boxing contests, as well as a conspiracy to monopolize and monopolization of the same. After a trial, the District Court, in an opinion incorporating detailed findings of fact and conclusions of law based on the principles laid down in our earlier opinion, found that the allegations of the complaint had been sustained. 150 F. Supp. 397 [1957 TRADE CASES ¶ 68,649]. After further hearings on the nature and extent of the relief necessary to protect the public interest, the court entered its final judgment dissolving two of the corporate appellants, directing divestiture of certain stock owned by the individual appellants and granting injunctive relief designed to open up the market in the business of promoting professional world championship boxing matches. 171 F. Supp. 841.

[*Appeal*]

The appellants, while not attacking any specific finding as clearly erroneous, claim that the proof did not show that they violated either Section 1 or 2 of the Act. In this regard appellants level their strongest blows at the District Court's definition of the relevant market. Out of the entire field of professional boxing, the District Court carved a market in championship contests alone, holding it to be the relevant market at which the conspiracy was aimed. In the alternative, appellants insist that the relief granted the Government was "unnecessarily punitive," even if liability is assumed. On a direct appeal to this Court we noted probable jurisdiction, 356 U. S. 910 (1958). We have concluded that the findings of the District Court are not clearly erroneous and that in view of our former holding on the sufficiency of the complaint the judgment on the merits was properly entered. As to the relief granted we find that the court did not exceed the limits of allowable discretion in framing a decree "that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States v. United States Gypsum Co.* [1950-1951 TRADE CASES ¶ 62,729], 340 U. S. 76, 88 (1950).

[*Trade or Commerce*]

Our previous decision herein having decided that the promotion of professional championship boxing contests on an interstate basis constituted trade and commerce among the States, within the meaning of the Sherman Act, there is no contest here either on the findings or the law on that point. Since on that appeal we discussed in some detail the allegations of the complaint, which the trial court has now found amply proven by the evidence, we shall only summarize the findings here.

[1] 15 U. S. C. § 1 *et seq.*

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THE FINDINGS

[*The Conspiracy*]

The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtaining from each of the four leading contenders[2] exclusive promotion rights including rights to radio, television and movie revenues. Upon securing these exclusive contracts Louis assigned them to the appellant International Boxing Club, Illinois, which was organized by Norris and Wirtz for the purpose of promoting boxing for the combination in Illinois. They paid Louis $150,000 cash plus an employment contract and a 20% stock interest in I. B. C., Illinois.

In March 1949 Norris and Wirtz approached appellant Madison Square Garden, in which they had for many years owned 50,000 shares of stock. It was the "foremost sports arena in New York City and is the best known arena of its kind in the United States, if not the world."[3] However, its facilities were tied up by an exclusive lease it had granted to Mike Jacobs' interests—the leading professional boxing promoter in the field at that time. Norris and Wirtz proposed that they should all "work together now and keep the events for our buildings and not create a competitive situation that would be harmful to all." In order to effectuate this program, appellant Madison Square Garden bought out Mike Jacobs' interests, including, in addition to his lease on Madison Square Garden, his exclusive leases to Yankee Stadium and the St. Nicholas Arena and his contract with the then welterweight champion Sugar Ray Robinson. These contracts were assigned to International Boxing Club, New York, organized for the purpose of promoting boxing for the combination in New York.

Once Jacobs' interests had been acquired, there remained only one substantial competitor in the field of promoting championship boxing matches. That was Tournament of Champions, Inc., owned in part by the Columbia Broadcasting System. It owned an exclusive lease on the Polo Grounds as well as an exclusive promotion contract covering the next two fights of the then middleweight champion of the world. In May 1949 Madison Square Garden bought all of the stock of Tournament of Champions at a cost of $100,000 plus 25% of the net profits on the next two middleweight championship matches. The assets thus acquired were likewise assigned to I. B. C., New York. By a simultaneous separate agreement, Columbia Broadcasting System agreed for a five-year period not to invest in or promote any professional boxing matches in return for a first refusal right to the broadcasting of certain boxing matches staged for a like period in Madison Square Garden.

This series of agreements, consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship divisions, *i. e.*, heavyweight, middleweight, and welterweight. Not satisfied with this temporary control, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, for a period of from three to five years. Over the facilities for the staging of contests appellants exercised like control, owning or managing the "key" arenas and stadia in the Nation.[4]

Tightening the ropes around the ring thus built, Norris and Wirtz increased their stockholdings in Madison Square Garden to where they controlled it and were able to "dictate its policies and boxing activities." This has continued their control over I. B. C., New York, the stock of which is now wholly owned by Madison Square Garden.[5] They

[2] Ezzard Charles, Joe Walcott, Lee Savold, and Gus Lesnevich.

[3] The importance of the Madison Square Garden in the present context is shown by the fact that of all the championship contests staged during the 12 years immediately preceding 1949, 45% were held in New York City, of which 75% were in Madison Square Garden. The balance of the New York championship bouts, with one exception, were held in Yankee Stadium, the Polo Grounds, or the St. Nicholas Arena.

[4] Between 1937 and 1948, 50% of all championship contests were staged in either the Madison Square Garden, Yankee Stadium, the Polo Grounds, St. Nicholas Arena, Chicago Stadium, Detroit Olympia Arena, or the St. Louis Arena.

[5] At the time the I. B. C.'s were formed, Joe Louis owned 20% of the stock of each and the other 80% was split evenly between Norris and Wirtz on one hand and Madison Square Garden on the other. At some point thereafter, Louis ceased to be a stockholder and his share was split evenly between Norris-Wirtz and

are the sole stockholders of Chicago Stadium Corporation which in turn is the sole stockholder of I. B. C., Illinois. Their control over this boxing empire is revealed by the fact that Norris is president of each of the four top corporations, *i. e.,* Madison Square Garden, I. B. C., New York, Chicago Stadium Corporation, and I. B. C., Illinois. He and Wirtz are directors in all four, while I. B. C., Illinois and I. B. C., New York, which have owned all of the promotion contracts with the contenders, have a joint board of directors.

[*Effect of Conspiracy*]

The effect of the conspiracy is obvious. Using the facilities of I. B. C., Illinois, and I. B. C., New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a contender thereafter was clear, *i. e.,* to sign with appellants or not to fight. With appellants in control of the key arenas and stadia of the country through Madison Square Garden, Chicago Stadium Corporation, and others, an event could not be successfully staged in any of these areas, the most fruitful in the Nation, without their consent. The exercise of this power brought immediate results. From June 1949, when appellants staged their first championship fight, until May 15, 1953, the date of the amended complaint, they staged or controlled the promotion of 36 of the 44 championship battles held in this country, giving them approximately 81% of that field. In two of the classifications, heavyweight and middleweight, the combine staged all of the contests. The power of the combine to exclude competitors in the championship field is graphically shown by their promotion of 25 out of 27 fights in all divisions, a total of 93%, during the two-and-a-half-year period ending with the filing of the amended complaint. This power extended to the sale of film and broadcasting rights—most valuable adjuncts to successful promotion in the business.

[*Relevant Market*]

Appellants launch a vigorous attack on the finding that the relevant market was the promotion of *championship* boxing contests in contrast to *all* professional boxing events. They rely primarily on *United States v. du Pont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377 (1956). That case, involving an alleged monopoly of the market in cellophane, held that the relevant market was not cellophane alone but the entire field of flexible packaging materials. In testing for the relevant market in Sherman Act cases, the Court said:

> ". . . no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." *Du Pont, supra,* at 395.

The appellants argue that the "physical identity of the products here would seem necessarily to put them in one and the same market." They say that any boxing contest, whether championship or not, always includes one ring, two boxers and one referee, fighting under the same rules before a greater or lesser number of spectators either present at ringside or through the facilities of television, radio, or moving pictures.

We do not feel that this conclusion follows. As was also said in *du Pont, supra,* at 404:

> "The 'market' . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."

With this in mind, the lower court in the instant case found that there exists a "separate, identifiable market" for championship boxing contests. This general finding is supported by detailed findings to the effect that the average revenue from all sources for appellants' championship bouts was $154,000, compared to $40,000 for their nonchampionship programs; that television rights to one championship fight brought $100,000, in contrast to $45,000 for a nontitle fight seven months later between the same two

Madison Square Garden. At the time of the final decree, apparently as the result of an effort to make a showing of separateness of control, the Norris-Wirtz interests owned all of the stock in I. B. C., Illinois, and Madison Square Garden owned all of the stock in I. B. C., New York. The trial court found that the two interests nevertheless still shared equally in the combined profits of both I. B. C.'s.

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fighters; that the average "Nielsen" ratings [6] over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs (reflecting a difference of several million viewers between the two types of fights); that although the revenues from movie rights for six of appellants' championship bouts totaled over $600,000, no full-length motion picture rights were sold for a nonchampionship contest; and that spectators pay "substantially more" for tickets to championship fights than for nontitle fights. In addition, numerous representatives of the broadcasting, motion picture and advertising industries testified to the general effect that a "particular and special demand exists among radio broadcasting and telecasting [and motion picture] companies for the rights to broadcast and telecast [and make and distribute films of] championship contests in contradistinction to similar rights to non-championship contests." [7]

In view of these findings, we cannot say that the lower court was "clearly erroneous" in concluding that nonchampionship fights are not "reasonably interchangeable for the same purpose" as championship contests. A determination of the "part of the trade or commerce" encompassed by the Sherman Act involves distinctions in degree as well as distinctions in kind. One prime example of this is the application of the Act to trade or commerce in a localized geographical area. See, *e. g., Schine Theatres v. United States* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110 (1948); *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100 (1948); cf. *Times-Picayune v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594 (1953); *United States v. Columbia Steel Co.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495 (1948). The case which most squarely governs this case is *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948). There, the charge involved, *inter alia,* extensive motion picture theatre holdings. The District Court had refused to order a divestiture of such holdings on the grounds that no "national monopoly" had been intended or obtained. This Court felt that such a finding was not dispositive of the issue, saying:

> "First, there is no finding as to the presence or absence of monopoly on the part of the five majors [defendants] in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (*United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 224, 225, n. 59), and § 2 condemns monopoly of 'any part' of trade or commerce." *Paramount, supra,* at 172-173. (Emphasis in the original.)

Similarly, championship boxing is the "cream" of the boxing business, and, as has been shown above, is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes.[8]

[*Antitrust Violations*]

We have also examined the remainder of this characteristically lengthy record. When the case was here previously appellants did not deny that the allegations of the complaint stated a cause of action against them, provided their activity came within the meaning of the Sherman Act. We held that the complaint stated a cause of action. The District Court has now found these allegations to have been proven. With the case in this posture, appellants have an almost insurmountable burden. They must show that the findings, or at least the basic ones, are "clearly erroneous." Rule 52(a), Rules of Civil Procedure. This they have not been able to do. It follows that the decree entered on the merits adjudging the appellants to have violated both §§ 1 and 2 of the Sherman Act must be affirmed.

THE RELIEF

[*General*]

In approaching the question of relief we must remember that our function is not to

[6] According to the District Court, the "Nielsen Average Audience rating is a percentage which purports to show the number of residential television sets that were tuned in to the program expressed as a percentage of the total residential television sets, whether turned off or on, which were in areas into which the program was telecast."

[7] Approximately 25% of the revenue produced by the appellants' championship fights during the period covered by the complaint was derived through the sale of radio, television and motion picture rights.

[8] By analogy, it bears those sufficiently "peculiar characteristics" found in automobile fabrics and finishes such as to bring them within the Clayton Act's "line of commerce." *United States v. du Pont & Co.* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586, 593-595 (1957).

sit as a trial court. *Besser Mfg. Co. v. United States* [1952 TRADE CASES ¶ 67,280], 343 U. S. 444, 449-450 (1952); *United States v. National Lead Co.* [1946-1947 TRADE CASES ¶ 57,575], 332 U. S. 319 (1947); cf. *United States v. Crescent Amusement Co.* [1944-1945 TRADE CASES ¶ 57,316], 323 U. S. 173, 185 (1944). As was said in *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, 400-401 (1947):

> "The framing of [antitrust] decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."

The yardstick which the trial court should apply in monopolization cases is well stated by the Court in *Schine Theatres v. United States* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110, 128-129 (1948). The decree should (1) put "an end to the combination or conspiracy when that is itself the violation;" (2) deprive "the antitrust defendants of the benefits of their conspiracy"; and (3) "break up or render impotent the monopoly power which violates the Act."

The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome we have painstakingly undertaken it to make certain that justice has been done. See, *e. g., United States v. Paramount Pictures, supra; Schine Theatres v. United States, supra; United States v. National Lead Co., supra.* That we have done here. We have finally concluded that the relief granted was not beyond the allowable discretion of the District Court.

The Bounds of the Relief Ordered

At the time of the final decree the Joe Louis agreements had elapsed; the exclusive-contract practice had been at least temporarily abandoned; the leases on Yankee Stadium, the Polo Grounds and St. Nicholas Arena in New York had been given up and the appellants had no control over the new heavyweight champion, Floyd Patterson. Nevertheless, the additional evidence taken by the District Court showed that they still possessed all of the power of monopoly and restraint. In this we agree. The appellants had exercised a strangle hold on the industry for a long period. It was evident at the time of the decree that, statistically, they still dominated the staging of championship bouts and completely controlled the filming and broadcasting of those contests. They had gained this leadership through the elimination by purchase of all of their major competitors in the field; by the control of contending boxers through exclusive agreements; and by the staging of events through the ownership or lease of key stadia and arenas. This illegal activity gave appellants an odorous monopoly background which was known and still feared in the boxing world. In addition, Norris and Wirtz still possessed the major tools, so well used previously, necessary to continue their control. They owned or controlled the key arena and stadium in New York and Chicago, the most lucrative communities in boxing; they continued to control all of the championship bouts staged there; they commanded the filming and broadcasting of all championship fights—the cream of the business—wherever staged; and though on the surface they owned no stock directly in the two I. B. C. corporations, each was the wholly owned subsidiary of corporations which Norris and Wirtz did control and manage.

In this setting the District Court ordered Norris and Wirtz to divest themselves, within a five-year period, of all stock which they owned "directly or indirectly" in Madison Square Garden. In addition, both of the International Boxing Clubs, Illinois and New York, were ordered dissolved. The Chicago Stadium and Madison Square Garden were each enjoined from staging more than two championship bouts annually. All exclusive agreements for the promotion of boxing events, including nonchampionship, were banned. Madison Square Garden was ordered for a period of five years to lease its premises when available at a "fair and reasonable" rental to any duly qualified promoter applying in writing therefor. Failure to agree on terms would require submission to the courts for determination. Like requirement was imposed on Chicago Stadium Corporation, provided Norris-and-Wirtz control continued.

The District Judge concluded that it was necessary to include each of these provisions in the decree in order to put an end to the combination, deprive the appellants of the benefit of their conspiracy and break

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up their monopoly power. At the conclusion of the final hearing on relief he observed that prior to 1949 the Norris-Wirtz group was in Chicago while the Madison Square Garden enterprise was in New York. They were "two separate entities," one promoting contests in the mid-West and the other in New York. He declared that "in order to destroy this monopoly we have to return the situation as nearly as possible to the economic conditions as they existed in 1949" and, further, "I can see no way in this case . . . that a proper decree can be formulated unless that power that Wirtz and Norris have in Madison Square Garden is curtailed. They have to get out of the control."

The Order of Divestiture

Appellants contend that since the stock owned by Norris and Wirtz was not acquired pursuant to the conspiracy, was not the fruit of illegal activity and was not proven to be the lever by which Madison Square Garden was persuaded to join the conspiracy, divestiture was but punishment rather than a necessary corrective remedy. They further say that the sale, even though made in the manner outlined in the decree,[9] would result in great loss to Norris and Wirtz. They contend that it was arbitrary for the District Court not to permit them to exercise an option, as proposed by them, of a choice between Madison Square Garden and the Chicago Stadium, both of which they still control.

It may be that the stock in Madison Square Garden was not the fruit of the conspiracy; but even if lawfully acquired it may be utilized as part of the conspiracy to effect its ends. See *United States v. Paramount Pictures, supra,* at 152. Moreover, since the inception of the conspiracy Norris and Wirtz have increased their holdings to over 219,000 shares. It was this stock ownership and their control of stock voting power that the trial court found dictated the election of the officers and directors of the Madison Square Garden and gave to Norris and Wirtz the unquestioned control and management of its activities. Although reluctant at first to require a divestiture of this stock, the trial judge ultimately became convinced that it was the *sine qua non* of the relief. During the hearing he said:

> "The great evil I found was the combination that Wirtz and Norris caused and created by joining up with Madison Square Garden. I regard Wirtz and Norris as one and Madison Square Garden as another, a separate entity and business interest. *The evil primarily sprung from their combination, their concerted efforts and action. That has to be broken up.*"
>
> (Emphasis supplied.)

What is perhaps equally significant is that through the exercise of this power Norris and Wirtz elected the officers and board of directors of I. B. C., New York—a joint board with I. B. C., Illinois, which they also controlled through the Chicago Stadium Corporation. This joint board was the bridge over which the conspiracy was made effective. Over it the control of the promotion of championship boxing contests was secured. That this control remained effective up to the very date of the final hearing, June 24, 1957, is shown by the following statement by the court on that date:

> "The unlawful combination of the defendants still possesses and exercises its monopolistic control in the field of championship contests. It appears that since May 15, 1953 there have been held in the United States 37 championship contests, excluding one bantamweight contest. The defendants admit that they had promotional control over 24 of the 37 championship contests which were held or of 65 per cent of the market, but we find that the defendants were not financial strangers to the other 13 championship contests which were held in cities other than New York and Chicago. Because the defendants are licensed by state authorities to promote only in New York and Illinois, they could not be the persons actually designated as the promoter of the 13 championship contests, but all five of the championship contests which originated in cities other than Chicago or New York on Friday nights were televised on IBC's-New York Friday night television series.
>
> "We find, too, that all of the 37 championship contests in this period from May 15, 1953, save only the five outdoor contests, were televised on either the defendants' Wednesday or Friday night television series, and that the profits of

[9] Norris and Wirtz were given five years to sell their stock in Madison Square Garden, which stock is listed on the New York Stock Exchange. During this time, the stock is to be held by two trustees named by the court. If the stock is not sold within five years, the trustees are ordered to sell it within the next two years.

the sale of the telecasting rights inured to the benefit of the defendants."

As this was some two and a half years after our opinion in the former appeal on January 31, 1955, it appears that appellants had continued exercising their unlawful control long after they well knew that this activity was within the coverage of the Sherman Act. In view of the fact that no denial was made on that appeal of the sufficiency of the Government's complaint it is reasonable to assume that appellants, subsequent to our opinion, knew that their conduct violated the Sherman Act, obedience to which is so important to our free enterprise system. Still they continued their illegal activity. In fact from all appearances it is continuing to this day. Such conduct, in addition to the interlocking nature of the ownership at the time of the final decree, fully justified the District Court's conclusion that the "dissolution of the combination can only be accomplished by an immediate and complete severance of the interlocking ownership of Norris and Wirtz in Madison Square Garden. . . . [T]here must be a complete divestiture of the stockholdings of Norris and Wirtz in the Garden. The Government has established Norris and Wirtz control the Garden Corporation." Moreover, this was the only effective means at hand by which competition in championship events might be restored. It was intended to return the parties as near as possible to the *status quo* existing prior to the conspiracy.

For these reasons, we do not see why it was incumbent upon the court to give Norris and Wirtz certain options requested at the time of the decree. We shall mention only two. The first was that they have the right to exercise a choice of retaining either the Madison Square Garden or the Chicago Stadium. But this would not be conducive to the re-establishment of competition *between* the two interests, which the District Court considered a necessity. Nor would it eliminate the "great evil" the trial court found in the Norris-Wirtz-Garden combination. Another requested option was that Norris and Wirtz be permitted to retain their control of the Madison Square Garden and the latter be enjoined from promoting championship boxing events. But this would have eliminated the world's principal boxing center—"the premier sports arena in the world," as appellants characterized it—from promoting such events in competition with Norris and Wirtz.

In short, the Government in its effort to free the professional boxing business of monopoly and unreasonable restraints would have won the battle but lost the war under either of the proffered alternatives. As this Court said in *United States v. Crescent Amusement Co.* [1944-1945 TRADE CASES ¶ 57,316], 323 U. S. 173, 189-190 (1944):

> "Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity . . . to act in combination . . . . The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future."

The Dissolution of the Two International Boxing Clubs

Admittedly these corporations were formed pursuant to and were the means used to effectuate the conspiracy. As the trial judge said:

> "These corporations are the promotional arms of the defendants, conceived and used to enable defendants to restrain and monopolize promotion of championship boxing contests. Their assets are of but nominal value except for the goodwill attaching to their names by virtue of the conspiracy."

The conditions existing here even subsequent to our former opinion confirm the need for such dissolution. Both corporations continued to share equally the profits the combination reaped from the staging of championship boxing contests. This also included revenues from championship contests promoted by others but televised by the combination. They continue even now as the bridge between the choice arenas Norris and Wirtz own or control and the boxers with whom they have exclusive promotion contracts. Through interlocking officers and directorates the two I. B. C.'s thus effectively hold the combination together. It is antitrust policy to decree dissolution "where the creation of the combination is itself the violation." *United States v. Crescent Amusement Co., supra,* at 189, and cases there cited. This is one of those situations where the injunctive process affords too little relief too late.

Appellants argue that this is punitive; that the parent companies, under the decree, are left free to organize new corporations to handle their respective boxing promotions

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and, hence, dissolution is a useless act. The trial court felt, however, and we agree, that continued operation under the old I. B. C. charters might lead to a situation *nominis umbra* not conducive to the elimination of the old illegal practices. New corporations, if formed, would start off with clean slates free from numerous written and oral agreements and understandings now existent and known throughout the industry. Hence dissolution might well have the salutary effect of completely clearing new horizons that the trial judge was attempting to create in the boxing world, especially when effected in conjunction with the stock divestiture provision. Moreover, there would be little inconvenience and nominal expense even if, as appellants contend, they "as a practical matter must [form new corporations] if they are to promote any boxing at all." This we think a poor excuse for not completely eliminating, by dissolution, these old trappings of monopoly and restraint.

The Compulsory Leasing Provisions

The District Court, having found that one of the means used in effectuating the conspiracy was the ownership and control of arenas and stadia, entered a compulsory leasing provision in the decree as to Madison Square Garden and the Chicago Stadium Corporation.[10]

The appellants' main concern with this provision of the decree is the requirement that in the event the terms of a lease cannot be agreed upon the matter will be submitted to the District Court. Appellants fear that this is not only an undesirable but an impractical activity for a District Court. But they have suggested no alternative to relieve the court of this burden. Obviously, such a provision may result in some disputes which must be settled. Until experience in the enforcement of the provision proves the reference to be too burdensome we see no reason to disturb it. If experience proves it unworkable the parties, under the decree, may apply to the court for appropriate relief. See *Lorain Journal Co. v. United States* [1950-1951 Trade Cases ¶ 62,957], 342 U. S. 143, 156-157 (1951); *International Salt Co., supra,* at 401.

Exclusive Contracts With Contestants

Appellants object to the prohibition against exclusive contracts applying to all professional boxing contests. They question the Government's enlarging its base from championship bouts to all professional boxing. But human nature being what it is there is sound reason to say that exclusive contracts with boxers in nontitle contests would surely affect those same boxers when and if they arrive at the title. Such arrangements would give appellants, so experienced in the boxing field, a decided advantage over the independent promoter. Such a prohibition is fully justified at least until the effects of the conspiracy are fully dissipated. For the same reason we see no fault in the five-year prohibition against exclusive rights to a return bout.

The trial court recognized that these restrictions went beyond the "relevant market" which has been considered for purposes of determining the Sherman Act violations, but felt that "[t]he relief here must be broader than the championship field because the evil to be remedied is broader." This Court has recognized that sometimes "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States v. United States Gypsum Co., supra,* 340 U. S., at p. 90; *Timken Co. v. United States* [1950-1951 Trade Cases ¶ 62,837], 341 U. S. 593, 600 (1951). When this sort of relief is granted, we must of course be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion, but for the reasons set out above, we feel that no such misuse of the trial court's power is present here.

[*Judgment Affirmed*]

We have considered the other objections of appellants to the decree and find them unsubstantial as presently posed. In the event experience proves that some of the provisions are so severe as to require modification or amendment, the parties may apply to the District Court as provided in paragraph 25 of the decree. The judgment should be affirmed.

It is so ordered.

[10] This provision of the decree, applying only to championship contests, ordered appellants to lease their respective buildings upon seasonable written request by a qualified promoter, if the proposed rent is reasonable, if the applicant furnishes adequate security, and if at the time of the application the building is neither already under lease to another for the specified day nor in conflict at that time with "any well-established event" which has been regularly conducted therein. If the parties cannot agree on what constitutes adequate security or a reasonable rental, either party may apply to the court for a determination thereof.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

[Dissenting Opinions]

MR. JUSTICE FRANKFURTER, dissenting in part.

While I have heretofore expressed views in favor of the almost controlling deference to be paid to a District Court's considered formulation of the provisions appropriate to a decree designed to remedy adjudicated violations of the antitrust laws, those views have not prevailed, see the opinions in *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, and this Court has felt free to modify and eliminate provisions of an antitrust decree, particularly when a single judge has imposed an unconventional and drastic remedy. The main issue dealt with in Mr. Justice Harlan's dissent, while a narrow one, is, in my view, important. While divestiture has been decreed by the district judge, the mandatory disposition of the stock has been delayed for five years, and the stock placed in trusteeship. During this five-year period a series of detailed controls have been imposed, under the supervision of the District Court, in order to prevent appellants Norris and Wirtz from exercising the power their stock ownership has given them over the operations of Madison Square Garden. The ownership itself has been sterilized. I think it not an unreasonable forecast that, even were we to postpone for five years the decision whether to order the divestiture or continue the trusteeship, appellants Norris and Wirtz would not find it profitable to continue their sterilized ownership of the Garden stock. However, there is no compelling reason to order them to do what sound business judgment may compel. One has the right to assume that, in view of this Court's unanimous affirmance of the findings below that appellants were in violation of the Sherman Law, they will scrupulously obey the decree and not even by the subtlest indirection seek to avoid our decision. Therefore I think it is needless now to determine that divestiture must take place five years hence, rather than wait upon the event in order to determine whether divestiture should then be ordered.

Accordingly, I join Mr. Justice Harlan's opinion.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting in part.

I am unable to subscribe to the Court's approval of those parts of the decree below which ordered (1) the divestiture of the stockholdings of Norris and Wirtz in Madison Square Garden Corporation and (2) the dissolution of the New York and Illinois International Boxing Clubs. On the other aspects of the case I agree with the results the Court has reached.

DIVESTITURE

As a starting point I accept the conclusion of the District Court that competition in the promotion and exhibition of professional championship boxing could not be effectively restored so long as Norris and Wirtz remained in control of Madison Square Garden's activities in this field. Because of the pre-eminence of the Garden as a site for boxing contests, the District Court found that its control by Norris and Wirtz constituted the fulcrum of the antitrust violations which were adjudged. That finding is supported by the evidence, and in turn justifies the court's conclusion that the elimination of their influence in the Garden was prerequisite to restoring competition.

It by no means follows, however, that the order divesting Norris and Wirtz of their Garden stockholdings was an appropriate method of accomplishing that objective in the circumstances of this case. Unless past pronouncements of this Court cautioning against the indiscriminate use of divestiture as a remedy in antitrust cases, see *Timken Co. v. United States* [1950-1951 TRADE CASES ¶ 62,837], 341 U. S. 593, are to be taken less seriously than they should be, it seems to me that the Court has too lightly given approval to the use of that drastic measure here.

First. It is not at all clear to me just why the District Court, which in the early stages of the hearings on relief expressed itself strongly against divestiture, ultimately reached the conclusion that such a course was necessary. Indeed the record can be read as indicating the court's belief that the five year trusteeship of the stock, though designed to alleviate some of the hardships of a forced sale, would at the same time effectively remove Norris and Wirtz from control over the Garden's affairs and therefore in conjunction with the other provisions of the decree result in restoring competitive

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conditions, whether or not the correlative requirement of sale was carried out within the five-year period.[1] The decree itself supports this reading. For despite the evident realization that the stock might not be sold within five years, the provisions of the decree especially aimed at opening up competition for the use of the Garden are all geared to this period. If in fact the District Court thought this five-year insulation of Norris and Wirtz from managerial and policy-making activities at the Garden would combine with the other restrictions to restore competition, justification for divestiture must then be found in a purpose to prevent a relapse into noncompetitive conditions after the five years have elapsed, something which the District Court quite properly considered to be a function of the decree. On this premise I am at a loss to see why continuance of the trusteeship, and, if necessary, the concomitant restrictions on the Garden's activities, should not have been considered adequate to serve that end.

Second. If I am mistaken in thus divining the thinking of the District Court, I still consider that in the circumstances of this case divestiture was at least ordered prematurely. Determination whether that drastic remedy was required should have been postponed until the expiration of the trusteeship period so that the necessity for its application could then be judged in light of the effectiveness of the other sanctions of the decree. I recognize that various contingencies can be conjured up to support the view that divestiture, rather than trusteeship, holds the more solid promise of assuring the preservation of competition. Nevertheless I think that rejection of a continuance of the trusteeship in favor of divestiture should, in the peculiar setting of this case, be based on experience rather than speculative apprehension.

Three factors seem to me especially compelling toward such a course. In the first place, this cannot properly be considered a case of reprehensible immoral conduct or willful lawbreaking.[2] Not until January 31, 1955, when this Court handed down its opinion in *United States v. International Boxing Club* [1955 Trade Cases ¶ 67,941], 348 U. S. 236, did it become known that professional boxing was even subject to the federal antitrust laws. In view of this Court's earlier decisions in the baseball cases, *Federal Baseball Club v. National League*, 259 U. S. 200, and *Toolson v. New York Yankees, Inc.* [1953 Trade Cases ¶ 67,602], 346 U. S. 356, I think it reasonable to say that in 1949 when this alleged conspiracy began most well-informed lawyers believed that professional boxing, like professional baseball, was beyond antitrust stricture. Hence the appellants had every reason to believe their actions were innocent when taken. Putting the matter somewhat differently, we should be slow in lending approval to the use of such a drastic remedy as this in a case where the appellants have never had the opportunity to demonstrate their willingness to comply with the law once they have learned that it applies to their activities. In my opinion, the thrust of this factor is not blunted by arguing, as the Court does, that appellants should voluntarily have done something to unscramble their relationships during the two and a half years that elapsed between the Court's decision in the original *International Boxing* case and the entry of the present decree. That sort of squeeze play should not be expected of those already involved in a lawsuit.

Further, divestiture here is brought to bear upon a large investment much of which was acquired long before the conduct charged in this case began, and the balance of which

[1] Apart from its divestiture and dissolution provisions, the decree imposes wide-ranging and pervasive restrictions on appellants' activities in boxing promotion and exhibition. It renders void all exclusive contracts which they may presently have with boxers. It prohibits the making of new exclusive contracts, with the exception that, after five years, exclusive provision may be made for return bouts. Similarly, exclusive leases with stadia not owned by appellants are proscribed. So, too, are such arrangements with television and radio broadcasters. Further, appellants are restrained, for a period of five years, from promoting more than four championship boxing programs annually, two by Madison Square Garden and two, cumulatively, by Norris and Wirtz. During that five-year period also, the compulsory leasing provisions discussed in the Court's opinion are to be in effect. Finally, the decree removes Norris and Wirtz as officers and directors of Madison Square Garden, and enjoins them from holding such positions in the future.

[2] The District Court put the matter in this way: "I don't charge them [Norris and Wirtz] with malicious intentional and moral wrongdoing, nor do I proceed to formulate the decree on such a basis. They are guilty, if anything, of a moral, prohibitive wrong, which was in doubt as to whether it was even prohibitive at the time some of these acts were done, and serious doubt, but most people held it was not."

was obtained prior to the announcement of the *International Boxing* decision. The "unlawful fruits" doctrine accordingly offers no justification for this divestiture. Although recognizing this to be true, the Court states that the Garden stock was nonetheless utilized as means of accomplishing the antitrust violations. But this is just another way of saying that divestiture is a necessary element of effective relief; it affords no independent justification for the employment of that remedy.

Lastly, the divestiture order reaches far beyond the subject matter of the action. It permanently removes Norris and Wirtz from all interest in the Garden, over 90% of whose activities are entirely unrelated to professional boxing.

Third. It is true, of course, that the trial court's considered judgment on what is necessary to dissipate the effects and prevent recurrence of an adjudged antitrust violation is entitled to much deference from this Court. But by the same token this Court, before it is asked to put its stamp of approval on such a drastic remedy as divestiture, is entitled to have a clear and unambiguous expression of the district court's reasoning in choosing such a course. Especially is this so where, as here, this Court is the sole reviewing authority and in consequence has not had the benefit of an intermediate review of the issues by a Court of Appeals. In my opinion this record leaves much to be desired in this regard. The most I can make of it, taking the case for divestiture most favorably to the Government, is that the District Court would have been justified in reserving that issue for consideration at the time the five-year trusteeship of the Norris and Wirtz stock expired. Certainly no adequate case for a present order of divestiture has been made out. In this view of the matter it becomes unnecessary to discuss at this time the various "options" alternative to divestiture which were rejected by the District Court.

Dissolution

I can find no adequate basis for the order dissolving the two International Boxing Clubs. My difficulty with this aspect of the relief is sufficiently shown by the fact that, as I read the record, it would be permissible for Madison Square Garden and the Norris and Wirtz interests in Chicago to create new corporations carrying exactly the same name as the two present organizations. The only justification offered by the Government for this aspect of the decree is that the two clubs were instrumentalities of the antitrust conspiracy and that their dissolution was but an expedient for insuring that all of their illegal agreements had been put to an end. But since all such agreements, both written and oral, are already canceled by other provisions of the decree, and since there is no suggestion that the sweeping relief granted by the District Court has any loopholes which would permit these organizations to function improperly, this justification is hardly convincing. In these circumstances dissolution appears to me to be not only punitive but futile, something not promotive of sound antitrust law enforcement.

I would remand the case to the District Court with instructions to modify its decree by striking the provisions for compulsory sale of the Norris and Wirtz stock in the Madison Square Garden Corporation, reserving the issue of divestiture for further proceedings at the end of the five-year trusteeship period, and eliminating the requirement of dissolution of the two International Boxing Clubs.

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[¶ 69,232] Edwin M. Reid v. Prentice-Hall, Inc.

In the United States Court of Appeals for the Sixth Circuit. No. 13,489. Filed December 23, 1958.

Appeal from the United States District Court for the Northern District of Ohio, Western Division. KLOEB, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Treble Damages—Pretrial Procedures—Dismissal of Action—Failure To Complete Settlement Agreement.—The dismissal of a treble damage action on the ground that the plaintiff failed to comply with a trial court order, providing for the dismissal of the action unless the plaintiff completed a settlement agreed to by the parties, was affirmed. The trial court had inherent power to punish the abuse of its process by the dismissal of the action in the interest of orderly administration of justice, and the trial court's findings were not clearly erroneous.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

For the appellant: Ben Neidlinger, Toledo, Ohio, who also was on the brief.

For the appellee: Vernon E. Rohrbacher, Toledo, Ohio. Leland H. Notnagel, Vernon E. Rohrbacher, and David W. Carroll, of Cobourn, Yager, Notnagel, Smith & Beck, Toledo, Ohio; and William P. Hindman, Jr., of Townley, Updike, Carter & Rodges, New York, N. Y., on the brief.

Before ALLEN, Chief Judge, and MARTIN and MILLER, Circuit Judges.

[*Settlement Agreement—Order*]

PER CURIAM [*In full text*]: This appeal attacks an order dismissing an action brought by plaintiff[1] praying damages for an alleged violation of the Robinson-Patman Act and other antitrust laws. The court dismissed the case in the following order:

"This matter came on for hearing on November 18, 1957 upon the issue of whether or not the parties hereto, subsequent to the commencement of this action, had entered into a valid and binding agreement of settlement and compromise of all matters in controversy and the Court, upon the submissions of proof, argument, evidence and representations of the plaintiff pro se and of respective counsel for both parties finds that a firm offer of settlement has heretofore been made by plaintiff, was accepted by defendant and was subsequently rejected by plaintiff and a higher figure demanded; and that defendant has, at all times since such agreement was accepted, and still is ready, willing and able to perform. The Court, at said hearing, thereupon stated that unless plaintiff completed the settlement found to have been agreed upon within five (5) days from November 18, 1957, it would summarily dismiss plaintiff's petition.

"The cause coming on for further hearing upon the affidavit of counsel for defendant that tender of defendant's performance under said agreement was again made within said five (5) days to counsel of record for plaintiff and thereafter all items to be delivered by it to plaintiff under said agreement were deposited with the Clerk of this Court with instructions to deliver the same to plaintiff upon receipt of plaintiff's consent to dismissal of this action with prejudice at defendant's costs, upon the report of the Clerk of this Court that the deposit made by defendant remains in his possession, upon exhibition and examination of said deposit by the Court, the Court finds that the tender made by defendant is complete and fulfills all requirements of the agreement of the parties, that defendant has complied with all of the orders of this Court, and that said tender has been refused by plaintiff.

"It Is Therefore Ordered, Adjudged, and Decreed, that this cause be, and it is hereby dismissed with prejudice at plaintiff's costs and the Clerk is ordered forthwith to return to defendant the item deposited with him by said defendant; to all of which, plaintiff excepts."

[*Dismissal Proper*]

It appears that the controlling questions are questions of fact. The District Court's findings are not shown to be clearly erroneous and its conclusions are in accord with the applicable law. The court has inherent

[1] The parties will be denominated as in the court below.

power, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongly done by virtue of its process. *Gumbel v. Pitkin,* 124 U. S. 131, 144, 14 Am. Jur., Courts, Section 171; *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Company,* 249 U. S. 134. The court has inherent power to punish abuse of its process by dismissal of an action in the interest of orderly administration of justice. See 4 A. L. R. (2d) 348, Dismissal of action for failure or refusal of plaintiff to obey court order. On page 350 of this note are listed cases from eleven states, as well as from this circuit, to the effect that there is inherent power in the court, in the interest of orderly administration of justice, to dismiss an action for disobedience of a court order. *Refior v. Lansing Drop Forge Company,* 124 Fed. (2d) 440 (C. A. 6), certiorari denied 316 U. S. 671, is closely in point and is controlling. That case held that where a cause had been pending for more than six years at time of dismissal and defendants had done their utmost to obtain a trial without success, and plaintiff was represented by the same nonresident attorney who was familiar with the case during the entire period, dismissal of the cause with prejudice for want of prosecution was not an abuse of discretion. The period involved herein was over five years. The court declared in the *Refior* case, *supra,* that a court of equity in the exercise of sound judicial discretion has general authority independent of statute or rule to dismiss a cause for want of diligence in prosecution or for failure to comply with a reasonable order of the court made in the exercise of a sound judicial discretion. To the same effect is *Colorado Eastern Railway Company v. Union Pacific Railway Company,* 94 Fed. 312 (C. A. 8). The court in the *Refior* case also held that every litigant has the duty to comply with reasonable orders of the court and, if such compliance is not forthcoming, the court has the power to apply the penalty of dismissal.

The judgment of the District Court is affirmed.

[¶ 69,233] Travelers Health Association v. Federal Trade Commission.

In the United States Court of Appeals for the Eight Circuit. No. 15,743. Dated January 13, 1959.

Petition to Review Order of Federal Trade Commission.

Federal Trade Commission Act and McCarran-Ferguson Act

Unfair Practices—False Advertising of Insurance—State Regulation of Company's Interstate Mail Order Business—Jurisdiction of Federal Trade Commission—McCarran-Ferguson Act.—A Federal Trade Commission false advertising order against an insurance company, which was licensed to do business in Nebraska and Virginia but which had policyholders in every state, was vacated on the ground that the Commission was without authority to regulate the company's advertising practices. Under the McCarran-Ferguson Act, the Federal Trade Commission Act is applicable to the business of insurance only to the extent that such business is not regulated by state law. The Nebraska "Unfair Competition and Trade Practices" Act, as amended in 1957, expressly prohibits an insurer domiciled in that State from engaging, there or elsewhere, in any "unfair or deceptive acts or practices in the conduct of the business of insurance." The company transacted all of its business through the mail from its home office in Nebraska. Since its incorporation in 1904, it had been supervised, regulated, and periodically examined by the Insurance Department of Nebraska; therefore, it could not be held that the company's practices in the solicitation of insurance by mail in Nebraska or elsewhere were unregulated by state law. It was of no substantial consequence that the 1957 Nebraska amendment authorizing the Nebraska Director of Insurance to deal with unfair and deceptive trade practices engaged in, in other states, by insurers domiciled in Nebraska, was enacted subsequent to the entry of the Commission's order. The validity of an order on review depends upon the law applicable at that time. Moreover, the court was of the opinion that the Director, at all times involved, had the power to regulate the company's practices in the solicitation of insurance in Nebraska and other states.

See Unfair Practices, Vol. 2, ¶ 5081.362, 5301.60, 8621.

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For the petitioner: C. C. Fraizer (T. J. Fraizer and Fraizer & Fraizer were with him on the brief).

For the respondent: James E. Corkey, Assistant General Counsel, Federal Trade Commission, (Earl W. Kintner, General Counsel, and J. B. Truly, Alvin L. Berman, Edwin S. Rockefeller and Frederick H. Mayer, Attorneys, Federal Trade Commission, were with him on the brief).

Amicus Curiae: Clarence S. Beck, Attorney General of the State of Nebraska, and Ralph D. Nelson, Assistant Attorney General of the State of Nebraska, filed brief for the State of Nebraska, as *Amicus Curiae,* in support of Petitioner. Joinders in the *Amicus Curiae* brief of the State of Nebraska with respect to the question of the jurisdiction of the Federal Trade Commission were filed by the following: Bruce Bennett, Attorney General for the State of Arkansas; John J. Bracken, Attorney General of the State of Connecticut; Richard W. Ervin, Attorney General for the State of Florida; Eugene Cook, Attorney General for the State of Georgia; Norman A. Erbe, Attorney General for the State of Iowa; Jo M. Ferguson, Attorney General, and Earle V. Powell, Assistant Attorney General, for the Commonwealth of Kentucky; Jack P. F. Gremillion, Attorney General for the State of Louisiana; Rufus D. Hayes, Commissioner of Insurance of the State of Louisiana; Frank F. Harding, Attorney General for the State of Maine; C. Ferdinand Sybert, Attorney General for the State of Maryland; Thomas M. Kavanagh, Attorney General of the State of Michigan; Fred M. Standley, Attorney General for the State of New Mexico; Louis J. Lefkowitz, Attorney General of the State of New York; Leslie R. Burgum, Attorney General for the State of North Dakota; T. C. Callison, Attorney General for the State of South Carolina; E. R. Callister, Attorney General for the State of Utah; Frederick M. Reed, Attorney General for the State of Vermont; Kenneth C. Patty, Attorney General for the Commonwealth of Virginia; Stewart G. Honeck, Attorney General of the State of Wisconsin; Thomas O. Miller, Attorney General for the State of Wyoming; Duke W. Dunbar, Attorney General of the State of Colorado. Whitney North Seymour and Simpson, Thacher & Bartlett filed brief for The Health Insurance Association of America, as *Amicus Curiae.*

Vacating a Federal Trade Commission cease and desist order in Dkt. 6252.

Before SANBORN, JOHNSEN and VOGEL, Circuit Judges.

[*Jurisdiction of FTC*]

SANBORN, Circuit Judge [*In full text*]: Travelers Health Association, of Omaha, Nebraska, by a petition to review, challenges the validity of a cease and desist order of the Federal Trade Commission dated December 20, 1956. The order was based upon a determination by the Commission (1) that it had jurisdiction to regulate the advertising practices of the petitioner in the promotion and sale, by mail, of insurance against disability caused by sickness, and (2) that certain of the petitioner's practices were false, misleading and deceptive within the meaning of the Federal Trade Commission Act, 15 U. S. C. § 45, 15 U. S. C. A. § 45. The order under review prohibited the petitioner from carrying on the practices found by the Commission to be unlawful.

[*McCarran-Ferguson Act*]

The petitioner contended before the Commission, and contends here: 1. That the Commission was precluded by the McCarran-Ferguson Act, 15 U. S. C. § 1011-1015, 15 U. S. C. A. § 1011-1015, from regulating the advertising practices of the petitioner, since its insurance business was subject to State laws "which relate to the regulation * * * of such business."[1] 2. That none of the advertising practices proscribed by the Commission was false, misleading or deceptive.

[1] The pertinent portions of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 61 Stat. 448, are as follows:

"That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law

[*Recent Supreme Court Decisions*]

The case was first argued and submitted to this Court on November 13, 1957. Decision was deferred pending the disposition by the Supreme Court of the cases of *The American Hospital and Life Insurance Co. v. Federal Trade Commission,* 5 Cir. [1957 TRADE CASES ¶ 68,675], 243 F. 2d 719, and *National Casualty Company v. Federal Trade Commission,* 6 Cir. [1957 TRADE CASES ¶ 68,739], 245 F. 2d 883, to review which the Supreme Court granted certiorari on November 12, 1957. 355 U. S. 867. In those cases it was held by the respective Courts of Appeals that, because of the McCarran-Ferguson Act, the Federal Trade Commission had exceeded its jurisdiction in attempting to regulate the advertising practices of the insurers there involved. A reversal of those decisions would have settled the problem of the Commission's jurisdiction in its favor in the instant case. However, on June 30, 1958, the Supreme Court, in a *per curiam* opinion, affirmed the judgments in both cases. *Federal Trade Commission v. National Casualty Co.,* and *Federal Trade Commission v. American Hospital and Life Insurance Co.* [1958 TRADE CASES ¶ 69,059], 357 U. S. 560, 78 S. Ct. 1260. In its opinion, the Supreme Court said of the McCarran-Ferguson Act (pages 562-563 of 357 U. S.):

> "* * * An examination of that statute and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' [the insurers'] advertising practices in those States which are regulating those practices under their own laws."

At our direction, the question of the Commission's jurisdiction over the advertising practices of the petitioner in the instant case was reargued and the case finally submitted on September 13, 1958.

[*Purpose of McCarran-Ferguson Act*]

The obvious purpose of the McCarran-Ferguson Act was to remove the cloud cast by the case of *United States v. South-Eastern Underwriters Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, upon the right of the States to continue to regulate and to tax interstate insurance business under their own laws, as they had done for some seventy-five years. The history and effect of the Act has already been adequately explained. See *Prudential Insurance Co. v. Benjamin,* 328 U. S. 408, 429-431; *Maryland Casualty Co. v. Cushing,* 347 U. S. 409, 413; *North Little Rock Transportation Co., Inc. v. Casualty Reciprocal Exchange,* 8 Cir. [1950-1951 TRADE CASES ¶ 62,599], 181 F. 2d 174, 176; *American Hospital and Life Ins. Co. v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,675], 5 Cir., 243 F. 2d 719; *National Casualty Co. v. Federal Trade Commission,* 6 Cir. [1957 TRADE CASES ¶ 68,739], 245 F. 2d 883, 887-888; *Securities and Exchange Commission v. Variable Annuity Life Ins. Co. of America,* D. C. D. C., 155 F. Supp. 521, 527.

[*State Regulation*]

The petitioner asserts that its insurance business, including its advertising practices, is regulated by State law within the meaning of the McCarran-Ferguson Act, and that, under Section 2(a) and (b) of the Act, the Commission is clearly without authority to do any additional or supplemental regulating of petitioner's advertising practices.

[*Contentions of FTC*]

The Federal Trade Commission contends that the Supreme Court, in its decision of June 30, 1958, in the *National Casualty Co.* and *American Hospital and Life Insurance Co.* cases, merely held that the States possess ample means to regulate insurance advertising disseminated by companies licensed to do business in those States and represented by agents located within their boundaries; that the Court expressly refrained from ruling upon the applicability of the McCarran-Ferguson Act to the mail order insurance business; that no amount of State regulation of insurance advertising can effectively stop the influx into a State of deceptive advertising material mailed by an out of State company doing a mail order insurance business; that, under the provisc of Section 2(b) of the McCarran-Ferguson Act, the Federal Trade Commission Act is applicable to the petitioner's advertising practices; and that the Commission has jurisdiction.

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enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Sherman Act. * * * the Clayton Act, and * * * the Federal Trade Commission Act * * * shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

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[*Adequacy of State Regulation*]

The Supreme Court, in its opinion of June 30, 1958, in the *National Casualty Co.* and *American Hospital and Life Insurance Co.* cases, decided no more than it was required to decide, and confined its opinion to the exact factual situation presented. That court, as the Commission says, was dealing with the advertising practices of insurers operating through agents in States in which the insurers were licensed. In the instant case the petitioner is licensed only in the States of Nebraska and Virginia. It sends letters soliciting insurance by mail throughout the United States. It has policyholders in every State in the Union, and all of its business is transacted through the mail at its home office in Omaha. It pays taxes to Virginia on premiums collected from its insureds in that State, but pays all other premium taxes to Nebraska. Since its incorporation in 1904, the petitioner has been supervised, regulated and periodically examined by the Insurance Department of the State of Nebraska. That the laws of that State are adequate to enable the Nebraska Insurance Department to deal effectively with any unfair advertising practice of the petitioner or of any other insurer domiciled in that State cannot be questioned.

[*Unfair Practices Prohibited*]

The Nebraska "Unfair Competition and Trade Practices" Act of 1947 (Secs. 44-1501 to 44-1521, Revised Statutes of Nebraska 1943, Reissue 1952) as amended in 1957 (Secs. 44-1501 et seq., Revised Statutes of Nebraska 1943, 1957 Cumulative Supplement) expressly prohibits an insurer domiciled in that State from engaging there or elsewhere in any "unfair or deceptive acts and practices in the conduct of the business of insurance." (§ 44-1503.) The Act empowers the Director of Insurance (1) to prefer charges against any such insurer if he has reason to believe that it has, in Nebraska or elsewhere, engaged "in any unfair or deceptive acts or practices in the conduct of such business," and to give the insurer notice of a hearing on the charges (§ 44-1506); (2) to take evidence at the hearing (§ 44-1507); and (3) to issue a cease and desist order if he determines that the insurer has engaged in the wrongful acts and practices with which it is charged. (§ 44-1509.)

[*Change in Applicable Law*]

At the time the Commission entered the order under review, the Nebraska Act did not expressly authorize the Director of Insurance to deal with unfair and deceptive trade practices engaged in, in other states, by an insurer domiciled in Nebraska. That, we think, is of no substantial consequence. The validity of the order under review depends upon the law presently applicable. A substantial change in applicable law, occurring after the entry of an order or judgment, which alters the rule governing a case will ordinarily be given effect on review. See and compare, *Trapp v. Metropolitan Life Insurance Co.*, 8 Cir., 70 F. 2d 976, 982, and cases cited. Moreover, we think the Director of Insurance of Nebraska at all times here involved had the power to regulate the practices of the petitioner in the solicitation of insurance in Nebraska and other states.

[*Interstate Business Conducted from Nebraska*]

It must be kept in mind that the business of the petitioner was all done at or from its home office in Omaha. There its solicitation material originated and was mailed; there the applications for insurance induced by solicitation were received; there all policy contracts were written; and there all premiums were paid. With every activity of the petitioner, in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the petitioner's practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law.

[*Practices Beyond FTC's Power*]

In our opinion, there is no controlling distinction between the instant case and the *National Casualty Co.* and *American Hospital and Life Insurance Co.* cases. We think that the advertising practices of the petitioner are regulated by State law within the letter and spirit of the McCarran-Ferguson Act, and that the Act has placed such practices beyond the regulatory power of the Commission.

[*Order Vacated*]

The order under review is vacated on the ground that the Federal Trade Commission is, and was, without authority to regulate the practices of the petitioner in soliciting insurance.

[Dissenting Opinion]

["Long Distance" Regulation Impractical]

VOGEL, Circuit Judge, dissenting: I do not dispute the majority's contention that "A substantial change in applicable law, occurring after the entry of an order or judgment, which alters the rule governing a case will ordinarily be given effect on review", but I do not believe here that the after-the-fact amendment of the Nebraska Code to include deceptive practices "in any other state" is the kind of regulation by state law Congress had in mind. To force the citizens of other states to rely upon Nebraska's regulation of the long distance advertising practices of the petitioner in the promotion and sale by mail or otherwise of insurance outside the State of Nebraska seems to me impractical and ineffective. This is much too frail a reed upon which to lean. The petitioner's mail order business is not regulated and cannot be regulated by the laws of the states whose citizens are subjected to the mail disseminated advertising. I believe the order of the Federal Trade Commission falls squarely within the purview of the Section 2(b) proviso of the McCarran-Ferguson Act and should be sustained.

[¶ 69,234] Royal Oil Corporation, and Alden C. Jocelyn and Joseph A. Inciardi, individually and as officers of Royal Oil Corporation v. Federal Trade Commission.

In the United States Court of Appeals for the Fourth Circuit. No. 7693. Argued October 16, 1958. Decided January 5, 1959.

On Petition for Review of an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresenting Character of Product—Failure to Make Material Disclosures—Labelling Motor Oil—Disclosure of Oil's Previous Use—Sufficiency of Labels Marked "Reprocessed Oil."—A Federal Trade Commission order prohibiting an oil company from advertising or selling reclaimed or previously used motor oil without disclosing the fact of the oil's previous use was affirmed. The cans in which the oil was sold were plainly marked "Reprocessed Oil," as required by North Carolina law; however, the Commission had held that the labels did not sufficiently inform the public of the nature of the product. The court rejected the company's contentions (1) that the Commission had no authority to require any disclosure other than that required by the law of North Carolina, (2) that the Commission's order deprived the company of "equal protection of the laws of North Carolina," (3) that in other cases the Commission had indicated its view that the term "reprocessed" alone would be a legally sufficient description of the product, and (4) that the testimony of witnesses who were not experts or who had never purchased used oil was an unfair sampling of "opinion."

See Unfair Practices, Vol. 2, ¶ 5081.550, 5105.60.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Jurisdiction of State Authorities—Power of Commission to Declare Practices Unfair Which Are Authorized by State Law.—A Federal Trade Commission ruling that an oil company which sold previously used motor oil in containers labelled "Reprocessed Oil" did not sufficiently inform the public of the nature of the product was affirmed. The company, which sold its products principally in North Carolina, contended that its labels complied with the law of that State, and that the Commission could not require any other disclosure. Although Congress has not specifically designated what disclosures must be made when reclaimed oil is sold in interstate commerce, it has clothed the Commission with the power to enjoin unfair business competition. Upon its general grant of authority, the Commission may, if it determines upon a reasonable basis that certain conduct constitutes an unfair method of competition, order those responsible to cease and desist even if the conduct is authorized by state law. The court found, however, that the Commission's order did not conflict with the North Carolina law. The state statute did not prohibit the use of additional descriptive words on the labels besides "Reprocessed Oil" and the company could readily comply with both the state statute and the Commission's order.

See Unfair Practices, Vol. 2, ¶ 5201.361, 5201.505.

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Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Jurisdiction of State Authorities—"Equal Protection" of State Law—Competition With Intrastate Sellers.—An oil company which was prohibited by a Federal Trade Commission order from selling previously used motor oil without disclosing the fact of its previous use was not "deprived of the equal protection of the North Carolina law." The company contended that it had complied with the law of North Carolina, the place where its products were principally sold, by labelling its previously used motor oil "Reprocessed Oil." The court held, however, that the company, which engaged in interstate commerce, had no ground of complaint if it found itself with less latitude in its methods of competition than the North Carolina law permitted its intrastate competitors. Intrastate commerce is not subject to federal regulation even though it may competitively affect interstate commerce; the Commission, however, does not lose its jurisdiction over interstate commerce merely because such commerce is in competition with intrastate activities beyond the Commission's control.

See Unfair Practices, Vol. 2, ¶ 5201.317, 5201.361.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Disclosure of Motor Oil's Previous Use—Tendency of Labels to Deceive.—A Federal Trade Commission ruling that labels marked "Reprocessed Oil" on cans of previously used motor oil did not sufficiently inform the public of the nature of the product was affirmed. The company contended that the Commission, in other cases, had indicated its view that "reprocessed" alone would be a legally sufficient description of the product. The court found, however, that nothing in the orders entered in those cases could reasonably be interpreted as affording the oil company encouragement to use the word "reprocessed" with no additional words indicating the oil's previous use. From the testimony of witnesses who had no prior experience with reclaimed oil, it appeared that some of them readily understood that the cans contained oil which had been repurified, while others were uncertain as to the character of the contents. This testimony, coupled with the Commission's own observation of the labels and its experience, was enough for a conclusion that the labels had a tendency to deceive. The court held that neither experts nor customers who have actually been deceived need be produced where the exhibits themselves demonstrate their capacity to deceive.

See Unfair Practices, Vol. 2, ¶ 5201.341.

For the petitioners: Joseph S. Kaufman and Harry D. Kaufman.

For the respondent: E. K. Elkins, Attorney, Federal Trade Commission (Earl W. Kintner, General Counsel, and James E. Corkey, Assistant General Counsel, Federal Trade Commission, on brief).

Affirming a Federal Trade Commission cease and desist order in Dkt. 6702.

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and BRYAN, District Judge.

[*Labelling Motor Oil*]

SOBELOFF, Chief Judge [*In full text*]: The petitioner, Royal Oil Corporation, is engaged in the general petroleum business and, among other activities, reclaims and markets used crank case oil drainings discarded by motorists at service stations. After impurities are removed, the oil is of high viscosity and good quality, comparable to oil that has not been previously used. The finished product is then packaged and sold in cans marked plainly and in large type "Reprocessed Oil." The Federal Trade Commission, however, has ruled that the labels on the cans did not sufficiently inform the public of the nature of the product. Royal and its officers, the individual petitioners, were ordered not to advertise such oil, or offer it for sale, without disclosing that it had been previously used. This proceeding is to review the Commission's order.

[*State Legislation*]

Twenty-one states have enacted legislation regulating the sale of previously used motor oil. North Carolina has a statute which requires that containers of reclaimed

used oil be clearly marked "Reprocessed Oil."[1] While Royal's plant is located in Baltimore, Maryland, and it sells oil in South Carolina, Virginia and Maryland, the words required by the North Carolina statute have been added to its labels because the company sells principally in that state.[2]

I

[*Authority of FTC*]

The petitioner's position is that since its labels are in compliance with the North Carolina law, the Federal Trade Commission has no authority to require any other disclosure. The company's argument is that Congress has not entered the field of regulation, and that therefore the Commission may not nullify a valid state statute.

[*State Law No Defense*]

We think this argument unsound for two reasons. First, while Congress has not specifically designated what disclosures must be made when reclaimed used oil is sold in interstate commerce, it has clothed the Commission with the power to enjoin unfair business competition. 15 U. S. C. A., Sec. 45. Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority, can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state. *United States v. South-Eastern Underwriters Assn.* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533 (1944); McCarran-Ferguson Act, 15 U. S. C. A., Sec. 1011-1015; *Federal Trade Commission v. National Casualty Co.* [1958 TRADE CASES ¶ 69,059], 357 U. S. 560 (1958); 66 Stat. 632, exempting from the antitrust laws agreements to fix prices made under State Fair Trade Laws, 15 U. S. C. A., Sec. 45(a). If the Commission determines upon a reasonable basis that certain conduct constitutes an unfair method of competition, it may order those responsible to cease and desist even if the conduct is authorized by state law. *Chamber of Commerce v. Federal Trade Commission*, 13 F. 2d 673, 684 (8 Cir., 1926).[3]

While the existence of a fairly uniform legislative judgment among the states, that the use of certain words sufficiently discloses the nature of a product, would be a circumstance for the Federal Trade Commission to consider, it would not be bound by the judgment prevalent in the states. If the Commission concluded that a more precise description was necessary to avoid public deception, it could lawfully go beyond the states' requirements.

In this case there is not even uniformity of opinion among the states as to which words best disclose the nature of the product. North Carolina is the only state requiring the word "reprocessed." Certainly in such a situation the Federal Trade Commission is not prohibited from requiring a more precise disclosure simply because the petitioner sells a substantial proportion of its product in that state.

[*Order Not in Conflict With State Law*]

However, we think that the order of the Commission in this case does not in reality conflict with the North Carolina law. The state statute does not prohibit the use of additional descriptive words, and the Commission has indicated that it is not the use of the word "reprocessed" which it considers deceptive, but rather the failure to make the additional specific disclosure that the reprocessed oil had been previously used. The order is clearly not in conflict with the state's requirement, and the petitioner can readily comply with both.

[1] Laws of North Carolina, 1953, Chapter 1137 (Article 2A, Sections 119-13.1, 119-13.2, 119-13.3 of the General Statutes of North Carolina.)

[2] South Carolina and Virginia have no statute requiring disclosure that oil has been previously used. The Maryland statute, (Code of Maryland, Art. 27, Sec. 231(a)) requires no particular words, but provides that it shall be unlawful to ". . . sell, expose for sale or offer for sale in any manner so as to deceive or tend to deceive the purchaser, any lubricating oil. . . . which had been once used for lubrication purposes and subsequently reclaimed, refined or reconditioned, without clearly indicating or setting forth such fact on the container, pump or distributing device used;"

[3] The court said: "But Congress, in the Federal Trade Commission Act, has assumed to legislate concerning 'unfair methods of competition' affecting interstate commerce and if any action by or any rule or regulation of the Chamber has that effect it is certainly subject to that act, no matter what the state has or has not authorized or permitted in that respect. Any action by the state legislature or any decision of the state courts falls blunted if it strikes at this power which Congress vested and had constitutional authority to vest in the Commission."

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[*"Equal Protection"*]

Nor is there any merit in the petitioner's contention that he has been "deprived of the equal protection of the North Carolina law." If the petitioner, who engages in interstate commerce, finds himself with less latitude in his methods of competition than the North Carolina law permits his intrastate competitors, this furnishes him no ground of complaint. The Supreme Court has held that intrastate commerce is not subject to federal regulation even though it may competitively affect interstate commerce, *Federal Trade Commission v. Bunte Brothers, Inc.* [1940-1943 TRADE CASES ¶ 56,098], 312 U. S. 349 (1941); but certainly the Federal Trade Commission does not lose its jurisdiction over interstate commerce merely because it is in competition with intrastate activities beyond federal control.

II

[*Basis for Commission's Order*]

The petitioner next asserts that the record affords insufficient basis for the Commission's order. It is claimed that in other cases the Commission indicated its view that "reprocessed" alone would be a legally sufficient description, and that to overcome the effect of these decisions, the trial examiner attempted in the present proceedings to prove by the testimony of witnesses that "reprocessed" was not a sufficient disclosure. The petitioner asserts that the trial examiner failed in this attempt, because none of the witnesses testified that they were led by the label to believe the petitioner's cans contained new oil.

[*Opinions of the Commission*]

A. The opinions of the Commission from which the petitioner argues that "reprocessed" was deemed a sufficient disclosure are *Pennsylvania Oil Terminal, Inc.*, 48 F. T. C. 356 (1951) and several cases pending before the Commission when the present case was considered: *Double Eagle Refining Co.*, Docket No. 6432, *Salyer Refining Co., Inc.*, Docket No. 6339, and *Mohawk Refining, Inc.*, Docket No. 6588. Typical of the language upon which the petitioner relies is the following passage from *Pennsylvania Oil Terminal, Inc., supra:*

> "In the absence of a disclosure on the containers that the oil therein is reclaimed or reprocessed, the general understanding and belief on the part of dealers and the purchasing public is that the oil sold in containers such as are used by respondents is, in fact, new oil and not reclaimed or reprocessed oil."

[*Disclosure of Prior Use*]

In most of the cases to which the petitioner refers, the containers had no markings to indicate the character of the oil, and the Commission's attention was therefore not focused on the question of the exact language that would constitute a sufficient disclosure of former use. While, in its opinions, the Commission may have failed to follow every reference to "reprocessed" or "reclaimed" with the phrase "from previously used motor oil," an overall reading indicates its view that the failure to disclose the oil's prior use was the core of the unfair and deceptive practice. This impression is certainly confirmed by the Commission's order in *each* of the cases cited by the respondent.

> "It is ordered that the respondents . . . do forthwith cease and desist from: . . .
>
> "(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, *without disclosing such prior use* to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container." (Italics supplied).

[*Insufficient Disclosure*]

Nothing in these orders can reasonably be interpreted as affording this respondent encouragement to use the word "reprocessed" with no additional words indicating the oil's previous use. In fact, the *Salyer* case suggested that the use of such a word alone would not be enough. There, after the complaint had been brought, the company added to its label the words "Guaranteed Re-refined" and an explanation that reclaimed *used* oil was as good as or better than crude oil. The Commission affirmed the hearing examiner's finding that the words "Guaranteed Re-refined" were insufficient to apprise the public that the oil was previously used, and that the explanation of what was meant by that phrase was inconspicuously placed and in such relatively small type that it would almost certainly escape the average purchaser's attention.

It is plain from the *Salyer* opinion that the Commission was unwilling to accept a disclosure of previous use which appeared less prominently than the disclosure of the process to which the oil had been subjected.

[*Witnesses—Label's Tendency to Deceive*]

B. At the hearing in this case, five witnesses were asked whether they could tell from petitioner's containers bearing the marking "Reprocessed Oil" if the oil was new or previously used. None of these witnesses had any prior experience or acquaintance with reclaimed used oil. Some, it appears, readily understood that the cans contained used oil which had been repurified, while others were uncertain as to the character of the contents. Although such testimony was not a strong and conclusive indictment of the petitioner's label, it indicated that some prospective purchasers were deceived by its limited disclosure. This, coupled with the Commission's own observation of the labels and its experience in regulation, was enough for a conclusion that the label had a tendency to deceive. *E. F. Drew & Co. v. Federal Trade Commission,* 235 F. 2d 735, (2 cir., 1956).

[*Capacity to Deceive*]

The petitioner stresses that none of the witnesses was an expert or had ever purchased used oil, and on this basis argues that the sampling of "opinion" was unfair. We think, however, that such witnesses are not always necessary. Neither customers who have actually been deceived, nor experts, need be produced where the exhibits themselves sufficiently demonstrate their capacity to deceive. *Zenith Radio Corp. v. Federal Trade Commission* [1944-1945 Trade Cases ¶ 57,252], 143 F. 2d 29 (7 cir., 1944); *New American Library of World Literature v. Federal Trade Commission* [1954 Trade Cases ¶ 67,752], 213 F. 2d 143 (2 cir. 1954); *Hillman Periodicals, Inc. v. Federal Trade Commission* [1948-1949 Trade Cases ¶ 62,411], 174 F. 2d 122 (2 cir., 1949).

The petitioners have advanced several other points which are basically variations of those discussed. We think that the manner in which we have determined the principal issues makes it unnecessary to pass upon the additional arguments.

[*Order Affirmed*]

The order of the Federal Trade Commission is affirmed.

[¶ 69,235] United States v. Pitney-Bowes, Inc.

In the United States District Court for the District of Connecticut. Civil Action No. 7610. Filed January 9, 1959.

Case No. 1430 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief —Compulsory Licensing of Patents—Practices Prohibited.—A manufacturer of postage meter machines was ordered by a consent decree to (1) file with the court a list of the patents owned or controlled by it, (2) grant to any qualified domestic applicant a non-exclusive, unrestricted and royalty-free license to make, use, lease, and vend postage meter machines under any of the manufacturer's existing United States patents, (3) grant to any qualified domestic applicant a non-exclusive and unrestricted license to make, use, lease, and vend postage meter machines under any of the manufacturer's future United States patents, and (4) grant to any qualified foreign applicant a non-exclusive and unrestricted license under any of the manufacturer's existing and future patents to make postage meter machines for use, lease or sale in the United States. The manufacturer was enjoined from (1) granting licenses or sublicenses under certain patents except in accordance with the terms of the decree, (2) taking any exclusive right or license under any patent owned or controlled by others unless the manufacturer was also granted the right to grant sublicenses to others, and (3) making any disposition of any patents which deprived it of the power to grant the licenses required by the decree unless the acquiring party consented to be bound by the decree. The manufacturer was also ordered to grant to licensees licensed pursuant to the decree various kinds of technical assistance for certain periods of time and upon specified conditions.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.30.

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Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Compulsory Licensing of Patents—Terms of Licensing Agreements—Royalties—Provisions Permitted.—A manufacturer of postage meter machines, after having been ordered by a consent decree to grant licenses under its various patents to qualified applicants, was prohibited from including in those licenses any restrictions other than those specified by the decree. Licenses issued under the manufacturer's existing United States patents could be non-transferable and they could contain a reasonable provision for marking the machines manufactured, used, leased, or sold under such licenses with the number of the patents covering the machines. As to licenses issued to domestic applicants under the manufacturer's future United States patents, and licenses issued to foreign applicants under the manufacturer's existing and future patents, (1) they could be non-transferable, (2) a reasonable royalty could be charged, (3) periodic royalty reports could be required, (4) reasonable provisions could be made for cancellation upon the licensee's failure to make royalty reports, pay royalties, or permit inspection of its books and records, and (5) reasonable provisions could be made for marking the machines manufactured, used, leased, or sold under such licenses with the number of the patents covering the machines. Also, the licenses must permit cancellation by the licensee at any time after one year from the initial date of the license upon the giving of thirty days' notice.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.30.

Monopolies—Monopolies Under Sherman Act, Section 2—Consent Decree—Practices Enjoined—Patents—Institution of Infringement Suits—Order to Grant Immunity from Infringement Suit.—A manufacturer of postage meter machines was prohibited by a consent decree from instituting or threatening to institute any action, suit, or proceeding against any person for any act of patent infringement alleged to have occurred prior to the date of the decree. The manufacturer was also ordered to grant to any qualified domestic applicant licensed pursuant to the decree, with respect to any postage meter machines manufactured in the United States pursuant to such license, a non-exclusive and unrestricted grant of immunity from suit under any foreign patent or application owned or controlled by the manufacturer at the time of the issuance of such license.

See Monopolies, Vol. 1, ¶ 2610.525.

Monopolies—Monopolies Under Sherman Act, Section 2—Consent Decree—Practices Enjoined—Horizontal Integration—Acquiring Stock or Assets of Competitors.—A manufacturer of postage meter machines was prohibited by a consent decree from acquiring, for a period of ten years, any of the assets or capital stock of, or financial interest in, any person engaged in the manufacture, sale, distribution, or leasing of postage meter machines. However, such an acquisition could be permitted by the court, upon an application by the manufacturer after the decree had been in effect for five years, and upon a showing by the manufacturer that the effect of such acquisition would not be substantially to lessen competition or tend to create a monopoly in the manufacture, sale, distribution, or leasing of postage meter machines.

See Monopolies, Vol. 1, ¶ 2610.120.

Monopolies—Monopolies Under Sherman Act, Section 2—Consent Decree—Practices Enjoined—Contracts and Agreements Not to Compete—Allocation of Markets and Customers—Distribution Agreements.—A manufacturer of postage meter machines was prohibited by a consent decree from entering into any agreement with any person engaged in the manufacture, sale, distribution, or leasing of postage meter machines which (1) allocated or divided territories, markets, or customers for the manufacture, sale, distribution, or leasing of postage meter machines, (2) designated the manufacturer as a distributor or agent for the distribution, lease, or sale in the United States of postage meter machines manufactured by others, and (3) designated any other person engaged in the manufacture of postage meter machines as an agent or distributor of the manufacturer. However, the manufacturer was not prohibited from entering into bona fide exclusive distributorship arrangements for designated territories with persons not then

engaged in the manufacture or distribution of postage meter machines produced by a person other than the manufacturer.

See Monopolies, Vol. 1, ¶ 2610.240, 2610.300.

Monopolies—Monopolies Under Sherman Act, Section 2—Consent Decree—Practices Enjoined—Foreign Activities and Agreements—Restricting Imports and Exports.—A manufacturer of postage meter machines was prohibited by a consent decree from entering into any agreement with any person engaged in the manufacture, sale, distribution, or leasing of postage meter machines which restricted, hindered, limited or prevented such person, or any other person, from importing such machines into the United States or exporting them from the United States.

See Monopolies, Vol. 1, ¶ 2610.340.

Monopolies—Monopolies Under Sherman Act, Section 2—Consent Decree—Practices Enjoined—Price Fixing.—A manufacturer of postage meter machines was prohibited by a consent decree from entering into any agreement with any person engaged in the manufacture, sale, distribution, or leasing of such machines which fixed any price, or any element of price, for the distribution, sale, or lease of such machines.

See Monopolies, Vol. 1, ¶ 2610.600.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Showing the Existence of Substantial Competition.—A manufacturer of postage meter machines was directed to show, within six months following the expiration of a ten-year period from the date of the decree, that substantial competition then existed with respect to the manufacture, sale, rental, and distribution of postage meter machines in the United States. Such competition should be deemed to exist if persons in each major market area of the United States then had the opportunity, actual and practical in fact, to purchase or rent from persons other than the manufacturer, on reasonably competitive terms, postage meter machines or devices and mechanisms serving purposes equivalent thereto under Post Office Department regulations. If the manufacturer should fail to establish to the satisfaction of the court that such competition then existed, the manufacturer should submit to the court a plan designed to bring about such competition as soon as possible. The decree further provided that the manufacturer could be relieved of its obligations under those sections at any time within ten years by applying to the court for such relief and establishing that a competitor or competitors, in no manner affiliated with it, was then actually engaged in the commercial manufacture, sale, rental and distribution of postage meter machines in the United States.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

Department of Justice Enforcement and Procedure—Consent Decree—Permissive Provisions—Acquisition of Stock or Assets.—A consent decree which prohibited a manufacturer of postage meter machines from acquiring any of the assets or capital stock of, or any financial interest in, any person engaged in the manufacture, sale, distribution, or leasing of postage meter machines also provided that the manufacturer, upon application to the court at any time after the decree had been in effect for five years, could be permitted to make such an acquisition upon a showing that its effect would not be substantially to lessen competition or tend to create a monopoly. The manufacturer was also permitted by the decree to (1) acquire the securities or assets of any of its subsidiaries, (2) form subsidiaries and transfer to them its own assets or those of its subsidiaries, and (3) acquire the stock or assets of its agents or distributors who were not engaged in the manufacture or distribution of postage meter machines not produced by the manufacturer.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.30, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; William D. Kilgore, Jr., Harry N. Burgess, and Lewis J. Ottaviani, Attorneys, Department of Justice; and the U. S. District Attorney, District of Conn.

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For the defendant: Shattuck, Bangs & Davis, by Charles P. Collins (Edwin P. Shattuck and Sigmund Timberg, of counsel); and Wiggin & Dana, by Frederick H. Wiggin.

Final Judgment

[*Consent Decree*]

ROBERT P. ANDERSON, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on January 9, 1959, and defendant, Pitney-Bowes, Inc., by its attorneys, having appeared and denied the substantive allegations thereof, and plaintiff and defendant having severally consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission in respect to any issue:

Now, Therefore, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein and upon consent to the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

The Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim against the defendant Pitney-Bowes, Inc. upon which relief can be granted under Section 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Postage meter" shall mean any device or mechanism, and the component parts thereof, which prints, registers and cancels pre-paid postage on mail matter;

(B) "Mailing machine" or "base machine" shall mean any device or mechanism, and the component parts thereof, used to support or facilitate operation of a postage meter, and to feed, moisten, close and seal or stack mail matter impressed with postage by a postage meter;

(C) "Postage meter machine" means any combination of (i) a postage meter and (ii) a mailing or base machine, which combination may be separable into two or more units or complete in itself when actually operated;

(D) "Existing patent" or "existing patents" shall mean any, some or all claims of the following:

(1) United States and foreign Letters Patent owned or controlled by defendant on the date of entry of this Final Judgment;

(2) Applications for United States and foreign Letters Patent, and any Letters Patent which may issue on any such applications, which applications were filed prior to, and are owned or controlled by defendant on, the date of entry of this Final Judgment;

(3) United States and foreign Letters Patent owned or controlled on the date of entry of this Final Judgment by any person other than defendant and under which defendant on such date has the power to grant licenses or sub-licenses to others;

(4) Any divisions, reissues or extensions of the Letters Patent described in clauses (1), (2) and (3) above;

relating to postage meters, mailing or base machines or postage meter machines;

(E) "Future patent" or "future patents" means any United States or foreign Letters Patent or applications therefor and patents which may issue thereon (exclusive of existing patents), and any divisions, reissues or extensions of such Letters Patent, relating to postage meters, mailing or base machines or postage meter machines, (i) which may be owned or controlled by defendant during a period of five (5) years after the date of entry of this Final Judgment or (ii) under which defendant may, during such period, acquire the power to grant licenses or sub-licenses to others;

(F) "Person" means any individual, partnership, firm, association, corporation or other legal or business entity other than the defendant, its directors, officers, employees, agents or subsidiaries;

(G) "United States" means the continental United States, its territories and possessions;

(H) "Qualified domestic applicant" means any person in the United States certified, in

writing, by the United States Post Office Department as meeting the qualifications established by said Department to manufacture postage meters or postage meter machines;

(I) "Qualified foreign applicant" means any person outside the United States who (1) represents, in writing, to the United States Post Office Department, its intention to manufacture, outside the United States, postage meter machines to be used, leased or sold in the United States in accordance with applicable rules and regulations of such Department, and (2) is certified, in writing, by such Department as meeting the qualifications established by said Department to manufacture postage meters or postage meter machines for use, lease or sale in the United States;

(J) "Subsidiary" means a corporation more than 50% of whose stock entitled to vote upon election of directors (other than preferred stock entitled to vote upon the failure of the corporation to pay certain dividends) is, directly or indirectly, owned by defendant;

(K) "Defendant" means the defendant Pitney-Bowes, Inc.

III

[*Applicability*]

(A) The provisions of this Final Judgment applicable to the defendant shall apply also to each of its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with such defendant who receive actual notice of this Final Judgment by personal service or otherwise;

[*Notice*]

(B) Defendant is ordered and directed forthwith to serve a copy of this Final Judgment upon (i) each member of its Board of Directors, (ii) each Vice President who is not a member of its Board of Directors, and (iii) the chief executive officer of each of its subsidiaries, and, within thirty (30) days after the date of entry of this Final Judgment, to file with this Court, and serve upon the plaintiff, an affidavit as to the fact and manner of its compliance with this subsection (B), setting forth in said affidavit the name, position and address of each person upon whom a copy of this Final Judgment shall have been served as herein directed.

IV

[*Order to Grant Patent Licenses*]

(A) Defendant is ordered and directed, within ninety (90) days after entry of this Final Judgment, to file with this Court, and serve upon the plaintiff, an affidavit showing separately, as of the date of this Final Judgment:

(1) The number, and date of issue (or filing, as to applications) and name of owner, where applicable, of each existing patent;

(2) The number, date of issue (or filing, as to applications) and name of the owner, where applicable, of each existing United States patent owned or controlled by the defendant on the date of this Final Judgment.

(B) Defendant is ordered and directed to grant to any qualified domestic applicant, making written request therefor to the defendant, a non-exclusive, unrestricted and royalty-free license to make (but not to have made—except for component parts), use, lease and vend postage meter machines under any, some or all, as the applicant may request, existing United States patents;

(C) Defendant is enjoined and restrained from including in any license issued pursuant to subsection (B) any restriction or limitation whatsoever except that (i) the license may be non-transferable, and (ii) reasonable provision may be made for marking the postage meter machines manufactured, used, leased or sold by the licensee under such license with the number of the patents covering such machines under which the licensee is licensed.

(D) Defendant is ordered and directed to grant to any qualified domestic applicant making written request therefor to the defendant, a non-exclusive and unrestricted license to make (but not to have made—except for component parts), use, lease and vend postage meter machines under any, some or all, as the applicant may request, future United States patents;

(E) Defendant is ordered and directed to grant to any qualified foreign applicant making written request therefor to the defendant a non-exclusive and unrestricted license under any, some or all, as the applicant may request, existing patents and future patents to make (but not to have made—except for component parts) postage

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meter machines for use, lease or sale in the United States;

(F) Defendant is enjoined and restrained from including in any license issued pursuant to subsections (D) and (E) hereof any restriction or limitation whatsoever except that:

(1) The license may be non-transferable;

(2) A reasonable royalty may be charged, which royalty shall be uniform and non-discriminatory as among licensees procuring the same rights under the same patents;

(3) Reasonable provisions may be made for periodic royalty reports by the licensee to the defendant and inspection of the books and records of the licensee by an independent auditor or any other person acceptable to both defendant and the licensee, who shall report to the defendant only the amount of the royalty due and payable;

(4) Reasonable provisions may be made for cancellation of the license upon failure of the licensee to make the reports, pay the royalties or permit inspection of his books and records as herein provided;

(5) The license must provide that the licensee may cancel the license at any time after one (1) year from the initial date thereof by giving to the defendant thirty (30) days' notice in writing;

(6) Reasonable provisions may be made for marking the machines manufactured, used, leased or sold by the licensee under such license with the number of the patents covering such machines under which the licensee is licensed;

(G) Upon receipt of a written request for a license under the provisions of subsections (D) and (E) hereof, defendant shall advise the applicant, in writing within thirty (30) days, of the royalty it deems reasonable for the patent or patents to which the application pertains. If such applicant and defendant are unable to agree upon what constitutes a reasonable royalty within ninety (90) days from the date the written application for the license was received by the defendant, either the applicant or defendant may, upon notice to the plaintiff, apply to this Court for the determination of a reasonable royalty. In any such proceeding the burden of proof shall be upon the defendant to establish the reasonableness of any royalty requested. Pending the completion of any such court proceeding, the applicant shall have the right to make (but not to have made—except for component parts), use, lease and vend under the patents to which his application pertains without payment of royalty or other compensation, but subject to the following provisions: defendant may, upon notice to the plaintiff, apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If this Court fixes such interim royalty rate, defendant shall then issue and the applicant shall accept a license providing for the periodic payment of royalties at such interim rate from the date upon which the applicant requested the license. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action may be grounds for the dismissal of his application for a license; in the case of such dismissal, the applicant shall pay any royalties found by the Court to be due to the defendant. Whether or not an interim royalty is fixed by the Court, a final Court determination of reasonable royalty shall be applicable to the applicant for a license from the date upon which the applicant requested such license, and to any other licensee, at its option, then having the same rights under the same patents from the date of such final determination. If the applicant fails to accept a license pursuant to such Court determination, such applicant shall pay any royalties found by the Court to be due to the defendant;

(H) Nothing herein shall prevent any applicant from attacking, in the aforesaid proceedings or in any other controversy, the validity or scope of any of the patents, nor shall this Final Judgment be construed as imputing any validity or value to any of said patents;

(I) Defendant is enjoined and restrained from (i) granting, after date of this Final Judgment, any license or sublicense under any patents to which this Section IV shall apply, except in accordance with, and pursuant to, the terms of this Final Judgment, and (ii) taking, or accepting, after the date of this Final Judgment, any right or license under any patent owned or controlled by any person other than defendant, which right or license is, by its terms or in fact, exclusive to the defendant unless the de-

fendant is also granted the right to grant sublicenses to others;

(J) Defendant is enjoined and restrained from making any sale or other disposition of any patent which deprives it of the power or authority to grant the licenses required by this Section IV, unless the purchaser, transferee or assignee shall file with this Court, and with the plaintiff, prior to consummation of any such transaction, its consent to be bound by the applicable provisions of this Section IV with respect to each patent;

(K) Defendant is ordered and directed, insofar as it has or hereafter may acquire the power to do so, to grant upon written request and without compensation, to any qualified domestic applicant licensed pursuant to this Section IV, with respect to any postage meter machines manufactured in the United States pursuant to such license, a non-exclusive and unrestricted grant of immunity from suit under any foreign patent or application owned or controlled by the defendant at the time of issuance of such license;

(L) Defendant is enjoined and restrained from instituting or threatening to institute any action, suit, or proceeding against any person for use of or any act of infringement of any patent alleged to have occurred prior to the date of this Final Judgment.

V

[*Order to Grant Technical Assistance*]

(A) Defendant, for a period of ten (10) years from the date of this Final Judgment, and upon written request therefor from any person licensed under existing or future patents pursuant to Section IV of this Final Judgment, is ordered and directed to furnish to such licensee, for a reasonable charge approximating cost, copies of any technical manuals, books of instruction, drawings, specifications, blueprints, pamphlets, diagrams or other similar documents, which it furnishes generally to its own manufacturing, servicing, repair or maintenance employees relating to the manufacture, repair, servicing or maintenance of postage meter machines commercially produced on the date of this Final Judgment.

(B) Defendant, for a period of five (5) years from the date of this Final Judgment, and upon written request therefor from any person licensed pursuant to Section IV of this Final Judgment, is ordered and directed to furnish to such licensee, for a reasonable charge approximating cost, copies of the patents under which such person is licensed and such of the defendant's technical information as licensee may reasonably need to enable him to utilize the invention or inventions of any of the patents licensed by the defendant to such licensee in such licensee's manufacture, not including, however, the type of documents referred to in sub-section (A) above.

(C) For a period of five (5) years from the date of this Final Judgment, and upon receipt of a written request from any person licensed pursuant to Section IV of this Final Judgment representing that the technical information furnished to such person by the defendant pursuant to subsections (A) and (B) of this Section V is inadequate or insufficient to enable such person satisfactorily to manufacture, operate, maintain, service or repair postage meter machines manufactured under his license from the defendant, the defendant is ordered and directed to make available to such licensee at the expense of the licensee for travel and at reasonable times and for reasonable periods, technically qualified personnel from among its own employees, for consultation with such licensee at the licensee's place of manufacture regarding the licensee's manufacture, repair, servicing or maintenance of postage meter machines. This subsection (C) shall not require the defendant to send any person outside of the United States.

(D) For a period of five (5) years from the date of this Final Judgment, any person licensed by the defendant pursuant to Section IV of this Final Judgment shall, upon written request to the defendant, and at his own expense, be permitted to visit the principal plant of the defendant manufacturing postage meter machines for the purpose of observing, and being advised as to, the methods, processes, machines and equipment then being used by the defendant in its commercial production of postage meter machines; provided, however, that such visits may be restricted as follows:

(1) To not more than 3 officers or employees of the licensee at any one time;

(2) To not more than 4 such visits per year.

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(E) The defendant may, as a condition to furnishing the benefits set forth in the foregoing subsections of this Section V, require the licensee, in writing, to agree to maintain any technical information received by such licensee from the defendant in confidence and use such information solely in connection with the manufacture, maintenance, service or repair by or for the licensee of postage meter machines.

(F) In order to accomplish the purposes of this Final Judgment, nothing herein shall be construed to prohibit the defendant from providing, upon terms and conditions not inconsistent with the other provisions of this Final Judgment, to any person requesting it, information or assistance not otherwise provided for in this Final Judgment.

(G) The furnishing by defendant of patent licenses and technical assistance pursuant to the requirements of Section IV and V of this Final Judgment shall not, in and of itself, create or constitute as to defendant, any guaranty or warranty as to machines not manufactured by it.

VI

[*Acquisition of Stock or Assets*]

(A) For a period of ten (10) years from the date of this Final Judgment, the defendant is enjoined and restrained from acquiring, directly or indirectly, through nominees, agents or otherwise, any of the assets or capital stock of or any financial interest in, any person engaged in the manufacture, sale, distribution or leasing of postage meter machines.

(B) Nothing in this Section VI, however, shall be construed to prohibit (i) acquisition by defendant of all or part of the securities or assets of any of its subsidiaries; (ii) formation of subsidiaries by defendant and the transfer thereto of assets of defendant or of its subsidiaries; (iii) acquisition by the defendant of all or any part of the stock or assets of any agent or distributor of defendant's products, who is not engaged in the manufacture or distribution of postage meter machines not manufactured by defendant; (iiii) application to this Court, at any time after this Final Judgment has been in effect for five (5) years from the date thereof, upon notice to the plaintiff, for permission to acquire any or all of the assets or capital stock of or financial interest in, a person engaged in the manufacture, sale, distribution or leasing of postage meter machines, which may be granted upon a showing by defendant to the satisfaction of the Court, that the effect of any such acquisition will not be substantially to lessen competition or to tend to create a monopoly in the manufacture, sale, distribution or leasing of postage meter machines.

VII

[*Practices Prohibited*]

(A) Defendant is enjoined and restrained from, directly or indirectly, entering into, adhering to, maintaining, or claiming any right under, any contract, agreement, understanding, plan or program with any person engaged in the manufacture, sale, distribution or leasing of postage meter machines which:

(1) allocates or divides territories, markets or customers for the manufacture, sale, distribution or leasing of postage meter machines;

(2) fixes, determines or adheres to any price, or element of price, for the distribution, sale or lease of any postage meter machines;

(3) restricts, hinders, limits or prevents such person or any other person from importing postage meter machines into the United States or exporting such machines from the United States;

(4) appoints or designates the defendant as a distributor or agent for the distribution, lease or sale in the United States of postage meter machines produced by any person engaged in the manufacture of postage meter machines;

(5) appoints or designates, as a distributor or agent of the defendant, for the distribution, sale or lease of postage meter machines manufactured by the defendant, any person engaged in the manufacture of postage meter machines;

provided that the foregoing shall not be construed to prohibit defendant from entering into bona fide exclusive distributorship arrangements for designated territories with any person not then engaged in the manufacture or distribution of postage meter machines manufactured by a person other than the defendant.

VIII

[*Promoting Competition*]

(A) Within six months following the ten (10) year period from the date of this Final Judgment, upon application by the plaintiff, the defendant shall show to the satisfaction of the Court that substantial competition then exists with respect to the manufacture, sale, rental and distribution of postage meter machines in the United States. Such competition shall be deemed to exist if persons in each major market area of the United States then have the opportunity, actual and practical in fact, to purchase or rent from other than the defendant on reasonably competitive terms, postage meter machines or devices and mechanisms serving purposes equivalent thereto, under Post Office Department regulations.

(B) If defendant fails to establish to the satisfaction of this Court that such competition then exists, defendant shall submit to the Court a plan, which to the satisfaction of this Court, in light of the conditions then existing, as well as the steps defendant has taken to try and bring about such competition, with full hearing and opportunity for both parties to be heard and present evidence, is designed to bring about such competition as soon as possible. Such plan shall provide for bringing about such competition, in a manner as, by the Court may be deemed necessary or appropriate (1) by substantial assistance to a competitor or potential competitor; or (2) by the establishment of competition by defendant out of its assets, business and properties; or (3) by some other or different method.

(C) Upon such terms as this Court may direct, the defendant may be relieved of its obligations under subsections (A) and (B) of this Section VIII at any time within ten (10) years from the date of this Final Judgment, by (i) applying to this Court, upon notice to the plaintiff, for such relief and (ii) establishing, to the satisfaction of this Court, (a) that a competitor or competitors to the defendant (and in no manner, directly or indirectly, affiliated with the defendant) is or are then actually engaged in the commercial manufacture, sale, rental and distribution of postage meter machines in the United States, and (b) that by reason of the then existence of such competitor or competitors to the defendant, the competition specified in subsection (A) of this Section VIII has then been accomplished.

IX

[*Notice of Judgment*]

(A) Defendant is ordered and directed, within ninety (90) days from the date of this Final Judgment, to furnish a true and complete copy of this Final Judgment (a) to the Postmaster General of the United States and (b) to each person who makes written request to the defendant for a copy of this Final Judgment.

(B) Defendant is ordered and directed to cause a copy of this Final Judgment to be published not less than once a month for three (3) successive months after the date of this Final Judgment, in a trade publication of general circulation to persons engaged in manufacturing office machines and equipment.

X

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant, made to its principal office, be permitted, subject to any legally recognized claim of privilege, (a) reasonable access during the office hours of defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession, custody or control of defendant relating to any matters contained in this Final Judgment, and (b) subject to the reasonable convenience of defendant, but without restraint or interference from it, to interview officers, directors, agents or employees of the defendant, who may have counsel present, regarding any such matter. Upon the written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be reasonably necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to

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any person other than a duly authorized representative of the plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XI

[*Jurisdiction Retained*]

(A) Jurisdiction is retained for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions contained herein, for the enforcement of compliance therewith and the punishment of the violation of any of the provisions contained herein.

(B) Jurisdiction is additionally expressly reserved to enter appropriate orders modifying Section V(A), (C) and (D) hereof, if such orders are consented to by the plaintiff, which consent is not to be unreasonably withheld, with respect to the obligation of the defendant to furnish the technical assistance referred to in Section V(A), (C) and (D) hereof, where the furnishing of same would tend to defeat the objectives of this Final Judgment to assure effective competition between defendant and others in the postage meter machine industry and to avoid undue concentration in such industry.

[¶ 69,236] Crosse & Blackwell Company v. Federal Trade Commission.

In the United States Court of Appeals for the Fourth Circuit. No. 7719. Argued November 10, 1958. Decided January 5, 1959. Modified, February 5, 1959.

On Petition to Review and Set Aside an Order of the Federal Trade Commission.

Federal Trade Commission Act and Robinson-Patman Price Discrimination Act

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibitions Against Price Discrimination—Jurisdiction of Federal Trade Commission and Secretary of Agriculture—Packers and Stockyards Act—Canner Engaged in Preparing Meat and Other Food Products.—A canner of various food products, a small portion of which contained meat, was subject to the jurisdiction of the Federal Trade Commission in its action charging the canner with violating the Robinson-Patman Price Discrimination Act. If the only business of the canner was the preparation and sale of products containing meat, its business would be that of a "packer." Its trade practices, therefore, would be subject to regulation by the Secretary of Agriculture under the Packers and Stockyards Act of 1921 and would be beyond the reach of the Federal Trade Commission. In view of the language of the Packers and Stockyards Act prior to its amendment in 1958 and in the light of the purposes the Congress in 1921 clearly intended to serve, there seems no doubt that it was never intended that relatively inconsequential activity which might be classified as meat packing should insulate all of the other activities of a corporation from the reach of the Federal Trade Commission. The Act is susceptible to the construction that one engaged in the business of processing meats for sale is subject to regulation in that business as a packer under the Packers and Stockyards Act, while any other business in which he may be engaged is subject to the general restraints of the antitrust laws, and that jurisdiction to enforce the antitrust laws was left in the Federal Trade Commission, except insofar as the businesses of the stockyard and packing industry, as such, were removed from the jurisdiction of the Federal Trade Commission. A literal interpretation of the exemption of Section 5(a)(6) of the Federal Trade Commission Act, prior to its amendment in 1958, must be laid aside for it is plainly at variance with the policy of the legislation as a whole, and if held to grant a more extensive exemption than the Secretary of Agriculture's regulatory power would produce an absurd result. A Commission order against the canner was affirmed by the court.

See Price Discrimination, Vol. 1, ¶ 3522.782; Unfair Practices, Vol. 2, ¶ 5201.261; FTC Enforcement and Procedure, Vol. 2, ¶ 8801.630.

For the petitioner: James W. Cassedy (A. Adgate Duer and Niles, Barton, Yost & Dankmeyer, on brief).

For the respondent: Carleton A. Harkrader, Attorney, Federal Trade Commission (Earl W. Kintner, General Counsel, and James E. Corkey, Assistant General Counsel, Federal Trade Commission, on brief).

Affirming a Federal Trade Commission cease and desist order in Dkt. 6463.

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and ROSZEL C. THOMSEN, District Judge.

[*Issue*]

HAYNSWORTH, Circuit Judge [*In full text*]: We are not persuaded to adopt the literal view that a canner of soups, relishes, preserves and similar products, including a small number containing meat ingredients, is a packer within the meaning of the Packers and Stockyards Act of 1921, 7 USCA §§ 181-195, 221-229, and as such is immune from an order of the Federal Trade Commission when, in connection with its general business, it violates § 2 of the Clayton Act, 15 USCA § 13.

[*Petitioner's Business*]

Crosse & Blackwell is a well-known canner of soups, marmalades, tomato products, pickles, relishes and other food products. It puts up and markets approximately 150 different products under the brand name "Crosse & Blackwell" and another 35 under the brand name "Keiler," its annual sales amounting to approximately $14,000,000. Among its products there are 14 which contain meat or meat stock as one of the ingredients,[1] and which collectively account for something less than three per cent of the annual sales of all of the products of Crosse & Blackwell. The meat content of these products is derived from cuts which Crosse & Blackwell purchases from slaughter houses and which it then trims, bones, cuts, mixes and cooks for subsequent mixing with other ingredients in the cans. Because it processes meats, Crosse & Blackwell obtained registration from the Department of Agriculture under the Meat Inspection Act, 21 USCA §§ 71-95, as it was required to do, and officials of that Department supervise and inspect Crosse & Blackwell's plant and operations, insofar as they relate to meat products, on an almost daily basis.

[*FTC Jurisdiction*]

Crosse & Blackwell sells its products through jobbers and wholesalers, or directly, to grocery stores and other retailers of food products. It was charged with having violated § 2 of the Clayton Act by giving credit to certain retailers for advertising Crosse & Blackwell products when such credits were not given or offered to competitors of the favored retailers. For the purpose of this proceeding, Crosse & Blackwell conceded that there would be substantial evidence that it had followed the questioned practice, chose not to stand upon its denial of the charges on the merits and elected to defend solely upon the ground that, because of its processing of meat, it is a packer within the meaning of the Packers and Stockyards Act of 1921. This contention leads Crosse & Blackwell to the conclusion that exclusive jurisdiction to question its trade practices, with respect to all of its products, is lodged in the Secretary of Agriculture, and that such jurisdiction has been wholly withdrawn from the Federal Trade Commission. The argument is that what Crosse & Blackwell does with meats to be used as an ingredient in some of its products subjects it to the Packers and Stockyards Act of 1921, 7 USCA § 191, which, by definition of a "packer," regulates activities of "any person engaged in the business * * * (b) of manufacturing or preparing * * * meat food products for sale or shipment in commerce * * *." It contends that its products containing meat are "meat food products," which the Act defines as the edible products of the slaughtering and meat packing industry, and that it is engaged in the business of preparing them for sale and shipment in commerce. Since § 202

[1] These 14 products, with their meat or meat stock content both before and after cooking are as follows:

Name	Raw Percentage	Cooked Percentage
Liver and Beef Paste	50%	39%
Corned Beef Hash	50	35
Ham and Tongue Paste	36	24
Beef Stew	25	18
Lamb Stew	25	18
Chili Con Carne	25.5	17.5
Scotch Chicken Soup	14	.4
Beef Noodle Soup	20	——
Vegetable Beef Soup	19	——
Chicken Noodle Soup	13.8	——
French Onion Soup	12.5	——
Vegetable Soup with Beef Stock	10	——
Chicken Rice Soup	9.3	——
Cream of Chicken Soup	8.7	——

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of the Packers and Stockyards Act of 1921 (7 USCA § 192) prohibits any packer from engaging in certain unfair trade practices and § 203 (7 USCA § 193) authorizes the Secretary of Agriculture, after appropriate proceedings, to prevent the continuance of such unlawful practices, Crosse & Blackwell, concludes that, as a packer, it is subject to the restraints of the Packers and Stockyards Act, and by § 406 of that Act (7 USCA §§ 226-227) as well as by § 5(a)(6) of the Federal Trade Commission Act (15 USCA 45(a)(6)) the jurisdiction of the Secretary of Agriculture is exclusive and the Federal Trade Commission powerless to proceed against it.[2] The Trial Examiner agreed with Crosse & Blackwell, but the Commission reversed, and Crosse & Blackwell has brought its legal contention here for decision.

[*Assumption*]

We may start with the assumption that if the only business of Crosse & Blackwell was the preparation and sale of corned beef hash, and its other products containing meat, we would agree that its products were "meat food products," its business that of a "packer," and its trade practices subject to regulation under the Packers and Stockyards Act and beyond the reach of the prohibitive powers of the Federal Trade Commission. *United Corporation v. Federal Trade Commission*, 4 Cir. [1940-1943 TRADE CASES ¶ 56,012], 110 F. 2d 473; *Trunz Pork Stores, Inc. v. Wallace*, 2 Cir., 70 F. 2d 688. Its total activity is not to be finally characterized upon a look at a small portion of the whole, however, and we must inquire whether its general business is the sort which Congress intended to, and did, withdraw from the jurisdiction of the Federal Trade Commission.

[*Statutory Construction*]

As Mr. Justice Frankfurter has said,[3] this "* * * statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be sev-

[2] The relevant sections of the several statutes, prior to the 1958 Amendments, are:

§ 2(a)(3). "The term 'meat food products' means all products and by-products of the slaughtering and meat packing industry—if edible."

§ 2(a)(5). "The term 'livestock products' means all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from livestock * * *."

§ 201. "* * * The term 'packer' means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless—

"(1) Such person is also engaged in any business referred to in clause (a) or (b) of this section, or unless

"(2) Such persons owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) of this section, or unless

"(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) of this section, or unless

"(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) of this section."

§ 202. "It shall be unlawful for any packer or any live poultry dealer or handler to:

"(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or * * *."

§ 406(b). "So long as this chapter remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this chapter is made subject to the jurisdiction of the Secretary except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case."

Federal Trade Commission Act, § 5(a)(6). "The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

[3] *United States v. Monia* [1940-1943 TRADE CASES ¶ 56,251], 317 U. S. 424, 432, 63 S. Ct. 409, 413, 87 L. Ed. 376, 382.

ered without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. * * *" It behooves us, therefore, to refer briefly to the problem which the Congress sought to resolve and the purpose to be served when the Packers and Stockyards Act of 1921 was enacted.

[*Packers and Stockyards Act*]

The Packers and Stockyards Act of 1921 has a long legislative history which began with realization of the tremendous potential power of the five great packing companies of that day to control both the prices of livestock and the price to the consumers of meat products. The stockyards and slaughtering centers, controlled by a handful of interests, were a bottleneck through which the livestock had to move on the way to the ultimate consumer, and those in control at the bottleneck were in position to misuse power to the detriment both of the producer and of the consumer. It was thus thought a proper and essential governmental purpose to provide controls of the prices and practices of the stockyards and packers, so that the interests of the producers, who sold their livestock through the established channels, and the purchasing public, who were dependent upon the packers for their supplies of meat, would be protected from the monopolistic power of those in control of the marketing facilities. The problem and the purpose were summarized by Mr. Chief Justice Taft in *Stafford v. Wallace,* 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, when he said:

"* * *

"The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence, in the form of meat products, to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East, for further preparation for the market.

"The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act was exorbitant charges, duplication of commissions, deceptive practices in respect to prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. * * *

"* * *

"The act * * * treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East."

The Packers and Stockyards Act would never have been adopted by the Congress if the marketing of livestock and the distribution of meat products did not present problems which, in the view of the Congress, were insufficiently met by the antitrust laws of general application. The problems were peculiar to agriculture, and it was appropriate that the regulatory responsibility be placed upon the Secretary of Agriculture and removed from the Federal Trade Commission. That one enterprise should not be subject to conflicting regulation in the same field, the Congress was careful to provide that the Federal Trade Commission should have no jurisdiction to proceed against any business subject to regulation by the Secretary of Agriculture under the Packers and Stockyards Act, but it is clear that the substance of what was intended to be withdrawn from the controls of the Federal Trade Commission and subjected to regulation by the Secretary of Agriculture were the businesses of the stockyards and of the packers as those industries were known and understood at the time. Doubtless the Congress did not anticipate that a great steel company might attempt to escape the restraints of the antitrust laws by operating a small packing plant, taking the position that it was engaged in the business of a packer and was thus subject, in its steel business, to regulation only by the Secretary of Agriculture under the Packers and Stockyards Act, or that a canner of miscellaneous food items might avoid compliance with the general antitrust laws solely by reason of

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the fact that it used a relatively small quantity of meat as an ingredient in some of its products, for it did not expressly provide in 1921 that one engaged in parallel businesses, or in peripheral activity, would be subject to regulation as a packer under the Packers and Stockyards Act to the extent that he was engaged in that business and subject to regulation under the general antitrust laws to the extent he was engaged in other businesses. Whatever doubt there may have been on that score has been removed by the adoption of Public Law 909, 85th Congress, approved September 2, 1958. But if we look to the language of the Act prior to the 1958 amendment, in the light of the purposes the Congress in 1921 clearly intended to serve, there seems no doubt that it was never intended that relatively inconsequential activity which might be classified as meat packing should insulate all of the other activities of a corporation from the reach of the Federal Trade Commission.

[*Exclusion of Activities*]

The language of the Act is susceptible to the construction that one engaged in the business of processing meats for sale is subject to regulation in that business as a packer under the Packers and Stockyards Act, while any other business in which he may be engaged is subject to the general restraints of the antitrust laws, and that jurisdiction to enforce the antitrust laws was left in the Federal Trade Commission, except insofar as the businesses of the stockyard and packing industry, as such, were removed from the jurisdiction of the Federal Trade Commission. It is the business of a packer which is subjected to regulation under the Act and § 406(b) withdraws from the jurisdiction of the Federal Trade Commission only such businesses. That section provides that the Commission "shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary * * *," which is an exclusion not of persons nor of corporate entities, nor of affiliated enterprises, but of integrated activities which were intended by the Act to be subjected to the regulatory controls of the Secretary of Agriculture.

[*FTC Act Exemption*]

The difficulty comes from the Federal Trade Commission Act, which prior to the 1958 amendment exempted "persons, partnerships or corporations subject to" the Packers and Stockyards Act, but it is not reasonable to suppose that the Congress intended the limitations upon the jurisdiction of the Federal Trade Commission to be more extensive than the regulatory powers conferred upon the Secretary of Agriculture and intended by the Congress to be exercised effectively by him. Harmonious reconciliation of the several statutory provisions can be achieved in the light of the apparent statutory scheme to subject the business of the packer and the stockyard operator to the regulatory control of the Secretary of Agriculture, whose department was particularly concerned with the problem and who had the means of effectively discharging the responsibility, while enforcement of the general antitrust laws, as they applied to other businesses than that of packers and stockyard operators, was left to the Federal Trade Commission, each exercising its particular functions in its own special field where a single corporation was engaged in activities, some of which were and some of which were not subject to regulation under the Packers and Stockyards Act.

We construe the Act, as we must, to effectuate the apparent purpose and intention of the Congress. *United States v. Champlin Refining Co.*, 341 U. S. 290, 71 S. Ct. 715, 95 L. Ed. 949; *United States v. American Trucking Associations,* 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345; *McKee v. United States,* 164 U. S. 287, 17 S. Ct. 92, 41 L. Ed. 437; *The Lessee of Brewer v. Blougher,* 39 U. S., 14 Peters, 178, 10 L. Ed. 408; *Minor v. Mechanics' Bank,* 26 U. S., 1 Peters, 46, 7 L. Ed. 47. A literal interpretation of the exemption of § 5(a)(6) of the Federal Trade Commission Act must be laid aside for it is "plainly at variance with the policy of the legislation as a whole," *Ozawa v. United States,* 260 U. S. 178, 43 S. Ct. 65, 67 L. Ed. 199; *United States v. Rosenblum Truck Lines,* 315 U. S. 50, 62 S. Ct. 445, 86 L. Ed. 671; *United States v. American Trucking Associations,* 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345, and if held to grant a more extensive exemption than the Secretary's regulatory power would produce an absurd result. *United States v. American Trucking Associations,* 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 134; *Sorrells v. United States,* 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413; *United States v. Edward Ryan,* 284 U. S. 167, 52 S. Ct. 65, 76 L. Ed. 224; *The Church of the Holy*

Trinity v. United States, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226.

We do not overlook the fact that a retailer or manufacturer of nonedible livestock products was made subject to the Packers and Stockyards Act if he should own more than a twenty per cent interest in a packer or a stockyard. The integration of the operations of stockyards and packers with those of retailers of meat products or of the manufacturers of other livestock products requires extension of the control of the primary regulatory agency. There is much reason for the belief that a vertically integrated business which handles meat through all of the steps from the hoof to the hand of the ultimate consumer may be effectively regulated only if the regulatory responsibility is lodged in one agency. Such beliefs and considerations, however, find no basis in the bare fact that different businesses in parallel may be lodged under the same corporate roof. The business of Crosse & Blackwell may be said to be unitary, but that of a canner of miscellaneous products is so far removed from that of the packing industry, upon which the attention of Congress was focused, that it may be said to have been reached by the Act, if at all, only to the extent it is actually concerned with the processing of meats.

[*General Business Conduct*]

The proceeding here arose out of the general conduct of the business of Crosse & Blackwell. It concerns credits for advertising its products in general, not just that small proportion of its products which contain meat ingredients. The problem is not one of those associated with the problem sought to be met by the Packers and Stockyards Act, nor is it one with which the Secretary of Agriculture is primarily concerned. It is a problem commonplace to the Federal Trade Commission, one which it has the general responsibility of meeting and which it may handle without prejudice to the effective performance of the functions of the Secretary of Agriculture under the Packers and Stockyards Act.

[*Conclusion*]

We conclude that Crosse & Blackwell was subject to the jurisdiction of the Federal Trade Commission when charged in the complaint with having given discriminatory advertising credits for its general products, though a small proportion of them contained meat ingredients. Such a construction is required by the apparent purpose and intention of Congress. It avoids having the Secretary of Agriculture saddled with responsibility in areas far beyond the bounds of his concern. It permits the orderly enforcement of the antitrust laws by the particular agency established for that purpose, with only such necessary exceptions as arise from the effective regulatory activity of other agencies.

[*Order Enforced*]

The petition to review will be denied and the order of the Federal Trade Commission will be affirmed.

[¶ 69,237] Local 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al. v. Revel Oliver, A. C. E. Transportation Company, Inc., and Interstate Truck Service, Inc.

In the Supreme Court of the United States. October Term, 1958. No. 49. Dated January 19, 1959.

On Writ of Certiorari to the Supreme Court of Ohio and Court of Appeals of Ohio, Ninth Judicial District.

Ohio Antitrust (Valentine) Act

Combinations and Conspiracies Under State Antitrust Laws—Labor Unions—Application of Ohio Antitrust Law to Provision of Collective Bargaining Agreement Within Subject Matter Controlled by Federal Law—Wagner and Taft-Hartley Acts.—The Ohio antitrust law cannot be applied to prevent a teamsters' union and a group of motor carriers from carrying out a provision of a collective bargaining agreement upon a subject matter as to which federal law directs them to bargain. An Ohio court had held that the provision of the agreement, which prescribed terms and conditions regulating the minimum rental and certain other terms of lease when a motor vehicle is leased to a carrier by an owner who drives his vehicle in the carrier's service and which differed substantially from an

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agreement under which an owner of trucks leased his equipment to motor carriers, violated the Ohio antitrust law. The objective of the provision was to protect a negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs. The point of the provision was not price fixing but wages, and it constituted a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. Under the Wagner and Taft-Hartley Acts, the carriers as employers were under a duty to bargain collectively with the union as to the subject matter of the provision. The goal of federal labor policy, as expressed in the above acts, is the promotion of collective bargaining. To allow the application of the Ohio antitrust law would wholly defeat the full realization of the congressional purpose. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state. It is immaterial that the conflict is between federal labor law and the application of what the state characterizes as an antitrust law.

See Combinations and Conspiracies, Vol. 1, ¶ 2335.37, 2401, 2441, 2457.

For the petitioners: David Previant, Milwaukee, Wis.; and Robert C. Knee, Dayton, Ohio, and Bruce Laybourne, Akron, Ohio, of counsel.

For the respondents: Stanley Denlinger, Akron, Ohio, for Revel Oliver; and Charles R. Iden and E. W. Brouse, Akron, Ohio, for A. C. E. Transportation Co., Inc., and Interstate Truck Service, Inc.

Reversing a decision of the Ohio Court of Appeals, Ninth Judicial District, 1957 Trade Cases ¶ 68,795.

[*Issue*]

MR. JUSTICE BRENNAN delivered the opinion of the Court [*In full text*]: As the result of multiemployer, multistate collective bargaining with the Central States Drivers Council, comprising local unions of truck drivers affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, a collective bargaining agreement, the "Central States Area Over-the-Road Motor Freight Agreement," effective February 1, 1955, and expiring January 31, 1961, was entered into by the locals and motor carriers in interstate commerce who operate under the authority of the Interstate Commerce Commission[1] in 12 midwestern States, including Ohio.[2] Article XXXII of this collective bargaining agreement[3] prescribes terms and conditions which regulate the minimum rental and certain other terms of lease when a motor vehicle is leased to a carrier by an owner who drives his vehicle in the carrier's service.[4] The Ohio courts enjoined the petitioner, Ohio's Teamsters Local 24 and its president, and the respondent carriers, A. C. E. Transportation Company, Inc., and Interstate Truck Service, Inc., Ohio employers, from giving effect to the provisions of Article XXXII. The Ohio courts held that the Article violates the Ohio antitrust law, known as the Valentine Act.[5] The question is whether the fact that the Article was contained in an agreement which was the

[1] Certificates of convenience and necessity are issued to common carriers pursuant to §§ 206-208 of the Interstate Commerce Act, 49 Stat. 551, 552, as amended, 49 U. S. C. §§ 306-308; permits are issued to contract carriers pursuant to § 209, 49 Stat. 552, as amended, 49 U. S. C. § 309.

[2] The agreement covers between 3,000 and 3,500 employers and between 45,000 and 50,000 truck drivers. Those covered in Ohio consist of approximately 500 employers and 6,000 drivers. Upwards of 90% of the Ohio drivers drive equipment owned by carriers who operate under I. C. C. certificates or permits. The rest of the covered drivers own their own equipment, usually one vehicle, but since they are not holders of I. C. C. certificates or permits, they lease their equipment to, and drive it for, certificated or permitted carriers.

[3] For the text of Article XXXII, see Appendix.

[4] For details of I. C. C. regulations governing the relationship between certificated carriers and the lessors of motor vehicle equipment, see the discussion in *American Trucking Assns., Inc., v. United States*, 344 U. S. 298.

[5] The specific provision involved, Ohio Rev. Code Ann. § 1331.01, provides as follows:

"As used in sections 1331.01 to 1331.14, inclusive, of the Revised Code:

"(A) 'Person' includes corporations, partnerships and associations existing under or authorized by any state or territory of the United States, or a foreign country.

"(B) 'Trust' is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

"(1) To create or carry out restrictions in trade or commerce;

fruit of the exercise of collective bargaining rights under the National Labor Relations Act[6] precluded the Ohio courts from applying the Ohio antitrust law to prohibit the parties from carrying out the terms of the Article they had agreed upon in bargaining. No claim is made that Article XXXII violates any provision of federal law.

[*Agreement in Question*]

The Article is in express terms made applicable only to a lessor-driver when he himself drives his vehicle in the business of the lessee-carrier. § 1. The Article, at least in words, constitutes the lessor-driver an employee of the carrier at such times: "The employer [the carrier] expressly reserves the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished." § 4. His wages, hours and working conditions are then to be those applied to the carrier's drivers of carrier-owned vehicles, and he has "seniority as a driver only." § 2. He must operate his vehicle at such times "exclusively in . . . [the carrier's] service and for no other interests." § 1. The carrier "agrees to pay . . . social security tax, compensation insurance, public liability and property damage insurance, bridge tolls" and various other fees imposed on motor freight transportation, except "that the owner-driver shall pay license fees in the state in which title is registered." § 10. The lessor-driver must be compensated by "separate checks . . . for driver's wages and equipment rental." § 6. The wage payment must be in the amount of "the full wage rate and supplementary allowances" payable to carrier drivers similarly circumstanced who drive carrier-owned vehicles. § 12(a). The equipment rental payment must be in an amount not less than "the minimum rates" specified by the Article which "result from the joint determination of the parties that such rates represent only the actual cost of operating such [leased] equipment. The parties have not attempted to negotiate a profit for the owner-driver." § 12(b). All leases by union members who drive their vehicles for carriers in effect on the operative date of the collective bargaining agreement are to "be dissolved or modified within thirty (30) days" to conform to the terms and conditions of the Article. § 15. The parties declare that "the intent of this clause [the Article] . . . is to assure the payment of the Union scale of wages . . . and to prohibit [a carrier from] the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wage

"(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

"(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

"(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

"(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure of fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected.

"A trust as defined in division (B) of this section is unlawful and void."

[6] Involved are §§ 7 and 8 of the National Labor Relations Act, as amended and re-enacted by the Labor Management Relations Act, 61 Stat. 140, 29 U. S. C. §§ 157, 158. Section 7 is as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Sections 8(a)(5) and 8(b)(3) require employers and labor organizations to bargain collectively. Section 8(d), in pertinent part, provides:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . ."

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scales provided in this Agreement. . . . [and] to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver [of his own vehicle] is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus, in fact, reducing his scale of pay." § 16.

[*Respondents*]

The respondent, Revel Oliver, a member of the union, is the owner of motor equipment[7] which, at the time the collective bargaining agreement was negotiated, was subject to written lease agreements with the carrier respondents, A. C. E. Transportation Company, Inc., and Interstate Truck Service, Inc. The terms and conditions of the leases, particularly in regard to rental compensation, differ substantially from those provided in Article XXXII.[8]

[*State Court Proceedings*]

Oliver brought this action on January 20, 1955, in the Court of Common Pleas, Summit County, Ohio, for an injunction restraining the petitioners and the respondent carriers from carrying out the terms of Article XXXII. He obtained a temporary restaining order upon sworn allegations. At the trial the respondent carriers joined with Oliver in making the attack on the Article. The petitioners defended on the ground that the State could not lawfully exercise power to apply its antitrust law to cause a forfeiture of the product of the exercise of federally sanctioned collective bargaining rights. The union justified the Article as necessary to prevent undermining of the negotiated drivers' wage scale said to result from a practice of carriers of leasing a vehicle from an owner-driver at a rental which returned to the owner-driver less than his actual costs of operation, so that the driver's wage received by him, although nominally the negotiated wage, was actually a wage reduced by the excess of his operating expenses over the rental he received. The Court of Common Pleas held in an unreported opinion that the National Labor Relations Act could not "be reasonably construed to permit this remote and indirect approach to the subject of wages," and that Article XXXII was in violation of the State's antitrust law because "there are restrictions and restraints imposed upon articles [the leased vehicles] that are widely used in trade and commerce. . . . [and] preclude an owner of property from reasonable freedom of action in dealing with it." On the petitioners' appeal to Ohio's Ninth Judicial District Court of Appeals that court heard the case *de novo* and affirmed the judgment of the Court of Common Pleas, adopting its opinion. The Court of Appeals entered a permanent injunction perpetually restraining the petitioners and the respondent carriers (1) "from entering into any agreements . . . or carrying out the . . . requirements . . . of any such agreement, which will require the alteration" of Revel Oliver's "existing lease or leasing agreement"; (2) "from entering into any . . . agreement or stipulation in the future, or the negotiation therefor, the . . . tendency of which is to . . . determine in any manner the rate to be charged for the use of" Revel Oliver's equipment; (3) "from giving force and effect to Section 32 [*sic*] of the Contract . . . or any modification . . . thereof, the . . . tendency of which shall attempt to fix the rates" for the use of Revel Oliver's equipment.[9] Petitioners' appeal to

[7] Oliver is rather unusual among Ohio owner-drivers because he owns not one vehicle but a fleet, six trucks and four trailers, each of which is under a lease agreement with one or the other of the carrier respondents. Oliver drove only occasionally, "every month or so for A. C. E. and every 8 months or so for Interstate" and Article XXXII applied to his leases only as to the vehicle he drove on those occasions.

[8] Accordingly, § 15 of Art. XXXII required the carriers to take steps to modify both agreements. The Interstate Truck Service lease with Oliver was for a fixed term, but contained a five-day cancellation clause. The agreement between A. C. E. and Oliver was not for any fixed term and was brought into effect by the issuance of individual waybills and manifests for particular hauls.

[9] The restraints entered by the judgment and order of the Court of Appeals filed September 30, 1957, are:

"(a) That the defendants-appellees, A. C. E. Transportation Co., Inc., Interstate Truck Service, Inc., and defendants-appellants, Local No. 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and each of them, their agents, representatives and successors or persons, acting, by, through or for them, or in concert with each other, are hereby perpetually restrained and enjoined from entering into any agreements one with the other or carrying out the effects, requirements or terms of any such agreement, which will require the alteration, cancellation or violation of plaintiff-appellee's [Revel Oliver's] existing lease or leasing agreement or any such

the Ohio Supreme Court was dismissed for want of a debatable constitutional question. 167 Ohio St. 299, 147 N. E. 2d 856. We granted certiorari to consider the important question raised of the interaction of state and federal power arising from the petitioner's claim that the Ohio regulation abridges rights protected by federal statute. 356 U. S. 966.

[*History of Article*]

Article XXXII did not originate with the 1955 agreement. The carriers and the union have disputed since 1938 the terms of a carrier's hire of a lessor's driving services with his leased vehicle. The usual lease is by the owner of a single vehicle who hires out his services as driver with his vehicle. A carrier's representative who has participated in all contract negotiations since those leading to the 1938 agreement testified to the history. According to him, the nub of the union's position over the two decades has been that the carriers abuse the leasing practice, particularly by paying inadequate rentals for the use of leased vehicles, with the result "that part of the men's wages for driving was being used for the upkeep of their vehicles . . . . They [the union] claimed that the leased people were breaking down the rate structure . . . ." The union's demands for contract provisions to safeguard against the alleged abuse were designed also to "secure a living wage [for the lessor] plus an adequate rental for his equipment." A minimum rental clause first appeared in the 1938 agreement which also contained provisions comparable to §§ 8, 10 and 14 of present Article XXXII. In 1939, after the union claimed that "there was a lot of people that was transferring their title into other people's name to avoid the conditions of the contract," § 3 was added to provide that "certificate and title to the equipment must be in the name of the actual owner." When the dispute brought the parties to the verge of a strike in 1941, the note to § 1 and §§ 13, 15, 16, 17 and 18 came into the agreement. But by 1946 the controversy reached a pitch where the union demanded agreement from the carriers to abolish the leasing practice: "the unions were going to refuse the addition of any individual owners, and the unions also desired to make certain restrictions on the use of owner-operators, again claiming that the . . . company operators were taking advantage of certain provisions of the contract." This demand was compromised by the addition of § 19 restricting leasing to carriers "who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state"; the section "represented the compromise between the union position that it should abolish all owner-operators and the companies' contention there should be no limitation."

[*Subject Matter of Collective Bargaining*]

First. The Ohio courts rejected the petitioners' contention that the evidence conclusively established that Article XXXII dealt with subject matter within the scope of "collective bargaining" in which federal law gave petitioners the right to engage. The state courts rested their judgments principally on the minimum rental regulations of § 12 of the Article. The principal discussion occurs in the opinion of the Court of Common Pleas. These regulations were held to constitute the Article a price-fixing arrangement violating the Ohio antitrust law in that they evidenced "concerted action of the Union combining with a non-labor third

agreement hereafter renewed or renegotiated and entered into, and

"(b) That the defendants-appellees, A. C. E. Transportation Co., Inc., Interstate Truck Service, Inc., and defendants-appellants, Local No. 24 of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and Kenneth Burke, President and Business Agent of said Local and each of them and the successor of each and those acting in concert with said defendants-appellees and appellants are hereby perpetually enjoined and restrained from entering into any combination, arrangement, agreement or stipulation in the future, or the negotiation therefor, the purpose, intent or tendency of which is to fix or determine in any manner the rate to be charged for the use of plaintiff's equipment, leased by said plaintiff-appellee to the defendants-appellees, A. C. E. Transportation Co., Inc., and Interstate Truck Service, Inc., and

"(c) That the said defendants-appellees, A. C. E. Transportation Co., Inc., Interstate Truck Service, Inc., and defendants-appellants, Local No. 24 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and Kenneth Burke, President and Business Agent of said Local and each of them and the successors of each are hereby perpetually enjoined from giving force and effect to Section 32 [*sic*] of the Contract between them as is fully set forth in this Court's finding, or any modification or alteration thereof, the import, effect or tendency of which shall attempt to fix the rates and the use of plaintiff-appellee's equipment or to fix or determine the return for plaintiff-appellee's capital investment in said equipment."

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party in a formal contract. . . . [the] effect [of which] is to oppress and destroy competition. . . . [and] preclude an owner of property from reasonable freedom of action in dealing with it."

It seems to us that in considering whether the Article deals with a subject matter within the scope of collective bargaining as defined by federal law the Ohio courts did not give proper significance to the Article's narrowly restricted application to the times when the owner drives his leased vehicle for the carrier, and to the adverse effects upon the negotiated wage scale which might result when the rental for the use of the leased vehicle was unregulated at these times. Since no claim was presented to the Ohio courts that the petitioners sought to apply these regulations to Revel Oliver's arrangements with the respondent carriers except on the very infrequent and irregular occasions when Oliver drove one of his vehicles for a carrier, we take it that the Ohio courts' opinions and judgments relate only to the validity of the Article as applied at such times. This would necessarily be the case as the text of the Article, and that text as illumined by its history, conclusively establish that the regulations in no wise apply to the terms of lease of a vehicle when driven by a driver not the owner of the vehicle; the wages, hours and working conditions to be observed by contracting employers of non-owner drivers are governed by the general provisions in that regard found in other articles of the collective bargaining agreement.

In the light of the Article's history and purpose, we cannot agree with the Court of Common Pleas that its regulations constitute a "remote and indirect approach to the subject of wages," outside the range of matters on which the federal law requires the parties to bargain. The text of the Article and its unchallenged history show that its objective is to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs. This is thus but an instance, as this Court said of a somewhat similar union demand in another case, in which a union seeks to protect lawful employee interests against what is believed, rightly or wrongly, to be "a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.* [1940-1943 Trade Cases ¶ 56,070], 311 U. S. 91, 98-99. Looked at in this light, as on the evidence it must be, to determine its relevance to the collective bargaining rights under the Federal Act, the point of the Article is obviously not price fixing but wages. The regulations embody not the "remote and indirect approach to the subject of wages" perceived by the Court of Common Pleas but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. *Cf. Bakery Drivers Local v. Wohl,* 315 U. S. 769, 771. It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, *cf. Labor Board v. Borg-Warner Corp.,* 356 U. S. 342, to hold, as we do, that the obligation under § 8(d) on the carriers and their employees to bargain collectively "with respect to wages, hours and other conditions of employment" and to embody their understanding in "a written contract incorporating any agreement reached," found an expression in the subject matter of Article XXXII. See *Timken Roller Bearing Co.,* 70 N. L. R. B. 500, 518, reversed on other grounds, 161 F. 2d 949. And certainly bargaining on this subject through their representatives was a right of the employees protected by § 7 of the Act.

[*Ohio Antitrust Law*]

Second. We must decide whether Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain. Little extended discussion is necessary to show that Ohio law cannot be so applied. We need not concern ourselves today with a contractual provision dealing with a subject matter that the parties were under no obligation to discuss; the carriers as employers were under a duty to bargain collectively

with the union as to the subject matter of the Article, as we have shown. The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. See *Labor Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45; *Labor Board v. American National Ins. Co.,* 343 U. S. 395, 401-402. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. *Cf. Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen,* 318 U. S. 1, 6. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, see *Allen Bradley Co. v. Local Union* [1944-1945 Trade Cases ¶ 57,386], 325 U. S. 797; *cf. United States v. Employing Plasterers Assn.* [1954 Trade Cases ¶ 67,692], 347 U. S. 186, 190. We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. *Cf. California v. Taylor,* 353 U. S. 553, 566-567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill v. Florida,* 325 U. S. 538, 542-544. *Cf. International Union v. O'Brien,* 339 U. S. 454, 457; *Amalgamated Assn. v. Wisconsin Employment Relations Board,* 340 U. S. 383; *Plankinton Packing Co. v. Wisconsin Employment Relations Board,* 338 U. S. 953. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. *Cf. Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,* 336 U. S. 301, 307-312.[10] Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See *Railway Employes' Dept. v. Hanson,* 351 U. S. 225, 232. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an antitrust law. ". . . Congress has sufficiently expressed its purpose to . . . exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade." *Weber v. Anheuser-Busch, Inc.* [1955 Trade Cases ¶ 68,000], 348 U. S. 468, 481. We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it.

Reversed.

The Chief Justice, Mr. Justice Frankfurter and Mr. Justice Stewart took no part in the consideration or decision of this case.

[Dissenting Opinion]

Mr. Justice Whittaker, believing that respondent Oliver, while driving his own tractor in the performance of his independent contract with the respondent carriers, was not an employee of those carriers, but

[10] In *Algoma,* state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through § 8(3) of that Act, 49 Stat. 452. Questions of the nature that we consider today were expressly left open. 336 U. S., at 312.

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was an independent contractor, *United States v. Silk*, 331 U. S. 704, and that, as such, he was expressly excluded from the coverage of the Labor Management Relations Act by 61 Stat. 137, 29 U. S. C. § 152(3), would affirm the judgment of the Court of Appeals for the Ninth Judicial District of Ohio.

Appendix

Article XXXII of the Central States Area Over-the-Road Motor Freight Agreement

Owner-Operators

Section 1. Owner-operators (See Note), other than certificated or permitted carriers, shall not be covered by this Agreement unless affiliated by lease with a certificated or permitted carrier which is required to operate in full compliance with all the provisions of this Agreement and holding proper ICC and state certificates and permits. Such owner-operators shall operate exclusively in such service and for no other interests.

(NOTE: Whenever "owner-operator" is used in this article, it means owner-driver only, and nothing in this article shall apply to any equipment leased except where owner is also employed as a driver.)

Section 2. This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement. The owner-operator shall have seniority as a driver only.

Section 3. Certificate and title to the equipment must be in the name of the actual owner.

Section 4. In all cases, hired or leased equipment shall be operated by an employee of the certificated or permitted carrier. The employer expressly reserves the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished.

Section 5. Certificated or permitted carriers shall use their own available equipment, together with all leased equipment under minimum thirty-day bona fide lease arrangements, on a rotating board, before hiring any extra equipment.

Section 6. Separate checks shall be issued by the certificated or permitted carriers for driver's wages and equipment rental. At no time shall the equipment check be for less than actual miles operated. Separate checks for drivers shall not be deducted from the minimum truck rental revenue. The driver shall turn in time direct to the certificated or permitted carrier. All monies due the owner-operator may be held no longer than two weeks, except where the lease of equipment agreement is terminated and in such cases all monies due the operator may be held no longer than thirty (30) days from the date of the termination of the operation of the equipment.

Section 7. Payment for equipment service shall be handled by the issuance of a check for the full mileage operated, tonnage or percentage, less any agreed advances. A statement of any charges by the certificated or permitted carrier shall be issued at the same time, but shall not be deducted in advance.

Section 8. The owner-operator shall have complete freedom to purchase gasoline, oil, grease, tires, tubes, etc., including repair work, at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

Section 9. There shall be no deduction pertaining to equipment operation for any reason whatsoever.

Section 10. The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security tax, compensation insurance, public liability and property damage insurance, bridge tolls, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at state lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the state in which title is registered.

All tolls, no matter how computed, must be paid by the Employer regardless of any agreement to the contrary.

All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the Carrier, excepting only vehicle licensing as such, in the state where title is registered.

Section 11. There shall be no interest or handling charge on earned money advanced prior to the regular pay day.

Section 12. (a) All certificated or permitted carriers hiring or leasing equipment

owned and driven by the owner-driver shall file a true copy of the lease agreement covering the owner-driven equipment with the Joint State Committees. The terms of the lease shall cover only the equipment owned and driven by the owner-driver and shall be in complete accord with the minimum rates and conditions provided herein, plus the full wage rate and supplementary allowances for drivers as embodied elsewhere in this Agreement.

(b) The minimum rate for leased equipment owned and driven by the owner-driver shall be:

	Per Mile
Single axle, tractor only	9½¢
Tandem axle, tractor only	10¢
Single axle, trailer only	3¢
Tandem axle, trailer only	4¢

75% of the above rates to apply for deadheading, if and when ordered, provided, however, that the 75% rate will apply only on first empty dispatch away from the home terminal; thereafter the full equipment rental rate to apply until driver is redispatched from home terminal; the above rates to be based on 23,000-pound load limit. On load limits over 23,000 pounds, there shall be one-half (½) cent additional per mile for each 1,000 pounds or fraction thereof in excess of 23,000 pounds. There shall be a minimum guarantee of 24,000 pounds for leased equipment owned and driven by the owner-driver. Nothing herein shall apply to leased equipment not owned by a driver.

The minimum rates set forth above result from the joint determination of the parties that such rates represent only the actual cost of operating such equipment. The parties have not attempted to negotiate a profit for the owner-driver.

Section 13. Driver-owner mileage scale does not include use of equipment for pick-up or delivery at point of origin terminal or at point of destination terminal, but shall be subject to negotiations between the Local Union and Company. Failure to agree shall be submitted to the grievance procedure.

Section 14. There shall be no reductions where the present basis of payment is higher than the minimums established herein for this type of operation. Where owner-operator is paid on a percentage or tonnage basis and the operating company reduces its tariff, the percentage or tonnage basis of payment shall be automatically adjusted so that the owner-operator suffers no reduction in equipment rental or wages, or both.

Section 15. It is further understood and agreed that any arrangements which have heretofore been entered into between members of this Union, either among themselves or with the Employer or with the aid of the Employer, applicable to owner-driver equipment contrary to the terms hereof, shall be dissolved or modified within thirty (30) days after the signing of this Agreement so that such arrangements shall apply only to equipment of the owner-driver while being driven by such owner-driver. In the event that the parties cannot agree on a method of dissolution or modification of such arrangement to make the same conform to this Agreement, the question of dissolution or modification shall be submitted to arbitration, each party to select one member of the arbitration board, and the two so selected to choose a third member of said board. If the two cannot agree upon the third within five (5) days, he shall be appointed by the Joint State Committee. The decision of said board to be final and binding.

Section 16. It is further agreed that the intent of this clause and this entire Agreement is to assure the payment of the Union scale of wages as provided in this Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wage scales provided in this Agreement. This clause is intended to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus in fact, reducing his scale of pay.

Section 17. It is further agreed that if the Employer or certificated or permitted carrier requires that the "driver-owner-operator" sell his equipment to the Employer or certificated or permitted carrier, directly or indirectly, the "driver-owner-operator" shall be paid the fair true value of such equipment. Copies of the instruments of sale shall be filed with the Union and unless objected to within ten (10) days

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shall be deemed satisfactory. If any question is raised by the Union as to such value, the same shall be submitted to arbitration, as above set forth, for determination. The decision of the arbitration board shall be final and binding.

Section 18. It is further agreed that the Employer or certificated or permitted carrier will not devise or put into operation any scheme, whether herein enumerated or not, to defeat the terms of this Agreement, wherein the provisions as to compensation for services on and for use of equipment owned by owner-driver shall be lessened, nor shall any owner-driver lease be cancelled for the purpose of depriving Union employees of employment, and any such complaint that should arise pertaining to such cancellation of lease or violation under this section shall be subject to Article X.

Section 19. (a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state. It is understood and agreed that all such grievances will be promptly heard and decided with the specific purpose in mind of

(1) protecting provisions of the Union contract;

(2) prohibiting any and all violations directly or indirectly of contract provisions relating to the proper use of individual owners;

(3) p hibiting any attempts by any certificatec or permitted carrier in changing his operation which will affect the rights of drivers under the terms of the contract, and generally the certificated or permitted carriers agree to assume responsibility in policing and doing everything within their power to eliminate all alleged abuses in the use of owner-drivers which resulted in the insertion of Section 19 (Article XXXIII) in the original 1945-47 Over-the-Road contract;

(4) owner-driver operations to be terminal to terminal, except where no local employees to make such deliveries or otherwise agreed to in this contract;

(5) the certificated or permitted carriers agree that they will, with a joint meeting of the Unions, set up uniform rules and practices under which all such cases will be heard;

(6) it shall be considered a violation of the contract should any operator deduct from rental of equipment the increases provided for by the 1955 Amendments or put into effect any means of evasion to circumvent actual payment of increases agreed upon effective for the period starting February 1, 1955, and ending January 31, 1961.

(b) No owner-operator shall be permitted to drive or hold seniority where he owns three or more pieces of leased equipment. This provision shall not apply to present owner-operators having three or more pieces of equipment under lease agreement, but such owner-operator shall not be permitted to put additional equipment in service so long as he engages in work covered by this Agreement or holds seniority. Where owner-operator drives, he can hold seniority where he works sixty (60) per cent or more of time.

[¶ 69,238] Robert D. Nelligan and Owen B. Nelligan, Jr., partners doing business under the partnership name of The Nelligans v. Ford Motor Company.

In the United States Court of Appeals for the Fourth Circuit. No. 7725. Argued November 11, 1958. Decided January 5, 1959.

Appeal from the United States District Court for the Western District of South Carolina, at Greenville. ASHTON H. WILLIAMS, District Judge.

Clayton and Sherman Antitrust Acts

Exclusive Dealing—Tying Arrangements—Manufacturer-Dealer Advertising Agreement—Elements of Unlawful Arrangement—Sufficiency of Complaint.—An automobile dealer's complaint alleging that an automobile manufacturer tied the sale of its automotive products with the sale of advertising in violation of Section 3 of the Clayton Act was properly dismissed. The complaint had alleged that a dealer's advertising fund was organized, with the consent of the manufacturer, for the purpose of advertising the manufacturer's

automobiles, and that dealers were required to become members of this organization and make contributions to it at the rate of $25 for each car purchased. The arrangement was entirely different from the tying agreements that had been held illegal *per se* in other cases. No facts were alleged which tended to show that the amounts spent on advertising through the organization restrained trade in automobiles or in advertising. It was not alleged that the manufacturer owned or controlled the advertising organization. Neither the manufacturer nor the advertising organization was selling advertising; both of them were buying advertising. All agencies and all media had the right to compete for the advertising purchased by the organization, and the manufacturer did not require dealers to use the organization's advertising exclusively. The dealer, in addition to its participation in the organization's advertising, spent thousands of dollars for local advertising which it selected itself.

See Exclusive Dealing, Vol. 1, ¶ 4005.175, 4009.840.

Monopolies—Dealership Contracts—Monopoly in Sale of Products Manufactured and Sold Under One's Own Trade-Mark—Relevant Market—Market Represented by One's Own Franchise Dealers.—An automobile dealer's complaint alleging that sales and advertising agreements entered into between an automobile manufacturer and its dealers contained provisions which permitted the manufacturer to monopolize the market for automobiles, parts, and accessories in violation of Section 2 of the Sherman Act was properly dismissed. It was not alleged that the manufacturer monopolized or attempted to monopolize the market for automobiles, parts, or accessories generally, but only the market represented by the manufacturer's own franchise dealers. The power which automobile manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Also, the dealer did not allege that it was forced to purchase any parts or accessories which it did not want.

See Monopolies, Vol. 1, ¶ 2510, 2540, 2580.

Combinations and Conspiracies—Tie-in Sales—Manufacturer-Dealer Advertising Arrangement—Legality—Existence of Unreasonable Restraint of Trade and Public Injury.—An automobile dealer's complaint alleging that an automobile manufacturer used its right to terminate dealerships and other provisions in sales agreements with its dealers to control and dominate the business of its dealers in violation of Section 1 of the Sherman Act was properly dismissed. The dealer alleged that the manufacturer required it to contribute $25 for each car purchased to an advertising organization which spent the money principally for national television advertising programs which were not received in the dealer's area. The dealer also alleged that, as a result of an unlawful conspiracy between the manufacturer and the advertising organization, the dealer's sales agreement with the manufacturer was cancelled because of the dealer's unwillingness to contribute to the advertising organization. However, no facts were alleged which tended to show that the amounts spent on advertising through the organization restrained trade in automobiles or advertising. It was not alleged that the manufacturer owned or controlled the advertising organization; the manufacturer was not using its economic position to invade and dominate the advertising business. The court held that it could not sustain a complaint which did not allege, with reasonable definiteness, facts from which it could infer conduct in restraint of trade of the kind prohibited by the antitrust laws, and from which an inference of public injury could reasonably be extracted.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.848; Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.475.

For the appellants: Myron N. Krotinger and Thomas A. Wofford (Mendelsohn, Krotinger & Lane on brief).

For the appellee: J. D. Todd, Jr. (Wesley M. Walker and Leatherwood, Walker, Todd & Mann on brief).

Affirming a decision of the U. S. District Court, Western District of South Carolina, Greenville Division, 1958 Trade Cases ¶ 69,086.

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and THOMSEN, District Judge.

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[*Sales and Advertising Agreements*]

THOMSEN, District Judge [*In full text*]: This is another private antitrust action against Ford Motor Company in which a franchise dealer claims that the sales agreements and advertising agreements which he was forced to sign in order to retain his dealership violated both the Sherman Act and the Clayton Act. In *Miller Motors, Inc. v. Ford Motor Company* [1958 TRADE CASES ¶ 68,937], 252 F. 2d 441, this court held that under the evidence in that case Ford's requirement that the dealers contribute a certain amount per car to LMDA, a non-profit corporation organized for Lincoln-Mercury dealer advertising, did not violate the Sherman Act, and that Miller's claim under the Clayton Act, which was based upon the required purchase of parts and accessories, was barred by limitations.

[*Alleged Antitrust Violations*]

In the instant case plaintiffs are appealing from an order dismissing their amended complaint. Plaintiffs contend that the complaint sufficiently alleges a violation of the antitrust laws, in that: the sales agreements and advertising agreements taken together constituted an attempt to monopolize under sec. 2 of the Sherman Act; that the requirements that the dealers contribute $25 per car to LMDA advertising was a tying arrangement which was illegal under sec. 3 of the Clayton Act, and was an unreasonable restraint of trade under sec. 1 of the Sherman Act; and that the cancellation of plaintiffs' sales agreements violated the antitrust laws.

In September, 1953, plaintiff partnership was formed to take over the business of a corporation which had been a Lincoln-Mercury dealer since December, 1946. The predecessor corporation assigned to plaintiffs the sales agreements and the other agreements which it had entered into with Ford, including the Lincoln-Mercury Dealer Advertising Fund Agreement.

[*Monopoly*]

Plaintiffs contend that these agreements contained provisions which permitted Ford "to monopolize the market for cars, parts and accessories presented by the many thousands of dealers who entered into such agreements", in violation of sec. 2 of the Sherman Act. However, as the Supreme Court noted in *United States v. DuPont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 393, the power which "automobile or soft drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly". Plaintiffs do not allege that Ford monopolized or attempted to monopolize the market for automobiles, parts or accessories generally, but only the market represented by its own franchise dealers. And plaintiffs do not allege, as Miller did, that they were forced to purchase any parts or accessories which they did not want. Cf. 149 F. Supp. 790, at 807; 252 F. 2d 441, at 448.

[*Right to Terminate Dealership*]

The complaint alleges that Ford's right to terminate a dealership at will on sixty days notice, together with other provisions contained in the agreements, permitted Ford to control and dominate the business of its dealers in violation of sec. 1 of the Sherman Act, and to coerce plaintiffs and other dealers into courses and methods of conducting business which they as independent businessmen would not otherwise have pursued. Plaintiffs' principal complaint is that they were required by Ford to contribute $25 per car to LMDA, which spent the money principally for national TV advertising programs which plaintiffs allege were not received in the Greenville, South Carolina, area, and which "did not, in the opinion of the plaintiff, assist plaintiff in its sales as greatly as would a program of local advertising purchased by plaintiff with the same funds". The complaint also alleges that in 1953 plaintiffs spent $37,550.82 for advertising, of which $13,300.00 was paid for LMDA advertising and the remaining $24,250.82 for local advertising.

[*Cases Distinguished*]

The facts alleged in the complaint in the instant case with respect to LMDA are essentially similar to the facts proved in the *Miller* case, where this court said: "Even if we accept plaintiff's argument that LMDA's are a creation of the Ford Motor Company, organized solely to raise advertising funds for its products, the action would nevertheless fail. It is not sufficient for the plaintiff to prove a cooperative effort between Ford and LMDA, but it must be shown that the combination has the objectionable features which the act is designed to prevent."

Like *Miller,* this case is distinguishable from the GMAC case, *U. S. v. General Motors Corp.,* 7 Cir. [1940-1943 TRADE CASES ¶ 56,139], 121 F. 2d 376, upon which plaintiffs strongly rely. (1) In that case the indictment charged and the evidence showed that General Motors Corp., General Motor Sales Corp., and General Motors Acceptance Corp. conspired to restrain unreasonably interstate trade and commerce in General Motors cars, and that their purpose was to control the financing essential to the wholesale purchase and retail sale of General Motors cars. GMAC was owned by General Motors; the conspirators had identical interests: to make money for the General Motors family. In this case, however, the interests of Ford and LMDA are not identical. It is not alleged that Ford owned or controlled LMDA; it is composed of Lincoln-Mercury dealers, who are interested in promoting the sale of Lincolns and Mercurys against all other automobiles, including Fords. (2) The scheme to require GMAC financing bore no relation to the good will of General Motors or its line of cars, whereas the advertising of Lincoln and Mercury automobiles has a most important bearing on the good will of defendant and its line of cars. (3) GMAC was selling financing and was in active competition with other finance companies. Neither Ford nor LMDA is selling advertising; both of them are buying advertising. It is not alleged that Ford had any interest in the advertising agency used by LMDA except to obtain effective advertising service from it. All agencies and all media had a right to compete for the advertising purchased by LMDA. (4) General Motors required dealers to promise to use GMAC financing exclusively. Ford did not require Lincoln-Mercury dealers to use LMDA advertising exclusively or to promise to use it exclusively. (5) General Motors was reaching out to monopolize the business of financing the resale of automobiles which it manufactured. Ford was not using its economic position as an automobile manufacturer to invade and dominate the advertising business.

[*Tying Agreements*]

The arrangement is entirely different from the tying agreements held to be illegal *per se* in *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, and in *Northern Pacific Ry. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1. See *Times-Picayune v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594; *Klor's, Inc. v. Broadway-Hale Stores,* 9 Cir. [1958 TRADE CASES ¶ 69,007], 255 F. 2d 214; Turner, Tying Arrangements, 72 Harv. L. R. 50, 72.

[*Restraint of Trade*]

No facts are alleged by plaintiffs which tend to show that the amounts which they spent on LMDA advertising restrained trade in automobiles. *Miller Motors, Inc. v. Ford Motor Co., supra.*

Moreover, the facts alleged show no restraint of trade or commerce in advertising. Some advertising agencies or advertising media may lose some dealer advertising as a result of co-ordinated LMDA advertising; that is true of advertising by any association. But advertising by associations does not violate the Sherman Act unless it restricts competition or tends to create a monopoly to an extent far beyond anything alleged in the amended complaint. In addition to their LMDA advertising, plaintiffs spent many thousands of dollars for local advertising which plaintiffs themselves selected. Except that participation in LMDA was required by Ford, the LMDA plan differs little from other cooperative advertising plans, which are "beneficial to the industry and to consumers". *Maple Flooring Mfrs. Ass'n v. United States,* 268 U. S. 563, 566, 45 S. Ct. 578, 579, 69 L. Ed. 1093.

[*Public Injury*]

Finally, plaintiffs argue that the cancellation of plaintiffs' sales agreements "was the result of a coercive and unlawful conspiracy resulting from plaintiffs' protests against and unwillingness to continue to make the contributions to LMDA * * *." Miller made a similar argument in the district court, but abandoned it on appeal. Plaintiffs here, like Miller, refer to the facts developed by Congressional committees which studied the automobile industry in 1955 and 1956. The reports of those committees are discussed in the district court's opinion in *Miller,* 149 F. Supp. at 810-811, and in a footnote to the opinion on appeal, 252 F. 2d at 451. The Congressional committees concluded that the antitrust laws did not afford automobile dealers a remedy against inequitable and oppressive use of the manufacturers' superior economic power,

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citing Judge Parker's opinion in *Ford Motor Co. v. Kirkmyer Motor Co.*, 4 Cir., 65 F. 2d 1001. Congress found it necessary to "supplement the antitrust laws of the United States" by adopting the "Automobile Dealer's Day in Court" statute, 15 U. S. C. A. (1958 Supp.) 1221, *et seq.* That statute does not apply in this case. We cannot sustain a complaint which does not allege with reasonable definiteness facts from which the court may infer conduct in restraint of trade of the kind prohibited by the antitrust laws, and from which an inference of public injury may reasonably be extracted. *Alex. Milburn Co. v. Union Carbide & Carbon Corp.*, 4 Cir., 15 F. 2d 678, 680; *Floyd v. Gage*, 4 Cir. [1950-1951 TRADE CASES ¶ 62,946], 192 F. 2d 137, 139. See *Radovich v. Nat. Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445, 453; *Klor's Inc. v. Broadway-Hale Stores, supra.*

[*Dismissal Affirmed*]

The district court did not err in granting defendant's motion to dismiss the amended complaint. Affirmed.

[¶ 69,239] Sperry Products, Inc., et al. v. Aluminum Company of America and Electro Circuits, Inc.

In the United States District Court for the Northern District of Ohio, Eastern Division. Civil Action No. 31,352. Filed January 5, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Patents—Refusal to Sell Patented Device—Legality.—A company's refusal to sell its patented devices for detecting flaws in metal parts to its competitors in the commercial testing business was not unlawful under the antitrust laws. While it was conceded that a patent is the grant of the right to exclude others from using the invention, it was argued that a refusal to sell the invention for the purpose of preventing competition with the patent owner in its use is an unlawful enlargement of the grant. The argument rested in the presupposition that by its exclusive use of the patented devices in its commercial testing business, the company obtained an unfair advantage over its competitors in such business. However, the advantage that the company enjoyed was the result of a right conferred upon it by the Constitution and statute and takes nothing from its competitors to which they were entitled under the law. The company simply reserved to itself its own patented devices for its own use in the commercial testing business; it did no more than what it had the right to do, that is, to be free from competition in the practice of its invention. That the company's lawful advantage had no substantial effect upon its competitors was evidenced by the fact that it did less than one per cent of the commercial testing business in the United States.

See Combinations and Conspiracies, Vol. 1, ¶ 2013; Monopolies, Vol. 1, ¶ 2580.30, 2610.

Combinations and Conspiracies—Monopolies—Patents—Accumulation of Patents—Legality.—A company's accumulation of patents concerning ultrasonic devices for detecting flaws in metal parts was not shown to have been unlawful under the antitrust laws. The company had no policy of acquiring patents from others, particularly competitors, to block the entry of anyone into the field of ultrasonic flaw detection. Its ownership of the basic patents was the result of the patentee's attempt to interest another company in his invention, and the suggestion by that company that the patentee submit a proposal to the instant company. As a matter of course, the company acquired rights in subsequent patents covering improvements. The company had its own staff of engineers and inventors, and its patent committee followed the policy of filing applications only on its inventions which could be put to use. Also, the company did not have the majority of the patents in the field and was using more than one-third of its patents, which was higher than the national average of thirty per cent. A patentee of an invention has no obligation either to use or grant its use to others, and the mere accumulation of patents, no matter how many, is not in and of itself illegal.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.200; Monopolies, Vol. 1, ¶ 2610.500.

Combinations and Conspiracies—Monopolies—Patents—Name Plates on Patented Devices—Listing Patents Not Embodied in Such Devices—Legality.—A company's use of name plates on its patented devices which listed patents in addition to those embodied in such devices was not shown to have been unlawful under the antitrust laws. There were different types of patented accessories and additional patents covering methods that could be used with the devices. The selection of accessories and methods to be used with the devices was determined by the various needs and wishes of the purchaser. The listing of all such patents on the name plate was a time and labor-saving expedient. Also, the practice had been adopted by many other companies. The contention that anyone reading the list of fifty patents "obviously would be frightened at the cost of investigating and would very likely go no further" was not supported by the evidence.

See Combinations and Conspiracies, Vol. 1, ¶ 2013; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Patents—Sending Notices of Infringement—Legality.—The sending of notices of infringement by a company could not be regarded as threats of suit which constituted an integral part of a plan to violate the antitrust laws. During a fifteen-year period, the company sent a total of five written notices of infringement. None resulted in litigation. The patent laws provide that "no damages shall be recovered by the patentee in any action for infringement except upon proof that the infringer was notified of the infringement." In notifying infringers, the company was merely complying with the requirements of the law, and there was no evidence that the company did not act in good faith in sending such notices.

See Combinations and Conspiracies, Vol. 1, ¶ 2013; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Patents—Licensing Agreements—Restriction on Use of Patented Device—Legality.—A provision in patent licensing agreements restricting the use of a patented device by railroads to the inspection of their rolling stock was not unlawful under the antitrust laws. An owner of a patent may lawfully restrict his license to the manufacture and sale of patented inventions for use in only one or some of several distinct fields in which it is useful, excluding it from the others.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.560; Monopolies, Vol. 1, ¶ 2610.550.

Combinations and Conspiracies—Monopolies—Patents—Agreement Between Patentee and Alleged Infringer—Imposition of Tying Arrangement.—A company did not impose a tying arrangement on an alleged infringer of its patents when the company agreed that it would forbear instituting suit for infringement provided the alleged infringer sold its product for use only in conjunction with the company's product. In only one instance did the company sell a patented product that was to be used with the alleged infringer's product. In that case, the company imposed no condition upon the use of its product but merely agreed that in addition to its use in the usual manner the purchaser might also use the product in conjunction with the alleged infringer's product. The other sales of the alleged infringer's product were made by it to owners of the company's product, and the company merely consented to the use of its invention in the above manner. At no time did the company attempt to enlarge its lawful monopoly under its patents. Cases in which a patent owner was misusing his patent to enforce the sale of unpatented products were not in point.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500; Monopolies, Vol. 1, ¶ 2610.

Monopolies—Practices—Patents—Institution of Infringement Suit—Legality.—A company's institution of a patent infringement suit was not shown to have been for the purpose of obtaining a monopolistic control of a market over and above the rights granted to it under its patents. The facts showed that the company was forced to sue for infringement in order to protect its rights. The company had given the alleged infringer ample time to convert its product and avoid the infringement action, and suit was not instituted until long after the alleged infringer embarked upon a deliberate program of infringement.

See Monopolies, Vol. 1, ¶ 2610.525.

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Combinations and Conspiracies—Patents—Foreign Patent Licensing Agreements—Legality.—A company's foreign patent licensing policy was not illegal under the antitrust laws because it was not shown that the company's foreign licenses had a direct and substantially harmful effect on interstate commerce or on the foreign commerce of the United States. The company's primary purpose in entering into foreign license agreements was to obtain income from royalties on its foreign patents, which had been a source of continuing and increasing expense and produced little or no income. It had granted an exclusive license under its foreign patents to an independent organization, which was given full power to grant sub-licenses. This organization negotiated sub-licenses with companies in various foreign countries with the company's approval. Sub-licensees were required to acknowledge the validity of the company's foreign patents and to agree not to contest the validity of such patents. Some of the sub-licenses contained a provision for the grant back of improvements and an exchange of technical information, and an agreement by the company not to engage in manufacturing in Europe. While the legality of other restrictive covenants in the foreign licenses was challenged, there was no evidence that any public injury resulted from the company's foreign licensing policy. The contention that the company expanded its rights under United States patents by its foreign patents covering the same inventions was rejected. Foreign patents covering the same inventions can neither restrict nor enlarge the rights acquired under patents issued by the United States Government. Foreign patents create rights separate and distinct from those created by patents issued in the United States.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.275.

Private Enforcement and Procedure—Treble Damage Counterclaim—Injury to Plaintiff—Causal Relation—Sufficiency of Proof.—In a patent infringement action, a counterclaim for treble damages was dismissed on the ground that the counterclaimant did not show that it was injured in its business or property by any violation of the antitrust laws. The principle which governs in private suits applies with equal force to alleged violations of the antitrust laws asserted by a counterclaiming defendant. In the instant case, there was no evidence of any antitrust violation as well as no evidence of any injury to the business or property of the counterclaimant. Among other things, it was pointed out that there was no showing of a causal relation, either proximate or remote, between certain alleged damages and the alleged antitrust violation.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.350, 9046.

Private Enforcement and Procedure—Antitrust Law Violation as Defense—When Antitrust Violations May Not Be Available as Defense—Abandonment of Illegal Practice.—Even if the restrictive leasing of a patented device was improper, the abandonment of the practice removed any impediment to the plaintiff's right to proceed with a suit for infringement of the patent. The contention that since the alleged improper practice was in effect at the time the infringement suit was instituted and for some time thereafter, it was too late for the plaintiff to purge itself, was rejected.

See Private Enforcement and Procedure, Vol. 2, ¶ 9043.05.

Private Enforcement and Procedure—Antitrust Law Violation as Defense—Patent Infringement Suit—Antitrust Violation Relating to Patents Not in Suit.—In a patent infringement action where the plaintiff was charged with misusing its patents, it was held that the defense of misuse is available only where there has been a misuse of the patents in suit.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.175.

For the plaintiffs: Charles B. Gordon, of Ely, Pearne and Gordon, Cleveland, Ohio; and R. Morton Adams and J. Philip Anderegg, of Pennie, Edmonds, Morton, Barros & Taylor, New York, N. Y.

For the defendants: Thomas J. Doran, of Hyde, Meyer, Baldwin and Doran, Cleveland, Ohio; William L. Hanaway, of Breed, Abbott and Morgan, New York, N. Y.; and Carlton Hill, of Hill, Sherman, Meroni, Gross & Simpson, Chicago, Ill.

Opinion

McNamee, District Judge [*In full text except for omissions indicated by asterisks*]: This is an action for infringement of four patents of plaintiff, Floyd A. Firestone, Nos. 2,280,226, 2,398,701, 2,467,301 and 2,592,134, which will be referred to sometimes hereinafter as Nos. 1, 2, 3 and 4. All of the patents relate to flaw detection apparatus and the use thereof. The Claims of the patents which it is alleged were infringed are Patent No. 1, Claims 2, 3, 4, 10 and 11; Patent No. 2, Claims 7, 16, 19, 20, 25, 26, 29 and 32; Patent No. 3, Claims 1, 2 and 3; Patent No. 4, Claim 2.

The Parties

The plaintiffs are: Floyd A. Firestone, inventor of all four patents in suit and the owner of the legal title to Patent No. 1; Sperry Products, Inc., a New York corporation, the exclusive licensee under Patents 1 and 2, and the owner of Patents 3 and 4; United Aircraft Corporation, a Delaware corporation, the owner of Patent No. 2, and present here as an involuntary party plaintiff.

The defendants are: The Aluminum Company of America (hereinafter called Alcoa), a Pennsylvania corporation, with a place of business at Cleveland, Ohio, where it has used the accused apparatus known as an Immerscope; and Electro Circuits, Inc., maker and supplier to Alcoa of such apparatus. Electro Circuits is a California corporation, having no place of business in the jurisdiction of this Court but became a party by the voluntary filing of an Answer and Counterclaim.

The Pleadings

The Complaint alleges infringement of the Claims enumerated above. The Answer denies infringement and alleges invalidity of the patents on several grounds, including alleged misrepresentations to the Patent Office, lack of invention, anticipation by prior patents and publications, ambiguity, failure to fully disclose invention and misuse of the patents. A counterclaim filed by Electrocircuits for treble damages alleges that damages were sustained by that defendants as a result of the violation by plaintiffs of the antitrust laws. The affirmative defenses alleged in the Answer and the alleged violation of the antitrust laws set forth in the Counterclaim of Electrocircuits are denied by plaintiffs. Thus, the principal issues are: Invalidity, infringement, alleged misuse of the patents and alleged violation of the antitrust laws.

Preliminary Statement

The devices described by the patents in suit which are sold under the trade name "Reflectoscope" are instruments that use the pulse echo ultrasonic method in the detection of flaws in metal parts. By this method ultrasonic sound waves having a higher frequency than that audible to the human ear and capable of penetrating solid, liquid or gaseous material are propagated into a metal part. The waves travel through the part at a known speed of propagation characteristic of the material of the part under inspection. When the waves reach the opposite end of the part or when they encounter discontinuities or flaws therein their echoes are reflected back to the face of the part. The reflections from flaws nearest the entering end of the part arrive at that point before the reflections from discontinuities farther away and sooner than the reflections from the opposite end of the part. As these various reflections reach the entering end of the part they are amplified and by means of a sweeping motion of a beam of cathode rays they are registered on a cathode ray oscilloscope in a manner that permits the determination of the time of travel of the waves and the location of flaws in the part. In order to measure accurately the time of travel of the waves to and from the reflecting surfaces, it is necessary to propagate them in short bursts or pulses to permit the reception of the reflected echo prior to the propagation of a subsequent pulse, hence the term "pulse echo."

In the early 1950's Donald Erdman, a former president and founder of Electro Circuits, developed a so-called Wide Band Converter. This device had the circuitry necessary to produce ultrasonic vibrations as high as 25 megacycle frequency and the apparatus to amplify and receive the electrical impulses generated by the returning echoes. The wide band converter was used primarily for detecting flaws in parts by placing the part to be inspected under water. In 1952, when Electro Circuits was ready to place its device on the market, Richards, then president of Electro Circuits, conferred with Farwell, president of Sperry,

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with the view of effecting an arrangement that would enable Electro Circuits to sell its apparatus without being sued for infringement by Sperry. Richards proposed that Sperry license the Firestone patents to Electro Circuits or, in the alternative, that Electro Circuits sell its apparatus to Sperry for resale by the latter. Both proposals were rejected by Sperry. Later an agreement was reached by the terms of which Sperry agreed to permit Electro Circuits to sell its device but only upon condition that each wide band converter would be used in conjunction with a Sperry Reflectoscope. Under this arrangement the only part of the Reflectoscope that was used was the cathode ray oscilloscope. All other functions of the dual apparatus were performed by the wide band converter, the Reflectoscope being 80% useless. This arrangement was effective for but a substantially short time, after which Electro Circuits placed the accused Immerscope on the market.

Some of the accused devices were sold to the defendant Alcoa and used by it in its plant in Cleveland, Ohio. This suit followed. Electro-Circuits was unable financially to defend this action and entered into a contract with Curtiss-Wright Aircraft Company, by the terms of which Curtiss-Wright agreed to finance the defense of the litigation. As a part of this agreement Curtiss-Wright was granted the right to manufacture and sell Immerscopes upon the payment of royalties to Electro-circuits. The Immerscope is a device used primarily in underwater inspection of metal parts but it is used also for flaw detection where the part to be inspected is not submerged. It is plaintiff's claim that the Immerscope is in all respects the equivalent of the device described in the claims of the Firestone patents in suit.

Defendants direct their heaviest fire against the validity of the patents, about 80% of their voluminous brief being devoted to a discussion of that issue. Their defense against the charge of infringement is generally that the Immerscope follows the prior art rather than the teachings of the Firestone patents. Additionally they rely upon a number of separately stated grounds to avoid infringement of some of the many claims in suit.

The issues raised by the defense of misuse of the patent and Electrocircuits' counterclaim based upon an alleged violation of the antitrust laws have been dealt with in separate briefs. Accordingly, in this opinion the issues of validity and infringement will be discussed in that order and will be followed by an inquiry into the merits of the allegations of misuse of the patents and those relating to the alleged violation of the antitrust laws.

* * *

INFRINGEMENT

* * *

To summarize, Claims Nos. 2, 3, 4, 10 and 11 of Patent No. 2280226, Claims Nos. 16, 20, 25, 26, 29 and 32 of Patent No. 2398701, Claims Nos. 1, 2 and 3 of Patent No. 2467301, and Claim No. 2 of Patent No. 2592134 are valid and infringed. Claim No. 7 of Patent No. 2398701 is held to be invalid but, if valid, would be infringed.

DEFENSE OF MISUSE OF THE PATENTS AND THE COUNTERCLAIM BASED ON ALLEGED VIOLATION OF THE ANTITRUST LAWS

The defense and the counterclaim rest upon the same facts but the defense of misuse is asserted by both defendants whereas the antitrust counterclaim is asserted only on behalf of Electro Circuits.

The defense of misuse and the counterclaim are predicated broadly on defendants' contention that Sperry's purpose in instituting this suit for infringement was to obtain a monopolistic control of the market for ultrasonic pulse echo devices for flaw detection over and above the limited monopoly embraced within the terms of the patents.

In support of such contention defendants direct a multiplicity of charges against Sperry's general policies and practices in relation to the patents in suit and its foreign patents in the field of ultrasonics. Standing alone, many of defendants' allegations are devoid of merit and warrant but scant consideration. It is defendants' claim, however, that, considered as a whole, the challenged practices demonstrate Sperry's consistent purpose to enlarge its monopoly beyond the scope of the grants of the Patent Office and unlawfully to suppress competition. It is Sperry's position that in the use, manufacture and sale of the patented devices and method, and in the institution of this suit for infringement it was motivated by no other purpose than the protection and preservation of its lawful right to exclude others from making, using or selling the inventions disclosed by the patents in suit. An outline

of defendants' several complaints is set forth in the Statement of Facts which will be supplemented to the extent necessary in the discussion of the various charges.

The Sperry Corporation was organized in 1928 by Dr. Elmer G. Sperry, a noted inventor, who died within a few years after the organization of the company. At the outset, the corporation's efforts were directed to developing and marketing the inventions of its founder. Throughout the ensuing years Sperry has expanded its operations along the same general line, engaging in research, developing, manufacturing and marketing of a number of inventions of members of its own staff and others. The company has prospered generally and is now a medium-sized corporation, having about 450 employees and 8 branch offices in the United States. The shares of the corporation are closely held by the heirs of Dr. Sperry except for a small interest held by J. B. Farwell, President of the corporation.

At an early date in its history, the company established the Sperry Rail Service for the detection of flaws in the tracks of the railroads. Such inspection is done by the use of railroad cars with trained crews who make inspections of thousands of miles of tracks by the induction method of flaw detection. Today Sperry maintains a fleet of 19 cars for this purpose. Although Sperry does about 70% of all rail testing in the United States, its actual and potential competitors, including the railroads, have a total of 22 cars designed and used for rail testing. As a result of its experience in rail testing, Sperry became interested in the detection of flaws in materials used in industry and, for a period of over ten years and at considerable expense, attempted to develop a satisfactory method of inspecting metal parts. The company was unsuccessful in this regard until it learned of and acquired the rights under the Firestone patents in suit. Since that time Reflectoscopes embodying the features of these patents have been sold by Sperry in the approximate number of 1100, about 136 of which were sold to the railroads.

Sperry is also engaged in the commercial testing business. This is a service by which the company uses its patented devices and other instruments in testing materials for others either in various manufacturing plants or in Sperry testing laboratories. There are about 150 individuals and corporations engaged in the business of commercial testing. The most recent information on the subject shows that the gross annual volume of such business by the 60 largest companies engaged therein is approximately $37,000,000. Sperry does only about one percent of all commercial testing. Sperry refuses to sell its patented devices for pulse echo ultrasonic testing to its competitors in the commercial testing business. Such refusal is the basis of one of the defendants' many charges of misuse and antitrust violation.

During the years, Sperry has acquired about 65 patents and has 25 pending applications for patents in the field of ultrasonics. This accumulation is also one of the practices against which defendants inveigh. On the name plates of the Reflectoscopes manufactured by Sperry appears the statement "manufactured under one or more of the following patents." Listed thereunder are the numbers of many patents, some of which have no application to the device in question. Defendants assail this practice as an "attempt to scare off competition." In the 15 years since Sperry acquired the first Firestone patent, it has sent five notices of infringement to others. None has resulted in litigation. Defendants regard these notices as threats of suit which constitute an integral part of a plan to violate the antitrust laws.

Sperry also manufactures a special patented transducer known as an Angle Beam Search Unit. This transducer is covered by Patent No. 2527986, which is not one of the patents in suit.

Originally this unit was sold with a tag affixed, bearing the legend "licensed only for use at 36°." This practice was discontinued at the end of 1952. Thereafter, for about three years, these instruments were licensed under a form of lease which limited the use of the search units to those not engaged in commercial testing and in the case of the railroads, to the inspection of their rolling stock. At the end of 1955 the licensing of the units was abandoned. Defendants contend that the original practice of attempting to restrict the use of the search units that were sold as well as Sperry's subsequent practice of restricting the use of such units under the leasing arrangement was unlawful. Defendants contend further that, inasmuch as the search units are used only in connection with Reflectoscopes covered by the patents in suit the restricted use of such units is in effect a restriction on the use of

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the Reflectoscope and constitutes a misuse of the patents in suit.

Reference was made at the outset of this opinion to the course of dealing between Sperry and Electro Circuits in connection with the manufacture and sale by the latter of a Wide Band Converter which is used for underwater testing of materials by the pulse echo ultrasonic technique. As hereinafter noted, an arrangement was effected by which Electro Circuits was permitted by Sperry to sell its Wide Band Converter but for use only in conjunction with Sperry Reflectoscopes. After the arrangement had been in effect for several months, Electro Circuits incorporated a B Scan device in the wide band converter. This was considered by Sperry to be a breach of the agreement of the parties and an infringement of Sperry patents and Sperry so informed Electro Circuits. The events that followed which culminated in Electro Circuits' decision to manufacture and sell Immerscopes and risk an infringement suit by Sperry will be recited in a discussion of the defendants' charge that Sperry misused the patent and violated the antitrust laws in its dealings with Electro Circuits.

After obtaining patents in the United States, Sperry, and in some instances Dr. Firestone, applied for and obtained patents in several European countries. For a while Sperry attempted, through its Sales Department, to market its products abroad and to obtain royalties by licensing its foreign patents. These efforts, however, were not successful and in March 1954 Sperry entered into an agreement with Resources and Facilities Corporation (hereinafter Refac). By the terms of the agreement, Refac was granted an exclusive license under Sperry's foreign patents with full power to grant sub-licenses for the use of the ultrasonic devices covered by such patents. Refac negotiated sub-licenses with various companies in Germany, France, Belgium, Italy and other European countries as well as an agreement with T. K. S. of Tokyo, Japan, all with the approval of Sperry. In addition to the payment of royalties, the sub-licenses provide for an exchange of patent rights and technical information between Sperry and the sub-licensees. Some of the licenses contain covenants by the licensees not to contest Sperry's foreign patents or applications therefor and to assign to Sperry the rights of the licensees in any future patents or applications. Additional relevant facts will appear in the discussion of defendants' charge that such licenses by their terms violate the antitrust laws of the United States and constitute a misuse of the patents in suit.

Finally, it is charged by defendants that the institution of this suit for infringement "was intended to do away with any and all domestic competition."

Refusal to Sell Reflectoscopes for Commercial Testing

It is difficult to understand the logic of defendants' position in respect of Sperry's refusal to sell Reflectoscopes to its competitors in the commercial testing business. Sperry manufactures and sells Reflectoscopes to others for use by the purchasers in testing their own products. All such sales are made without restriction. Sperry is also engaged in the commercial testing business, in the operation of which it uses testing instruments available to all. In addition, Sperry also uses its own Reflectoscopes, which are covered by the patents in suit, for testing by the pulse echo ultrasonic technique. Defendants concede that a patent is the grant of the right to exclude others from using the invention but they advance the novel argument that a refusal to sell the inventions for the purpose of preventing competition with the patent owner in their use is an unlawful enlargement of the grants. Merely to state the argument is to expose its fallacy. The argument rests on the presupposition that by its exclusive use of the patented devices in its commercial testing business, Sperry obtained an unfair advantage over its competitors in such business. However, the advantage that Sperry enjoys is the result of a right conferred upon it by the Constitution and statute, and takes nothing from its competitors to which they were entitled under the law. The monopoly of a patent is distinguishable from a monopoly, as that term is used generally, and in the antitrust laws. The distinction was delineated by the Supreme Court in *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 186-187, as follows:

> "Though often so characterized, a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. *Seymour v. Osborne,* 11

Wall. 516, 533. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant. Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge."

Defendants add no force to their contention by citing out of context excerpts from authorities holding that the possession of a patent gives the patentee no exemption from the provisions of the antitrust laws. *United States v. Line Material Co.* [1948-1949 TRADE CASES ¶ 62,225], 333 U. S. 287. It is settled law that a patentee may not enlarge the scope of his grant by tying other products, patented or unpatented, to the sale or use of the patented device. *Morton Salt Co. v. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488; *Mercoid Corp. v. Mid-Continent Co.* [1944-1945 TRADE CASES ¶ 57,201], 320 U. S. 661; *Hartford-Empire Co., et al. v. United States* [1944-1945 TRADE CASES ¶ 57,319], 323 U. S. 386. Nor may the patentee use the patent as a means of controlling resale prices or restricting customers. *United States v. Bausch & Lomb Optical Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707. It is axiomatic that a patent may not be used to restrain competition or to monopolize trade in goods not covered by the patent. All of defendants' citations are wide of the mark. Sperry does not sell to some testing laboratories and discriminate against others. Sperry has no agreements with any of its competitors calculated to restrain competition or unlawfully monopolize any part of the business of commercial testing. It simply reserves to itself its own patented devices for its own use in the commercial testing business. Sperry does no more than the Supreme Court, in *Mercoid Corp. v. Mid-Continent Co., supra,* said a patent owner had the right to do, i. e. "to be free from competition in the practice of his invention." In *Hartford-Empire Co. v. United States, supra,* the Supreme Court stated the rights of a patent owner thus:

"A patent owner is not in the position of a quasi-trustee for the public or under any obligation to see that the public acquires the free right to use the invention. He has no obligation either to use it or to grant its use to others. If he discloses the invention in his application so that it will come into the public domain at the end of the 17-year period of exclusive right he has fulfilled the only obligation imposed by the statute. This has been settled doctrine since at least 1896."

And, as said in *United Shoe Machinery Corp. v. O'Donnell Rubber Products Co.,* 84 F. 2d 383 (6th Cir.)

"It has long been settled that, in the United States, exclusion of competitors is the very essence of the right conferred by a patent."

See also *Byers Machinery Co. v. Keystone Driller Co.,* 44 F. 2 283.

That Sperry's lawful advantage had no substantial effect upon its competitors is evidenced by the fact that Sperry does less than one percent of the commercial testing business in the United States. Notwithstanding Sperry's policy of not selling to its competitors, it was shown that Magnaflux Corporation, a competitor, has obtained and was using two Reflectoscopes in its laboratory. These devices were procured from original vendees of Sperry and were being used without any protest or objection by Sperry. There is no evidence that any competitor in the commercial testing business was sued or threatened with suit by Sperry nor has it been shown that defendants have suffered any injury by reason of the practice of which they complain. I hold there was no misuse of the patents in suit, or any violation of the antitrust laws in Sperry's refusal to sell its patented devices to its competitors in the commercial testing business.

ACCUMULATION OF PATENTS

Defendants attack Sperry's accumulation of patents as being motivated by the purpose to secure an unlawful monopoly of the pulse echo ultrasonic method of non-destructive testing. Sperry has 65 patents in the field of ultrasonic testing, with 25 applications pending. In addition, it received 16 applications from sub-licensees of its foreign patents but this number had dwindled to 2 applications, with only one claim allowed. It has also received other rights from its Belgian licensee but these relate to specific types of transducers rather than to pulse echo systems of flaw detection. Sperry has no policy of acquiring patents from others, particularly competitors, to block the entry of anyone into the field of ultrasonic flaw detection. Its ownership of the basic Firestone patent covering the pulse echo method is the result

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of Firestone's attempt to interest the Sperry Gyroscope Company in his invention and the suggestion by that company that Firestone submit a proposal to plaintiff Sperry Products Company. Upon acquiring this basic patent it followed as a matter of course that Sperry acquired rights in the subsequent Firestone patents covering improvements on the original invention. Many of its other patents in this field cover various types of transducers and other auxiliary equipment. Sperry has its own staff of engineers and inventors. Its patent committee meets several times a year and follows the policy of filing applications only on its inventions which can be put into use. Of over 300 inventions submitted to the committee only 136 were found to conform to the above policy and applications filed. Magnaflux Corporation, with a different flaw detection system, has 57 patents and 20 pending applications. Defendant Electro Circuits has 4 patents, one of which covers that defendant's F-M system of ultrasonic flaw detection, which the defendant does not use. There are 44 patents on ultrasonic flaw detection devices owned by others. Sperry is currently using more than one-third of its patents, which is higher than the national average of 30%. As said in *Hartford Empire Co. v. United States, supra,* a patentee of an invention "has no obligation either to use or grant its use to others."

Defendants have not shown any illegal purpose in the size of Sperry's patent portfolio. In *Automatic Radio Manufacturing Co., Inc. v. Hazeltine Research, Inc.* [1950-1951 Trade Cases ¶ 62,634], 339 U. S. 827, the Supreme Court said "the mere accumulation of patents, no matter how many, is not in and of itself illegal." Defendants have failed to show that Sperry's accumulation of patents is unlawful, or that either defendant has sustained any injury by reason thereof.

Markings on the Name Plates

Defendants contend there is a misuse of the patents in suit in the practice of placing on the name plates of the Reflectoscopes a list of patents in addition to those embodied in such devices. Manifestly there is no misuse of the patents in suit by listing them on the name plates of the Reflectoscopes. "Misuse which constitutes a defense is a misuse of the patents in suit." *Apex Electrical Mfg. Co. v. Altorfer Bros. Co.* [1956 Trade Cases ¶ 68,550], 238 F. 2d 867.

Lipschutz, patent attorney for Sperry, testified that he was responsible for the listing of patents on the name plates and that he followed the practice adopted by many other corporations, including General Electric Company, from whose name plates he copied the words "Manufactured under one or more of the following patents." Lipschutz also submitted a sound and reasonable explanation of the practice. There are about 20 different types of patented accessories and additional patents covering methods that can be used with Reflectoscopes. The selection of accessories and methods to be used with the Reflectoscopes is, of course, determined by the various needs and wishes of the purchasers of such instrument. The listing of all such patents on the name plates is a time and labor-saving expedient which nevertheless fully informs any potential competitor of the extent of Sperry's patent holdings. According to Lipschutz, the alternative to the above practice would be "to sit down with an engineer and salesman each time an instrument was sold and make a separate and different name plate for such instrument." The practice followed by Sperry is an old one. See *National Folding-Box & Paper Co. v. Elsas,* 86 Fed. 917 (1898); also see *Chicago Pneumatic Tool Co. v. Hughes Tool Co.,* 192 F. 2d 620 (1951). Defendants' suggestion that anyone reading the list of 50 patents "obviously would be frightened at the cost of investigating and would very likely go no further," finds no support in the evidence. Electro Circuits was not frightened, nor was Alcoa. Cline, who was in charge of standardizing equipment purchases for Alcoa, said he never looked at the name plates. Defendants have not sustained their claims of misuse, or antitrust violation in Sperry's use of the name plates, nor has either defendant sustained any injury by reason of such practice.

Notices of Infringement

During the period of fifteen years, Sperry sent a total of five written notices of infringement. Section 287, Title 35 U. S. C. A., provides that "no damages shall be recovered by the patentee in any action for infringement except upon proof that the infringer was notified of the infringement." In notifying infringers, Sperry was merely complying with the requirements of the statute. There is no evidence that Sperry did not act in good faith in sending such

notices. In *Virtue v. Creamery Package Mfg. Co., etc.*, 227 U. S. 8, the Supreme Court said:

> "Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts."

Defendants' claims in this connection are without substance and there is no evidence of any injury to either defendant by reason of Sperry's notices to infringers.

Angle Beam Search Unit

Although the patent covering the angle beam search unit is not one of the patents in suit, defendants contend that because the search units are used with Reflectoscopes which are covered by the patents in suit, the restriction on the use of the former is in effect a restriction on the use of the latter. However, this falls far short of showing that the patents in suit were used to restrict the use of the angle beam search unit. In a further effort to connect the patents in suit with the restrictions in the lease, defendants assert that a plastic wedge on the bottom of the angle beam search unit serves as a delay member as taught by Patent No. 2467301, which is one of the patents in suit. However, no witness testified that the plastic wedge serves the purpose now claimed for it by defendants. But even if it did, this would not establish that one of the patents in suit was used to enforce the restrictions in the leases of the search units. It is not essential to the effective use of the invention covered by Patent No. 2467301 that it be used with the angle beam search unit. Defendants also contend that in restricting the use of the search units by the railroads to inspection of their rolling stock, Sperry suppressed its ultrasonic patents in order to enable it to "maximize its income from its induction rail service." In support of this contention, they advance the argument that "Sperry was afraid that the railroads might hit upon a way of applying ultrasonics to rail testing and thus did not wish to give the railroads the angle beam search unit which might have made the adaptation of the Reflectoscope to rail testing possible." Even if this were a correct surmise of Sperry's motive, it would not serve to invalidate the restriction. During the time the practice of restrictive licensing was in effect neither Sperry nor the railroads had developed a technique of inspecting rails by the use of Reflectoscopes and the only use to which the search units could be put in this connection was an experimental one. Sperry was using the angle beam search units for such purposes and as the owner of the patent it had the right to be free from competition in this field of use. Sperry also was acting within the scope of its lawful authority under the patent in restricting the use of the search units to those who were not engaged in the commercial testing business. Indeed, in view of Sperry's policy of refusing to sell Reflectoscopes to its competitors in such business, the restriction was of little or no significance. Obviously, if its competitors in commercial testing business were unable to purchase Reflectoscopes they would have no need of the angle beam search units.

The Supreme Court of the United States has approved the practice of restrictive licensing of inventions. In *General Talking Pictures v. Western Electric Co.*, 305 U. S. 124, it was held that:

> "The owner of a patent may lawfully restrict his licensee to the manufacture and sale of patented inventions for use is only one or some of several distinct fields in which it is useful, excluding him from the others." (Headnote No. 1)

On p. 124 of the opinion, the Court said:

> "The practice of granting licenses for restrictive use is an old one. See *Rubber Co. v. Goodyear*, 9 Wall. 788, 789, 800; *Gamewell Fire Alarm Telegraph Co. v. Brookman*, 14 F. 255. So far as appears its legality has never been questioned."

In *Hartford-Empire v. United States, supra*, the court, in discussing the provisions of the decree of the District Court, said:

> "Paragraph 29 should be amended to permit any appellant, corporate or individual . . . to license with restrictions any patent hereafter applied for or acquired."

See also *Williams v. Hughes Tool Co.* [1950-1951 Trade Cases ¶ 62,785], 186 F. 2d 278, 285.

In view of the foregoing authorities, it must be held that the restrictions in the leases were valid. Even if this were not so, and if it were held that such restrictions constituted a misuse of the patents in suit, defendants would have no cause for complaint. As shown above, the practice of leasing was discontinued at the end of 1955 and since that time the angle beam search units have been sold without restriction.

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The reason for the abandonment of said practice was stated by Manning, assistant to the president of Sperry, as follows: "We found that it just wasn't worth the bother. Of course our interest in leasing in the beginning was to protect a very substantial investment in the research and development applying to this rail and we concluded this just wasn't worth the bother and we were willing to open it up to anybody." Manning testified further that the search units were easy to make and were being made by many people. If, contrary to the views hereinabove expressed, it were held that the restrictive leasing of the search units was improper, the abandonment of such practice would remove any impediment to plaintiffs' right to proceed with their suit for infringement. Defendants argue that since such practice was in effect at the time this suit was instituted and for some time thereafter, it is too late for Sperry to purge itself. This is not the law. In *White Cap Co. v. Owens-Illinois Glass Co.* [1953 Trade Cases ¶ 67,476], 203 F. 2d 694 (6th Cir.) the Court said:

> "However, the master held that the plaintiff had purged itself of the illegal practice. The fact that the objectionable provision was cancelled during the pending proceedings does not establish that the holding is erroneous. *Campbell v. Mueller* (6th Cir.) (159 F. 2d 803. See also *Standard Oil Co. v. United States,* 283 U. S., at p. 161, . . . in which the illegal clauses were cancelled a short time before the entry of the decree."

To the same effect are *Sylvania Industrial Corp. v. Visking Corporation* [1940-1943 Trade Cases ¶ 56,255], 132 F. 2d 947; *Air Products, Inc. v. Boston Metals Co.* [1950-1951 Trade Cases ¶ 62,926], 98 F. Supp. 719; *Eastern Venetian Blind Co. v. Acme Steel Co.* [1950-1951 Trade Cases ¶ 62,819], 188 F. 2d 247.

For the reasons hereinabove stated, it is held that defendants have not established a misuse of the patents in suit or any violation of the antitrust laws or that any damage resulted to either of them by reason of Sperry's practices in connection with the angle beam search unit.

Relations Between Sperry and Electro Circuits

Defendants charge that Sperry misused the patent in suit by "the imposition of a tying arrangement." They also assert that Sperry enticed Electro Circuits into the field of ultrasonic pulse echo testing and subsequently attempted to expel Electro Circuits therefrom. It requires no more than a statement of the salient facts to demonstrate that both contentions are groundless. Electro Circuits was organized in California in 1951. It commenced active operations in that state in July 1951. Its first development was a weld inspection apparatus which was followed by the development of a Wide Band Converter and the Immerscope. These devices operate on the principle of the pulse echo method of ultrasonic testing. At the time of its first development Electro Circuits attempted to secure a license under the Sperry patents in return for its agreement to purchase from Sperry unpatented sub-assemblies of the latter's patented devices. Sperry rejected this proposal. When Electro Circuits was ready to market its Wide Band Converter, Richards, the president of that company, had a conference with the officials of Sperry with a view of securing an agreement that would permit Electro Circuits to manufacture and sell its Wide Band Converter without being sued for infringement. Richards proposed that Sperry grant a license to Electro Circuits or, in the alternative, that Electro Circuits sell its Wide Band Converter to Sperry for resale by the latter. Sperry rejected both proposals. It was agreed between the parties, however, that Sperry would forebear instituting suit for infringement provided Electro Circuits sold its Wide Band Converter for use only in conjunction with Sperry's Reflectoscopes. The Wide Band Converter was designed so that it could be "plugged in" to a Reflectoscope. Under this arrangement of joint use, only the display portion of the cathode ray oscilloscope of Sperry's instrument was used. All other functions of the dual apparatus were performed by the Wide Band Converter. The agreement remained in effect for about 9 months, during which time Electro Circuits sold 8 Wide Band Converters to owners of Reflectoscopes and one Wide Band Converter to a customer who agreed to its use with a Reflectoscope to be purchased from Sperry. In March 1953 Farwell, president of Sperry, learned through an advertisement in a trade journal that Electro Circuits was making a B Scan display in connection with its Wide Band Converter. Farwell considered this a breach by Electro Circuits of its agreement and an infringement of Sperry's patents, and notified Electro Circuits to this effect. There-

after officials of Electro Circuits went to New York and there conferred with representatives of Sperry.

At this time Electro Circuits was negotiating with the Magnaflux Company with a view of engaging the latter to act as its distributor. In making the trip to New York, Richards stopped in Chicago and informed Magnaflux of Sperry's notice of infringement. On May 6, 1953 Richards held a series of conferences with Sperry in New York, at which time many proposals were made and rejected. It was finally agreed, however, that Electro Circuits might continue selling its Wide Band Converter and B Scan for use with the Reflectoscopes for a period of six months, after which time Electro Circuits would convert its equipment to the F-M system of ultrasonic inspection, on which it held a patent. Before returning to California, Richards again stopped at Chicago and saw the officers of the Magnaflux Company. On this occasion he learned that Magnaflux had received an opinion from a firm of patent lawyers that the Sperry patents probably were invalid. When he arrived back in California Richards requested a firm of patent attorneys in San Francisco to submit opinions on two questions: (1) whether its F-M system infringed the Sperry patents, and (2) whether the Sperry patents were invalid. The opinions received were to the effect that the F-M system did not infringe and that the Sperry patents probably were invalid. Thereafter, at the end of the six months period, Electro Circuits did not convert its equipment to the F-M system—instead it incorporated a cathode ray oscilloscope in its wide band converter and called the new self-operating unit an Immerscope. In only one instance did Sperry sell a Reflectoscope that was to be used with the Wide Band Converter. In that case Sperry imposed no condition upon the use of its instrument but merely agreed that in addition to its use in the usual manner the purchaser might also use the Reflectoscope in conjunction with the Wide Band Converter. The other eight sales of Wide Band Converters were made by Electro Circuits to owners of Reflectoscopes and Sperry merely consented to the use of its invention in the manner described above. At no time in connection with any of the transactions did Sperry attempt to enlarge its lawful monopoly under its patents. As counsel for plaintiff aptly observed, Electro Circuits "might have had something to talk about" if Sperry had acceded to the request of Electro Circuits and sold its unpatented assemblies to the latter. The cases cited by defendants are not in point. *Morton Salt Co. v. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488; *Carbice Corp. v. American Patent Developments Co.*, 283 U. S. 27 and *Morton Picture Patents Co. v. Universal Film Co.*, 243 U. S. 502 are cases in which the patent owner was misusing the patent to enforce the sale of unpatented products. *Black v. Magnolia Liquor Co.*, 355 U. S. 24 and *Distilled Brands v. Dunnigan*, 222 F. 2d 867, involved tie-in sales of liquor dealers. Patents were not involved in those cases. The excerpts quoted from *U. S. v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100 and *U. S. v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 are not pertinent under the facts of this case.

Electro Circuits' claim that Sperry enticed it into the pulse echo ultrasonic testing business is repudiated completely by the facts. Electro Circuits was an active and successful petitioner of concessions from Sperry that would enable it to manufacture its Wide Band Converters free of the threat of a suit for infringement. After receiving notice that it infringed the Sperry patents by incorporating a B-scan in the Wide Band Converter, Electro Circuits succeeded in persuading Sperry to defer the institution of suit for a period of 6 months upon Electro Circuits' promise to convert to its F-M system at the end of that time. Thereafter, in violation of its promise, Electro Circuits proceeded to manufacture and sell the accused Immerscope.

I find no basis in the evidence for the charge of enticement nor do I find any evidence of a misuse of the patents in suit or a violaiton of the antitrust laws in Sperry's dealings with Electro Circuits.

PLAINTIFF'S PURPOSE IN FILING THIS SUIT

An examination of the above captioned subject is made at this point because of its close relation to the events referred to in the subject last discussed. It is the contention of defendants that Sperry's purpose in instituting suit was to obtain monopolistic control of the market over and above the rights granted to it under its patents. In support of this contention defendants refer to Sperry's policy of asserting its patent rights against infringers, Sperry's alleged

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improprieties in its relations with Electro Circuits and Sperry's alleged attempt to reserve the United States market to itself through its foreign license agreements.

As noted above, Sperry was doing no more than asserting its right under the patents in sending notices to infringers. It has also been determined above that in its relations with Electro Circuits, Sperry was guilty of no impropriety and that such charge is entirely without merit. The implication in defendants' argument that Sperry's policy of licensing its foreign patents was a part of an alleged unlawful purpose to monopolize will be hereinafter discussed. It is enough to say at this point that there is no relation between Sperry's licensing of its foreign patents and this action for infringement of the United States patents in suit. Defendants also refer to testimony that statements were made by salesmen of Sperry in 1955 to customers of Electro Circuits that the Aluminum Company of America had standardized on Sperry equipment. Defendants assert that such statements were designed to "stampede" customers of Electro Circuits into using Sperry equipment. This testimony was hearsay, and there is no evidence tending to prove that, if made, such statements had any effect on the customers of Electro Circuits. By such testimony defendants seek to establish that in its relations with Electro Circuits Sperry followed a policy of forwarding improper notices to the trade. They fail in their purpose on two grounds—the testimony is incompetent—and it is entirely lacking in probative value. Defendants also refer to the testimony of Buckman, now with Curtiss-Wright, that while he was employed by Thompson Products in 1955, Smack, of Alcoa, said to him that the Immerscope could not operate at a certain speed, whereupon Buckman demonstrated that it could. It is difficult to believe that defendants are serious in their claim that this unimportant incident is related to the question of improper trade notices. Buckman's testimony in this regard is entitled to no weight. Defendants also refer to the fact that Farwell expressed the opinion on several occasions that the market for ultrasonics was only large enough for one manufacturer. It is implied that such statements evidence an unlawful monopolistic purpose. The statements were made by Farwell on the occasion of the conference in May 1953 between representatives of Sperry and Electro Circuits. Richards, president of the latter company, testified that Farwell made such statements in explanation of Sperry's policy not to grant licenses because the field was not large enough for two companies. According to Richards, Farwell added that in view of its patents it was Sperry's right "to have exclusive use of the field." I am unable to read any unlawful intent in Farwell's statement of Sperry's purpose to exercise its lawful right to exclude others from using its inventions.

The matters above referred to lend no strength to defendants' major contention that in filing this suit Sperry was motivated by a purpose to enlarge the scope of the monopoly granted by the Patent Office. The facts in the record lead inescapably to the conclusion that Sperry was forced to sue for infringement in order to protect its rights under the patent. Although Sperry served Electro Circuits with a notice of infringement in March 1953, and its agreement of May 1953 to defer action for six months terminated in November of that year, it was not until ten months later, and long after Electro Circuits embarked upon its deliberate program of infringement, that this action was filed. Sperry had done more than make good on its promise to give Electro Circuits ample time to convert to its F-M system and avoid the infringement action. Sperry's conduct, which is now assailed, was regarded quite differently by Electro Circuits when it was promoting the sale of its stock during the period within which it was to convert to the F-M system of flaw detection. In a prospectus filed with the Investment Department of the Division of Corporations of the State of California, on October 6, 1953, Electro Circuits, among other things, made the following statements:

> "There is some question as to whether or not, in the absence of the working agreement mentioned above, the B-scan and wide band converter infringe patents held by Sperry and relating to pulse modulation ultrasonic inspection. To avoid any possible conflict on this matter, the Corporation decided to convert its instruments to phase, frequency or other modulation mode clearly differing from the pulse mode. The Corporation owns United States Patent 2,593,865, directed to frequency modulation system of ultrasonic flaw detection. The patent firms of Hill, Sherman, Meroni, Gross & Simpson of Chicago"—"and Lippincott and Smith of San Francisco, have independently given

opinions that conversion of the present pulse modulated instrument to a mode of modulation as described in said patent, will avoid any question of infringement of the Sperry owned patents. The Corporation has recognized for some time the advantages of phase or frequency modulation, particularly with respect to improved resolution and diversification of applications. The cost of conversion, however, has not been heretofore justified. Sperry has indicated continued cooperation during the period required for the Corporation to effectuate this conversion."

Sperry's cooperation was given in full measure but Electro Circuits recanted on its promise to convert and infringed the Sperry patents.

During the period of the so-called "working agreement" Electro Circuits sold 8 Wide Band Converters while Sperry sold but one Reflectoscope for use with a Wide Band Converter. Both instruments sold for about the same price, and it is obvious that the benefits realized by Electro Circuits under the arrangement were many times greater than those realized by Sperry. Electro Circuits suffered no loss through any alleged improper conduct of Sperry.

Electro Circuits relies heavily on *Kobe v. Dempsey* [1952 Trade Cases ¶ 67,312], 198 F. 2d 416 as authority supporting its claim that the filing of this suit was an integral part of Sperry's alleged purpose to unlawfully monopolize the pulse echo system of flaw detection. The *Kobe* case, however, is of no aid to defendants. In the cited case, the Court of Appeals found that in March 1933 Kobe and Rodless Pump Company, competitors in furnishing hydraulic pumps to the oil industry, entered into an agreement which provided that a third corporation, known as Roko, would be created for the purpose of holding title to patents assigned to a pool. The new corporation had no other function than holding the pooled patents, acquiring other patents and granting licenses. Kobe and Rodless assigned all their patents to Roko for a period of 25 years. Subsequently Roko acquired all of the patents covering inventions of hydraulic pumps and Kobe became the sole licensee of Roko.

In 1948 suit was filed by Kobe against Dempsey. At the time of filing Kobe had no concrete information that the Dempsey pump infringed any of Kobe's patents. The court found that upon the filing of the infringement action Kobe sent notices to the trade which were veiled threats that purchasers might be involved. The notices resulted in an almost complete boycott of the Dempsey pump. In holding that the institution of the infringement action was an integral part of Kobe's unlawful monopoly, the court found that the Kobe-Rodless agreement of 1933, which created Roko, was the beginning of an arrangement to corner the hydraulic pump business for oil wells. Among other things, the court said:

> "The purposes of the original contract creating the monopoly were illustrated by the activities of Kobe when Dempsey appeared on the market and became the definite prospect for competition in the hydraulic field. *Until then there had been no need for Kobe to display its monopolistic power.* A reading of the communications between the company and the sales agents and the testimony as to the activity of different representatives of Kobe can leave no other inference than that the monopolistic purpose of this *original arrangement* was to be continued if possible. This suit was no more than a part of the *original plan* and was designed to nip this competitive threat in the bud." P. 423-4. (Emphasis supplied)

As shown by the findings of the Court of Appeals, Kobe's suit against Dempsey was an attempt to maintain and continue in effect the unlawful monopoly created by Kobe's contract with Rodless 15 years before the infringement suit was filed. No comparable situation is to be found in the case at bar. The defendants ignore this basic distinction between the two cases and take no account of the striking contrast between the facts of Kobe and those of the instant case. Accusations and imputations of reprehensible conduct, such as were present in Kobe, are poor substitutes for the missing proof of similar conduct by Sperry. The evidence in this case admits of no other rational conclusion than that Sperry was forced to sue for infringement to protect its lawful rights under its patents. *Cole v. Hughes Tool Co.* [1954 Trade Cases ¶ 67,857], 215 F. 2d 924; *United States v. United Shoe Machinery Corp.* [1953 Trade Cases ¶ 67,436], 110 F. Supp. 295; *International Visible Systems Corp. v. Remington-Rand, Inc.* [1932-1939 Trade Cases ¶ 55,034], 65 F. 2d 540 (6th Cir.).

Sperry's Foreign Licenses

There can be no doubt that Sperry's primary purpose in entering into foreign license agreements was to obtain income

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from royalties on its foreign patents. Sperry had attempted for some time to market its products abroad but with little success. It had decided that the limited market abroad did not warrant the substantial investment necessary to establish manufacturing plants in foreign countries. Some of the European countries impose taxes on patents, particularly those covering inventions not used commercially. Sperry's foreign patents were therefore a source of continuing and increasing expense and were producing little or no income. In an effort to correct and improve this unprofitable condition, Sperry entered into an exclusive license agreement with Refac in March 1954. Sperry has no financial interest in Refac, which is an independent organization specializng in assisting American corporations in the handling of their foreign business. The original license was amended in September 1955 to separate those patents in which Dr. Firestone has an interest and Sperry's other patents. The term of the amended license was for 5 years and Refac was granted the right to terminate the agreement at any time upon 6 months' notice. Refac was authorized to sub-license others, with Sperry's approval, in consideration of the payment of royalties, part of which were to be retained by Refac and the balance remitted to Sperry. Refac negotiated and executed 13 sub-licenses with 12 European companies and one with TKS of Tokyo, Japan. Eleven of such licenses are in effect and, with the exception of the license to TKS, all of such licenses are non-exclusive. The sub-licensees are authorized to manufacture and sell the devices and accessories covered by the patents in specified territories. The territory of several of the licensees extends into countries in which Sperry has no patent rights. There was also an overlapping of territories in many of the licenses. In addition to the payment of royalties, the licensees were required to acknowledge the validity of Sperry's foreign patents, both present and future, and to agree not to contest the validity of such patents or future applications. In six of the licenses provision is made for "grant backs" of improvements and an exchange of technical knowledge and know-how. Three of such licenses contain agreements by Sperry not to engage in manufacturing in Europe. The terms of the licenses vary in respect of termination rights. Some of the licensees were granted the right to cancel their agreements in 1957, others in 1958, and still others in 1963 and 1965. The original exclusive license to TKS contained a provision requiring the licensee not to manufacture or sell ultrasonic equipment for a period of five years after the termination of the license no matter which party caused the termination. This provision was modified by an amendment on November 20, 1957. The amendment limited the scope of the obligation of TKS not to engage in the manufacture or sale of ultrasonics after termination of the license by excepting therefrom the manufacture and sale of such inventions as "shall have become public knowledge by publication or patenting within the licensed area."

In discussing defendants' contentions in respect of the foreign licenses, the claims of antitrust violation in the counterclaim of Electro Circuits will be separated from the claim of both defendants that the patents in suit were misused.

To make out a case of antitrust violation, the counterclaiming defendant must show that Sperry's foreign licenses had a direct and substantially harmful effect on interstate commerce or on the foreign commerce of the United States. Defendant Electro Circuits contends that "the primary purpose of Sperry's foreign licensing policy was to reserve to Sperry the American market." In support of this contention the defendant asserts that Sperry has obtained almost all patents owned by foreign manufacturers most likely to compete with it in the United States markets. Defendant, however, takes no account of the actual number of patents received by Sperry or their value. The fact is that Sperry has received very little by way of assignments from its foreign licensees. Of the 10 assigned applications from Krautkramer, of Germany, 6 have been abandoned, 2 others are about to be abandoned and only one claim has been allowed on the 2 remaining applications. Sperry has also received rights under 6 patents from A. C. E. C. of Belgium, but these relate to various types of transducers and are of doubtful value. No assignment of any application or patent covering ultrasonic pulse echo apparatus has been received. It is the teaching of *Transparent Wrap Machine Co. v. Stokes & Smith* [1946-1947 TRADE CASES ¶ 57,532], 329 U. S. 637, that "The inclusion in a license of a condition requiring the licensee to assign improvements is not per se illegal and unenforceable." See also *Hart-*

ford Empire v. United States [1944-1945 TRADE CASES ¶ 57,319], 323 U. S. 386, 422, 423. Where a challenged practice is not per se illegal, an examination of all relevant market factors and their economic consequences is required to determine whether the assailed practice is within the ban of the Sherman Act. Defendant has insisted throughout that the relevant market here is that of ultrasonic pulse echo testing instruments. Yet it is not shown whether the applications and patents received by Sperry from its licensees are competitive or merely complementary, nor has it been established that there has been any illegal acquisition of patent rights from the licensees. Moreover, no attempt has been made to show any adverse economic consequences arising from the "grant backs." Defendant also contends that the foreign licenses have had a harmful effect on the import trade of the United States. In support of such contention defendants point to a few instances where corporations in the United States were unable to buy pulse echo equipment from Krautkramer, one of Sperry's foreign licensees. However, the most reasonable inference to be drawn from the evidence is that such purchases were prevented by Sperry's lawful exercise of its rights under its United States patents and Krautkramer's unwillingness to infringe such patents. It is not claimed that any other purchases from abroad were prevented by Sperry's foreign licenses. That such licenses were without effect on this country's import trade is indicated by the fact that Kelvin Hughes and Glass Developments, two large English corporations who are competitors and not licensed under the Sperry foreign patents, do not sell ultrasonic devices in the United States. It also appears that none of the foreign licensees did business in the United States prior to the time they were licensed under Sperry's foreign patents. The conclusion is inescapable that the inability of a few American corpoartions to buy pulse echo equipment from Krautkramer was due to Sperry's ownership of the United States patents on such equipment and its exercise of its lawful right to exclude other from selling such equipment in this country.

In an effort to show that the export trade of the United States was harmed by the foreign licenses defendants assert that in order to obtain concessions from its licensees Sperry agreed not to compete in certain areas of the world. There are no such express agreements with the licensees. It is true that Sperry agreed with three of its licensees not to manufacture in Europe. However, it is shown that since such license agreements were executed Sperry's export trade has increased. While some of Sperry's export shipments were made to countries where it has no foreign patents, such countries are within the territories assigned to the licensees with whom such agreements were made. Sperry's freedom to export American manufactured products has not been restricted. There is no evidence tending to show that the export trade of Sperry, or any one else, including Electro Circuits, has been injuriously affected by the foreign licenses. Sperry has granted a license to T. K. S. In effect this was an assignment of its patent rights in Japan to the licensee. There is no evidence showing that such license had any detrimental effect on this country's export trade.

Defendant also attacks the legality of practically all of the other restrictive covenants in the foreign licenses but offers no evidence to show that any or all of such covenants had any harmful effect on the foreign or domestic commerce of the United States. It is unnecessary, therefore, to extend this discussion to a consideration of the various claims of the defendant in this regard. Defendant has failed to prove any public injury resulting from Sperry's foreign licensing policy. There is also a complete failure of proof that the foreign licenses have caused any injury to the counterclaiming defendant. The real question on this branch of the case, therefore, is whether Electro Circuits has any right of action under the antitrust laws.

THE COUNTERCLAIM OF ELECTRO CIRCUITS

Section 15 of Title 15 U. S. C. A., in its pertinent part, reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The courts have held uniformly that it is a prerequisite to the maintenance of an action under the antitrust laws by a private suitor that the plaintiff prove that he was damaged as a direct result of defendant's

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violation of the Sherman Act. *Studio Unions v. Loew's, Inc.* [1950-1951 Trade Cases ¶ 62,953], 193 F. 2d 51; *Productive Inventions, Inc. v. Trico Products Corp.* [1955 Trade Cases ¶ 68,104], 224 F. 2d 678; *Hunter Douglas Corp. v. Lando Products* [1956 Trade Cases ¶ 68,386], 235 F. 2d 631; *E. V. Prentice Machinery Co. v. Associated Plywood Mills, Inc.* [1958 Trade Cases ¶ 68,930], 252 F. 2d 473; *Peller v. International Boxing Club* [1955 Trade Cases ¶ 68,202], 227 F. 2d 593; *Mason City Tent & Awning Co. v. Clapper* [1956 Trade Cases ¶ 68,553], 144 F. Supp. 754. The principle which governs in all private suits under the statutes applies with equal force to alleged violations of the antitrust laws asserted by a counterclaiming defendant. In order to maintain its counterclaim it is therefore incumbent upon the defendant to show that it has been injured in its "business or property" by the wrongful acts of Sperry. This, the counterclaiming defendant has failed to do. As already shown, there is no evidence of any antitrust violation by Sperry in the conduct of its business in the United States. It is clear that in respect of all its acts and practices in this country Sperry was acting within the ambit of its lawful monopoly under the patents in suit. The defendant contends, however, that it sustained damage as a result of Sperry's alleged practice of requiring each purchaser of a Wide Band Converter to buy a Sperry Reflectoscope. This argument is based upon a false premise. Sperry did not require any purchaser of a Wide Band Converter to buy a Reflectoscope. It was Electro Circuits who insisted that the purchasers of its Wide Band Converters use them only in connection with a Reflectoscope in order to avoid infringing the Sperry patents. In all but one of the sales made under the "working agreement" Electro Circuits sold its equipment to customers who already owned Reflectoscopes. One Reflectoscope was sold to the du Pont Company with premission to use it in conjunction with a Wide Band Converter but no other sales of Reflectoscopes were made for the same purpose. Moreover, Electro Circuits never purchased any Reflectoscopes and its claim of damages as a result of the "working agreement" between the parties is entirely devoid of merit.

Defendant also contends that it was damaged by reason of expenses incurred in investigating the validity of the Sperry patents; that it sustained further damage in the expenditure of time and capital in an effort to design devices that would avoid Sperry's patent claims even though it considered the validity of such claims to be questionable. However, these alleged injuries were self-inflicted and are in no way attributable to any wrongful act of Sperry. Defendant contends further that it sustained a loss of profits by reason of this suit for infringement because of its inability to offer satisfactory indemnity agreements to its potential customers prior to the time the Curtiss-Wright Corporation agreed to underwrite the expense of defending this suit. Also claimed as an item of damage is the alleged loss of profits resulting from defenadnts' agreement with Curtiss-Wright. These contentions represent no more than claims for damages resulting from the suit for infringement. They rest upon the erroneous presupposition that Sperry's action in filing suit was in the furtherance of an unlawful monopoly. This is contrary to the fact determined above that Sperry was forced to institute suit to protect its lawful rights under the grants from the Patent Office. To justify such claims for damage defendant again seeks to assimilate the facts of *Kobe v. Dempsey, supra,* to the facts of this case, but, as already shown, there is no parallel between that case and the facts of this one. Defendant also cites and relies upon the following statement of the court in *Bigelow v. RKO Radio Pictures* [1946-1947 Trade Cases ¶ 57,445], 327 U. S. 251, 265, 266:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proper invasion of the plaintiff's rights."

The quotation from *Bigelow* is unquestionably a correct statement of the law but it has no application here. Defendant has not shown any invasion of its rights by any wrongful act of Sperry. Defendant embarked upon a deliberate program of infringement by manufacturing and selling Immerscopes in full knowledge that it was risking, if not inviting, a suit for infringement. This Court has found that defendants did infringe the Sperry patents. It would be a strange paradox indeed if Electro

Circuits were permitted to escape the consequences of its own tortious conduct and recover damages from Sperry, who was merely asserting its lawful rights under its patents.

Electro Circuits has also failed to establish any damage to itself or its property directly resulting from Sperry's licensing of its foreign patents. The only testimony offered by Electro Circuits in this connection is that of its president, Richards, who testified his company had signed a contract with a foreign sales representative in San Francisco but did not aggressively attempt to sell abroad until 1954; that such efforts were discontinued on November 17, 1955 without any foreign sales being made. There was not the slightest suggestion by the witness that Sperry's licensing policy abroad had any effect whatever on Electro Circuits' failure to sell in foreign markets. The reasons for its lack of success in this field are unstated by the defendant and unknown to the Court. It is clear, however, that there is no showing of a causal relation, either proximate or remote, between Electro Circuits' failure to make sales abroad and Sperry's licensing policy in foreign countries. The record is barren of any proof that Sperry's licensing policy abroad or its acts and practices in the operation of its business in this country resulted in any pecuniary injury to the counterclaiming defendant.

For the reasons indicated, it is held that Electro Circuits is not entitled to maintain its counterclaim, and that the same must be dismissed.

Alleged Misuse of the Patents in Suit

This issue may be disposed of with brief comment. By specific findings this Court has held that Sperry did not misuse the patents in suit in any of its acts or practices of which defendants complain that relate to the conduct of Sperry's business in the United States. Such findings are hereby reaffirmed. All of Sperry's foreign licenses were granted under its foreign patents. Hence there was no use, and consequently no misuse, of the United States patents in suit in connection with Sperry's foreign licensing policy. Defendants recognize that the defense of misuse is available only where there has been a misuse of the patents in suit. However, they attempt to relate Sperry's United States patents to its foreign licensing policy. Defendants advance the argument that Sperry's rights under the patents in suit were expanded by its foreign patents covering the same inventions and that Sperry used its foreign patents to expand its rights under its United States patents "beyond anything contemplated by law." The implication of such argument seems to be that the patents in suit as expanded by the foreign patents covering the same inventions were misused by Sperry in connection with its foreign licensing policy. The argument is unsound. Foreign patents create rights separate and distinct from those created by patents issued in the United States. Foreign patents covering the same inventions as United States patents can neither restrict nor enlarge the rights acquired under patents issued by the United States Government. An excellent statement of the applicable principles is found in the Report of the Attorney General's Committee on Antitrust Laws (1955) where it is said (p. 96):

> "We point out, however, that a patent is a grant from the sovereign and therefore has no force beyond that sovereign's territorial limits. Thus, a United States patent creates rights coextensive only with United States laws. Similarly, a British patent, covering the same invention as an American patent, is governed by British law co-extensive with British territory. This means that patent rights in the same invention may differ in scope and effect in the respective territorial limits of the country of issuance."

The doctrine of misuse rests upon the principle that the holder of an exclusive privilege granted in the furtherance of public policy may not claim protection of his grant by the courts where it is being used to subvert that policy. *Morton Salt Co. v. Suppiger* [1940-1943 Trade Cases ¶ 56,176], 314 U. S. 488, 494. Sperry seeks no protection of the patents granted by foreign countries and it is not shown that the patents in suit were used to subvert the public policy of the United States as expressed in the Constitution and patent laws.

An order may be entered dismissing the counterclaim of the defendant Electro Circuits and granting plaintiffs the injunctive relief and the accounting prayed for in their amended and supplemental complaint.

This opinion constitutes Findings of Fact and Conclusions of Law pursuant to Rule 52(a).

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[¶ 69,240] United States v. Standard Oil Company of California; The Texas Company; Richfield Oil Corporation; General Petroleum Corporation; Tidewater Associated Oil Company; Union Oil Company of California; Shell Oil Company; and Conservation Committee of California Oil Producers.

In the United States District Court for the Southern District of California, Southern Division. No. 11584-C Civil. Dated October 21, 1958.

Case No. 1024 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Defenses—Mootness.—An oil conservation committee's motion for a summary judgment of dismissal on the ground of mootness was granted. The committee had been composed of employees of the other defendants in the action and of people from other segments of the oil industry. The membership of the committee was not static but was changing. An injunction against the committee, in view of its changing complexion, would be an idle act. A decree against the other defendants would accomplish far more than a decree against an illusory committee that could disband and reorganize under a new name and with different personnel and do all that the old committee had done. Furthermore, the presence of the committee as a defendant would not assist the other defendants or the Government in the trial of the action.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.675.

For the plaintiff: George B. Haddock, Attorney, Department of Justice.

For the defendant: Hanna & Morton, by Harold C. Morton, Los Angeles, Cal.

For another opinion of the U. S. District Court, Southern District of California, see 1958 Trade Cases ¶ 69,212.

Transcript of Proceedings

[*Summary Judgment*]

The Court [JAMES M. CARTER, District Judge, *In full text*]: In view of the Rule about issues of fact being sufficient to defeat a motion for summary judgment, it is hard for me to imagine a case with ingenious counsel where you can't have some issue of fact.

We judges in the Southern District of California have sat around the table with Judge Fee at lunch time discussing summary judgment—and I know that he will not take offense if he reads what I have to say—and he has put the fear of God in us about summary judgments. His view of summary judgments is such that you have to think twice about granting motions for summary judgment.

[*Committee as Defendant—Mootness*]

As far as the motion of the Conservation Committee on its second ground is concerned, the motion is denied.

As to the motion of the Conservation Committee on its first ground, on the ground of mootness, I was inclined to take this matter under submission, but maybe in view of Mr. Morton's remarks urging a decision on it I had better dispose of that end of it, too.

One factor that seems to me very important in passing on that motion is the character of this Committee. The Committee in the past has been composed, in part, of employees of the defendants and in part of people from other segments of the oil industry. The Committee is not static; it is changing. The Committee one day consists of certain people, and another day of others. Reading the affidavits as to how these young men who have studied engineering have progressed from trainee capacity to chief petroleum engineer, you see why the Committee is a changing body. Time goes on.

I begin to realize how old I am when I read about these fellows graduating in engineering in 1937 and 1939 and now being chief of this unit or chief of that unit. I think back on my days of schooling which precede that by a whole decade.

So the Committee of necessity has to be a committee composed of different people at different times, and the present group

on the Committee, with few exceptions, are not the people who were on the Committee at earlier times. An injunction against this Committee, in my mind, to a very large extent would be an idle act. The very nature of the changing complexion of the Committee and the fact that if there are illegal activities—I might say a big if—if there are illegal activities, it is the activities of the defendants operating through their agents and employees that make this possible.

Therefore, a decree against the defendants, if that is the way the case ever turns out, accomplishes far more than a decree against an illusory committee that could lie down and die tonight and tomorrow a new committee with a new name composed of different personnel could or could not do all that the old committee could do.

I don't think it is going to further the trial of this case to have the committee around. I don't think it is going to assist the defendants or the Government. The Government still has a right to show that past activities of the Committee, if they can produce that proof, were illegal. A judgment of dismissal as to the Committee will not affect the scope of the Government's proof. It will merely remove from our presence a very agreeable and, according to his own statement, underpaid counsel —in which respect he differs from all other counsel in the case, from my understanding of the situation. And if the Government makes out this case against the defendants at a trial and the Committee was still in the case, I would think that my decree would be fashioned against the defendants and not against the Committee in which some of the defendants have participated.

Furthermore, the Government concedes that the Committee has a usefulness. The Government concedes that it doesn't want the Committee dismembered. That doesn't bathe the Committee in a complete shower of righteousness, but it shows that this Committee stands in a different situation than the seven major defendants do in this case. And I would think, therefore, if the case were tried and the Government made out its case and I found there had been a conspiracy and that the Committee, namely, as it existed in those days, had participated in the unlawful activities on the basis of sitting here and hearing the testimony of 70 or 90 of these people who might tell what the Committee had done since May, 1950, I do not have much doubt in my mind that my decree wouldn't run against the Committee.

Therefore, I am going to grant the motion for summary judgment on the ground of mootness as to the Committee.

I am not satisfied with these findings that are prepared. I want new findings drawn other than as proposed by the defendant. In particular I notice, for instance, there is a Finding 23: "There is no conspiracy now existing . . ."

Mr. Morton: I think, your Honor, that Mr. Haddock and I can agree on a form of order that will cover the situation.

The Court: And Finding 25: "There is no monopoly . . ." speaking of the present.

I would ask, therefore, that the counsel confer on the preparation of a set of findings.

I was going to take this under submission, but I don't know that I would have come to any other conclusion. I have read your briefs as they came in. I read your brief on intent in criminal conspiracies, Mr. Haddock. I read Mr. Lasky's when it came in. I have been looking these over from time to time. I read a lot of this material when it first came in. Last night I thumbed through a number of the affidavits and I found your tabulation of what the affidavits consist.

I am just as certain in denying the motion on the second ground as I am in granting it on the first ground. If there are issues of fact, they could not be disposed of on this motion.

Nothing I have said here indicates that I think the defendants are guiltless or guilty of the charges against them—it has nothing to do with this part of the case, and as I see it, unless somebody convinces me to the contrary, evidence of activities as to the Conservation Committee may be shown in evidence notwithstanding the fact that the Conservation Committee is not here present. If anybody disputes that, they had better get busy writing a brief, because I don't think dismissal of the Conservation Committee affects the rest of the case.

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[¶ 69,241] **United States v. Beatrice Foods Company, Roberts Dairy Company, and Alamito Dairy Company.**

In the United States District Court for the District of Nebraska. Criminal No. 0351. Dated December 11, 1958.

Case No. 1411 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictment—Defendants' Pleas of Nolo Contendere.—In a criminal action against three dairies, the court ruled that it should not have previously accepted pleas of *nolo contendere* tendered by two of the dairies, in view of the allegations and information set forth in a Government memorandum with respect to the imposition of sentences and in showings on the behalf of the two dairies, and particularly in view of the fact that the third defendant tendered a plea of not guilty which was accepted by the court. It is within the sound discretion of the court to accept such pleas. One of the reasons why the dairies tendered pleas of *nolo contendere* was the recognition that a trial would be time consuming and expensive; however, under the circumstances justice would not be served by the acceptance of the pleas, which for the purpose of imposition of sentence would have to be treated as pleas of guilty.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.860.

For the plaintiff: James Mann, Antitrust Division, Department of Justice, Chicago, Ill.

For the defendants: Edwin Cassem and Robert K. Adams, Omaha, Neb., for Roberts Dairy Co.; and Alfred C. Munger, Omaha, Neb., for Alamito Dairy Co.

[*Sentence—Pleas*]

Before Honorable Richard E. Robinson, Chief Judge, at Omaha, Nebraska, on December 11, 1958 [*In full text*].

Mr. Mann: May it please the Court, this matter is before the Court on the matter of sentence of the Roberts Dairy and Alamito Dairy, as you will recall, on a plea of *nolo contendere* on September 25th. They are both represented here. Both the dairies are represented by counsel. Would you care to have them make their appearances known in the record?

By the Court: Yes, I think for the purpose of the record that should be done.

Mr. Munger: Alfred C. Munger, 1110 First National Bank Building, for Alamito Dairy.

Mr. Cassem: Edwin Cassem, 830 City National Bank Building, and Robert K. Adams, of the same address, for Roberts Dairy Company.

[*Rejection of Pleas*]

By the Court: I think before proceeding further in this matter, the Court should make an announcement.

Since the pleas of *nolo contendere* were entered by the Defendant Alamito Dairy Company and Roberts Dairy Company, the Court has been furnished, through the office of the Probation Officer, with so-called factual memoranda of the Government with respect to the imposition of sentences on the Defendants, and likewise with showings on behalf of Roberts Dairy Company and Alamito Dairy Company. In view of the allegations and information set forth in the respective showings, and particularly in view of the fact that there is a third Defendant, Beatrice Foods, which has tendered a plea of not guilty, which was accepted by the Court, the Court has concluded it probably should not have accepted the pleas of *nolo contendere* which were tendered on behalf of the Defendants Roberts Dairy Company and Alamito Dairy Company. The Court appreciates that it is merely within the sound discretion of the Court to accept such pleas, but for the purpose of imposition of sentence those pleas are tantamount to pleas of guilty. Now then, if the information as set forth by the Government is correct and true, that is one thing. If the information as set forth in the respective showings of the Defendants Roberts Dairy Company and Alamito Dairy Company is true, then an indictment should never have been returned in this case. In other words, the two showings just can't stand together. One must be true and one must be untrue.

The Court recognizes that both of the Defendants are responsible business firms in this community and I feel, under the circumstances, that if neither one is guilty of the offenses charged then they should not be tarnished with the stigma of having the Court find them guilty.

So, at this time on the Court's own motion, I am setting aside the pleas of *nolo contendere* entered by the Defendant Roberts Dairy Company and the Defendant Alamito Dairy Company and shall enter a plea of not guilty as to each of said Defendants, giving the Defendants the right within ten days, if they so desire, to tender such other plea as they may want to make.

Mr. Mann: I would like to say for the Government that we concur 100% with Your Honor's ruling. We think that that would be a very proper thing to do. Since we are going to have to try the case against Beatrice Foods, we will try the case against all of them.

By the Court: I appreciate that at least one of the announced reasons why the respective Defendants tendered their pleas was because of the recognition that a trial would be a long trial and time consuming, and I don't doubt expensive to both Defendants, but under the circumstances I don't think that justice would be served by the Court taking the pleas of *nolo contendere* which for the purpose of imposition of sentence would have to be treated as pleas of guilty.

Mr. Mann: I think the Government can assure the Court this will not be a long trial. I think it is one we can be very happy to expedite, at least for the Government to put its evidence in, so that the Defendants should be assured of that fact. If they wish to stand trial, the Government will do everything possible to expedite matters, and we can almost assure them it will not be a long drawn-out trial at all, as far as the Government's evidence is concerned, and we are very happy with the ruling the Court has made, and we do hope the Defendants do stand trial and do give us an opportunity to prove the charges.

By the Court: Does Counsel for the respective Defendants have anything to say at this time?

Mr. Cassem: I wish to say, Your Honor, the sole reason for the Defendant Roberts Dairy Company entering a plea of *nolo contendere* was the information and advice of Counsel that an Anti-Trust Case of this kind would inevitably last a very considerable period of time, during which time employees of the Company at all levels will be taken from attendance upon their usual duties and the business of the Company greatly disrupted. The experience in that connection which the Company had during the several sessions of the Grand Jury was so bad from the standpoint of disruption of its business that we felt a trial of the case simply could not be justified from that standpoint, and for that reason, although we asserted that we are not guilty and believe that a conviction could not be obtained, we did enter a plea of *nolo contendere* and entered it solely for that reason.

Mr. Munger: We concur in the same reasoning as Counsel for Roberts.

I also have a question for the Attorney for the Department of Justice, if the Court approves.

Would it be proper for a motion for a bill of particulars to be filed at this time in view of the change of the situation?

By the Court: The Court will certainly grant you that right to file a motion if you so desire.

Mr. Munger: We should like to file a motion in view of this change in the situation.

By the Court: Very well. It will be so ordered. You may prepare and file your motion.

Mr. Mann: We have no objection, Your Honor, principally because the Defendant Beatrice has a motion pending before this Court for a bill of particulars, so we will, after their motions are filed, set down a date for hearing on all of them at the convenience of the Court.

[¶ 69,242] **In the Matter of the Application to Enforce an Administrative Subpoena *Duces Tecum* of the Federal Trade Commission v. Waltham Watch Company.**

In the United States District Court for the Southern District of New York. No. M 18-304. Filed January 14, 1959.

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Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Investigation—Access to Documentary Evidence—Validity of Subpoena *Duces Tecum* Returnable Before Investigator.—A Federal Trade Commission subpoena directing a corporation to produce books, papers, and documents was not invalid where it was made returnable before a representative of the Commission investigating alleged violations of the Federal Trade Commission Act by the corporation and not before an independent hearing examiner as defined by the Administrative Procedure Act. The Administrative Procedure Act deals only with adjudicative and rule-making proceedings before an administrative agency. While imposing strict requirements for independence on the hearing examiner in the case of an adjudicative proceeding, the Act recognizes the different nature of the investigative function. The investigation being conducted was not in any sense an adjudicative or adversary proceeding as defined by the Administrative Procedure Act or as contemplated in the Federal Trade Commission Act which requires the taking of testimony by an independent hearing examiner. Also, there is no limitation in Section 9 of the Federal Trade Commission Act on the use of an examiner to conduct an investigation, nor need an examiner be appointed as "an independent hearing examiner" in order to do so. The action taken by the Commission in making the subpoena returnable before the investigating examiner was in compliance with the Commission's rules.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.55.

Federal Trade Commission Enforcement and Procedure—Investigation—Access to Documentary Evidence—Validity of Subpoena *Duces Tecum*—Claimed Use of Investigatory Subpoena To Obtain Evidence for Pending Adjudicative Proceeding.—A Federal Trade Commission subpoena directing a corporation to produce books, papers, and documents before a representative of the Commission investigating alleged violations of the Federal Trade Commission Act by the corporation was not being used improperly to obtain additional evidence to support an adjudicative proceeding which was pending against the corporation. A Commission hearing examiner had been appointed to take testimony and receive evidence in the adjudicative proceeding which was pending at the time the subpoena was served. Even assuming that the investigation did embrace the same subject matter as the pending adjudicative proceeding, there is nothing in the Federal Trade Commission Act which limits or circumscribes the investigatory functions of the Commission during the course of an adjudicative proceeding. Nor is there anything in the Administrative Procedure Act which so provides.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8701, 8741.55.

Federal Trade Commission Enforcement and Procedure—Investigation—Access to Documentary Evidence—Subpoena *Duces Tecum*—Commission Denial of Motion To Quash Subpoena Without Hearing.—The Federal Trade Commission's denial of a corporation's motion to quash an investigatory subpoena *duces tecum* without affording the corporation a hearing did not constitute a denial of due process. There is no requirement in the Administrative Procedure Act or the Federal Trade Commission Act that a hearing must be granted on a motion to quash an investigatory subpoena issued by an administrative agency. Nor do the rules of the Commission require a hearing in such cases. There can be no denial of constitutional due process by the failure of the Commission to grant a hearing on the motion to quash. The subpoena is enforcible only on application to the court, and the respondent is entitled to a full hearing there.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.55.

Federal Trade Commission Enforcement and Procedure—Order Denying Motion To Quash Subpoena—Order Signed by Secretary of Commission.—The contention that an order denying a motion to quash an investigatory subpoena was not valid because it was signed by the Secretary of the Commission rather than by the Commission itself was rejected. The order denying the motion was issued by the Commission and signed by its secretary in strict conformity with Section 5 of the Commission's rules, which provides that "all orders of the Commission are signed by the secretary."

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.91.

Federal Trade Commission Enforcement and Procedure—Investigation—Access to Documentary Evidence—Validity of Subpoena *Duces Tecum*—Relevancy of Material Sought—Trade Secrets.—A Federal Trade Commission subpoena directing a corporation to produce certain books, papers, and documents before a representative of the Commission investigating alleged violations of the Federal Trade Commission Act by the corporation was enforced, where it was contended that the material sought was irrelevant and immaterial to the investigation and concerned matters beyond the scope of the Commission's regulatory power. The material sought was plainly relevant to the subject matter of the investigation. The subpoena was authorized by Congress, was issued for a purpose which Congress could authorize, and the material sought was relevant to the authorized inquiry. The documents were adequately specified, and there was nothing to indicate that the burden of producing them was in any way unreasonable. The fact that some of the material sought dealt with matters which may contain so-called trade secrets is no reason for refusing their production.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.55, 8741.70.

For the petitioner: Jno. W. Carter, Jr., Acting Assistant General Counsel, Federal Trade Commission; Carleton A. Harkrader, Attorney, Federal Trade Commission; and Paul W. Williams, United States Attorney for the Southern District of New York.

For the respondent: B. Paul Noble, Washington, D. C., and Irving Stolz, New York, N. Y.

Opinion

[*FTC Subpoena*]

BRYAN, District Judge: [*In full text*]: This is an application by the Federal Trade Commission, pursuant to Section 9 of the Federal Trade Commission Act, 15 U. S. C. § 49, to enforce an administrative subpoena *duces tecum* issued by the Commission and served upon the respondent.

The subpoena, issued on April 24, 1958 and served on April 28, required the respondent Waltham to appear before "Miss Charlotte Maskey, Attorney and Examiner for the Federal Trade Commission at Room 511C, United States Court House, Foley Square, in the City of New York, New York, on the 8th day of May, 1958 * * * to testify in connection with the F. T. C.'s investigation (No. 5823282) to determine whether or not Waltham Watch Company has been using false and misleading advertising or has engaged in other deceptive acts or practices violative of Section 5 of the F. T. C. Act (15 U. S. C. A. 45) in connection with the sale or offering for sale of watches". It was issued after a request by letter for the data sought had proved ineffective.

[*Material Sought*]

The subpoena contained seven specifications of books, papers and documents to be produced which may be roughly classified as follows:

(1) Advertising and sales promotional material; (2) price lists, tags, tickets, labels, bulletins and directives; (3) specimen copies of guarantees on watches and correspondence and records relating to Waltham's performance of such guarantees; (4) diagrams, reports and other records describing the functioning, performance and construction of watches represented by Waltham as "shockproof", "shock-protected", "waterproof" or "water-protected"; (5) diagrams and specifications as to the composition of watch cases and records of tests disclosing such composition; (6) invoices and other records showing sales of watches and net sales prices to customers; and (7) contracts and agreements between Waltham and Hallmark, Inc.

All specifications except 6 cover the period July 1, 1957 through March 31, 1958. Specification 6 covers the period December 1, 1957 through January 31, 1958.

[*Compliance Refused*]

On May 5, 1958 Waltham filed with the Commission a motion to quash the subpoena. The Commission denied the motion on May 7, 1958 without hearing or argument.

On May 8, 1958 Waltham appeared by attorney before Examiner Maskey and stated on the record that it refused to comply with the subpoena upon the same grounds on which it now resists its enforcement. As a result the Commission petitioned this court for an order of enforcement.

[*FTC Powers*]

The Federal Trade Commission Act confers broad powers on the Commission to

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prevent unfair and deceptive acts and practices in Interstate Commerce which are made unlawful. (Section 5; 15 U. S. C. § 45(a).) In the exercise of its powers the Commission "may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States". (Section 3; 15 U. S. C. § 43.) It has power "to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce * * *". (Section 6; 15 U. S. C. § 46.)

The Commission is given the authority to require, by compulsory process, the attendance and testimony of witnesses relating to any matter under investigation. The Commission, or its agents, have the "right to copy any documentary evidence of any corporation being investigated or proceeded against" and may "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation". (Section 9; 15 U. S. C. § 49.)

In the event of disobedience to a subpoena the Commission is authorized to apply to the United States Courts for its enforcement (Section 9; 15 U. S. C. § 49) as it has done here.

[*FTC Contentions*]

The Commission asserts that the subpoena *duces tecum* directed to Waltham was fully authorized by the Act, was properly issued in pursuance of an investigation which it was lawfully empowered to conduct, calls for production of adequately specified documents relevant to such inquiry, and that therefore it should be enforced by the court. See *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186; *United States v. Morton Salt Co.* [1950-1951 Trade Cases ¶ 62,561], 338 U. S. 632; *Federal Trade Commission v. Crafts* [1957 Trade Cases ¶ 68,830], 355 U. S. 9, reversing *Crafts v. Federal Trade Commission*, 9 Cir. [1957 Trade Cases ¶ 68,641], 244 F. 2d 882; *Federal Trade Commission v. Scientific Living, Inc.*, D. C. M. D. Penn. [1957 Trade Cases ¶ 68,673], 150 F. Supp. 495, aff'd 3 Cir., 254 F. 2d 598, cert. den. 355 U. S. 940; *Federal Trade Commission v. Hallmark, Inc.*, D. C. N. D. Ill., No. 58-C-855, Sept. 11, 1958 [1958 Trade Cases ¶ 69,148].

[*Person Conducting Investigation*]

Waltham, on the other hand, urges that the subpoena is invalid and should not be enforced for four separate reasons each of which bears some discussion.

1. Waltham contends that the subpoena served upon it is invalid because it was made returnable before the representative of the Commission investigating the alleged violations referred to in the subpoena and not before an independent hearing examiner as defined by the Administrative Procedure Act.

This contention fails to recognize the distinction between the investigative and adjudicative functions of the Commission.

The Administrative Procedure Act deals only with adjudicative and rule-making[1] proceedings before an administrative agency. Adjudication is defined by Section 2(d) of the Act (5 U. S. C. § 1001(d)) as "agency process for the formulation of an order". " 'Order' means the whole or any part of the final disposition * * * of any agency in any matter other than rule making but including licensing".

In an adjudicative proceeding all testimony relating to the matters in issue must be taken by an independent hearing examiner who shall not be "responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency". Administrative Procedure Act, § 5(c) (5 U. S. C. § 1004(c)). But the Administrative Procedure Act, while imposing strict requirements for independence on the hearing officer in the case of an adjudicative proceeding, itself recognizes the different nature of the investigative function.

The Federal Trade Commission has both adjudicative and investigative powers. *Cf.* Section 5(b) and Section 6 of the Federal Trade Commission Act, (15 U. S. C. §§ 45(b), 46). The investigation of the "business, conduct, practices and management of any corporation engaged in commerce" by the Commission is expressly authorized. Federal Trade Commission Act, § 6(a), (15 U. S. C. § 46(a)). In aid of such investigation the Commission or its agents may copy any documentary evidence of "any corporation being investigated" and may subpoena documentary evidence "relating to any matter under investigation". Federal Trade Commission Act, § 9, (15 U. S. C. § 49).

[1] "Rule-making", of course, is not involved here.

The subpoena which the Commission seeks to enforce in this proceeding was issued in the course of an investigation by the Commission as to possible violations of Section 5 by Waltham and so states on its face. The investigation is for the purpose of determining whether or not facts exist upon which an adjudicative proceeding, as defined by the Administrative Procedure Act, and contemplated by Section 5(b) of the Federal Trade Commission Act, should be commenced by the filing of a complaint. An investigation does not lead to the issuance of a cease and desist order, nor is it a part of any final disposition of the rights or duties of the respondents. It may well be that the investigation will disclose that there are no facts which would justify the filing of a complaint.

The investigation being conducted of Waltham is not in any sense an adjudicative or adversary proceeding as defined by the Administrative Procedure Act or as contemplated in the Federal Trade Commission Act which requires the taking of testimony by an independent hearing examiner. Such a requirement is in no way applicable to the present investigation.

The argument made by Waltham that Section 9 of the Federal Trade Commission Act, by providing that "members and *examiners* of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence" requires that subpoenas must be returnable before an independent hearing examiner, has no substance. Miss Maskey, before whom the subpoena is returnable, is an examiner of the Commission as well as its representative. There is no limitation in Section 9 on the use of an examiner to conduct an investigation, nor need an examiner be appointed as "an independent hearing examiner" in order to do so. In fact, to so construe the word "examiner" would nullify the first part of Section 9 which provides that "the commission, or its duly authorized agent or agents, shall * * * have access to, for the purpose of examination, * * * any documentary evidence of any corporation being investigated or proceeded against. * * *" Congress manifested no intention so to circumscribe the broad investigative powers which it granted to the Commission.

Moreover, the action taken by the Commission in making the subpoena returnable before the investigating examiner is in strict compliance with its Rules of Practice, Procedures and Organization which spell out in detail the procedure to be followed. (§§ 1.31-1.35.)[2]

The comprehensive opinion of Chief Judge Murphy of the Middle District of Pennsylvania in *Federal Trade Commission v. Scientific Living, Inc., supra,* and the numerous authorities there cited, make it abundantly clear that there is no merit to petitioner's contention. See, also, *Federal Trade Commission v. Hallmark, Inc., supra. Cf. Oklahoma Press Publishing Co. v. Walling, supra; Durkin v. Fisher,* 7 Cir., 204 F. 2d 930, cert. den. 346 U. S. 897, rehearing denied 346 U. S. 928; *Porter v. Mueller,* 3 Cir., 156 F. 2d 278, 280; *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309

[2] "§ 1.31 *Investigational policy.* The Commission encourages voluntary cooperation in its investigations where such can be effected without undue delay or without prejudice to the public interest. The Commission may, in any matter under investigation, invoke any or all of the compulsory processes authorized by law."

"§ 1.32 *By whom conducted.* Inquiries and investigations are conducted, under the various statutes administered by the Commission, by Commission representatives designated and duly authorized for the purpose. Such representatives are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission, including the administration of oaths and affirmations, in any matter under investigation by the Commission."

"§ 1.33 *Notification of purpose.* Any party under investigation compelled to furnish information or documentary evidence shall be advised with respect to the purpose and scope of the investigation."

"§ 1.34 *Investigational hearings.* (a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted in the course of any investigation undertaken by the Commission, including inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Commission or the manner in which decrees in suits brought by the United States under the antitrust acts are being carried out and cases referred by the courts to the Commission as a matter in chancery.

"(b) Investigational hearings may be held before the Commission, one or more of its members, or a duly designated representative, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation."

"§ 1.35 *Investigational subpoenas.* The Commission may issue a subpoena directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence relating to any matter under investigation, or both. Subpoenas shall be served in the manner provided in § 3.4 of this chapter."

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U. S. 134, 142-144; *Cudahy Packing Co. v. Holland,* 315 U. S. 357, 365; *Morgan v. United States,* 298 U. S. 468, 481.

[*Use of Investigation Process*]

2. A related contention is that the subpoena served upon Waltham, purportedly issued in aid of a Commission investigation,[3] is in fact being used improperly to obtain additional evidence to support an adjudicative proceeding which is pending against it before the Commission. It is urged that such use of an investigative subpoena is in violation of the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.,* and of constitutional due process.

On October 23, 1957 an adjudicative proceeding was commenced before the Commission by the filing of a complaint which charged Waltham and certain of its officers with specific violations of Section 5 of the Federal Trade Commission Act.[4] The violations charged were that respondents had engaged in unfair and deceptive practices in the sale of watches involving representations as to the number of jewels in such watches, the genuineness of certain of the jewels and the place of manufacture of the watches.

A commission hearing examiner was appointed to take testimony and receive evidence in the proceeding which was pending at the time the subpoena was served.

The investigation being conducted "to determine whether or not Waltham Watch Company has been using false and misleading advertising or has engaged in other deceptive acts or practices violative of Section 5" does not necessarily embrace the same subject matter as the pending adjudicative proceeding.

Some of the specifications of the subpoena relate to material which does not appear to be relevant to that proceeding in any way, for example, specification 4 relating to shockproof and waterproof watches and specification 5 relating to the metal composition of watch cases. On the other hand specifications 2 relating to pricing bulletins and directives, 6 relating to sales prices and 1 relating to advertising and sales promotional material may well deal with matters some of which bear a relationship to the violations which are presently being adjudicated.

But assuming this to be so, there is nothing in the Federal Trade Commission Act which limits or circumscribes the investigatory functions of the Commission during the course of an adjudicative proceeding. Nor is there anything in the Administrative Procedure Act which so provides.

The broad powers of investigation granted to the Commission by Congress, which embrace all unfair or deceptive practices of a corporation engaged in interstate commerce, should not be held in abeyance merely because complaints charging specific and limited violations have been filed against it. Such a theory would leave the corporation free, once it had been charged with a violation, to engage in unchecked violations of the Act in other directions until the pending proceeding was finally disposed of.

In *Bowles v. Bay of New York Coal & Supply Corp.,* 2 Cir., 152 F. 2d 330, it was argued that an administrative agency should not be permitted to issue an investigation subpoena during the course of a suit by it against the person subpoenaed. It was argued that only discovery proceedings under the Federal Rules of Civil Procedure should be permitted in such cases and the investigative powers of the administrative agency with respect to matters which might be related to the suit should be suspended. The court rejected this argument and held that (p. 331):

> "* * * the various statutes granting the power of subpoena must control its limits * * *. The necessity of 'prompt and effective use of the subpoena power' in administrative investigations has been stressed, *Perkins v. Endicott Johnson Corp., supra,* 2 Cir., 128 F. 2d 208, 216; and we think it would be unduly hampering of the Administrator's duties to import a condition here against the broad terms of the statute * * *."

See, also, *Bolich v. Rubel,* 2 Cir., 67 F. 2d 894; *Bowles v. Abendroth,* 9 Cir., 151 F. 2d 407; *Porter v. Mueller, supra.*

There is no basis here for limiting the broad powers of investigation which Congress saw fit to grant to the Federal Trade Commission by importing a condition that it may not conduct such investigations as it deems necessary even though such investigations may cover ground which is already the subject matter of an adjudicative proceeding.

[3] F. T. C. File No. 5823282.

[4] F. T. C. Docket No. 6914.

[*Denial of FTC Hearing*]

3. Waltham's contention that the denial by the Commission of its motion to quash the subpoena constitutes denial of administrative due process because it was not granted a hearing or argument on its motion merits little discussion.

There is no requirement in the Administrative Procedure Act, the Federal Trade Commission Act, or otherwise, that a hearing must be granted on a motion to quash an investigatory subpoena issued by an administrative agency. Nor do the rules of the Federal Trade Commission require a hearing in such cases.

Of course there can be no denial of constitutional due process by the failure of the Commission to grant a hearing on the motion to quash. The subpoena is enforcible only on application to the court and the respondent is entitled to a full hearing there. See *Federal Communications Commission v. W. J. R.*, 337 U. S. 265; *Sun Oil Company v. Federal Power Commission*, 5 Cir., 256 F. 2d 233.

There is equal lack of merit in the contention that the motion was denied by the Secretary of the Commission rather than by the Commission itself. The order denying the motion to quash was issued by the Commission and signed by its secretary in strict conformity with Section 5 of the Commission's rules which provides that "all orders of the Commission are signed by the secretary".

[*Relevancy of Material Sought*]

4. Finally, Waltham contends that specifications 2, 6 and 7 of the subpoena should not be enforced because the documentary material sought is irrevelant and immaterial to the investigation being conducted and concerns matters beyond the scope of the Commission's regulatory power.

Specification 2 calls for the production of price lists, price tags, tickets and labels, and bulletins and directives relating to the practices of Waltham in pricing its watches at wholesale and retail. Specification 6 concerns invoices, purchase orders, credit memoranda and other records, relating to sales of watches and respective net sales prices. Specification 7, which relates to contracts between Waltham and Hallmark, Inc. is said by respondents to represent "the crystallization of demand expressed in paragraph 6" of the Commission's earlier request asking for shipping and billing invoices, and therefore apparently also relates to sales practices.

All of these matters seem to me to be plainly relevant to an investigation as to whether Waltham "has been using false and misleading advertising or has engaged in other deceptive acts or practices" in the sale of watches in violation of Section 5 of the Federal Trade Commission Act. They bear on such questions as whether or not fictitious prices were charged, how the watches were represented and described, what representations were made in connection with their distribution, and what information Waltham is placing in the channels of commerce which might mislead the public as to the customary selling price of its watches. Moreover, the material would aid in a determination as to whether Waltham, as it claims, sells only to wholesalers or whether distributors holding themselves out as wholesalers are actually retailers. *Cf. Macher v. Federal Trade Commission*, 2 Cir., 126 F. 2d 420.

This is all within the scope of the power granted to the Commission by Congress to prevent the use of "unfair or deceptive acts or practices" in interstate commerce. (Section 5, Federal Trade Commission Act.) The subpoena fully meets the tests of *Oklahoma Press Publishing Co. v. Walling, supra,* since it is authorized by Congress, is issued for a purpose which Congress may authorize, and the documents sought are relevant to the authorized inquiry.

Waltham's reliance on such cases as *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298 and *Federal Trade Commission v. Baltimore Grain Co.*, D. C. Md., 284 Fed. 886, is misplaced. The Commission seeks no such unlimited right of access to Waltham's papers as was sought in such cases and the subpoena is not a general warrant to roam at will through the papers, the books and the records of the respondent corporation "in the hope that something may turn up". The documents are adequately specified and there is nothing to indicate that the burden of producing them is in any way unreasonable.

Moreover, even if, as Waltham claims, some of the specifications deal with matter which may contain so-called trade secrets,

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that is no reason for refusing their production. *Federal Trade Commission v. Tuttle*, 2 Cir. [1957 TRADE CASES ¶ 68,669], 244 F. 2d 605, cert. den. 354 U. S. 925.

[*Subpoena Enforced*]

The petition of the Commission to enforce the subpoena will therefore be granted and an order will be entered on notice requiring the respondent Waltham to comply therewith.

[¶ 69,243] **McElhenney Co., Inc.; W. F. Snipes; J. T. Snipes; George Toole; Mac Toole; R. P. Swofford; Charles L. Gasque; and Harry Clinkscales v. Western Auto Supply Company.**

In the United States District Court for the Western District of South Carolina, Spartanburg Division. Civil Action No. 2135. Filed November 18, 1958.

Clayton and Sherman Antitrust Acts

Exclusive Dealing—Dealership Franchises—Manufacturer's Cancellation of Dealers' Franchises for Dealing in Competitors' Products—Existence of Restrictive Agreement—Refusal To Deal.—A complaint alleging that a manufacturer and distributor of home and automobile supplies violated Section 3 of the Clayton Act by a "course of dealing" in which the manufacturer cancelled the franchises of dealers who handled competing products was dismissed. The complaint contained no allegation that the manufacturer actually leased, sold, or contracted to sell any commodities on the condition, agreement, or understanding that the dealers should not deal in the goods of the manufacturer's competitors. There is a fundamental difference between refusing to deal with a customer and prohibiting that customer, by contract, from dealing with another. The dealers could not have been under any restriction imposed by the manufacturer when they ceased to have a franchise from it. Refusals to deal and the right of customer selection on the part of a single trader have been upheld even though the refusal was prompted by the motive of securing exclusive dealers. It made no difference that a distributor of competing products joined the disenfranchised dealers in the complaint and alleged that its sales were curtailed by the manufacturer's policy against its dealers' handling of competing products.

See Exclusive Dealing, Vol. 1, ¶ 4005.175, 4009.420.

Exclusive Dealing—Tying Arrangement Between Manufacturer and Dealers—Tying "Readily Salable" Items to Less Popular Items—Existence of Agreement.—A complaint alleging that a manufacturer and distributor of home and automobile supplies violated Section 3 of the Clayton Act by tying the sale of its "readily salable" items to its less popular items was dismissed for failure to allege the existence of any tying agreement.

See Exclusive Dealing, Vol. 1, ¶ 4005.175.

Exclusive Dealing—Effect on Competition—Determination of Unlawful Effects—Factors—Adverse Effect Upon Interstate Commerce—Substantial Lessening of Competition—Tendency to Create a Monopoly.—A complaint alleging that a manufacturer and distributor of home and automobile supplies violated Section 3 of the Clayton Act by cancelling the franchises of dealers who handled the products of competing distributors was held deficient for failure to allege facts which demonstrated an adverse effect upon interstate commerce. Section 3 of the Clayton Act requires that the prohibited contract, sale, or lease have the potential effect to "substantially lessen competition or tend to create a monopoly." No facts were alleged to demonstrate such a possible effect.

See Exclusive Dealing, Vol. 1, ¶ 4007.275, 4007.300.

Monopolies—Monopolization—Monopoly in Sale of Products Manufactured and Sold Under One's Own Brand or Trade-Mark.—A complaint which, in reality, charged a manufacturer and distributor of home and automobile supplies with monopolizing or attempting to monopolize the market for its own products was dismissed. Every manufacturer has a monopoly on its own brand name, and such a natural monopoly does not violate Section 2 of the Sherman Act.

See Monopolies, Vol. 1, ¶ 2510, 2580.

Monopolies—Monopoly Power—"Dominance" of Home and Automobile Supply Business—Annual Business Volume—Size.—A complaint charging a manufacturer of home and automobile supplies with monopolizing or attempting to monopolize trade was dismissed since there was no allegation that the manufacturer monopolized the home and automobile supply business in any relevant market. The dealers' allegation that the manufacturer was "dominant" in that field was not sufficient, for dominance is not the equivalent of monopoly power. The manufacturer distributed its products at retail through some 350 company-owned stores and at wholesale to some 3,600 associate stores located throughout the United States. It operated seven company-owned stores, and had 91 associate stores, in South Carolina. Mere allegations of annual business volume or total number of outlets were totally insufficient. No allegations in the complaint demonstrated that the manufacturer either possessed market control or engaged in acts and practices so approaching monopoly control as to create a dangerous probability thereof.

See Monopolies, Vol. 1, ¶ 2530.40.

Monopolies—Monopolization—Attempt to Monopolize—Cancellation of Dealers' Franchises for Dealing in Competing Products—Existence of Specific Intent to Monopolize.—A complaint in which a manufacturer of home and automobile supplies was charged, by its retail dealers and by a wholesale distributor of competing products, with engaging in a scheme or plan by which the manufacturer "intended to monopolize or attempted to monopolize certain lines of trade in interstate commerce" was held deficient under Section 2 of the Sherman Act for failure to allege any act or conduct evidencing intent to abuse, maintain, or exercise monopoly power, or to allege facts demonstrating the existence of a specific intent to monopolize. The dealers alleged that their franchises were cancelled by the manufacturer because they insisted on purchasing some items not distributed by the manufacturer. The cancellation of the franchises demonstrated no more than a permissible refusal to deal on the part of the manufacturer. Since the manufacturer possessed the legal right to terminate the franchises for reasons sufficient to itself, the exercise of that right was not a violation of the Sherman Act.

See Monopolies, Vol. 1, ¶ 2510.400, 2515.40, 2610.300, 2610.720.

For the plaintiffs: Chester D. Ward, Jr., Spartanburg, S. C.

For the defendant: Wyche, Burgess and Wyche, Greenville, S. C.; and Watson, Ess, Marshall & Enggas, Kansas City, Mo.

Order

[*Treble Damage Action*]

ASHTON H. WILLIAMS, District Judge [*In full text*]: Defendant has moved to dismiss the amended complaint on the ground that it fails to state claims upon which relief can be granted. The amended complaint seeks treble damages for alleged violations of Section 2 of the Sherman Act (15 U. S. C. A. 2) and Section 3 of the Clayton Act (15 U. S. C. A. 14) as authorized by Section 4 of the Clayton Act (15 U. S. C. A. 15).

THE PARTIES

The defendant Western Auto Supply Company is engaged in the business of selling tires, tubes, batteries, auto accessories, sporting goods, home appliances, etc., at retail through some 350 company-owned stores and at wholesale to some 3600 Associate Stores located throughout the United States. As of December 31, 1956, it operated seven company-owned stores and had 91 Associate Stores in South Carolina.

The plaintiffs, except McElhenney Co., Inc., were, prior to 1954, five owners and operators of their respective Associate Stores in various towns in South Carolina. Each alleges that at various dates between 1954 and 1956 his franchise from the defendant was cancelled but that he continued to operate either independently or by an affiliation with Firestone. Plaintiff McElhenney Co., Inc., from February 1954 to October 1956, had the exclusive franchise for the distribution at wholesale of Sylvania radio and television sets and parts in South Carolina.

THE ALLEGATIONS OF THE AMENDED COMPLAINT

[*Franchise Agreements*]

The amended complaint alleges that the defendant did business with its Associate

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Stores, including the former dealers suing as plaintiffs herein, by means of a franchise. The Associate Store franchise is a vendor-purchaser contract by which defendant Western grants to the Associate the right to use the name "Western Auto Associate Store" in conjunction with the proprietor's name and agrees that it will sell the Associate merchandise on the same terms as all other Associate Stores. The Associate retains ownership, management and control of his store and only agrees under certain conditions to buy a stated amount of merchandise from Western for the opening stock of his store. The franchise is terminable by either party at any time on 60 days' written notice. Nothing in the franchise requires the Associate to deal exclusively with Western.

[*Exclusive Dealing*]

Plaintiff-retailers contend that their franchises were cancelled because they insisted upon purchasing some items of "outside" merchandise, i. e., merchandise not distributed by defendant. Plaintiff McElhenney, the former Sylvania distributor, asserts that defendant's alleged policy against its Associate Stores handling "outside" merchandise curtailed its sales of Sylvania products to Western Auto Associate Stores in South Carolina, all to its loss and damage.

[*Antitrust Violations Alleged*]

Plaintiffs' contentions are that the above alleged facts manifest an unlawful exclusive dealing arrangement in violation of Section 3 of the Clayton Act and an unlawful attempt to monopolize or monopolization in violation of Section 2 of the Sherman Act. Defendant, on the other hand, contends that the above allegations manifest no more than the exercise of the defendant's legal right to terminate the franchises of dealers who it deems do not adequately represent it. Judgment is sought by plaintiffs in the amount of $2,241,000 and costs and a reasonable attorney's fee.

Discussion

[*Necessary Averments*]

It is fundamental that the purpose for the enactment of the federal antitrust laws, including the Sherman and Clayton Acts, was to protect the public interest from the evils of monopolies and unreasonable restraints of trade in interstate commerce. *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165 (1915). Accordingly, to recover in a private antitrust suit the plaintiff must allege facts from which it can be determined that there has been a violation of the antitrust laws together with damage to the plaintiff as a consequence of such violation. *Glenn Coal Co. v. Dickinson Fuel Co.* [1932-1939 Trade Cases ¶ 55,062]; 72 F. 2d 885 (4th Cir. 1934); *Schwing Motor Company v. Hudson Sales Corporation* [1956 Trade Cases ¶ 68,292], 138 F. Supp. 899 (D. C. Md. 1956), affirmed 239 F. 2d 176 (4th Cir. 1956) [1956 Trade Cases ¶ 68,564]; *Nelligan v. Ford Motor Company* [1958 Trade Cases ¶ 69,086], 161 F. Supp. 738 (D. C. S. C. 1958). See also *Shotkin v. General Electric Co.* [1948-1949 Trade Cases ¶ 62,341], 171 F. 2d 236 (10th Cir. 1948); *Feddersen Motors v. Ward* [1950-1951 Trade Cases ¶ 62,579], 180 F. 2d 519 (10th Cir. 1950); *Arthur v. Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D. C. Md. 1937); *Neumann v. Bastian-Blessing Co.* [1946-1947 Trade Cases ¶ 57,531], 70 F. Supp. 447 (N. D. Ill. 1947).

If the amended complaint herein does not allege facts from which it can be ascertained that the defendant has violated the antitrust laws with injury to the plaintiffs, defendant's motion to dismiss must be sustained.

Section 3 of the Clayton Act

Section 3 of the Clayton Act, 15 U. S. C. A. 14, provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, ware, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale on such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[*No "Exclusive Dealing" Agreement*]

The amended complaint contains no allegations that the defendant actually leased, sold or contracted to sell any goods, wares, merchandise, machinery, supplies or other commodities on the condition, agreement or understanding that the plaintiffs or anyone else should not use or deal in the goods of a competitor of the defendant.

[*"Course of Dealing"*]

The plaintiffs contend that the defendant terminated the franchises of the retailer-plaintiffs on account of their handling of products not approved by the defendant and that this "course of dealing" constitutes a violation of Section 3 of the Clayton Act. The defendant contends that nothing more is involved than a permissible refusal to deal by a single trader acting unilaterally and not in concert with any competitor or anyone else, pursuant to the right reserved to it in its franchise agreements and in the exercise of its sound business judgment.

[*Cases Discussed*]

In *Nelson Radio and Supply Co. v. Motorola, Inc.* [1952 TRADE CASES ¶ 67,386], 200 F. 2d 911 (5th Cir. 1952), cert. den. 345 U. S. 925 (1953), a closely parallel situation was presented. There the plaintiff, a wholesaler of communications equipment, alleged that it had distributed defendant's products for several years prior to February 10, 1949. The contract under which the plaintiff operated contained a specific termination date but it also provided that it continued after that date subject to termination by written notice of either party. Prior to January 2, 1948, the defendant submitted to the plaintiff an agreement for the year 1948 and at the same time informed the plaintiff that it could not sell communications equipment manufactured by defendant's competitors. The plaintiff alleged that it signed the 1948 contract under coercion and further that during the period November 1947—February 10, 1949, the defendant notified it that it was not permitted to sell competing products. In November and December 1948 the parties sought to renew the 1948 agreement but the plaintiff insisted on the right to sell products manufactured by others than the defendant. The defendant resisted and the plaintiff's franchise was cancelled effective February 10, 1949. Holding these allegations to be insufficient to state a violation of Section 3 of the Clayton Act and affirming the dismissal of the complaint, the court said (pp. 915-16):

> "Section 3 of the Clayton Act, by its express terms, covers only leases, sales or contracts actually made on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor of the lessor or seller. There is nothing whatever in the Act to suggest that it covers a situation where the manufacturer refuses to make a sale or enter into a contract, and it has been stated time and again that a manufacturer has the unquestioned right to refuse to deal with anyone for reasons sufficient to himself. [citations] For that matter, a review of all of the cases decided by the Supreme Court involving Section 3 of the Clayton Act, reveals that in each of them there was an agreement and not a mere refusal to deal. There is a real difference between the act of refusing to deal and the execution of a contract which prevents a person from dealing with another. The plaintiff has not been injured as the result of a contract, either express or implied, which sought to prevent him from dealing in the goods of any competitor of the defendant.
>
> "The judgment of the District Court dismissing the amended complaint was right and it is hereby affirmed."

The *Motorola* case was followed by *Leo J. Meyberg v. Eureka Williams Corp.* [1954 TRADE CASES ¶ 67,834], 215 F. 2d 100 (9th Cir. 1954), cert. den. 348 U. S. 875 (1954). This was also an action under Section 3 of the Clayton Act charging that the defendant refused to continue business relations with the plaintiff because the latter insisted upon handling competing products. According to the allegations of the amended complaint in that case, the plaintiff was engaged in the wholesale distribution of electric vacuum cleaners, including the defendant's Eureka brand. In 1952 the defendant notified the plaintiff that unless the plaintiff ceased handling a competing line of cleaners, the Hoover brand, the defendant would cancel all business relations with the plaintiff, stating that "Hoover factory rebuilt cleaners at their special sale prices and Eurekas just can't live together in the same house any longer * * *." The District Court dismissed the complaint for failure to state a claim and the Court of Appeals affirmed, stating (p. 100):

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"The complaint herein alleges a violation of § 3 of the Clayton Act, 15 U. S. C. A. § 14, by reason of the refusal of appellee to continue business relations with appellant unless appellant would agree to deal exclusively in the product of appellee. That section of the Clayton Act makes it unlawful to enter into any lease, sale, or contract conditioned upon the lessee or purchaser not dealing in the goods of a competitor, where the effect of such lease, sale or contract may be to substantially lessen competition or create monopoly. The contract (of 1944) previously existing between the parties was, by its terms, terminable at will, and contained no provision violative of § 3 of the Clayton Act. In July, 1952, appellee terminated the contract by telegram for the reason heretofore stated, because appellant was continuing to deal in the product of a competitor of appellee.

"Prior to July, 1952, the contract between the parties did not forbid appellant to deal in products of a competitor of appellee. After July, 1952, there was no contract, lease or sale between the parties at all. It is manifest that there could be no violation of said § 3 by entering into an illegal lease, sale or contract.

"The judgment of the district court dismissing this case must therefore be, and it hereby is, affirmed."

[*Specific Prohibitions*]

The Court of Appeals for this Circuit has recently pointed out that the proscriptions of Section 3 are specific and prohibit only leases, sales or contracts for sales based on the condition that purchaser or lessee not deal in the goods of the competitor. *Allied Equipment Co. v. Weber Engineered Products* [1956 Trade Cases ¶ 68,502], 237 F. 2d 879 (4th Cir. 1956). The court there state (p. 883):

"The final question involves Allied's claim for treble damages arising out of Weber's alleged breach of the antitrust laws. It is Allied's contention that Weber, by attempting to use the threat of cancellation to force Allied to enter into an illegal exclusive-dealing contract, engaged in unfair competition which was the proximate cause of pecuniary damage to Allied. Under Section 3 of the Clayton Act, upon which this claim is based, it is unlawful to enter into any lease, sale or contract which is conditioned upon the lessee's or purchaser's not dealing in the goods of a competitor, where the effect of such lease, sale or contract may be substantially to lessen competition or to create a monopoly. There can be no violation of the Act unless there is a contract, sale or lease.

"Allied faces a dilemma on the point. If there was no contract denying it the right to handle products competitive to Weber, there was no violation of the antitrust laws. If there was such a contract, as we have already pointed out the breach was by Allied and so no damages accrued to it."

Accord: *Cole v. Hughes Tool Co.* [1954 Trade Cases ¶ 67,857], 215 F. 2d 924 (10th Cir. 1954); *Hunter Douglas Corp. v. Lando Products* [1954 Trade Cases ¶ 67,839], 215 F. 2d 372 (9th Cir. 1954); *Hudson Sales Corp. v. Waldrip* [1954 Trade Cases ¶ 67,694], 211 F. 2d 268 (5th Cir. 1954).

[*"Single Trader"*]

Refusals to deal and the right of customer selection on the part of a single trader have been upheld by the courts even though the refusal was prompted by the motive of securing exclusive dealers. *Brosious v. Pepsi-Cola Co.* [1944-1945 Trade Cases ¶ 57,343], 59 F. Supp. 429 (M. D. Pa. 1945), affirmed 155 F. 2d 99 (3rd Cir. 1946) [1946-1947 Trade Cases ¶ 57,459], *Camfield Mfg. Co. v. McGraw Elec. Co.* [1946-1947 Trade Cases ¶ 57,570], 70 F. Supp. 477 (D. C. Del. 1947); *Dublin Distributors v. Edward and John Burke, Ltd.* [1952 Trade Cases ¶ 67,398], 109 F. Supp. 125 (S. D. N. Y. 1952). See also *United States v. Colgate & Co.*, 250 U. S. 300 (1919); *Times-Picayune Pub. Co. v. United States* [1953 Trade Cases ¶ 67,494], 345 U. S. 594 (1953); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2nd Cir. 1915). Nor can it make any difference that complaint is also made by a distributor of competing products as well as by disenfranchised dealers. *Camfield Mfg. Co. v. McGraw Electric Co., supra.*

[*Refusal to Deal Not Prohibited*]

The antitrust laws do not prohibit a manufacturer or distributor from selecting dealers who will devote their time and energies to selling the former's products and a manufacturer or distributor is not compelled to retain dealers having divided loyalties adverse to the interests of the said manufacturer or distributor. Under these circumstances Western was within its legal rights in discontinuing business relations with the plaintiff-retailers herein and announcing in advance the terms upon which it would continue to do business with them.

The basic fallacy inherent in plaintiff's contention is that so long as they handled "outside" merchandise while keeping a franchise from the defendant they were permitted to handle such merchandise. When they ceased to have a franchise from the defendant it is quite apparent they could have been under no restriction imposed by the defendant. There is a fundamental difference between refusing to deal with a customer or potential customer and prohibiting that customer by contract from dealing with another. As long as the customer has a choice between dealing with his immediate supplier and dealing with others he may act of his own free will. If his immediate supplier determines that for reasons known only to himself, whether they be because of inadequate representation, unsatisfactory relationships, or others, he may terminate the relationship, then the dealer is free to deal with all other suppliers. It follows that at no point has there been a contract or agreement which prohibits the purchaser from dealing in the goods of another.

In the present case the amended complaint makes it clear that the defendant imposed no legal obligation on plaintiff-retailers to refrain from handling "outside" merchandise. It seems that the defendant objected to its Associate dealers handling a few articles of competitive merchandise which were also offered to them by defendant. However, defendant had afforded the plaintiff-retailers the benefit of its name and national advertising. It is not strange that defendant was unwilling to share its benefits with manufacturers and wholesalers of brands not handled by the defendant. Consequently, there is no inference to be drawn from defendant's urging upon the plaintiff-retailers that they restrict their operations to whatever extent possible to handling the goods and merchandise of defendant.

[*Cases Distinguished*]

The cases relied upon by plaintiffs, *United States v. Richfield Oil Co.* [1950-1951 TRADE CASES ¶ 62,878], 99 F. Supp. 280 (S. D. Cal. 1951), aff'd *per curiam,* 343 U. S. 922 (1952) [1952 TRADE CASES ¶ 67,262], and *Carter Carburetor Corp. v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,306], 112 F. 2d 722 (8th Cir. 1940), are clearly distinguishable. *Richfield, supra,* was a companion case to *United States v. Standard Oil Co. of Cal.* [1948-1949 TRADE CASES ¶ 62,269], 78 F. Supp. 850 (S. D. Cal. 1948), aff'd 337 U. S. 293 (1949) [1948-1949 TRADE CASES ¶ 62,432], and involved essentially the same question of the validity of requirements contracts under both Section 1 of the Sherman Act and Section 3 of the Clayton Act. The only type of agreement in the *Richfield* case not previously adjudicated in the *Standard Stations* case involved L-O Stations and as to these Richfield expressly admitted that it had agreements with the station operators requiring them to deal exclusively in Richfield products, its defense to this arrangement being that the operators were agent or employees of Richfield and consequently the arrangement was not within the purview of Section 3 of the Clayton Act. This defense was not sustained and the agreements were held illegal.

The *Carter Carburetor* case, *supra,* dealt with a situation wherein the defendant attempted the total destruction of a specific competitor by the use of preferential discounts which made the handling of the defendant's products unprofitable to non-exclusive dealers. This was a patent violation of Section 3 because discounts and rebates are specifically prohibited by the statute.

[*Tying Agreements*]

Plaintiffs further suggest that the amended complaint may be sustained under Section 3 of the Clayton Act with reference to the doctrine of the "tying" cases, taking the position that the defendant tied the sale of its allegedly "readily salable" items such as its tires and batteries, to the sale of its allegedly less popular items such as its appliances. Plaintiffs, however, have singularly failed to allege the existence of any tying agreement and the essentials of a tying contract are not present herein. See *Judson L. Thomson Mfg. Co. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,399], 150 F. 2d 952 (1st Cir. 1945); *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392 (1947); *Times-Picayune Pub. Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594 (1953); *Nelligan v. Ford Motor Co.* [1958 TRADE CASES ¶ 69,086], 161 F. Supp. 738 (W. D. S. C. 1958).

[*Interstate Commerce*]

The amended complaint is further deficient in that plaintiffs have not demonstrated any adverse effect upon interstate

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commerce. Section 3 of the Clayton Act requires that the prohibited contract, sale or lease have the potential effect to "substantially lessen competition or tend to create a monopoly * * *." No facts are alleged to demonstrate such a possible effect.

[*Private Controversy*]

The gist of plaintiffs' grievances is merely that the defendant, for reasons sufficient to itself, exercised its undoubted and reserved right to terminate the franchises of the plaintiff-retailers. This is purely a private controversy and one not cognizable under Section 3 of the Clayton Act.

[*No Violation Alleged*]

The amended complaint does not allege a violation of Section 3 of the Clayton Act.

Section 2 of the Sherman Act

Section 2 of the Sherman Act provides as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[*Relevant Market*]

Paragraph 3 of the second count of plaintiffs' amended complaint alleges that the defendant engaged in a "scheme and plan by which defendant intended to monopolize or attempt[ed] to monopolize certain lines of trade in interstate commerce." Paragraph 19 of the amended complaint defines the market involved as "the sale and distribution of [defendant's] various products manufactured by it * * *." Defendant in reality is charged with monopolizing or attempting to monopolize the market for its own products. But every manufacturer has a monopoly on its own brand name and such natural monopoly does not violate Section 2 of the Sherman Act. The principle is well stated by Judge Chesnut in *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. C. Md. 1937), where he said (p. 828):

> "* * * Every manufacturer has naturally a complete monopoly of his particular product especially when sold under his private brands, and no private controversy with a distributor could legally tend to increase that type of a natural monopoly. The Sherman Act is, therefore, clearly not really involved."

The Supreme Court had recent occasion to pass upon the same question in *United States v. E. I. duPont de Nemours & Co.* [1956 Trade Cases ¶ 68,369], 351 U. S. 377 (1956), where duPont produced approximately 75% of all cellophane manufactured in the United States. This was held not to violate the antitrust laws because cellophane competed with other flexible wrapping materials and duPont did not possess market control over the entire market involved. The court said (p. 393):

> "* * * Thus one can theorize that we have monopolistic competition in every non-standardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product."

Accord: *Packard Motor Co. v. Webster Motor Car Co.* [1957 Trade Cases ¶ 68,682], 243 F. 2d 418, 420 (D. C. Cir. 1957); *Schwing Motor Co. v. Hudson Sales Corp.* [1956 Trade Cases ¶ 68,292], 138 F. Supp. 899, 902 (D. C. Md. 1956), aff'd 239 F. 2d 176 (4th Cir. 1956) [1956 Trade Cases ¶ 68,564].

[*Monopoly Power*]

There is no allegation in the amended complaint that the defendant monopolizes the home and auto supply business in any relevant market. The most that can be said is that plaintiffs allege that the defendant is "dominant" in that field. This is not sufficient, for dominance is not the equivalent of monopoly power. *United States v. Aluminum Company of America* [1950-1951 Trade Cases ¶ 62,646], 91 F. Supp. 333, 346 (S. D. N. Y. 1950); *United States v. duPont de Nemours* [1953 Trade Cases ¶ 67,633], 118 F. Supp. 41, 207 (D. C. Del. 1953).

No allegations in the amended complaint herein demonstrate that the defendant either possessed market control or engaged in acts and practices so approaching monopoly control as to create a dangerous probability thereof. Hence there is no factual predicate for the application of Section 2 of the

Sherman Act. Mere allegations of annual business volume or total number of outlets are totally insufficient. *Mackey v. Sears Roebuck & Co.* [1956 TRADE CASES ¶ 68,519], 237 F. 2d 869, 873 (7th Cir. 1956). See also *United States v. Columbia Steel Co.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495, 533 (1948).

[*Intent to Monopolize*]

Plaintiffs' claim under the Sherman Act is further deficient in failing to allege any act or conduct evidencing intent to abuse, maintain or exercise monopoly power or facts demonstrating the existence of a specific intent to monopolize as is required to sustain the offenses charged. *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100 (1948); *American Tob. Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781 (1946); *Swift and Co. v. United States,* 196 U. S. 375 (1905). The acts and conduct alleged as shown in the discussion of plaintiffs' claim under Section 3 of the Clayton Act, *supra,* demonstrate no more than a permissible refusal to deal on the part of the defendant. Since the defendant possessed the legal right to terminate the franchises of its dealers for reasons sufficient to itself, the exercise of this right is not a violation of the Sherman Act or Clayton Act. See *Brosious v. Pepsi-Cola Co., supra; Dublin Distributors v. Edward and John Burke, Ltd., supra.* See also *ABC Distributing Co. v. Distillers Distributing Corp.* [1957 TRADE CASES ¶ 68,844], 316 P. 2d 71 (Cal. App. 1957).

[*No Violation Alleged*]

The amended complaint does not allege a violation of Section 2 of the Sherman Act.

CONCLUSION

[*Complaint Dismissed*]

It is concluded that the amended complaint does not allege any violation of Section 3 of the Clayton Act or Section 2 of the Sherman Act. It does not state a claim upon which relief can be granted under the antitrust laws. The motion to dismiss the amended complaint is hereby granted.

[¶ 69,244] Riss & Company, Inc. v. Association of American Railroads, et al.

In the United States District Court for the District of Columbia. Civil Action No. 4056-54. Dated January 16, 1959.

Sherman Antitrust Act and Interstate Commerce Act

Combinations and Conspiracies—Applicability of Sherman Act to Common Carriers—Regulated Industries—Jurisdiction of District Court and Interstate Commerce Commission.—In a motor carrier's treble damage action charging railroads with conspiring to destroy the motor carrier's business, a Federal district court ruled that it was not required to refer to the Interstate Commerce Commission the issue of whether rate reductions by the railroads were immune from the operation of the antitrust laws under Section 5a of the Interstate Commerce Act. It is the governing rule that the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under that section of the Act must, in a case where such issue is the sole or dominant issue, be referred to the Commission prior to a court determination of whether such rate reduction violates the antitrust laws. The rate reduction was not, however, the sole or dominant issue of the instant case, but was only one of several overt acts alleged. Referral of that issue to the Commission would have resulted in undue delay and would have been a waste of time and effort. No degree of immunity under the Interstate Commerce Act could remove the rate reduction from the prohibitions of the Sherman Act if it should be proved that the rate reduction, as one of several overt acts, was made for the purpose of excluding the motor carrier as a competitor of the railroads. Since a lawful act may be alleged as forming a part of a conspiracy for an unlawful purpose, the rate reduction could still be alleged as one of the means used to effect a conspiracy, regardless of the Commission's decision. Referral of the rate reduction issue to the Commission was also denied as to certain railroads which contended that the rate reduction issue was clearly the dominant issue as to them because they were neither the prime movers nor the principal beneficiaries of the other aspects of the alleged conspiracy. However, a lesser role in a conspiracy may bring about

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liability equal to that of the prime movers. There was sufficient basis in those railroads' own statements to connect them, to some degree, with aspects of the alleged conspiracy other than the rate reduction issue.

See Combinations and Conspiracies, Vol. 1, ¶ 2039.70; Private Enforcement and Procedure, Vol. 2, ¶ 9007.50, 9007.60.

Combinations and Conspiracies—Elements and Proof of Unlawful Conspiracy—Degree of Participation—Liability of Member for Acts of All Conspirators.—In a motor carrier's treble damage action charging railroads with conspiring to destroy the motor carrier's business, certain of the railroads contended that they were neither prime movers nor principal beneficiaries of certain aspects of the alleged conspiracy. Despite the conflicting assertions as to how much or how little those railroads might have been involved in the issues raised by the complaint, there was sufficient basis in those railroads' own statements to connect them, in some degree, with the activities charged. Even if the evidence should show that they took only a small part in the alleged conspiracy, if they did so with knowledge of the conspiracy and consented to take part in it, then they assumed equal responsibility for the acts of all the conspirators. Even a lesser role may bring about liability equal to that of the prime movers. When one enters a continuing conspiracy after its inception, one becomes liable for the acts of all the conspirators since the conspiracy is, in effect, renewed each day of its existence.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.410.

Combinations and Conspiracies—Trade Associations—Association Membership as a Means of Trade Restraint—"Mute Membership" in Association Charged With Unlawful Conspiracy.—In a motor carrier's treble damage action charging railroads with conspiring to destroy the motor carrier's business, certain of the railroads contended that their only connection with certain aspects of the alleged conspiracy was "mute membership" in various railroad associations. Mute membership in an association charged with an unlawful criminal conspiracy will not impose liability upon a member. Some degree of knowledge and consent to the conspiracy, or some kind of knowing assistance given in furtherance of it, is usually required to impose liability. However, allegations of membership in an association charged with a conspiracy, without more, does not warrant a dismissal of a party before the evidence has been heard. If, at the end of the motor carrier's case, the evidence fails to connect any of the railroads with the charges contained in the complaint, then a motion for a directed verdict would be entertained.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121.

For the plaintiff: Antonia Chayes, A. Alvis Layne, H. Charles Ephraim, and Lester M. Bridgeman, Washington, D. C.

For the defendants: Philip F. Welsh and Gregory S. Prince, Washington, D. C.

For a prior opinion of the U. S. Court of Appeals, District of Columbia Circuit, see 1958 Trade Cases ¶ 69,122; for a prior opinion of the U. S. District Court, District of Columbia, see 1958 Trade Cases ¶ 68,959.

Opinion

[*Prior Proceedings*]

JOHN J. SIRICA, District Judge [*In full text*]: On August 8, 1958, the United States Court of Appeals for the District of Columbia remanded this case to the District Court with directions to vacate its order of May 26, 1958, and to reconsider petitioners' motion to suspend proceedings in the light of said order.

In the early part of 1958, petitioners moved to suspend all proceedings in this antitrust litigation except discovery not connected with this motion, and urged the Court to refer to the Interstate Commerce Commission one of the issues set forth in the complaint regarding rate-making, pur-

suant to agreements on procedure filed with the Commission, so that the Court might obtain a ruling on whether these joint rate reductions were immunized from the operation of the antitrust laws. Extensive briefs were filed and the Court heard oral arguments. After delivering an oral opinion from the bench, the Court denied the motion in an order entered May 26, 1958. Relying strongly on a recent Supreme Court decision not mentioned by the Court in its oral opinion, most of the railroad defendants then petitioned for a writ of certiorari from the Court of Appeals and asked that court to reverse this Court's order and to direct this Court to suspend proceedings and refer the above issue to the Commission. The Court of Appeals granted the writ, but declined to rule on the merits. Instead, it remanded the case to this Court with directions to vacate the order of May 26, and to reconsider petitioners' motion in the light of its order and of the Supreme Court's recent holding in *Federal Maritime Board v. Isbrandtsen Co., et al.,* 356 U. S. 481 (1958).

Petitioners then requested the Court of Appeals to clarify certain language in its order of August 8, 1958. The Court granted this request in an order dated December 16, 1958.

Before discussing the legal issues raised by this motion, it is necessary to summarize the background of this complex case so that all issues may be viewed in their proper context.

[*Antitrust Violations Alleged*]

In 1954, Riss & Company, Inc., a common carrier by motor vehicle in interstate commerce, filed this civil antitrust suit, seeking an injunction and $90,000,000 in treble damages. It alleged that beginning in or about 1950, defendants, most of whom are railroad companies, had agreed and conspired in unreasonable restraint of trade and commerce to injure or destroy plaintiff's business and to acquire a monopoly of land transportation of property in the United States, and had thus violated Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2).

[*Parties*]

Plaintiff alleges it has been a common carrier of property by motor vehicle since 1927 and operates as authorized by the Interstate Commerce Commission throughout twenty-two states plus the District of Columbia. It uses over 800 truck units and employs over two thousand persons. Riss also has alleged that during the years from 1950 to 1953, inclusive, it was one of the five largest interstate motor carriers in the United States in terms of gross revenues and is, and has been for several years, one of the largest motor carriers of military supplies, including ammunition and explosives, for the Armed Forces. About fifty-eight first class railroad companies, several joint railroad organizations and trade associations and one public relations firm are defendants in this action.

[*Means of Effecting Conspiracy*]

In order to effectuate the object of the alleged conspiracy, plaintiff charges that defendants employed various means, some of which are cited as examples in the complaint. Defendants are accused of having carried on a program of soliciting, directly as well as indirectly through "front" organizations, the elected and appointed officials of various states to take steps leading to the revocation and cancellation of the interstate operating authority held by plaintiff. In 1952, it is alleged that some of the defendants employed a public relations expert to persuade the Public Utilities Commission of Ohio to file proceedings before the Interstate Commerce Commission looking toward the cancellation of plaintiff's operating authority.

[*Hampering Operations*]

By similar methods of solicitation, according to the complaint, officials of states, cities and towns through which plaintiff operates, were urged by defendants to enact statutes, ordinances and regulations designed to unduly hamper the operations of the plaintiff and to render them economically unfeasible, such as by imposing unreasonably low weight limits on truck shipments or by banning the use by plaintiff's vehicles of certain important highway routes. Defendants are also alleged to have urged, directly and indirectly through "front" organizations, that state officials carry out a campaign of unusually strict enforcement of statutes, ordinances and regulations particularly aimed at plaintiff's vehicles such as by urging the Public Utilities Commission of Ohio to assign special investigators to follow plaintiff's trucks for hundreds of miles in order to discover possible violations.

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[*Alleged Anti-Truck Propaganda*]

Defendants also are alleged to have abused their privilege of intervention in proceedings before the Interstate Commerce Commission. According to plaintiff, defendants joined together to carry on an extensive and vicious campaign of anti-truck propaganda in order to persuade citizens' groups, automobile clubs and other neutral organizations to register their complaints against Riss in the course of proceedings started by Riss before the I. C. C. to obtain new operating authorizations. Other unfair competitive practices, such as circulating and publishing false and malicious statements about Riss and its officers are also charged in the complaint.

According to the complaint, defendants used railroad groups in their public relations campaign as well as "front" organizations whose connection with the railroad would not be known to the public. It is also asserted that defendants tried to infiltrate and make use of several independent public organizations such as the Illinois Parent-Teachers Association and the Congress of Parents and Teachers of Oklahoma in order to achieve their unlawful objectives. Chief reliance, however, is alleged to have been placed on such instrumentalities as "Competitive Transporation Research", "Motor Carrier Bureau" and "Committee on Motor Transportation" set up by defendants, as well as upon other temporary committees and organizations. Plaintiff claims that defendants spent large sums of money, estimated at about $1,000,000 in carrying out their unlawful activities.

[*Exclusion from Explosives' Traffic*]

In January, 1958, with the permission of the Court, plaintiff filed a supplement to its complaint which is embodied in paragraph 18. Plaintiff claims therein that, pursuant to the unlawful plan described above, defendant railroads submitted to traffic officials of the Department of Defense in 1955 a forty-per cent reduction in rate on the carriage of explosives totaling more than 50,000 pounds by railroads competing with Riss for the same kind of traffic. It is plaintiff's claim that this reduction was intended to accomplish one of the principal objects of the conspiracy; i. e., to exclude plaintiff from the explosives traffic and it has allegedly had that effect with respect to the principal points served by the plaintiff.

[*Relief Sought*]

Plaintiff further alleges that defendants conduct has caused serious damage to its business and to its reputation and has forced plaintiff to spend large sums to counteract the effects of defendants' conduct. By way of relief, plaintiff demands the following:

"1. Injunctive relief permanently enjoining and restraining AAR, Western Railways, Presidents Conference and Eastern Railroads, and each of them, from creating or continuing any committees, subcommittees, bureaus, departments, sections, divisions, subdivisions, or other association activity the principal purpose of which is to restrain, impede, impair, hamper, harass or eliminate the competition of plaintiff and of other motor carriers;

"2. Injunctive relief permanently enjoining, restraining and prohibiting defendants and each of them and their officers, directors, agents, servants and employees from agreeing, conspiring or combining to restrain the competition of plaintiff and from conspiring, combining and attempting to monopolize land transportation by the elimination of plaintiff and from performing any acts in furtherance of such unlawful objects and purpose;

"3. Judgment against defendants and each of them for $90,000,000, being the amount equal to three times the damages sustained by plaintiff;

"4. Judgment against defendants and each of them for the amount of reasonable attorneys' fees and costs of this action;

"5. Such other and further relief as to the Court may appear just and proper; and

"6. Injunctive relief enjoining the defendant railroads from accepting traffic pursuant to the illegal quotation described in paragraph 18 hereof."

I.

[*"Primary" Jurisdiction of ICC*]

This is a summary of plaintiff's allegations. In their motion to suspend and to refer the rate reduction issue to the I. C. C., defendants seek to invoke the doctrine of "primary administrative jurisdiction". The defendants contend that a new issue was raised which involves the primary, if not the exclusive, jurisdiction of the Interstate Commerce Commission when plaintiff was allowed by the Court to supplement its complaint and to include in paragraph 18 the allegation that the uniform and concerted rate reduction, which took effect on

or about November 20, 1955, was intended to exclude the plaintiff from the business of carrying such shipments of explosives; that said quotation was made for the purpose of effectuating one of the principal objects of the conspiracy, that is the elimination of the plaintiff as a competitor with the railroads for explosives traffic. As a defense to this allegation, it is also argued that the new rates are reasonable and compensatory when all the cost factors are taken into consideration and that, furthermore, the rate quotation was set up according to procedural agreements approved by the Commission and thus is immunized from the operation of the antitrust laws by virtue of 49 U. S. C. § 5b(9). It is defendants' position that this matter is extremely technical and complex and thus the Court should obtain the expert opinion of the Commission with respect to defendants' contentions before the case goes to trial.

Plaintiff argues, on the other hand, that it is immaterial whether defendants' act of reducing rates, considered by itself, is covered by prior procedural agreements approved by the Commission or is immunized from the antitrust laws because it is a well-settled principle of law that a lawful act may be properly alleged as a means of effectuating one of the principal objects of the alleged conspiracy; that is, the elimination of plaintiff as a competitor with the railroads for explosives traffic.

[*Practical Considerations*]

These, then, are the basic legal issues before the Court. Certain practical considerations also enter into the case. This private antitrust suit against almost sixty defendants has been on the docket over four years. During that time, five different judges have made rulings on various preliminary motions. In the interest of finally resolving the complex and serious issues raised by this case and of doing so in the spirit of Rule 1 of F. R. C. P., this Court has set October, 1959, as a tentative time for trial. A great deal of work by both Court and counsel will yet have to be done in order to meet such a schedule, and this date may be delayed because of the recent proceedings in our Court of Appeals. Both sides have requested trial by jury, and have estimated that the trial will last from four to six months. The Court's basic problem is this: Should this important anitrust suit, already more than four years old, and involving issues of serious importance to the national transportation industry, be further delayed for one or perhaps several years in order that the Court might request the expert opinion of the Interstate Commerce Commission as to whether one of many overt acts alleged to have been committed pursuant to a Sherman Act conspiracy ought to be immunized from the operation of the antitrust laws?

[*Rate Reduction Issue*]

The rate reduction issue is raised in paragraph 18 of the Complaint as Supplemented, which reads as follows:

> "18. On or about Oct. 20, 1955, the railroad defendants herein caused to be submitted to traffic officials employed by the Department of Defense a uniform, unpublished rate quotation, by and on behalf of the railroads engaged in carrying explosives traffic in competition with the plaintiff. Said quotation established railroad rates for carrying explosive shipments totalling more than 50,000 pounds which were nearly forty percent below the general level of such rates prevailing for the previous eight years. Said uniform and concerted rate reduction, which took effect on or about November 20, 1955, was intended to exclude the plaintiff from the business of carrying such shipments of explosives and has had that effect with respect to the principal points served by the plaintiff. Said quotation was made for the purpose of effectuating one of the principal objects of the conspiracy charged herein, to wit, the elimination of the plaintiff as a competitor with the railroads for explosives traffic and has substantially injured the plaintiff's business. The Interstate Commerce Commission has no jurisdiction over said quotation and plaintiff will continue to suffer substantial and irreparable injury from said illegal quotation until and unless the acceptance of traffic pursuant thereto is enjoined by this Court."

[*Cases Considered*]

In its earlier ruling on this motion, this Court was strongly influenced by the decision in *Atchison, Topeka and Santa Fe Railway Co., et al. v. Aircoach Transportation Association, Inc., et al.* [1958 TRADE CASES ¶ 68,958], 102 U. S. App. D. C. 355, 253 F. 2d 877 (1958), hereinafter referred to as *ACTA*. On motions by both sides for summary judgment, the District Court there had ruled that the concerted quotation by rail-

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roads under Section 22 of the I. C. C. Act of certain variable rates and package bids for military passenger traffic were *per se* illegal under the antitrust laws, and that 49 U. S. C. § 5b(9) did not grant immunity from these laws.

In reversing, the Court of Appeals held that it could not be said as a matter of law that *all* joint rate reductions under section 22 must be excluded from the class of concerted actions covered by prior procedural agreements approved by the Commission under 49 U. S. C. § 5b(9) and, therefore, it was error to hold that all such reductions in rate must be denied immunity from the antitrust laws under 49 U. S. C. § 5b(9). Hence, some section 22 rates arrived at by joint action might be within the coverage of prior approved arrangements for rate making and hence might be immunized from the antitrust laws. The Court of Appeals felt that the Commission's prior rulings as to the possible or actual coverage of defendants' conduct by procedural agreements or as to the Commission's power to decide these very questions were not clear and decisive. The Court observed at p. 885:

> "Nevertheless, the questions are appropriate for Commission consideration, even though, as we believe, exclusive primary jurisdiction over either of them does not reside in the Commission by reason of section 5a(7) [49 U. S. C. 5b(7)]."

The Court of Appeals then ruled that the District Court should, in its discretion, withhold decision on the interpretation of the I. C. C. Act and the approved procedural agreements until the Commission has had a chance to decide initially whether, in its opinion, the railroad rate reductions can be relieved from the antitrust laws because of coverage by approved agreements.

After discussing the relationship of defendants' practices to unlawful price-fixing, the Court of Appeals then set a limitation on the power of the Commission to resolve the antitrust aspect of the rate practices. It said at page 365:

> "One further substantive legal question must be considered. Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9). We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of Aircoach for the section 22 transportation involved. See, by analogy, *American Tobacco Co. v. United States*, 328 U. S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575; *State of Georgia v. Pennsylvania R., supra*, 324 U. S. at page 458, 65 S. Ct. at page 726; *Kobe, Inc. v. Dempsey Pump Co.*, 10 Cir. 198 F. 2d 416, 422; *Noerr Motor Freight, Inc. v. Eastern R. R. Pres. Conf.*, D. C. E. D. Pa., 155 F. Supp. 768, 814-816, 822-825; *Parmelee Transp. Co. v. Keeshin*, D. C. N. D. Ill., 144 F. Supp. 480, 484; *Noerr Motor Freight, Inc. v. Eastern R. R. Pres. Conf.*, D. C. E. D. Pa., 113 F. Supp. 737, 742-744; *Slick Airways, Inc. v. American Airlines, Inc.*, D. C. D. N. J., 107 F. Supp. 199, 214, *appeal dismissed sub nom. American Airlines, Inc. v. Forman*, 3 Cir. 204 F. 2d 230, certiorari denied 346 U. S. 806, 74 S. Ct. 54, 98 L. Ed. 336; *United States v. Association of American Railroads*, D. C. D. Neb., 4 F. R. D. 510, 526 . . . . The motion of Railroads is not to be construed as admitting factual *allegations in regard to a purpose to destroy competition which would have the legal result of removing Railroads from any possible protection from the antitrust laws;* nor can Aircoach's motion be construed as abandoning those allegations. Thus, on this aspect of the case, there remains a factual dispute. Moreover, this aspect of the case need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law.
>
> "There thus arises a matter of procedure. As to this, a discretion must be left to the District Court after hearing the parties. It might be considered preferable, if Aircoach desires to pursue the assertions regarding a purpose to destroy competition, that this branch of the case should be the subject of a hearing, limited to that problem. Should Aircoach prevail Railroads would be liable in damages, and an appropriate injunction also could be granted. Or proceedings in the District Court on this subject could await reference to the Commission of the questions of coverage by statute or approved agreement." (Emphasis supplied.)

The case of *American Tobacco Company v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 809, decided in 1946 and cited above was a criminal action brought under the Sherman Act and the defendants, who were officers of large tobacco com-

panies, were convicted on four counts of an indictment charging conspiracy in restraint of trade, monopolization, attempting to monopolize, and conspiracy to monopolize. In the petition for certiorari the question was limited to "whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act."

At page 809 the Court said:

"It is not the form of the combination or the particular means used but the result to be achieved that the Statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids. they come within its prohibition . . . ."

The case of *State of George v. Pennsylvania Railroad Company* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439, decided in 1945, was a suit by a state charging that the defendant railroads had set up rates that discriminated against the ports and cities of Georgia and greatly hampered the industrial and economic development of the entire state, in violation of the antitrust laws.

One of the defendants' contentions was that the I. C. C. had jurisdiction over these rate matters and had actually approved these rates under I. C. C. Act standards. The court held that carriers are also subject to the antitrust laws. Even though the rates had to be cleared through the I. C. C., it may be that circumstances make these rate agreements restrictive rather than competitive. The court said that a conspiracy to fix rates might be illegal though the rates fixed were reasonable and nondiscriminatory, and, as Mr. Justice Brandeis had said in the *Keogh* case (260 U. S. 156), the fact that rates had been approved by the I. C. C. would not, it seems, bar proceedings by the Government.

The court then stated:

"It is sufficient here to note that we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates *clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier.*" (Emphasis supplied.)

[*Unlawful Intent*]

It is clear from the above language in the *ACTA* case that a court need not refer to the Commission the issue of whether a rate quotation was made as part of a combination or conspiracy to eliminate a competitor. This follows logically because such a joint act if combined with the unlawful intent of eliminating a competitor would fall outside of the immunity granted by 49 U. S. C. 5b(9) regardless of a possible I. C. C. ruling that the methods of arriving at the new rate conformed to prior procedural agreements filed with and sanctioned by the Commission. The Court of Appeals also authorized a separate hearing on the allegations of intent to destroy competition which might, if the defendants in *ACTA* lost, result in a determination of liability and an award of damages and injunctive relief. Thus, a clear distinction was drawn between the antitrust aspects and the technical rate-making issues in the *ACTA* case. In *ACTA*, both aspects grew out of the same type of activity, namely, section 22 rate quotations. The lawfulness of these quotations formed, for all practical purposes, the sole issues of that case. Since the Court of Appeals authorized the District Court, in *ACTA*, in its discretion, to itself decide the fundamental questions of antitrust liability and damages, it seems to be far more important to follow that reasoning in this case where the technical aspects of section 22 rate-making constitutes only one part of the issue raised by paragraph 18 of the complaint as supplemented and where this rate reduction itself forms only one out of the many overt acts alleged by the plaintiff.

[*Conditions Which Require Referral to ICC*]

However, in the view of the Court of Appeals, the decision of the Supreme Court in *Federal Maritime Board v. Isbrandtsen Co., et al*, 356 U. S. 481 (1958), has modified the holding in *ACTA* by placing on District Courts a duty under clearly defined conditions to refer certain issues to administrative agencies. The Court of Appeals in its order dated August 8, 1958 stated as follows:

". . . it is the view of this court that the *Isbrandtsen* opinion modifies the holding of the *Aircoach* case by requiring that the issue of the intent and effect of an

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agreement approved by the Commission must, *in a case where such issue is the sole or dominant issue in the case,* first be referred to the Commission prior to a court determination of whether such agreement violates the anti-trust laws, ..." (Emphasis supplied.)

Answering defendants' motion for clarification of the above language, the Court of Appeals in an order dated December 16, 1958 stated as follows:

". . . The intent, however, of the order of August 8 was to assert our view that the *Isbrandtsen* opinion modifies the holding of the *Aircoach* case by requiring that the issue of the intent and effect of a rate reduction claimed to have been taken pursuant to procedures set forth in agreements approved by the Commission under Sec. 5a of the Interstate Commerce Act, must, in a case where such issue is the sole or dominant issue, first be referred to the Commission prior to a court determination of whether such rate reduction violates the anti-trust laws. The "issue" referred to in the order was not intended to mean the issue of the applicability of sec. 5a agreements to the rate reductions."

The Court, in its order of August 8, interpreted *Isbrandtsen* as applying to a factual situation more in line with the case at bar, and used the following language:

". . . it is the view of this court that the *Isbrandtsen* decision does not necessarily require referral to the Commission of issues such as those sought to be referred to the Commission by petitioners' motion *where the agreement is only one of a considerable number of overt acts alleged and where the policy favoring referral is clearly outweighed by other factors such as the probability of undue delay and the overriding importance of early consideration of the other overt acts alleged . . . .*" (Emphasis supplied.)

[*Isbrandtsen Case*]

Before considering the precise way in which *Isbrandtsen* modified *ACTA* with respect to this case, it may be noted that this Court, at the request of defendants, had considered *Isbrandtsen* before it denied the original motion to suspend.

The sequence of events leading up to this Supreme Court decision is of importance in determining its scope. In 1952, an association or "conference" of steamship lines engaged in foreign trade adopted a dual system of international freight rates. Under this system, a shipper would pay less than regular rates for the same service if he signed an agreement to patronize the conference exclusively. The ostensible purpose of the dual-rate arrangement was to meet the competition of an independent carrier, Isbrandtsen Co., Inc. The proposed system was submitted to the Federal Maritime Board for approval pursuant to law, and orders of approval were issued in December, 1955 and January, 1956. Isbrandtsen Company, Inc. petitioned our Court of Appeals to review these orders. That Court set aside the Board's order on the ground that the system of dual rates was illegal *per se* under § 14 of the Shipping Act of 1916. [99 U. S. App. D. C. 312, 239 F. 2d 933 (1956)]

The Supreme Court granted certiorari to resolve the issue as to the legality of the dual-rate system and stated in its opinion at page 487:

". . . The question for our decision is whether the Court of Appeals correctly set aside the Board's orders."

The Supreme Court agreed with the Court of Appeals and held that the dual-rate system was illegal.

Examination of the opinion shows that the case was not decided by application of the doctrine of "primary administrative jurisdiction". Under this doctrine, the courts often decline to determine a controversy, first presented to it, where it involves a question which is within the jurisdiction of an administrative agency, prior to the decision of that question by the administrative tribunal, and where the question demands the exercise of administrative interpretation requiring the special knowledge, experience and services of the agency to decide technical and intricate matters of fact.

The court in *Isbrandtsen* discussed this practical policy of judicial administration in the course of explaining the rulings in two of its earlier decisions which had been relied upon by Far East Conference. On page 496 of its opinion, it said:

"Petitioners argue that our construction of § 14 Third is foreclosed by this Court's decisions in *United States Nav. Co. v. Cunard S. S. Co.* 284 U. S. 474, (76 L. ed. 408, 52 S. Ct. 247); and *Far East Conference v. United States,* 342 U. S. 570, (96 L. ed. 576, 72 S. Ct. 492). A reading of those opinions immediately refutes any suggestions either that this issue was ex-

pressly decided in those cases or that our holding here is not fully consistent with the disposition of those cases."

The Court then summarized petitioners' contentions as follows:

"The Board and the Conference argue that, if the Court in these earlier cases had thought that § 14 Third in any way makes dual rates *per se* illegal and thus not within the power of the Board to authorize, it would not have found it necessary to require that the Board first pass upon the claims."

In rejecting this reasoning, the Court said at page 498:

"It is, therefore, very clear that these cases, while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack. Rather, those cases recognized that in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed."

Thus, it is clear that the problem of whether or not a district court should refer certain issues to an administrative agency was not squarely before the court in the *Isbrandtsen* case.

[*Proper Forum*]

The question next arises: In what precise way does *Isbrandtsen* modify *ACTA*? *ACTA* contained two basic holdings. The first related to the proper forum for decision of issues as to the procedural agreements and their connection with Section 22 rate practices. The second dealt with the exceptional circumstances under which Sec. 5a immunity would not apply. On the first issue, the Court of Appeals held in the *ACTA* case that the I. C. C. and the District Court had concurrent jurisdiction to decide the intent and effect of approved procedural agreements in relation to Section 22 rates, and whether coverage by these agreements would immunize these rates from the antitrust laws. On page 364 of that opinion the court stated as follows:

"In short, the court, while retaining jurisdiction, should in its discretion withhold decision on the interpretation of the statute and existing agreements approved under section 5a, insofar as the challenged practices are concerned, until the Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be relieved of the operations of the antitrust laws under the statute and, if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date. *The Commission might disclaim jurisdiction, or for some other reason might refrain from deciding these questions. We do not hold that it is required to decide them. The court could then proceed according to its own light to interpret either the statute or the agreements."* (Emphasis supplied.)

[*Antitrust Immunity*]

On the second question, it was held in *ACTA* that, under no circumstances could antitrust immunity under 49 USC 5b(9) be held to apply to the use of approved procedures to set Section 22 rates if they were part of an effort by railroads in combination or conspiracy to eliminate the competition of Aircoach.

It is clear from the language in its order that the Court of Appeals interpreted *Isbrandtsen* as modifying the first holding in *ACTA* only by limiting the District Court's discretion to refer issues.

[*Governing Rule*]

It is the governing rule now that the issue of the intent and effect of a rate reduction, claimed to have been taken pursuant to procedures set forth *in agreements approved by the Commission* under Section 5a of the Interstate Commerce Act, must, *in a case where such issue is the sole or dominant issue,* first be referred to the Commission prior to a Court determination of whether such rate reduction violates the antitrust laws.

Thus, it would appear that the second holding of *ACTA* stands unaffected by *Isbrandtsen.*

If plaintiff, during the trial, cannot prove an affirmative answer to this question, then it concedes it cannot recover based on the rate reduction issue. On the other hand, if it should develop at the trial that the plaintiff can prove that the rate reduction as set forth in paragraph 18 was one of several overt acts alleged, and prove that this rate reduction was made for the purpose of effectuating one of the principal objects of the conspiracy charged therein; that is, the elimina-

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tion of the plaintiff as a competitor with the railroads for explosives traffic, then under *ACTA* no amount of coverage by approved agreements and no degree of immunity under 49 U. S. C. 5b(9) could remove the rate reduction from the prohibitions of the Sherman Act.

[*Lawful Act as Part of Conspiracy*]

In reaching either of these alternatives, no determination by the Commission seems necessary on the above contentions made by the plaintiff. Even if the Commission were to decide that the rate reduction, considered by itself, conformed to the standards of the Interstate Commerce Act, it is nevertheless well settled that a lawful act may be validly alleged as forming a part of a conspiracy for an unlawful purpose such as to restrain trade. *Noerr Motor Freight v. Eastern Railroad Pres. Conf.* [1957 TRADE CASES ¶ 68,827], 155 F. Supp. 768 (E. D. Pa. 1957).

The basic reason behind defendants' motion to suspend is the expectation of obtaining an I. C. C. ruling that the Section 22 rate reduction is "immunized" from the operation of the antitrust laws by 49 U. S. C. 5b(9). This Court cannot say how the Commission would be likely to rule if this issue alone were submitted to it. After a substantial delay in the final disposition of this issue, it is possible that defendants might obtain an adverse ruling. Then all the harmful effects that a long delay brings to protracted litigation would have been endured to no purpose.

[*Purpose of Immunity Provision*]

The result would not be different if the defendants won all of their arguments before the Commission. In effect, the Commission would be ruling that the Section 22 rate reduction on explosives, standing alone, were covered by approved agreements on rate procedures and that therefore they are removed from the operation of the antitrust laws by 49 U. S. C. 5b(9). Thus, no antitrust suit could be brought based on the act of reducing rates alone. This would simply mean that a private party could not validly file a complaint alleging that defendants violated the antitrust laws solely because they concertedly lowered the rates on explosives traffic for the United States Government. Without such an immunity provision, railroads would often be suspected of combining to fix prices when they make even routine changes in their rates in cooperation with each other. The railroads are right in their contention that cooperative or joint rate-making is often essential, especially when the goods in question are normally handled by many companies on a vast, interlocking rail system. As the court in *ACTA* observed at 102 U. S. App. D. C. 355, 361, 253 F. 2d 877, 883 (1958):

> ". . . Furthermore, upon the basis of extensive testimony in committee hearings on section 5a, bearing on its possible application to section 22 'rate adjustment' or reduced rates for war materials, the House and Senate Committee Reports pointed out that the evidence was convincing that the joint organizations maintained by the carriers were not only necessary to enable them to meet the commercial requirements of the nation but also were indispensable to the requirements of national defense."

Thus, it would seem that the antitrust immunity that defendants invoke was designed to protect ordinary rate-making in the course of regular business so as to adjust to changing costs and to meet the challenges of outside competition. Could the protection of 49 U. S. C. 5b(9), assumed above, extend to the use of the power to set rates in concert as part of a plan or conspiracy to eliminate competition? According to the holding in *ACTA* quoted above it could not. Even if a given joint act of reducing rates were to be considered as lawful standing by itself, it may still be properly alleged as one of the means used to effectuate a conspiracy to accomplish an unlawful object. This is clear from the cases cited in the *ACTA* opinion.

[*Integral Part of Alleged Conspiracy*]

Thus, the rate issue is an integral part of the alleged conspiracy, and cannot be evaluated apart from the other allegations in the complaint. There are two possibilities that would result from referral to the I. C. C. If the I. C. C. heard argument or conducted a hearing solely upon the immunization issue raised by defendants, then its ultimate ruling would, under the plaintiff's allegations, certainly be indecisive. On the other hand, the parties might be permitted to present all of the issues raised by the pleadings so that the Commission could get the entire picture. This would be a laborious way to resolve only one issue in this

complex case. Several months would probably be required to present all of this evidence. Furthermore, at the end of this process plaintiff, if it prevailed, would still be unable to obtain the substantive relief it seeks here. An entire retrial of the case would then be necessary in the District Court.

[*Referral to ICC Unnecessary*]

The Court must conclude, therefore, that a reference of the rate-reduction issue to the I. C. C. would be a waste of time and effort and would entail unnecessary expense on the part of all parties to this litigation.

[*Importance of Other Allegations*]

Furthermore, it is also clear that the intent and effect of the Section 22 rate-reduction is in no sense the dominant, much less the sole, issue of this litigation. The complaint as supplemented alleges a complex conspiracy in violation of the Sherman Act. A concerted reduction in explosives rates is alleged to have been one of the many overt acts designed to effectuate the unlawful plan. When the plaintiff filed the original complaint the rate issue was not included and the other allegations were relied upon to constitute a cause of action.

Defendants, in their supplemental memorandum filed September 29, 1958, try to de-emphasize the non-rate allegations of the complaint. On page 8 it is said:

> ". . . There may be some evidence relating to the alleged campaign of defamation. But this will be only to lend color to plaintiff's claim that there is a continuing conspiracy among the defendants.
>
> * * *
>
> "Obviously, plaintiff can say that the complaint raises issues as to defamation. But the assertion of issues does not make them substantial."

However, in the course of oral argument on this motion on May 23, 1958, this Court asked Mr. Ball, counsel for some of the defendants, whether he would be willing to stipulate that the non-rate or other charges contained in plaintiff's complaint are true if the rate-reduction issue by itself were sent to the I. C. C. (Tr. pp. 95, 96, 97) The exact colloquy is as follows on page 95 of the Transcript of Proceedings before the Court on May 23, 1958:

> "The Court: Let me ask you this. I don't suppose you would consent to this. I wouldn't either if I were you. Would you be willing to go over to the Commission and say to the Commission, in effect, this: that we admit for the purpose of this case, if it is sent over there, that we are guilty of every single thing that the plaintiff says we are guilty of in this complaint; but regardless of that, the Act which you have been speaking about, which enacted 5a, I think, of the Interstate Commerce Commission Act, immunizes us from the antitrust laws, so it makes not a particle of difference whether or not we were guilty of any conspiracy?
>
> Mr. Ball: I cannot say that because the complaint—
>
> The Court: Would you do that?
>
> Mr. Ball: I would not, because the complaint alleges things that go beyond the rate-making actions themselves.
>
> The Court: I understand. I didn't expect you to do it, frankly. I mean that I am saying that it seems to me that a hearing would have to be conducted over there, pursuant to the *ACTA* case, to determine whether or not the defendants were guilty of the very things that the plaintiff says they were guilty of. I don't know whether they are or not, and I am not going to know until the evidence is in this case.
>
> Mr. Ball: Now, let me clarify one point. The Commission is not going to decide whether we went before or did the public relations job.
>
> The Court: Of course, they are not going to decide that.
>
> Mr. Ball: Those are the allegations that are not rate-making allegations.
>
> The Court: I understand that.
>
> Mr. Ball: But the Commission is the one that has got to decide.
>
> The Court: They are going to decide whether or not this agreement, the way it was prepared and agreed to, they are going to decide whether or not that agreement itself was a valid agreement, correct?
>
> Mr. Ball: And first and second whether the activities under it were in accordance with it and, third, whether the rate made under it, was it made in accordance with it, or whether there was a predatory practice or some violation of transportation policy.
>
> The Court: I understand, and they will limit their investigation and hearing on that point.
>
> Mr. Ball: Now, with that—
>
> The Court: These points."

Counsel declined to so stipulate and thus impliedly recognized the importance of those allegations if they could be established as true.

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On the factual importance of these non-rate allegations, little can be said at this stage of the case. The parties are in the midst of discovery and the over-all picture is far from complete. It is impossible now to tell what evidence the plaintiff will present at the trial. Isolated statements of plaintiff's officers in answer to interrogatories and by way of depositions cannot be the basis for judging the weight or importance of evidence as it may develop at trial, months from now.

Furthermore, these allegations of defamation as well as other charges are not unique to this case. In *Noerr Motor Freight,* cited above, several of the allegations appear to resemble some of those in this litigation. It, too, was a private antitrust suit for treble damages and injunctive relief brought by trucking firms against railroads, rail associations and a public relations firm. At the outset, Judge Clary, the trial judge, felt that the charges seemed somewhat incredible. Cf. 155 F. Supp. 808. After presiding over a four month trial, the judge made the following finding, on page 816:

> "The proofs in this case have definitely established joint action on the part of all of the defendants to destroy the good will and injure the business of the plaintiffs. They have proved the formation of so-called 'independent citizens groups' which were mere pawns in circulating information derogatory to the plaintiffs; dissemination of false information to customers of the plaintiffs for the same purpose, the organization of groups to protest the use of the highways by plaintiffs' 'Big Trucks', and the duping and using of public officials and officials of independent organizations to accomplish the same purpose of driving the plaintiffs out of competition with the defendants. The actions of the defendants do not fall within legal bounds of either proper means or proper objectives and consequently such activities must be condemned."

After a separate hearing on the issue of relief and damages, the Court enjoined defendants from continuing the conspiracy charged and awarded $652,000 damages plus $200,000 counsel fees. Cf. 166 F. Supp. 163 [1958 Trade Cases ¶ 68,085]. The judgment is now on appeal.

[*Failure to Seek Preliminary Injunction*]

Defendants also contend that plaintiff's request for injunctive relief to prevent further acts unrelated to the rate cut is not to be taken seriously, because plaintiff has made no effort to seek a preliminary injunction. This failure, it is argued, shows that plaintiff does not really think it can show substantial injury resulting from the alleged defamation campaign. But more reasonable inferences may also be made. The size and scope of the conspiracy alleged would make necessary a lengthy and costly hearing. Preparation for this would involve the same kind of detailed discovery that is now going on in preparation for the trial itself. The procedure of waiting until the case has been presented on its merits was followed in the *Noerr* case and, furthermore, a separate hearing on the question of relief and damages was there held some time after the trial. Thus, no inference adverse to plaintiff can be made based on its failure to seek an injunction before the trial on the merits.

[*Legal Standards for Referral to ICC*]

From the above discussion, it is clear that the purely legal standards for referral of the rate reduction issue to the Commission have not been met. It is not the sole or dominant issue of the case and no possible ruling as to its coverage by prior approved procedural agreements would be conclusive where such rate reduction is alleged to be part of a conspiracy to restrain trade. At this point, certain practical aspects of the referral problem must be considered.

[*Undue Delay*]

In the first place, undue delay with accompanying hardship and expense to the parties would almost certainly result if this issue were referred to the Commission. The rate question, while not the sole or dominant issue of the case, is, nevertheless, an essential segment of plaintiff's cause of action and equally as important as the other allegations. The trial on the merits could not proceed properly with this aspect of the case missing. Referral would delay the entire litigation. This Court has no power to compel the Commission to make any ruling at all, much less to bring about a prompt decision. A determination would have to await its turn on the Commission's crowded docket. It might be that many months would pass without Commission action. The Court would then probably have to wait a reasonable time before itself taking action, and this might amount to one

or more years. What "a reasonable time" might be can perhaps be gauged by examining the duration of past Commission proceedings involving numerous parties. In the memorandum filed by plaintiff, it cites the so-called Government reparations suits as an example. These actions involved many of defendants here and dealt with the reasonableness of the railroad explosives rates which had been in effect prior to the rate reduction in November, 1955. The suits were initially filed by the Government in September and October, 1947. It was not until February, 1955, almost eight years later, that the Commission ruled that the pre-1955 explosives rates were reasonable. Cf. 294, I. C. C. 5. Approval by the Commission of some of the Section 5a procedural agreements mentioned above consumed a great amount of time. This ranged from eleven months for the Western Traffic Association's agreement to two years nine months for the agreement submitted by the Southern Freight Association.[1]

The experience of the plaintiff in *ACTA* may also be relevant here. On pages two and three of the Memorandum of *Aircoach Transport Association, Inc., et al.,* as *amicus curiae,* filed in our Court of Appeals in this cause (No. 14,562), it is stated that on April 18, 1958 the District Court in *ACTA* entered an order in which proceedings were to be instituted before the I. C. C. by one or more of the parties within 20 days of this date; that proceedings before the I. C. C. were commenced before it on April 22, 1958, by the filing of a petition or complaint initiating proceedings; and that the Commission has not yet acted on the issues referred to it under the District Court's order of reference.

Thus, it will be seen that it has been over eight months since proceedings were started before the Commission and as of October 31, 1958 it had not yet taken any action. Besides that, there is nothing to indicate to this court how long it will take for the Commission to render its decision in that case, and even after the Commission has rendered its decision, its ruling may be appealed by one of the parties. If this happens, considerably more time will undoubtedly elapse before the Courts will be able to render a final decision in that case.

It must also be remembered that in connection with defendants' motion to suspend proceedings, it also requests that all discovery proceedings regarding the rate reduction issue be suspended until the Commission has made its ruling.

It would thus seem that a reasonable time before Commission action might well be measured in years rather than months. The Court has taken into consideration the fact that this action has been pending more than four years; that it will be many months before a trial can be had, and that it will take from four to six months to try the case. It would be contrary to sound judicial discretion to permit this additional delay to this over-postponed litigation merely to seek an optional ruling from the Commission on the rate reduction aspect, which is not the sole or dominant issue in this case.

[*Importance of Early Trial*]

In addition, the very nature of the other overt acts alleged reveal the great importance of early consideration of these acts on their merits as soon as practicable. The claims and counterclaims in this case indicate continuing injury to the business of the various parties. Plaintiff's request for injunctive relief should be resolved without unnecessary delay. New delay will add to the difficulty of obtaining witnesses and will further dim memories of facts essential to all parties. The extraordinary cost to all parties of this litigation would also be increased.

[*Conclusion*]

Thus, the Court concludes that too much delay has already taken place in the disposition of this case. In fairness to all parties, the Court deems it essential to get to the merits of the case as speedily as possible. Reference to the Commission would only serve to thwart this purpose.

[1] *WTA—Agreement* application filed November 15, 1948; decided October 3, 1949, 276 I. C. C. 183. *Eastern Railroads* [*TEA*]—*Agreements* application filed December 7, 1948; decided March 15, 1950, 277 I. C. C. 279. *Southern Freight Association, et al.—Agreements,* application filed January 5, 1949; decided October 18, 1951, 283 I. C. C. 245. See also, *Illinois Freight Association—Agreement,* application filed April 28, 1950; decided August 17, 1951, 283 I. C. C. 17; *Southern Ports Foreign Freight Committee—Agreement,* application filed March 16, 1950; decided April 11, 1952, 284 I. C. C. 775; *Railroad Interritorial Agreement,* application filed October 18, 1950; decided January 21, 1953, 287 I. C. C. 701.

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II.

[*Separate Contentions*]

In addition to the joint memorandum filed on behalf of most of the railroad defendants, Atlantic Coast Line and seven other Southern railroads filed a supplemental memorandum on September 29, 1958 raising questions allegedly relating to them alone. Two defendants who did not take part in the joint memorandum; namely, the Central Vermont Railway and the Grand Trunk Western Railroad Company, asked permission to file a memorandum containing their contentions with respect to the motion to suspend, and their request was granted. The questions raised by both memoranda will be considered together at this time.

[*Degree of Involvement*]

The underlying contention here is that the rate reduction is clearly the dominant issue as to them and hence they, at least, should be permitted to litigate the question of antitrust immunity under 49 U. S. C. 5b(9) before the I. C. C. The southern railroads, on page 3 of their brief, point to statements by plaintiff's counsel in connection with an earlier motion that they were neither prime movers nor principal beneficiaries of the alleged defamation conspiracy. They also cite the depositions of plaintiff's principal officers to the effect that no official was able to state of his own knowledge what specific role was played by the southern railroads in the alleged defamation campaign outside of the publication of a certain anti-truck article in one of their magazines. At page 6 of their memorandum, the southern railroad defendants concede that they also made a contribution toward the production of a film by the Farm Roads Foundation. The publication of the magazine article is set forth in the complaint as one of the overt acts done to effectuate the conspiracy and the film production has been mentioned by plaintiff in affidavits as one of the concerted methods used by defendants in connection with the alleged conspiracy. The southern railroads admittedly took some part in the I. C. C. hearings in opposition to the application by Riss and other motor carriers for operating authority. As to the rate reduction, it is said at page 8 of their brief:

> "While rates in southern territory were reduced several months later, in March and April of 1956, the reductions could hardly have been intended to and did not affect the competition of Riss since Riss does not operate to any significant extent in southern territory. Thus, the supplement to the complaint does not include this later reduction in its allegations."

Thus, it is clear that southern railroads are merely urging statements of fact and inferences contrary to those made by the plaintiff in its complaint and sworn affidavits. The court is asked to divide this litigation and to refer the rate reduction issue regarding a few defendants to the I. C. C. based on conflicting assertions as to how much or how little these few defendants may be involved in the issues raised by the complaint.

[*Responsibility for Acts of Conspirators*]

Despite the conflict, there seems to be a sufficient basis in the statements of defendants alone to connect them in some degree with the activities of the other defendants. Even if the evidence should show these defendants took only a small part in the alleged conspiracy, if they did so with knowledge of the conspiracy and consented to take part in it, then they assume equal responsibility for the acts of all conspirators. As was said in *United States v. National City Lines* [1950-1951 Trade Cases ¶ 62,757], 186 F. 2d 562, 571 (7th Cir. 1951).

> ". . . Nor does the circumstance that certain of the supplier defendants had requirements contracts with one but not both of the City Lines defendants absolve those defendants of participation in the conspiracy charged in the indictment or prove that no such conspiracy existed; it was not incumbent on the government to prove that each defendant participated in that conspiracy in all of its ramifications, for, in order that one be found guilty as a conspirator, it need only be shown that, with knowledge of the existence of the conspiracy, he knowingly performed an act designed to promote or aid in the attainment of the object of that known conspiracy."

When one enters after the inception of a continuing conspiracy, he becomes liable for the acts of all the conspirators since the conspiracy is, in effect, renewed each day of its existence. *United States v. Borden Co.* [1932-1939 Trade Cases ¶ 55,250], 308 U. S. 188, 202 (1939); *United States v. N. Y. Atlantic and Pacific Tea Co.* [1940-1943 Trade Cases ¶ 56,287], 137 F. 2d 459, 463 (5th Cir. 1943) cert. denied 320 U. S. 783 (1943). A reading of the complaint

reveals that plaintiff will attempt to prove the existence of an antitrust conspiracy continuing over a period of several years. When dealing with such a charge, it is essential to consider the allegations as a whole and not to dismember it into many parts. *United States v. Patten,* 226 U. S. 525, 544 (1913).

Since, therefore, the defendants' degree of participation cannot be judged before plaintiff has presented all its evidence and since even a lesser role in a conspiracy may bring about liability equal to that of prime movers, it cannot be said that any one allegation such as the rate reduction issue is of dominant importance as to these defendants.

[*"Mute Membership"*]

These considerations apply with equal force to defendants Grand Trunk Western Railroad Company and Central Vermont Railway. They urge on page 3 of their separate memorandum that the only connection with the defamation allegations which has been so far adduced is the mere "mute membership" of each petitioner in two of the rail associations named as defendants, and that, hence, the rate reduction is the dominant issue as to them. They cite *United States v. Food and Grocery Bureau of Southern California,* 43 F. Supp. 966, 973 (S. D. Calif. 1942), to establish the principle that mere mute membership in an association charged with an unlawful criminal conspiracy will not impose liability upon a member. This would seem to be in accordance with the general principles of conspiracy law discussed above. Some degree of knowledge and consent to the conspiracy or some kind of knowing assistance given in furtherance of it is usually required to impose liability.

In their brief, these defendants simply deny any other connection with the alleged defamation conspiracy except "mute membership" in railroad associations which are defendants in the case and base this denial on certain answers to interrogatories. On page 3 of their memorandum it is said:

> ". . . Indeed, after almost four years of pleading and discovery procedures the only nexus relating the undersigned defendants to the alleged conspiracy is their membership in several railroad associations to whom Riss has imputed leadership in this supposed campaign of defamation. These two railroads were members of the Association of American Railroads and the Eastern Railroad Presidents Conference, and the Grand Trunk Western Railroad Company belonged to the Traffic Executive Association—Eastern Railroads (Central Vermont Railway, Inc., did not). However, no officer or employee of either railroad served as an officer in any of the associations."

[*Hearing Evidence Before Dismissal*]

The Court is asked to accept the above statement at this stage of the case for the purpose of granting their motion to suspend proceedings as to them and refer the rate reduction issue to the Commission apart from the disposition of the motion with respect to the other defendants. However, this was not the question before Judge Yankwich in the *Food and Grocery* case which was particularly relied upon by defendants in this motion. That case does not stand for the proposition that allegations of membership in an association charged with a conspiracy, without more, warrants a dismissal of that party from the case before the Court has had an opportunity to hear the evidence. The statements relied upon by defendants were made by Judge Yankwich in connection with motions by various defendants to dismiss at the close of the government's case. The charges were dismissed as to some defendants after the government had presented its entire case because the Court was satisfied that the evidence had failed to establish consent to or participation in the alleged conspiracy. The Court approves of this procedure. If it appears at the end of plaintiff's case that the evidence does not adequately connect any defendant with the charges contained in the complaint, then a motion for a directed verdict as to such defendant may be entertained.

However, just as the Court could not logically dismiss defendants from the case at this point because it is not yet aware of what the evidence may show at trial, in like manner, it would not be proper to assume that these two defendants had little or no connection at all with the alleged defamation conspiracy in order to reach the conclusion that the rate reduction issue is the sole or dominant issue as to them. Besides, it is a well-settled principle of conspiracy law that a defendant may be held fully liable for the consequences of a conspiracy even though its degree of participation may turn out to have been somewhat less than that of other defendants.

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[*Unnecessary Delay*]

The very sound judicial policy against dealing with litigation piecemeal also militates against defendants' position. Since the court could not proceed with the trial until the Interstate Commerce Commission had an opportunity to take action, unnecessary delay would result in this long-delayed case if the defendants' motion to suspend were granted.

Conclusion

[*Motions Denied*]

The order of this Court dated May 26, 1958, denying the motion by certain railroad defendants to suspend proceedings in this case and to refer certain issues to the Interstate Commerce Commission for determination is hereby vacated.

For the reasons set forth in the above opinion, and in conformity with the orders of the United States Court of Appeals for the District of Columbia Circuit dated August 8, 1958 and December 16, 1958, the Court makes the following rulings:

1. The motion of defendant railroads to suspend proceedings and to refer certain issues to the Interstate Commerce Commission as supported by the memorandum on behalf of all movants filed September 29, 1958 as well as by the supplemental memorandum on behalf of Atlantic Coast Line Railroad Company, et al., filed September 29, 1958, is hereby denied.

2. The motion of defendants Central Vermont Railway, Inc., and Grand Trunk Western Railroad Company to have proceedings suspended as to them is hereby denied.

Counsel for plaintiff will submit an appropriate order in accordance with this opinion.

[¶ 69,245] United States v. Maryland and Virginia Milk Producers Association, Inc.

In the United States District Court for the District of Columbia. Civil Action No. 4482-56. Dated January 14, 1959.

Case No. 1309 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies in District of Columbia—Sherman Act, Section 3—Agricultural Organizations—Exemptions Under Clayton Act, Section 6—Acquisition of Non-Agricultural Organization—Foreclosure of Competition.—An association of milk producers violated Section 3 of the Sherman Act by acquiring the assets of a dairy. The acquisition resulted in an unreasonable restraint of trade and in the foreclosure of competition in respect to Government contracts and purchases of milk from milk producers. The court found that the transaction was entered into with the intent and purpose of restraining trade, although such a finding was not necessary in order to reach the conclusion of law that the antitrust laws have been violated. It is unreasonable *per se* to foreclose competitors from any substantial market. The acquisition was not within the statutory immunity afforded to agricultural cooperatives under Section 6 of the Clayton Act because the transaction involved the making and carrying out of a contract with a retail milk outlet, an organization not engaged in agricultural pursuits. While some cases involving labor union transactions tended to support the association's contention that the statutory immunity is lost only when the transaction results in a competitive advantage to the party not clothed with the immunity, labor unions have certain privileges under other statutes that are not accorded to agricultural cooperatives. Transactions involving labor unions are therefore governed by somewhat different principles.

See Combinations and Conspiracies, Vol. 1, ¶ 2051.600, 2115, 2247.

For the plaintiff: Joseph J. Saunders, Edna Lingreen, Joseph E. Waters, and A. Duncan Whitaker, all of the Department of Justice, Washington, D. C.

For the defendant: Herbert A. Bergson, William J. Hughes, Jr., Daniel H. Margolis, Daniel J. Freed, and Nicholas J. Chase, all of Washington, D. C.

For prior opinions of the U. S. District Court, District of Columbia, see 1958 Trade Cases ¶ 69,161 and 69,197.

Opinion

[*Separate Causes of Action*]

ALEXANDER HOLTZOFF, District Judge [*In full text*]: As has been heretofore indicated, the complaint in this civil action brought by the United States against the Maryland and Virginia Milk Producers Association, Inc., under the antitrust laws, is in effect divided into three separate claims for relief or causes of action.

[*Prior Proceedings*]

At the first section of the trial, the Court upheld the defense of immunity to the first cause of action, in that the defendant, being an agricultural cooperative, was immune from the antitrust laws unless and except when it entered into transactions with persons or organizations that themselves did not possess such immunity, that is, were not agricultural cooperatives.

The trial then proceeded as to the third cause of action, which was predicated on the Clayton Act. That section of the trial concluded with a decision in favor of the Government to the effect that the transaction involving the acquisition by the defendant of Embassy Dairy, Inc., was a violation of Section 7 of the Clayton Act, and with a decision in favor of the defendant in respect to similar acquisitions of Richfield and Wakefield Dairies.

[*Sherman Act, Section 3*]

The Government then requested that the Court proceed to a decision under the second cause of action, which also attacked the Embassy Dairy transaction, but based the attack on the Sherman Act, instead of on the Clayton Act. It was stipulated that the case, insofar as this cause of action was concerned, would be submitted on the same record as that before the Court at the trial on the first and third causes of action.

[*Findings of Fact*]

The Court, therefore, readopts the findings of fact that it has heretofore made. In addition, it is going to make a few additional findings, largely of the nature of ultimate findings based upon the evidentiary findings heretofore made. First, the Court finds as a fact that the result of the transaction complained of was a foreclosure of competition, in respect to Government contracts and in respect to purchases of milk from milk producers. The Court further finds as a fact that the transaction complained of was entered into with the intent and purpose of restraining trade. In the light of the decision of the Supreme Court in *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100, 105, the Court does not regard it as necessary to find a specific intent to restrain trade in order to reach the conclusion of law that the antitrust laws have been violated. Nevertheless, the Court does make hereby such a finding of fact. The Court further concludes that an unreasonable restraint of trade, violative of the Sherman Act, has resulted from the acquisition of Embassy Dairy by the defendant.

[*Agricultural Cooperatives*]

It has been urged in behalf of the defendant that the transaction involved in this case is within the immunity accorded to agricultural cooperatives. The basis of this argument is that the doctrine that bans immunity in respect to transactions entered into between agricultural cooperatives and organizations that are not such cooperatives should be limited to such transactions as result in a competitive advantage to the other party, that is, the party which is not clothed with the immunity.

The Court does not find any authoritative basis for such a distinction. The general doctrine limiting the immunity in the manner heretofore stated was formulated and enunciated by the Supreme Court in *United States v. Borden Co.* [1932-1939 TRADE CASES ¶ 55,250], 308 U. S. 188, 204. There is nothing in that case intimating that any such limitation as is now suggested should exist. This Court finds no authoritative or binding expression formulating such a qualification.

[*Labor Unions*]

True, some expressions are cited from a number of District Court cases involving transactions of labor unions, which tend to support the reasoning advanced on behalf of the defendant in this respect. Entirely aside from the fact that those expressions are not binding on this Court, it must be noted that the decisions involving labor union transactions are governed by a somewhat different principle than those that apply to agricultural cooperatives. To be sure, the same provision of law grants an immunity from the antitrust laws to agri-

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cultural cooperatives as to labor unions. In addition, however, other statutes, such as the Norris-La Guardia Act, the National Labor Relations Act, and the Labor-Management Act, add certain further privileges to labor unions that are not accorded to agricultural cooperatives. It necessarily follows, therefore, that decisions involving labor unions are not necessarily apposite as to this point when an agricultural cooperative is involved.

In this connection, it is appropriate to call attention to the decisions of the Supreme Court in *United States v. Hutcheson* [1940-1943 Trade Cases ¶ 56,091], 312 U. S. 219, and in *Allen Bradley Company v. Local Union No. 3* [1944-1945 Trade Cases ¶ 57,386], 325 U. S. 797, 806, in which it was held expressly that:

> "The Sherman, Clayton and Norris-La-Guardia Acts must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the Anti-trust legislation."

Naturally, an agricultural cooperative can derive no benefit from the statutes relating to labor unions.

[*Transaction Not Immune*]

The Court, therefore, reaches the conclusion that the statutory immunity accorded to agricultural cooperatives does not apply to the transaction here involved.

[*Foreclosure of Competition*]

In respect to the main issue here presented for decision, it has been held by the Supreme Court that it is unreasonable *per se* to foreclose competitors from any substantial market. *International Salt Co. v. United States* [1946-1947 Trade Cases ¶ 57,635], 332 U. S. 392, 396; *United States v. Griffith* [1948-1949 Trade Cases ¶ 62,246], 334 U. S. 100, 107. In addition, the case of *United States v. Yellow Cab Co.* [1946-1947 Trade Cases ¶ 57,576], 332 U. S. 218, generally supports the conclusion that is being reached here.

[*Sherman Act Violated*]

The Court concludes that the transaction involving the acquisition of Embassy Dairy by the defendant constitutes a violation of Section 3 of the Sherman Act.

This oral opinion will constitute the findings of fact and conclusions of law. Counsel will prepare a judgment in accordance with the ruling and in the form indicated in the opinion rendered in this case on November 21, 1958.

[¶ 69,246] Habif v. Maslia, et al.

In the Supreme Court of Georgia. No. 20264. Decided January 12, 1959.

Georgia Antitrust Laws

Combinations and Conspiracies Under State Antitrust Laws—Contract Not to Compete with Business of Former Partner—Legality.—In an action seeking to enjoin a former partner from engaging in any business involving the sale and servicing of automotive motors or transmissions, an agreement by the former partner that he would not engage in such a business within twenty miles of a specific address in Atlanta, Georgia, for a period of three years after dissolution of the partnership was held valid and enforceable. Although contracts in general restraint of trade are void under Georgia law, the restrictive covenant in the instant case concerned a useful and lawful business, was only in partial restraint of trade, and was reasonably limited as to time and place.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.12.

For the plaintiff in error: Samuel L. Eplan and Charlie Franco, both of Atlanta, Ga.

For the defendants in error: David Gershon, Atlanta, Ga.

[*Syllabus*]

By the Court: Since there was no issue as to the facts and the denial of the interlocutory injunction was based upon an erroneous interpretation of the law as to the effect of the partnership dissolution agreement, the judgment denying the interlocutory injunction was erroneous.

[*Exception to Judgment*]

The exception is to a judgment of the Superior Court of DeKalb County entered at an interlocutory hearing on a petition brought by the plaintiff Morris N. Habif against Henry Maslia and Fulton Motor Exchange, Inc., seeking to enjoin the defendants from engaging in any business involving the sale and servicing of automotive motors, transmissions, or other motor or transmission parts.

[*Judgment*]

The judgment ordered:

"(a) That the application for the restraining order is based upon a restrictive covenant set out in a partnership agreement between the plaintiff and the defendant, Henry Maslia, dated May 23rd, 1956; that subsequently thereto there was a partnership dissolution agreement between these same parties dated June 13th, 1957, in which there was a restrictive covenant only binding the plaintiff, Morris N. Habif. The court, being of the opinion that the terms and conditions of the partnership agreement of May 23rd, 1956, insofar as any restrictions against the said Maslia after the termination of the partnership were concerned, are merged into the partnership dissolution agreement of June 13th, 1957, it is therefore ordered that the General Demurrer of the plaintiff to the defendant's answer is hereby overruled.

"(b) It is the further order of the court that the application of the plaintiff for a restraining order is hereby denied, based upon the same grounds as are heretofore provided in the foregoing paragraph."

[*Agreement Not to Engage in Business*]

The restrictive covenant in the agreement creating the partnership provided: "In the event that this partnership is dissolved, Maslia hereby agrees not to go into, either as principal or agent, any business involving the sale or servicing of automotive motors, transmissions, or other parts, nor to be employed by or permit his name to be used in the operation of said type of business within a twenty-mile radius of 312 Spring Street, N. W., Atlanta, Ga., for a period of three years following such dissolution."

[*Dissolution of Partnership*]

The agreement dissolving the partnership contained a covenant restricting the plaintiff Habif from engaging in the muffler business, ". . . within twenty (20) miles of 197 Piedmont Avenue, N. E., Atlanta, Georgia, 632 North Main Street, East Point, Georgia, and 1922 Roswell Street, Marietta, Georgia, for a period six (6) months from the date of this HM instrument." In their separate, but identical, answers, the defendants pleaded that the provisions in paragraph five of the dissolution agreement, "It is agreed that the partnership heretofore existing between the parties hereto be, and the same is, hereby dissolved, and that this agreement constitutes a full and complete accounting and liquidation of said partnership business, and the party of the first part acknowledges that he has no claim or demand of whatsoever kind or nature against the party of the second part, and the party of the second part acknowledges that he has no claim or demand of whatsoever kind or nature against the party of the first part," constitutes an accord and satisfaction of all obligations of the defendant Maslia under the original agreement and that all obligations therein imposed upon him, including the restrictive covenant, are extinguished. It was as to these allegations as to accord and satisfaction in the answers that the plaintiff demurred. The demurrers were overruled by the court.

[*Violation of Covenant*]

The evidence at the interlocutory hearing was undisputed that the defendant Maslia was president of the defendant Fulton Motor Exchange, Inc.; that he owned fifty per cent of the stock; that his wife and mother-in-law owned the balance of the stock; that he directed the activities of the corporation; and that he and the defendant Fulton Motor Exchange, Inc., were engaged in the business which he was prohibited from entering by the restrictive covenant of the original partnership agreement and were operating within the forbidden area.

[*Limitations as to Time and Place*]

MOBLEY, Justice [*In full text*]: Although contracts in general restraint of trade are void (Code § 20-504), where, as here, the restrictive covenant of the partnership agreement concerns a useful and lawful business, is only in partial restraint of trade, and is reasonably limited as to time and place, it is valid and enforceable. *Aladdin, Inc. v. Krasnoff* [1958 TRADE CASES ¶ 69,167], Case No. 20209, and cases cited.

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[*Issue*]

The issue presented is whether the restrictive covenant in the original partnership agreement limiting the defendant Maslia's business operations after dissolution of the partnership was cancelled or rendered of no force or effect by the dissolution agreement. In our opinion, it was not. The dissolution agreement, after reciting that the parties were doing business under the firm names "Motor Exchange Service" and "Muffler Service Company" under their partnership agreement, recited further: "WHEREAS, it is the desire of the parties hereto to finally settle and dissolve the businesses and affairs of the partnership as between these parties . . ." and followed with the terms and conditions of the settlement of the partnership business and affairs. The purpose of the agreement as stated therein was to settle the affairs of the partnership business. It dissolved the partnership, provided that the agreement constituted a full and complete accounting and liquidation of the partnership business, and contained an acknowledgment by each of the parties that he had no further claim or demand of any kind against the other. The construction of the contract is a question of law for the court (Code § 20-701), and the whole contract should be looked to in arriving at the construction of any part. Code § 20-704(4). Construing the contract in its entirety, we conclude that the acknowledgment by each of the parties that he had no claim or demand of any kind against the other referred to claims or demands arising out of the partnership business. The dissolution agreement simply settled the affairs of the partnership as between the parties. It obviously had no reference to the restrictive covenant of the original partnership agreement. That provision had no bearing on the conduct of the partnership business. It came into effect only upon the dissolution of the partnership. It was not one of the matters to be settled, agreed upon, liquidated or otherwise dealt with in settling the partnership business. An acknowledgment by the parties that the dissolution agreement constituted a full liquidation and accounting of the partnership business would not encompass this restrictive covenant, it not being any part of said business. Nor would the acknowledgment that each had no further claim or demand upon the other include anything other than those growing out of the partnership business.

[*Purpose of Agreement*]

The record clearly indicates that the plaintiff Habif took the defendant Maslia into his going business, making him a partner thereof, and that the purpose of the restrictive covenant was to prevent Maslia, upon dissolution of the partnership, from engaging in the same business for a period of three years in the area in which the business was operated; and that, during the operation of the partnership business, they developed a muffler business and a restrictive covenant was placed in the dissolution agreement for the purpose of preventing the plaintiff Habif from competing with the defendant Maslia in the muffler business. With this provision in the dissolution agreement and with the original restrictive covenant in the partnership agreement, each of the parties was restricted from engaging in the business that each retained upon dissolution of the partnership.

[*Accord and Satisfaction*]

The dissolution agreement did not constitute an accord and satisfaction of, or otherwise nullify, the restrictive covenant in the partnership agreement. The trial court erred in overruling the plaintiff's general demurrer to the defendants' answers.

[*Judgment Reversed*]

Since there was no issue as to the facts and the denial of the interlocutory injunction was based upon an erroneous interpretation of the law as to the effect of the partnership dissolution agreement, the judgment denying the interlocutory injunction was erroneous. *Ballard v. Waites,* 194 Ga. 427, 429 (2) (— S. E. 2d —) and cases cited.

Judgment reversed. All the Justices concur.

[¶ 69,247] **W. A. Elliott and I. L. Elliott, his wife; Madeline O'Larte; Rita Stoermer; Lester Callaghan; Theresa Callaghan, Jr.; Samuel A. Hanson and Vesta C. Hanson, his wife; Mabel George; Mary Mathilda Lawrence; Marie Hanson; Nancy Rampone Sarmento; Mary W. Robbins and D. L. Robbins, her husband; Wilma C. Barr and G. H. Barr, her husband; Josephine C. Cordell and L. A. Cordell, her husband; Thirteenth Doe to Fiftieth Doe, inclusive; and others similarly situated v. Amerada Petroleum Corporation; Standard Oil Company of California; The Superior Oil Company; The Texas Company; Natural Gas Corporation of California; Monterey Oil Company; Pacific Gas and Electric Company; Tracy Drilling Corporation; Red and Green Corporation; John Doe and Jane Doe, his wife; and Richard Roe.**

In the Superior Court of the State of California in and for the County of Solano, Department No. 2. No. 30636. Dated January 8, 1959.

California Antitrust (Cartwright) Act

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Rule of Reason—Applicability of Sherman Act Case Law.—Cases decided under the Sherman Act and at common law are applicable to cases arising under the Cartwright Act, except that federal cases under the Sherman Act decided subsequent to the enactment of the Cartwright Act cannot determine the meaning of terms employed in that Act—they are persuasive only. In those areas where there appear to be differences of opinion between the California appellate courts and the federal courts, a state trial court must take the position adopted by the California courts. The decisions of the California courts are explicit to the effect that the Cartwright Act, like the Sherman Act, is a codification of the common law and that plaintiffs in a private action must state a case actionable under the rule of reason. Therefore, generally the Cartwright Act may not be taken literally but must be interpreted in the light of the rule of reason.

See Combinations and Conspiracies, Vol. 1, ¶ 2429.05.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Rule of Reason—Applicability of Rule to Business Affected by Public Interest.—In a private damage action, the contention that the rule of reason does not apply in cases involving a business affected by the public interest, such as a gas utility, was rejected. In the instant case, the existence of a gas company as a legal monopoly eliminated the concept of competition among sellers of gas. That which remained to the public interest was to insure that a plentiful supply of gas at the lowest possible cost was obtained by the company and in turn sold to the public at the lowest possible cost. It was the constitutional function of the state utilities commission to see that this process was accomplished. Consequently, it would be foolhardy to strike down any challenged contract on the ground that it was contrary to the literal terms of the Cartwright Act without examining into its apparent effect on the economy in the light of the circumstances.

See Combinations and Conspiracies, Vol. 1, ¶ 2383.05, 2429.05.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Rule of Reason—Applicability of Rule to Limitation on Production.—A limitation on production is not illegal per se under the Cartwright Act. The rule of reason is applicable, and such a restraint must be appraised from the viewpoint of its effect in the light of all of the circumstances to see if it is unreasonable.

See Combinations and Conspiracies, Vol. 1, ¶ 2429.05.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Procedure—Private Suit—Availability of Injunctive Relief.—Injunctive relief is not available to a private litigant under the Cartwright Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2421.05.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Procedure—Private Suit—Indispensable Parties.—In a private damage action, a natural gas company and federal and state regulatory agencies were not indispensable parties because their interests, rights, or duties would not inevitably be affected by any judgment which could

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be rendered in the action. One of the defendants in the action could respond in damages without inevitably affecting the interests of the suggested additional parties.

See Combinations and Conspiracies, Vol. 1, ¶ 2425.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Procedure —Private Suit—Pleading—Contradictions in Complaint.—Plaintiffs in a private damage action could not in one breath attribute all of the responsibility for the evils of which they complained to one of the defendant's alleged arbitrary use of monopoly power and in the next attribute the same evils to a combination and conspiracy among all of the defendants, at least in the absence of pleading such specific facts as would explain the apparent inconsistency. Another contradiction appeared in that the plaintiffs showed that they bargained away the rights to sell and produce gas which they alleged the defendants had conspired to prevent them from exercising.

See Combinations and Conspiracies, Vol. 1, ¶ 2425.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Procedure —Private Suit—Pleading—Public Injury.—To state a private cause of action under the Cartwright Act, it is necessary to demonstrate public injury. The Cartwright Act, like the Sherman Act, in allowing multiple damages to private individuals, seeks only the more effective enforcement of prohibitions against practices which cause public injury. In the instant action, the plaintiffs had not pleaded sufficient facts from which the public injury necessary to state a cause of action could be inferred. An allegation to the effect that alleged unlawful restrictions discouraged the exploration for and development of gas properties was insufficient; it was not the kind of public injury which is contemplated by the Act. The kind of public injury designed to be prevented is the kind delineated at common law and set forth in the *Apex Hosiery* case, 1940-1943 Trade Cases ¶ 56,039, 310 U. S. 469, as "agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or customers the advantages which accrue to them from free competition in the market."

See Combinations and Conspiracies, Vol. 1, ¶ 2425.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Procedure —Private Suit—Damages—Proximate Cause—Target Area.—To recover double damages under the Cartwright Act, (1) the plaintiff's injury must have been proximately caused by the restrictions in trade carried out by the conspirators, and (2) the plaintiff must, himself, be in the same category of business or occupation as those in the unlawful combination and conspiracy, that is, be in the target area of the conspiracy. In the instant action, it appeared that the plaintiffs were neither producers nor sellers of natural gas as the defendants, but had such rights only as were reserved to them through leases. Assuming that the plaintiffs hurdled the proximate cause obstacle, they had not pleaded themselves within the target area in the sense prescribed by the California rules.

See Combinations and Conspiracies, Vol. 1, ¶ 2403.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Procedure —Private Suit—Class Action.—Owners of certain mineral rights appurtenant to their properties situated in a gas field could not maintain a class action on behalf of all similarly situated owners of lands overlying the gas field. The minimum requirements of a class action are that (1) there must exist a well-defined community of interest in questions of law and fact between those bringing the action and those claimed to be represented, and (2) the suing and non-suing groups must constitute a definitely ascertainable class. They could not represent owners similarly situated on the theory that they were entitled to represent them as co-tenants. Since the property of the owners differed, there was not a sufficient community of interest among all those whom the plaintiffs sought to represent. Each of the owner's rights and liabilities would turn on a variety of factors, legal and factual, peculiar to himself. It would be unfair to assume that the owners' interests would be properly protected in a class action or to force them in as plaintiffs or defendants.

See Combinations and Conspiracies, Vol. 1, ¶ 2425.

Combinations, Conspiracies, and Monopolies Under State Antitrust Laws—Procedure—Private Suit—Pleadings—Permission To Amend Complaint.—Plaintiffs were permitted to amend their complaint, which had been held insufficient, where their action had a history of some three years, and, taking into consideration a companion suit filed in a federal court, the last complaint constituted the plaintiffs' seventh pleading.

See Combinations and Conspiracies, Vol. 1, ¶ 2425.

For the plaintiffs: Clifton Hildebrand of Hildebrand, Bills and McLeod; Reginald G. Hearn; Leo C. Dunnell; K. I. Jones; Julian Caplan; Dodge and Evans; and Aldo P. Guidotti.

For the defendants: Harold A. Black, of McCutchen, Black, Harnagel and Greene, for Amerada Petroleum Corp.; Turner H. McBaine, of Pillsbury, Madison and Sutro, for Standard Oil Co. of Cal.; Julian O. von Kalinowski, of Gibson, Dunn and Crutcher, for The Texas Co.; Frederick W. Mielke, Jr., and O'Hara, Randall and Castagnetto for Natural Gas Corp.; John F. Runner for Monterey Oil Co.; Angell and Adams for Tracy Drilling Corp.; and John H. Blake, of Hanna and Morton, for Superior Oil Co.

Memorandum of Opinion and Order

[*State Antitrust Charges*]

RAYMOND J. SHERWIN, Judge [*In full text*]: In this action the several defendants opposed general and special demurrers and motions to strike to the plaintiffs' Third Amended Complaint. The case has a history of some three years and, taking into consideration the companion suit filed in the Federal District Court, since dismissed, this constitutes the plaintiffs' seventh pleading. The parties have been most generous with words and to avoid unnecessary addition thereto, the following will be as brief as possible and is not intended to accomplish more than to indicate to counsel the Court's views on the various contentions of the parties.

Insofar as it can be perceived, the essence of the plaintiffs' complaint for double damages under the Cartwright Act is that the plaintiffs claim to be the owners of certain mineral rights appurtenant to their properties situated in the Rio Vista gas fields; that for three years next preceding the filing of the action, the Pacific Gas & Electric Company has, by previously completed mergers and acquisitions, constituted itself as the only buyer of natural gas in Northern California and as such arbitrarily forced the sellers thereof to accept such prices as are dictated by Pacific Gas & Electric Company, and has by contract with El Paso Natural Gas Company agreed to import 77% of its requirements from out of the State and as a corollary thereto, exacted as a condition of purchase from Rio Vista the power to determine such limits as it chooses on the quantity taken from Rio Vista; that all of the defendants have combined and conspired unreasonably to limit the production of gas owned by the plaintiffs and from the whole Rio Vista field to a fraction of its potential commercial production, to take from plaintiffs the right to sell gas in a free and competitive market, and to prevent plaintiffs from selling any gas in quantities other than defendant Pacific Gas & Electric would buy; further, that the defendants have reduced the overall production and thereby the value of the plaintiffs' mineral interest by various improper and illegal production methods such as the irregular, unscientific opening and closing of wells, the irregular spacing of same, the illegal drainage of gas from some properties by wells on others, by maintaining an inadequate number of wells, by insufficient exploration and by the elimination of competition for the purchase and transportation thereof; that these practices are contrary to the public interest because they reduce the value of plaintiffs' royalty interest as landowners, discourage the exploration and development of the gas fields, and because the restriction of supply is detrimental to the price and services the public can get; that the plaintiffs are specially damaged because the plaintiffs' property is capable of producing two million cubic feet per day at a price of 36¢ per thousand cubic feet, or $32,850.00 worth per year, but they actually receive only the minimum rental of $1,800.00 per year.

The second cause of action set forth by the plaintiffs is the same as the first except for different parties plaintiff.

In the third cause of action, the named plaintiffs, on behalf of themselves, and on behalf of certain others whose lands are alleged to be similarly situated with respect to productive capacity, whom the plaintiffs purport to represent as tenants in common, complain that the defendants arbitrarily and without the plaintiffs' authority or the authority of any regulatory

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body placed them into a unit operation whereby all landowners are paid on the basis of the ratio of their acreage to the total acreage of the unit, so that the plaintiffs' lands are being drained for the benefit of the less productive lands and the latter are receiving royalties which plaintiffs ought to be getting. The plaintiffs ask the compulsory joinder of other landowners in the unit either as plaintiffs or defendants so that the interests of each may be adjudicated.

The fourth cause of action is similar to the first; the fifth is similar to the third; the sixth and seventh are similar to the first; the eighth is similar to the third and fifth; and the ninth cause of action purports to be a class action and asks that all persons having interests in the Rio Vista gas fields be brought in so that their correlative rights may be ascertained.

[*Relief Sought*]

The general prayer is for double damages; however, in the fifteenth paragraph of the first cause of action, plaintiffs ask the Court to exercise its injunctive powers to restrain the defendants from monopolizing the purchase and production of gas and from continuing with the pooling and unitization agreements currently in effect which limit the production of and competition in the production and sale of gas.

[*Pleading*]

Before undertaking to deal with the specific grounds of the defendants' demurrers and motions, some preliminary observations are in order. The complaint is lengthy and replete with conclusions of law, statements of economic theory, and argumentative matter. Presumably by way of justification the plaintiffs devote some argument to the proposition that this State, in adopting discovery, has also adopted Federal theories and rules of pleading. But, even in the Federal Courts, a tendency on the part of the trial courts most frequently confronted with anti-trust cases to require the pleadings to state the issues concisely so as clearly to outline the issues is observable. (See, for example, *New Dyckman Theater Corp. v. Radio Keith-Orpheum Corp.* [1954 Trade Cases ¶ 67,853], 16 FRD 203; *Baim and Blanking v. Warren-Connelly Co.*, 22 FR Service, '56; *Erone Corp. v. Skouras Theater Corp.*, 22 FR Service 59.) More to the point, there is no hint in any of the California decisions that the courts are free to ignore the traditional statutory requirements governing proper pleading. To adopt the Federal rules would be a radical innovation, and I am satisfied that had the Legislature intended to do so it would have enacted specific legislation rather than merely leaving the matter to inference.

The arguments of the parties on the merits will now be considered in the order in which they were presented.

1. Omission of Indispensable Parties

The Pacific Gas & Electric Company argues that unless the plaintiffs intended to include Pacific Gas & Electric Company in the plural term "defendants" as the same is used throughout the complaint, the only allegation involving Pacific Gas & Electric Company is that in view of its monopoly situation its contract with El Paso requires it to import too much gas from out of the State and take too little from the Rio Vista field, from which situation the plaintiffs ask injunctive relief. Pacific Gas & Electric Company points out that in the original complaint and First Amended Complaint, plaintiffs in this connection complained only that the Pacific Gas & Electric Company had constituted itself as monopoly and sole purchaser of natural gas, again, unless Pacific Gas & Electric Company was intended to be included in the loose term "defendants" throughout. It was after a demurrer was sustained per stipulation that the plaintiffs added to their complaint the allegation that Pacific Gas & Electric Company brings in too much El Paso gas and takes not enough Rio Vista gas, brought in El Paso as a party defendant, and filed their suit in the Federal Court. They have not named El Paso as a defendant here, and Pacific Gas & Electric Company contends that El Paso is an indispensable party to this action.

It may well be that if this were a proper action for injunctive relief Pacific Gas & Electric Company's contentions would be correct. A restraining order would present limited alternatives to this defendant, of which alternatives it sees only one. It contends that if the Pacific Gas & Electric Company is forced to take more gas at a steady rate from Rio Vista it must take less from El Paso, which in turn would run

head on into the orders of the State and Federal Utilities Commissions. These administrative agencies have sanctioned the importation of given quantities of gas from El Paso which could not be varied from without their permission. However, it is conceivable that other alternatives exist, such as the purchase or lease of wells for natural storage, the construction of artificial storage, or the wastage of gas. Since the latter is unlawful, the alternatives are limited indeed. However, consideration of this aspect of the case is simplified by a fact which has not been alluded to by either party; *viz,* that injunctive relief is not available to a private litigant under the Cartwright Act. (*Overland Publishing Co. v. Union Lithograph Co.,* 57 C. A. 366.) Thus, the real question is whether El Paso and the regulatory agencies are indispensable parties where plaintiffs' recovery can be in the form of damages only. It appears that indispensable parties are only those "'. . . whose interests, rights, or duties, will inevitably be affected by any decree which can be rendered in the action . . .'" (See *Witkin, California Procedure,* pp. 317, 318). Since Pacific Gas & Electric Company could respond in damages without inevitably affecting the interests of the other suggested parties, I am of the opinion that they are not indispensable.

2. Exhaustion of Administrative Remedies; Doctrine of Primary Jurisdiction

The argument in support of the demurrer on the grounds that the plaintiffs must first litigate their claims before the California Public Utilities Commission and the parallel Federal agency stems from the assumption that Pacific Gas & Electric Company's contract with El Paso must be attacked. The validity of the argument depends on the validity of the premise and requires no further discussion at this point.

3. The Internal Contradictions in the Complaint

The defendants which are the companies producing gas from the Rio Vista gas field argue that plaintiffs' assertion that the Pacific Gas & Electric Company, having acquired its monopoly position as the purchaser of gas, used its power arbitrarily to control prices, manner of production, and limitation of production is fatally contradictory to the statement that the "defendants" have combined to do these things.

As a guide to the analysis of pleadings, it is held that generalized conclusions must give way to such specific facts as are pleaded. (*Little v. Union Oil Co. of California,* 73 C. A. 612; *Denman v. City of Pasadena,* 101 C. A. 769.) Also, since the pleader is assumed to have pleaded his case as strongly as possible in his own favor, it is only proper to accept as true those specific facts pleaded which bear most strongly against him. (*Faulkner v. California Toll Bridge Authority,* 40 Cal. (2) 317; *Beatty v. Pacific States S. & L. Co.,* 4 C. A. (2) 692.) As is said in the *Denman* case, *supra*:

> "It is argued that the averment that 'the said defendants' *caused* the grandstand to be constructed and to remain in a dangerous condition is broad enough to include the Tournament Association, its officers and members. But this allegation follows the paragraphs which are definitely tied down to the City of Pasadena and its officers, and the expression 'said defendants' has no reference to the association, its officers or members. Furthermore, this general averment is in direct conflict with the pleading that the defendant Lockwood 'caused' this particular grandstand to be erected 'for his own pecuniary benefit and profit and had the right and authority to control the construction, use and seating capacity thereof.' Here again the averment of specific facts must control over the general conclusions of the pleader. Taking these allegations together it is apparent that the pleader means that the association by staging the festival and inviting guests to witness the parade offered an inducement to Lockwood to obtain pecuniary profit by constructing the grandstand, but that the latter did this for his own benefit and had sole supervision and control over it. Here again these respondents are merely charged with the remote cause of the injury to appellant while the proximate cause is definitely laid to others over whom these respondents had no control."

Following these rules in the instant case, the plaintiffs may not in one breath attribute all of the responsibility for the evils of which they complain to Pacific Gas & Electric Company's arbitrary use of its monopoly powers and in the next attribute the same evils to a combination and conspiracy among all of the defendants, at least in absence of pleading such specific facts as will explain the apparent inconsistency. (*Hoekler v.*

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Ward, 105 C. A. (2) 615). The reasons why this must be so will appear more clearly by inference, at least, in that section of this Order dealing with proximate cause and target area.

A further internal contradiction in the complaint appears in that the plaintiffs have set forth exhibits which show specifically that long ago they bargained away the rights to sell and produce gas which they now generally allege the defendants have conspired to prevent them from exercising.

4. Absence of a Showing of an Unreasonable Restraint of Trade.

It is the defendants' next argument that it is incumbent upon the plaintiffs to plead facts showing the defendants to be guilty of an unreasonable restraint of trade, which they say has not been done. The plaintiffs counter with the arguments that the defendants' combination to restrain production is in violation of the literal terms of the act and *ipso facto* illegal, but that even if this not be true, a limitation of production is a "per se" violation under the doctrine of the rule of reason.

In considering these arguments, it is to be observed that cases decided under the Sherman Act and at the Common Law are applicable to cases arising under the Cartwright Act (*Milton v. Hudson Sales Co.* [1957 Trade Cases ¶ 68,791], 152 C. A. (2) 418); except that Federal cases decided subsequent to the enactment of the Cartwright Act could not determine the meaning of terms employed in that Act but are persuasive only. (*Peo. v. Building Maintenance Association* [1954 Trade Cases ¶ 67,651], 41 Cal. (2) 719). It would seem to me to be true also that in those areas where there appear to be differences of opinion between the California Appellate Courts and the Federal Courts, this trial Court must take the position adopted by the California Courts.

The decisions of the California Courts are explicit to the effect that the Cartwright Act, like the Sherman Act, is a codification of the Common Law and that the plaintiffs must state a case actionable under the rule of reason. (*Speegle v. Board of Fire Underwriters* [1946-1947 Trade Cases ¶ 57,493], 29 Cal. (2) 34; *Rolley, Inc. v. Merle Norman Cosmetics* [1955 Trade Cases ¶ 67,937], 129 C. A. (2) 844). Therefore, generally the Cartwright Act may not be taken literally but must be interpreted in the light of the rule of reason. (*Milton v. Hudson Sales Co., supra.*)

The plaintiffs argue that with respect to businesses affected by the public interest, such as a gas utility, the rule of reason does not apply, citing *Coombs v. Burke,* 40 C. A. 8. In that case, the plaintiff's assignor, the Los Angeles Gas & Electric Company, sold defendants certain appliances pursuant [to] a contract which required the defendants to buy gas only from the plaintiff. In reaching its decision, the Court said that where a contract relates to a business affected with the public interest, since no restraint however partial can be tolerated, the Court will not inquire into or consider the extent of the restriction imposed, citing *Gibbs v. Consolidated Gas Co.,* 130 U. S. 396.

With respect to this case, it might be observed that the last quoted statement was unnecessary to the decision, since tying contracts have been struck down in innumerable situations. Secondly, the authority of the *Gibbs* case upon which the Court relied has been vitiated by the subsequent case of *Twin City Co. v. Harding Glass Co.,* 283 U. S. 353. Thirdly, quite a different impact upon the economy is apparent in the *Gibbs* case as compared to this one. In *Gibbs,* the challenged contract in effect prevented the public from getting the benefit of competition between sellers of gas. In this one, the existence of Pacific Gas & Electric Company as a legal monopoly eliminates the concept of competition among sellers of gas. That which remains to the public interest is to insure that a plentiful supply of gas at the lowest possible cost is obtained by Pacific Gas & Electric Company and in turn sold to the public at the lowest possible price. It is the constitutional function of the Public Utilities Commission to see that this process is accomplished. Consequently, it would be foolhardy for the Court to strike down any challenged contract on the grounds that it was contrary to the literal terms of the Cartwright Act without examining into its apparent effect on the economy in the light of the circumstances.

Finally, a mere cursory reading of cases arising under the Commerce clause since the *Gibbs* case will reveal an increasing comprehension on the part of the courts that virtually all businesses affect the public interest more or less. The difference is of degree, not of kind. Hence, to make the applicabil-

ity of the rule of reason depend on such a distinction is not sound.

The next leg of the plaintiffs' argument is that assuming the applicability of the rule of reason, a limitation of production is per se illegal. It is true that many cases, in discussing the type of arrangements which were frowned upon at Common Law, state that they consisted of agreements to limit production, fix prices, etc. (See for example, *Apex Hosiery v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469). However, the plaintiffs have failed to cite any cases, Federal or State, which actually *hold* that a limitation of production is per se a violation of Anti-Trust Statutes. Neither counsel nor Court have found any California cases specifically on the problem. The fact that there are Federal cases which say that the limitation of production is a per se violation is not surprising in view of the loose language habitually used in Anti-Trust cases. In the instances where the proposition had to be decided, however, it has been held that a limitation of production is a violation of the Act only as such limitation tends to or is intended to fix prices or otherwise unreasonably restrain competition. (*U. S. v. Aluminum Co. of America* [1944-1945 TRADE CASES ¶ 57,342], 148 Fed. (2) 416), and that a combination to limit production is subject to scrutiny under the rule of reason. (*Association of Window Glass Manufacturers v. U. S.*, 263 U. S. 403.) I hold that the rule of reason is applicable, and that the alleged restraints must be appraised from the viewpoint of their effects in the light of all the circumstances to see if they are unreasonable.

As to whether the limitation of production alleged in the instant case has any associated results, the plaintiffs say only, "the greater the supply the better price and service the public can expect to get." This is not an allegation which, even on a demurrer, the Court must accept as true and immutable without regard to circumstances. A digression in the discussion is imposed. Generally, conclusions of law (*Griffin v. Colusa Co.*, 44 C. A. (2) 915) and statements contradictory to facts of which the Court may take judicial notice (*Peo. v. Oakland Waterfront Co.*, 118 Cal. 234; *Chavez v. Times-Mirror Co.*, 185 Cal. 20; *Livermore v. Beal*, 18 C. A. (2) 535) are not accepted as facts which must be assumed to be true in considering a pleading to which a demurrer has been interposed. I would assume that the plaintiffs' allegations hereinabove quoted fall in the same category, for whatever might be thought of the validity of the venerable Scot's economic theory in a market in which the factors of supply and demand have full play, such is not the instant situation. The Court judicially notices that there is but one purchaser of natural gas from the Rio Vista fields, and plaintiffs do not attack the legality of its monopoly; that importations of gas by that single purchaser are necessary for the present and future convenience of the public, as determined by the appropriate administrative agencies; and that, as conceded by the plaintiffs in their argument, the only apparent effect on the rate structure of the evils complained of in the instant case when considered in relation to the compulsory steady flow of imported gas and the seasonal fluctuation in demand is perhaps to reduce the rate to the public. It is my opinion, therefore, that the plaintiffs have not stated facts sufficient to bring themselves within the rule of reason so as to state a cause of action under the Cartwright Act.

5. PUBLIC INJURIES

A corollary to the rule of reason proposition and embodied in it is the qualification that to state a cause of action under the Cartwright Act it is necessary to demonstrate public injury. To put this in other words, the Cartwright Act, like the Sherman Act, in allowing multiplied damages to private individuals seeks only the more effective enforcement of prohibitions against practices which cause public injury. It follows that it is the public injury which is the gist of the action. (*Milton v. Hudson Sales Corp, supra; Munter v. Eastman Kodak Co.*, 28 C. A. 660; *Chicago Board of Trade v. U. S.*, 246 U. S. 238; *Grogan v. Chaffee*, 156 Cal. 611; *D. Ghirardelli v. Hunsecher*, 164 Cal. 344.) In his argument, plaintiffs' counsel conceded the rule to be that public injury is the *sine qua non* of actions under the Anti-Trust Act, but argued that the instant restrictions are shown by the complaint are to have adequate public disadvantages in that they discourage the exploration for and development of gas properties. This allegation in the pleadings is at best argumentative and is bolstered by no facts showing it to be true. Moreover, it is not the kind of public injury which is contemplated by the Act. The kind of public injury designed to be prevented is the kind delineated at Com-

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mon Law and set forth in *Apex Hosiery v. Leader, supra,* as ". . . agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices which tend to raise prices or otherwise take from buyers or customers the advantages which accrue to them from free competition in the market." This statement was cited with approval in *Milton v. Hudson Sales, supra,* and *Schweizer v. Local Joint Executive Board* [1953 Trade Cases ¶ 67,620], 121 C. A. (2) 45. (See also *Rolley, Inc. v. Merle Norman Cosmetics, supra.*) The plaintiffs state, however, that the effect of *Mandeville Farms v. American C. S. Co.* [1948-1949 Trade Cases ¶ 62,251], 92 Lawyers Ed. 1328, 334 U. S. 219, is to establish that the sellers of a product may be the "public" as that term is used in the decisions on the anti-trust cases. I do not so read the case. It did establish that the Sherman Act did not confine its protection to consumers or to purchasers, but extended it to sellers. However, the majority opinion pointed out that the agreement had two effects, one upon the price received by the growers of sugar beets; the other, considering the nature of the industry, *to reduce competition in the interstate distribution of sugar.* A dissenting opinion was filed by Justice Frankfurter upon the basis that by amendment to the complaint the charge that the agreements affected prices of sugar in interstate commerce was omitted; but the majority decision in effect anticipated this dissent by stating that this amendment did not remove from the complaint numerous other allegations which they considered effectually repeated the charge in various forms.

To recapitulate, plaintiffs have not pleaded sufficient facts from which the public injury necessary to state a cause of action under the Cartwright Act can be inferred.

6. Proximate Cause and Target Area.

The defendants' demurrer incorporates the argument that the plaintiffs are not proper parties within the meaning of the Cartwright Act and have not shown damages of the nature recoverable thereunder. This argument poses a question which, like the controversy surrounding the application of the doctrine of the rule of reason and per se violations, is as yet seemingly unsettled. It appears from the early decisions that in the Federal Courts from the beginning there was a consciousness of the windfall features of the treble damage recovery together with a belief that a limit had to be drawn somewhere or businessmen would be faced with virtually unlimited liability. More recently, some of the courts have taken the attitude that Congress must have known what it was doing and have foreseen the possibilities of such liability but passed the Act anyway, because such liability would be created only by the defendants' wrongful acts; hence, the courts should not emasculate the Statutes and thereby encourage disregard for the law.

The existence of these opposing philosophies on the part of the several courts has produced unending confusion. In the effort to delineate limits of liability, the courts have attempted to define legal relationships in popular terms, which when subjected to critical analysis as to their import, turn out to be of little use as accurate criteria. For instance, in the lessor-lessee situation, it has been held that the lessor may not recover for the reason that he has not been injured in his "property", because it is the lessee, not the lessor, who has the "property". In the later Federal cases, like *Steiner v. 20th Century Fox* [1956 Trade Cases ¶ 68,304], 232 Fed. (2) 190, and more particularly *Congress Building Corporation v. Loews* [1957 Trade Cases ¶ 68,725, 68,799], 246 Fed. (2) 587, which appear to be moving towards a more liberal application of the Sherman Act, injury to the "property" of lessors in a percentage rental situation is found in the reduction of the lessor's rentals and damage to the reversion. In the *Steiner* case there was present also the allegation that by unlawful combination of the lessee with others the lessor was forced to grant options for renewals of the lease without adequate consideration. To subject the whole problem to Hohfeldian analysis would be salutary, but in cruder terms, the question is: How many sticks in the bundle of a person's rights in relation to property must he have before he may complain of damage to those rights under the Anti-Trust Act?

This is another area in which it appears that the law as it has evolved in the courts of the State of California has diverged from the later developments in some of the Federal courts referred to hereinabove. This Court is in no position to assume that the California Courts will adopt the viewpoint of the Federal Courts, even if their reasoning appears persuasive. From the California cases, two propositions emerge: (1) That to

recover double damages under the Cartwright Act the plaintiff's injury must have been proximately caused by the restrictions in trade or commerce carried out by the conspirators; and (2) The plaintiff must, himself, be in the same category of business or occupation as those in the unlawful combination and conspiracy; or to put it in other words, be in the target area of the conspiracy. (*Krigbaum v. Sbabaro*, 23 C. A. 427; *ABC Distributing Corp. v. Distillers Distributing Corp.* [1957 TRADE CASES ¶ 68,844], 154 C. A. (2) 175.)

In *Krigbaum v. Sbabaro, supra*, the plaintiff, a real estate broker, alleged that he had secured a purchaser for certain wine grape lands for a client; that pursuant a conspiracy by the defendants to monopolize the manufacture and sale of wines, they frustrated the sale. The Court held that since there was no charge of conspiracy to prevent free competition in the general business of buying and selling real estate, plaintiff was not injured in his business or property within the meaning of the Cartwright Act, even though it appeared that he had a cause of action for the tortious interference with his contractual relations and it was conceded that the control of all wine growing lands would be an important if not an essential element in the monopolization of the wine industry.

In *Clark v. Lesher*, 106 C. A. (2) 403, a father and son were partners in a publishing firm. The complaint alleged that after the father died a rival publisher conspired with the administrator of the plaintiff's father's estate to have a receiver appointed by fraudulent means and then conspired with the latter to cease publication, thereby depreciating the assets so that they might be bought cheaply and plaintiffs be eliminated as a competitor. It was held that there was no cause of action stated for damage under the Cartwright Act in that such must be solely those resulting directly from the fact of the existence of the unlawful combination and flow from restrictions in trade or commerce fostered thereby. The Court said that the plaintiff's loss was the result of the fraudulent destruction of the value of the partnership property, which occurred before the conspiracy got to the point where by eliminating the competing paper they were in a position to create and maintain the restrictions. (See also *Munter v. Eastman Kodak Co., supra.*)

Applying the foregoing rules to the facts of the case at hand, insofar as they are revealed by the complaint, certain difficulties in analyzing for proximate cause are occasioned by the ambiguities therein. For instance, is plaintiff charging the reduction in royalties resulting from the limitation of production to the alleged combination or to the arbitrary policies of Pacific Gas & Electric Company?

It does appear from such facts as have been specifically pleaded by exhibit and otherwise that plaintiffs are neither producers nor sellers of natural gas, but have such rights only as are reserved to them through the leases executed many years ago. Hence, if it be assumed that plaintiffs could hurdle the proximate cause obstacle, they have not pleaded themselves within the "target area" in the sense prescribed by the strict California rules. We have here essentially the parallel of the Krigbaum situation, in an area where the Federal Courts historically have been less liberal in allowing recovery than in the commission broker or salesman relationship represented by Krigbaum. Therefore, plaintiffs have not stated a cause of action under the Cartwright Act.

7. BREACH OF CONTRACT.

Although counsel for the plaintiffs in oral argument stated that the pleadings made no attempt to state a cause of action for breach of contract, the question has been examined because if no claim under the Cartwright Act can be maintained, the problem of whether a cause of action for breach of contract can be stated will remain. Except for the Elliott lease, none of the pertinent agreements is set forth either *in haec verba* or by summary of the terms. The plaintiffs have not pointed out wherein any of the alleged practices of the defendants violate either express or implied terms of their agreements; consequently, at this point no cause of action for breach of contract is stated.

8. CLASS ACTION.

In the ninth cause of action the plaintiffs purport to set forth facts whereby to justify their representing all similarly situated owners of lands overlying the Rio Vista gas fields and ask that all owners be brought into the action as plaintiffs or defendants. In the third, fifth and seventh counts, the plaintiffs desire to represent the owners of "similarly situated" lands within particular

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units within the Rio Vista gas fields on the theory that they are entitled to represent them as co-tenants.

The latter contention may be disposed of quickly. It is settled that a co-tenant may sue on his own behalf and obtain relief which will completely vindicate his own rights and that incidentally the other co-tenants may profit thereby but he cannot represent the co-tenants.

With respect to the problem of the class action, the defendants contend that before the Court would be justified in fulfilling the named plaintiffs' desires to represent others similarly situated, it must be shown that there can be isolated a well defined class; that there is a well defined community of interest among all those whom the plaintiffs desire to represent as to questions of both fact and law; that there must be no conflict of interests between the members of the alleged class; and that it must appear eminently fair that those not appearing except as represented by the plaintiffs be bound by such decree as might be rendered.

The conditions of a class suit are set forth in Section 382, *Code of Civil Procedure,* the appropriate phrase of which reads: ". . . and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." In *Barber v. California Employment Stabilization Commission,* 130 C. A. (2) 7 @ 14, the court said, "It is certain that the minimum requirements of a class suit under this language are (1) there must exist a well defined community of interest in questions of law and fact between those bringing the suit and those claimed to be represented, and (2) the suing and non-suing groups must constitute a definitely ascertainable class. If the rights of each member of the class are dependent upon facts applicable only to him, there is not the requisite ascertainable class required for a representative suit. . ." (See also *Bowles v. Superior Court,* 44 Cal. (2) 574; 2 *Witkin, California Procedure* (1954) 1091 *et seq* and 1957 Supplement 21).

It does not seem to me that plaintiffs have presented a situation which would meet these tests. If I understand their premises correctly, they are that the value of properties overlying the natural gas fields and a fair apportionment of their income can be measured by reference to the thickness of the isopach over which they lie together with the porosity and permeability of the gas bearing sands within such isopach. Ignoring for a moment the other factors which the defendants contend may affect the productivity of a given well or series of wells, it may be observed that the very terms used by the plaintiffs in the context of their complaint are relative, and suggest that the assumption that one property *can* be precisely similar to another, cannot be indulged. The thickness of the isopach underneath properties varies gradually like the surface topography, not as if they were in geometrically arranged blocks. The sands therein are as likely as not to differ in their permeability and porosity. If the defendants' suggestions that the problem of identifying similar properties is further complicated by such things as breaks and shifts in the strata, pockets of extraneous material that reduce the volume of storage or form a barrier to the flow of gas and other conditions too numerous to mention, it appears obvious that the likelihood of finding a sufficient community of interest among all those whom plaintiffs seek to represent is nil.

It would appear that the plaintiffs recognize the general nature of the legal tests for proper class actions, for in their brief, reference is made to Witkin's discussion and to the case of *Weaver v. Pasadena Tournament of Roses,* 32 Cal. (2) 833, in which it is said, ". . . it has been uniformly held that there must be a well defined 'community of interest' in the questions of law and fact involved. . .", and which held that the following questions of fact peculiar to each individual made the case inappropriate as a class action: whether each individual was a person over the age of twenty-one years; presented self and demanded admittance; tendered price; and was wrongfully refused admission. (See also *Barber v. California Employment Stabilization Commission, supra.*)

In the instant case, the plaintiffs request that the Court retain jurisdiction to determine defendants' liability, then assert that it will cost no less than Three Hundred Thousand Dollars ($300,000.00) in engineering fees alone to ascertain the facts bearing on each individual landowner's rights to a recovery of damages. But each such individual's rights and liabilities will turn on a variety of factors, legal and factual, peculiar to himself. Among them are his

contract, his special damages, if any, his physical location, the subsurface conditions, and other variants which may be inferred from the complaint and from facts of which the Court may take judicial notice. Moreover, it would appear that whether any given person would profit in the long run from an upsetting of existing contractual arrangements is so highly speculative as to suggest that it would be manifestly unfair for the Court either to assume that their interests would be properly protected in a class action or to force them in as plaintiffs or defendants. I think that each is entitled to exercise his own judgment in the premises and join or not join as he sees fit.

9. The Demurrer of the Non-Contracting Parties.

Monterey, Superior and Texas Company point out that there is nothing in the complaint to show that any of them have any contracts of any kind with any named plaintiff and that their responsibility therefore is confined to such responsibility as they may have under the Cartwright Act. In view of the remarks above concerning the purported class actions, this contention is sound.

10. The Special Demurrers.

The defendants correctly point out a number of defects in the pleadings which are susceptible to correction by special demurrer. Among them are:

1. The uncertainty resulting from the use of the plural form of the word, "defendant", aggravated by the inconsistency of this useage with the specific charges against Pacific Gas & Electric Company;

2. The uncertainty arising from the use of the word "conspiracy" if the plaintiffs do not confine themselves to an anti-trust action; i. e., conspiracy to commit a tort? If so, what tort? If to interfere with a contractual relation, what term of what contract?

3. Similar to (1), the apparent inconsistency in the use of the word "monopoly" in the context of the alleged conspiracy;

4. The allegations as to what plaintiffs should be getting and their inconsistency with the terms of the incorporated exhibits;

5. The casual reference to the plaintiffs as the "owners" or "sellers" of gas;

6. The meaning of the term "potential commercial production" in the complaint;

7. The reference to "combinations and agreements". (See *Bower v. Ventura, etc.*, 45 Cal. (2) 276; *Bernstein v. Piller*, 98 C. A. (2) 441.)

11. Permission to Amend.

The major question presented by the case in its present condition is the question of whether or not the plaintiffs ought to be given permission to amend their complaint. The defendants argue strenuously that considering the pleadings in the Federal District Court, this is the plaintiffs' seventh try at stating a cause of action and that considering the ability of their counsel, they ought to have been able to state a valid cause of action by this time if they have one. It may be observed, however, that in none of the previous proceedings either in the State Courts or the Federal Courts, did the demurrers or motions of the defendants result in a court ruling except pursuant the stipulations of counsel. It may be that the plaintiffs are entitled to the independent views of an impartial court as a guide before being absolutely foreclosed from further effort properly to state a cause of action. Their previous stipulations may have been dictated by caution rather than conviction.

The real crux of the problem is whether the plaintiffs can state a cause of action. One facet of this question is posed by the Statute of Limitations. The Federal cases are persuasive authority to the effect that even in the Federal Courts, in actions arising under the Sherman Act, the State Statutes prevail. (See *Steiner v. 20th Century Fox, supra; Congress Building Corp. v. Loews;*) and that the applicable Statute in California is three (3) years. (*Steiner v. 20th Century Fox, supra.*) These same cases are authority for the proposition that it is the last overt act of the defendants which *causes* the damages as distinguished from the time of the *incidence* of such damages which tolls the Statute. In the *Congress* case, this overt act was found in the continuance of the policy of running first subsequent run pictures instead of first run pictures at the plaintiff's theater. I suppose that in the instant case, although the leases were executed many years ago, overt acts such as the shutting down of plaintiffs' wells may be considered as operating to toll the Statute.

Other questions concerning the plaintiffs' capacity to state a cause of action may be inferred from the foregoing discussion of the

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several arguments advanced by the defendants. I must confess that in the present state of the pleadings, viewed in the light of those matters of which the Court must take judicial notice, I am at a loss to perceive how the plaintiffs can make out a cause of action under the Cartwright Act. There may be considerable argument about their right to shift to charges of breach of unnamed contracts, or undesignated portions of named contracts, based on the proposition that they are not entitled to change their cause of action by amendment. (*Cyr v. White,* 83 C. A. (2) 22.) However, they may be permitted to shift legal theory on the same general state of facts, (*Clark v. Lesher, supra*) and buried in the pleadings may be some of the elements of such a case. The court's attention has been drawn to one such filed in Sacramento County. With regard to the anti-trust theory, the whole field is so complex and fluid that the Court hesitates to assume that even such highly competent counsel as have appeared to argue and brief this case have thought of and mentioned every possibility that might be conceived if more time were permitted for study and reflection.

In reaching the conclusion that the plaintiffs ought to be allowed opportunity to amend, the Court is not unmindful of their violations of certain elementary considerations affecting good pleading. It will be expected that conclusions of law, argumentative matter, and patent or calculated ambiguities will be avoided.

For the foregoing reasons, the general and special demurrers of the defendants and each of them are sustained with leave to amend, however, within sixty (60) days hereof. Under the peculiar circumstances, rulings on the motions to strike will be deferred pending the amendment of the complaint.

[¶ 69,248] United States v. Operative Plasterers and Cement Masons International Association of the United States and Canada; Bricklayers, Masons and Plasterers International Union of America; and Plastering Development Center, Inc.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 56 C 1096. Dated January 21, 1959.

Case No. 1296 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Labor Unions—Consent Decree—Practices Enjoined—Agreements with Non-Labor Organization—Restricting Disposition of Labor-Saving Device.—Two plasterers' labor unions were prohibited by a consent decree from entering into agreements with any manufacturer of plastering machines which have the effect of (1) preventing or restricting the lease, sale, or other disposition of plastering machines or (2) prescribing or otherwise regulating the terms or conditions under which plastering machines can be leased, sold, or otherwise disposed of by manufacturers or other persons. The decree also enjoined the unions from inducing, coercing, or knowingly permitting their local affiliates to enter into agreements with contractors which have the effect of precluding the contractors from leasing, purchasing, or otherwise acquiring plastering machines manufactured by persons who make such machines available to contractors employing or not employing members of the unions.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Cooperation with Labor Unions—Agreements Restricting Disposition of Labor-Saving Device.—A manufacturer of plastering machines was prohibited by a consent decree from entering into agreements with any other person which (1) prevents or restricts the lease, sale, or other disposition of plastering machines, (2) requires the manufacturer to impose any terms or conditions upon a purchaser or lessee of plastering machines, (3) requires a purchaser or lessee of plastering machines to employ any person or class of persons designated by the manufacturer to operate such machines, (4) requires a purchaser or lessee to operate plastering machines acquired from the manufacturer in compliance with the working rules and regulations of any labor union, and (5) prevents a purchaser or lessee, after payment

of the full sale price of a plastering machine, from selling, transferring, assigning, subletting, or otherwise disposing of the machine. The decree also prohibited two plasterers' labor unions from entering into agreements with manufacturers of plastering machines which have the effect of restricting the sale or lease of such machines.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.605, 2005.760.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Sales and Leases—Conveying Title to Machines—Offers to Sell.—A manufacturer of plastering machines was ordered by a consent decree to (1) send a bill of sale, for no additional consideration, conveying title to plastering machines to certain individuals and firms, (2) cancel all prior agreements with those individuals and firms regarding such machines, and (3) offer to sell, on non-discriminatory terms, plastering machines to all persons or firms to whom it had refused to sell or lease such machines since a certain date.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; and George H. Schueller, William D. Kilgore, Jr., Earl A. Jinkinson, and Ned Robertson, Attorneys, Department of Justice.

For the defendants: Martin F. O'Donoghue, Washington, D. C., for Operative Plasterers and Cement Masons International Association of the United States and Canada; Sherman Carmell, Chicago, Ill., for Bricklayers, Masons and Plasterers International Union of America; and Thomas L. Marshall of Bell, Boyd, Marshall & Lloyd, Chicago, Ill., for Plastering Development Center, Inc.

Final Judgment

[Operative Plasterers and Cement Masons Int'l Assn. of the U. S. and Canada]

JOSEPH SAMUEL PERRY, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 29, 1956, the defendant Operative Plasterers and Cement Masons International Association of the United States and Canada having filed its answer denying the substantive allegations thereof, and the plaintiff and said defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue:

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties signatory hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against the defendant signatory hereto under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Plastering machine" means any mechanical device which is actuated by gas or electricity and sprays a plaster mix on walls or ceilings;

(B) "Contractor" means any person, firm or corporation which regularly enters into contracts for and engages in the performance of plastering work, employing workmen and purchasing equipment and materials therefor;

(C) "Defendant Union" means defendant Operative Plasterers and Cement Masons International Association of the United States and Canada, with offices located at 335 Euclid Avenue, Cleveland 14, Ohio.

III

[*Applicability*]

The provisions of this Final Judgment shall apply to defendant Union and to each of its successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with any of them who receive actual notice

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of this Final Judgment by personal service or otherwise.

IV

[*Prohibited Agreements*]

Defendant Union is enjoined and restrained from, directly or indirectly:

(A) Entering into, adhering to, or enforcing any contract, agreement or understanding with any manufacturer of plastering machines which has the purpose or effect of

(1) preventing, limiting or restricting the lease, sale or other disposition of any plastering machines, or

(2) dictating, prescribing, or otherwise regulating the terms or conditions under which any such plastering machines may be leased, sold or otherwise disposed of by any manufacturer or any other person;

(B) Inducing, coercing or knowingly permitting any local union affiliated with defendant Union to enter into any contract, agreement or understanding with any contractor having the purpose or effect of precluding the contractor from leasing, purchasing or otherwise acquiring a plastering machine manufactured by a person who makes plastering machines available to contractors employing, or not employing members of defendant's Union.

V

[*Notice of Judgment*]

Defendant Union is ordered and directed within sixty (60) days after the entry of this Final Judgment, to serve by mail upon each local union affiliated therewith, a conformed copy of this Final Judgment.

VI

[*Publication*]

Defendant Union is further ordered and directed to publish in *The Plasterer and Cement Mason,* 335 Euclid Avenue, Cleveland 14, Ohio, and in all trade journals and publications which have carried advertisements of the defendant at any time between January 1, 1950, and the date of the entry of this Judgment, a summary statement of the Judgment entered herein; provided, however, that forty-five (45) days prior to said publication, a copy shall be made available to the Midwest Office, Antitrust Division, Department of Justice, who shall have the right to make any reasonable changes as to form and additions or deletions to said summary statement prior to publication.

VII

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Union, mailed to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access during regular office hours to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant which relate to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of the defendant, and without restraint or interference from it, to interview its officers or employees, who may have counsel present, regarding any such matters.

Upon such written request, defendant Union shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

IX

[*Effective Date of Judgment*]

This Final Judgment shall become effective thirty (30) days after entry herein.

Final Judgment

[Bricklayers, Masons and Plasterers Int'l Union of America]

JOSEPH SAMUEL PERRY, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 29, 1956, the defendant Bricklayers, Masons and Plasterers International Union of America having filed its answer denying the substantive allegations thereof, and the plaintiff and said defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue:

Now, Therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties signatory hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against the defendant signatory hereto under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Plastering machine" means any mechanical device which is actuated by gas or electricity and sprays a plaster mix on walls or ceilings;

(B) "Contractor" means any person, firm or corporation which regularly enters into contracts for and engages in the performance of plastering work, employing workmen and purchasing equipment and materials therefor;

(C) "Defendant Union" means defendant Bricklayers, Masons and Plasterers International Union of America, with offices located at 815 15th St., N. W., Washington 5, D. C.

III

[*Applicability*]

The provisions of this Final Judgment shall apply to defendant Union and to each of its successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Prohibited Agreements*]

Defendant Union is enjoined and restrained from, directly or indirectly:

(A) Entering into, adhering to, or enforcing any contract, agreement or understanding with any manufacturer of plastering machines which has the purpose or effect of

(1) preventing, limiting or restricting the lease, sale or other disposition of any plastering machines, or

(2) dictating, prescribing, or otherwise regulating the terms or conditions under which any such plastering machines may be leased, sold or otherwise disposed of by any manufacturer or any other person;

(B) Inducing, coercing or permitting any local union affiliated with defendant Union to enter into any contract, agreement or understanding with any contractor having the purpose or effect that the contractor will not lease, purchase, or otherwise acquire a plastering machine manufactured by someone who makes plastering machines available to contractors employing, or not employing members of defendant's Union.

V

[*Notice of Judgment*]

Defendant Union is ordered and directed within sixty (60) days after the entry of this Final Judgment, to serve by mail upon each local union affiliated therewith, a conformed copy of this Final Judgment.

VI

[*Publication*]

Defendant Union is further ordered and directed to publish in *Plastering Industries*, 215 West Harrison, Seattle 99, Washington,

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and in all trade journals and publications which have carried advertisements of the defendant at any time between January 1, 1950, and the date of the entry of this judgment, a summary statement of the judgment entered herein; provided, however, that forty-five (45) days prior to said publication, a copy shall be made available to the Midwest Office, Antitrust Division, Department of Justice, who shall have the right to make any reasonable changes as to form and additions or deletions to said summary statement prior to publication.

VII

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Union, mailed to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access during regular office hours to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant which relate to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of the defendant, and without restraint or interference from it, to interview its officers or employees, who may have counsel present, regarding any such matters.

Upon such written request, defendant Union shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

IX

[*Effective Date of Judgment*]

This Final Judgment shall become effective thirty (30) days after entry herein.

Final Judgment

[Plastering Development Center, Inc.]

Joseph Samuel Perry, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 29, 1956, the defendant Plastering Development Center, Inc., formerly E-Z-ON Corporation, having filed its answer denying the substantive allegations thereof, and the plaintiff and said defendant having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties signatory hereto, it is hereby, Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against the defendant signatory hereto under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Plastering machine" means any mechanical device which is actuated by gas or electricity and sprays a plaster mix on walls or ceilings;

(B) "Person" shall mean any individual, partnership, corporation, association, firm, trustee or other legal entity;

(C) "Defendant Plastering Development Center, Inc." means defendant Plastering Development Center, Inc., and its predecessor E-Z-ON Corporation, with offices located at 1725 West Pershing Road, Chicago, Illinois.

III

[*Applicability*]

The provisions of this Final Judgment shall apply to defendant Plastering Development Center, Inc., and to its subsidiaries, successors, assigns, officers, directors, servants, employees and agents, and to all persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Prohibited Agreements*]

Defendant Plastering Development Center, Inc., is enjoined and restrained from entering into, adhering to or enforcing any contract, agreement or understanding with any other person, directly or indirectly:

(A) Preventing, limiting or restricting the lease, sale or other disposition of any plastering machine, except that as a manufacturing licensee defendant may agree with a patent holding licensor to lease only and not to sell plastering machines produced by it under license agreement with said patent holder;

(B) Requiring said defendant to impose any terms or conditions upon a purchaser, lessee or other transferee of any plastering machine;

(C) Requiring a purchaser, lessee or other transferee of any plastering machine to employ any person or class of persons designated by defendant to operate a plastering machine;

(D) Requiring or attempting to require a purchaser, lessee or other transferee to operate a plastering machine acquired from said defendant in compliance with the working rules and regulations of any labor union or association;

(E) Preventing or attempting to prevent a purchaser, lessee or other transferee after payment of the full sale price of a plastering machine from selling, transferring, assigning, subletting, or otherwise disposing of said plastering machine.

V

[*Specific Relief*]

(A) Defendant Plastering Development Center, Inc., is ordered and directed, within sixty (60) days after the entry of this Final Judgment, to send by certified mail to each individual and firm listed in the appendix attached hereto [not reproduced] except those who to said defendant's knowledge have disposed of plastering machines listed therein, a bill of sale for no additional consideration (a) conveying to said individual or firm all right, title and interest to said plastering machine; and (b) cancelling all prior agreements between said defendant and said individual or firm, regarding said plastering machine.

(B) Said defendant is further ordered and directed within ninety (90) days from the date of the entry of this Final Judgment to send by certified mail a notification to all persons, firms or corporations to whom said defendant, so far as its records show, refused to sell or lease its plastering machines, at any time since January 1, 1950, offering to sell to said persons, firms or corporations on non-discriminatory terms defendant's plastering machines.

(C) Said defendant is further ordered and directed, within one hundred twenty (120) days from the entry of this Final Judgment to furnish plaintiff a carbon copy of each bill of sale mailed pursuant to this Final Judgment and United States Postal receipts indicating delivery, or attempted delivery, of said bills of sale.

VI

[*Publication*]

Defendant Plastering Development Center, Inc., is further ordered and directed to publish in all plastering trade journals and publications which have carried said defendant's plastering machine advertisements

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at any time between January 1, 1950 and the date of the entry of this Final Judgment, a summary statement of the Final Judgment entered herein; provided, however, that not less than forty-five (45) days prior to said publication a copy shall be made available to plaintiff herein who shall have the right to make any reasonable changes as to form and additions or deletions to said summary statement prior to publication, and reasonable directions as to position in said publication.

VII

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Plastering Development Center, Inc., made to its principal offices, be permitted:

(a) Access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matter contained in this Final Judgment; and

(b) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matter.

Upon such written request, defendant Plastering Development Center, Inc., shall submit such reports in writing to the Department of Justice with respect to any of the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of said Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

IX

[*Effective Date of Judgment*]

This Final Judgment shall become effective thirty (30) days after entry herein.

[¶ 69,249] **Seagram Distillers Company, a division of the House of Seagram, Inc. v. Guy Armanetti, d.b.a. Armanetti Liquors, et al.**

Browne-Vintners Co., Inc. v. Ben Zimmerman, et al.

In the Illinois Appellate Court, First District. Nos. 47475 and 47476, respectively. Decided December 8, 1958. Released January 26, 1959.

Interlocutory Appeals from Circuit Court, Cook County.

Illinois Fair Trade Act

Fair Trade—Selling Below Fair Trade Prices—Non-Contracting Dealer—Knowledge of Fair Trade Contracts at Time of Acquisition of Products—Affirmative Defense.—Liquor distributors' complaints alleging that retailers sold fair trade products at less than fair trade prices were not defective in failing to allege that the retailers, at the time they purchased the merchandise, had knowledge of the fair trade contracts between the

distributors and other retailers. Although the complaints did not allege that the retailers had knowledge of the fair trade contracts at the time they acquired the goods, the complaints did allege that the retailers had such knowledge at the time they made the sales. Also, the retailers did not disclaim knowledge of the fair trade contracts at the time they acquired the merchandise. Lack of knowledge is an affirmative defense; if the retailers purchased the fair trade products without knowledge of the fair trade contracts, they should have interposed that fact as a defense.

See Fair Trade, Vol. 1, ¶ 3258.15, 3268.

Fair Trade—Enforcement—Right to Injunctive Relief—Absence of Provision for Injunctive Relief in Illinois Fair Trade Act.—In an action by liquor distributors charging retailers with selling fair trade products at less than fair trade prices, injunctive relief was held to be an appropriate remedy, although the Illinois Fair Trade Act contains no specific provision for such relief. The possessor of a right, where he is without an adequate remedy at law, has the privilege of seeking equitable relief regardless of whether the right has its origin in the common law or in a statute.

See Fair Trade, Vol. 1, ¶ 3350.15.

Fair Trade—Fair Trade Contracts—Validity—Vendor-Vendee Relationship Between Parties to Contracts—Ownership of Trade-Marks—Sufficiency of Consideration.—Liquor distributors, on the basis of their fair trade contracts with various retailers, were entitled to temporary injunctions against retailers who allegedly sold below fair trade prices, although the distributors did not sell directly to retailers and were not the owners of the trade-marks for which they sought protection. The Illinois Fair Trade Act designates the party who may stipulate resale prices only as the "vendor." The Act applies not only to contracts between the parties, but to any contract relating to the sale or resale of a commodity; the object of the fair trade contract is to protect the trade-mark, brand, or name of the producer or owner, regardless of who makes the sale. Therefore, fair trade contracts may be made between a distributor and a retailer who do not trade directly with each other. Also, the contracts were not lacking in consideration since the retailers secured for their benefit the establishment of the fair trade program. The court, in ruling on whether or not the trial court had been justified in issuing a temporary injunction, did not reach an ultimate decision on the above questions, but determined only that there was a reasonable probability of their ultimate resolution in favor of the distributors.

See Fair Trade, Vol. 1, ¶ 3130, 3170.15, 3172.

For the appellants: Schultz, Biro & Karmel, Chicago, Ill.

For the appellees: Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Ill.

[*Fair Trade Action*]

Mr. Justice Robson delivered the opinion of the Court [*In full text*]: This is an interlocutory appeal. The two plaintiffs, Seagram Distillers, Inc. and Browne-Vintners Co., Inc., brought separate suits in the Circuit Court of Cook County against a total of nineteen defendants, all of whom are engaged in the retail liquor business in Chicago, or its immediate vicinity, seeking equitable relief under Section 2 of the Illinois Fair Trade Act. The trial court denied the motions of defendants to dismiss the complaints, as amended, and granted the motions of plaintiffs for temporary injunctions prohibiting the various defendants from advertising, offering for sale, or selling products distributed by plaintiffs at less than the prices stipulated by plaintiffs under certain contracts entered into by plaintiffs pursuant to the Fair Trade Act of Illinois. Defendants appealed from these orders and in this court the appeals were consolidated.

[*Contentions on Appeal*]

Defendants contend that the temporary injunctions should not have been granted because (1) the complaints failed to allege that defendants acquired the merchandise in controversy with knowledge that it was subject to the provisions of fair trade contracts; (2) that injunctive relief is not an

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appropriate remedy for violations of the Illinois Fair Trade Act, and (3) that the complaints based upon the contracts in question do not allege sufficient facts to grant the temporary injunctions.

[*Fair Trade Violations Charged*]

The complaints allege that plaintiffs are engaged in the business of selling and distributing alcoholic beverages throughout the United States under certain trademarks and brand names; that plaintiffs are the sole distributors of such branded products in Illinois; that plaintiffs are parties to Fair Trade contracts with a number of retailers in Illinois; that the prices stipulated by plaintiffs in accordance with these contracts were made known generally to the trade and particularly to defendants; that notwithstanding the provisions of the contracts and the demands of plaintiffs, the defendants refused to discontinue selling or offering for sale products distributed by plaintiffs at less than the stipulated prices. The complaints conclude with allegations that the conduct of defendants has done irreparable damage to the good will of plaintiffs and contain prayers for injunctive relief, costs, and such further relief as the court may deem just.

[*Fair Trade Contracts*]

Attached to each complaint as exhibit "A" is a copy of a contract between one of the plaintiffs and a retail liquor dealer. The contracts are virtually identical except for the parties and provide, in substance, that the retailer will not sell, advertise, or offer for sale in Illinois branded products distributed by the plaintiffs at a resale price which differs from that which the plaintiff may stipulate by schedule from time to time. The contracts designate plaintiffs as owners and provide that the various price schedules shall be considered a part of the contract.

[*Illinois Fair Trade Act*]

The pertinent portions of the Illinois Fair Trade Act provide as follows (Ill. Rev. Stat., 1957, chap. 121½, pars. 188, 189):

> "No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:
>
> "(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.
>
> "(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee. * * *
>
> "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[*Knowledge of Fair Trade Contracts*]

The defendants, with reference to their first contention that the complaints do not allege that defendants had knowledge of the contracts between plaintiffs and other retailers at the time of purchasing products from plaintiffs for resale, argue that such an omission from the complaints was a fatal error, while plaintiffs urge that any unawareness on the part of defendants was a matter peculiarly within their knowledge and could at best constitute an affirmative defense. While the complaints do not allege that defendants had knowledge of plaintiffs' fair trade contracts or the prices stipulated pursuant thereto when they acquired the merchandise in question, they do allege that defendants had such knowledge at the time of making the sales. Defendants do not disclaim knowledge of plaintiffs' fair trade contracts at the time they acquired their merchandise. Lack of knowledge is an affirmative defense. *James Heddon's Sons v. Callender*, 29 F. Supp. 579. The defendants did not interpose such a defense. Had they purchased without knowledge they should have so stated. This they failed to do.

[*Injunctive Relief*]

We must next consider defendants' second contention of whether injunctive relief is an appropriate remedy for an alleged violation of the Illinois Fair Trade Act. Although the propriety of such relief has never been directly in issue in this State,

our courts have tacitly approved it heretofore. See *Sunbeam Corp. v. Central Housekeeping Mart, Inc.* [1954 TRADE CASES ¶ 67,789], 2 Ill. App. 2d 543 (1954); *Old Fort Dearborn Wine and Liquor Co. v. Old Dearborn Distributing Co.*, 287 Ill. App. 187 (1936); *Seagram Corp. v. Old Dearborn Co.*, 363 Ill. 610 (1936); *Triner Corporation v. McNeil*, 363 Ill. 559 (1936); *Triner Corporation v. Oransky* [1932-1939 TRADE CASES ¶ 55,143], 365 Ill. 19 (1936). In *Triner Corporation v. McNeil, supra*, the court noted that the propriety of the relief was not being assailed. Nor has it been assailed in any subsequent case under the Illinois Act. The Court of Appeals for the Seventh Circuit has given approval to the remedy. In *Economy Food & Liquor Co. v. Frankfort Distillers Corp.* [1956 TRADE CASES ¶ 68,334], 232 F. 2d 410 (7th Cir. 1956), the court affirmed the dismissal of a retailer's complaint for a counter-injunction against a distiller on the ground that the complaint constituted an indirect attack on an injunctional order granted in favor of the distiller under the Fair Trade Act of Illinois.

[*Absence of Provisions for Injunctive Relief*]

The defendants rely on *Calvert Distillers Co. v. Wish*, 1958 CCH TRADE CASES, par. 68921 (D. C., N. D. Ill., 1957), in which, under similar circumstances, injunctive relief was denied. We have scrutinized that opinion and find in it no support for the argument of the defendants. While it is true that the court denied equitable relief on the basis of plaintiff's failure to exhaust whatever legal remedy might have been available to it under the Illinois Act, the opinion rests on the court's discretion to grant or deny injunctive relief and the court's finding that the alleged damages were too speculative to satisfy the requisite jurisdictional amount. Nowhere does the opinion suggest that the Illinois Act precludes equitable relief in fair trade cases. The defendants, however, insist that injunctive relief is proper in fair trade cases only where the particular act contains specific provision for such relief. The Illinois Act contains no such provision, although the acts of Idaho, Maine, Michigan, New Hampshire, Ohio, Rhode Island, and Washington do. In this respect and others the language of the South Carolina Act is similar to that of the Illinois Act. In *Miles Laboratories v. Seignious*, 30 F. Supp. 549 (D. C., E. D., S. Car. 1939), the court approved the enforcement of that act by injunction as follows (p. 555):

> "A statute normally creates or defines a right, it may or may not provide a remedy; but the courts are never powerless to enforce a right because of doubt as to the nature of a just remedy. The entire process of injunction in equity, and in fact the courts of chancery themselves, first grew out of the inability of courts of common law of England to grant appropriate relief in certain cases, thereby suggesting to litigants, who were possessed of a right without a remedy, to apply to the King for relief; and thereupon the King delegated to his chancellor the power to grant equitable remedies, including injunction. When any right exists, and a proper showing is made that the possessor of that right is without adequate remedy at law, he has the privilege of seeking equitable relief, and this is true regardless of whether the right has its origin in the common law, or in a statute. The power to administer injunctive relief stems back to the peculiar origin and development of the courts of chancery; it is not ordinarily a statutory grant of power to the court.
>
> "But while no authority within the statute is necessary for the administration of such relief, yet, in this statute it so happens that the legislature has indicated that such relief is intended. It defines certain conduct as 'unfair competition' and when it used those words, it used words that have a technical meaning. It has long been recognized that injunction is a proper remedy against unfair competition."

We are in accord with the views advanced by the District Court in South Carolina and can find no merit in the argument that the Illinois Fair Trade Act may be enforced only by an action at law for damages.

[*Temporary Injunction—Necessary Showing*]

Defendants' third contention is whether plaintiffs were entitled to temporary injunctions on the basis of the facts set forth in the complaints. It is well settled that a party seeking a temporary injunction need only show in his complaint that he raises a fair question as to the existence of the right he seeks to enforce and that the probability of his ultimate success is sufficient to justify a preservation of the status quo pending the final determination of that question. *Schuler v. Wolf*, 372 Ill. 386, 389 (1939); *Nestor Johnson Mfg. Co. v. Gold-*

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blatt, 371 Ill. 570, 574 (1939); *Chicago Motor Coach Co. v. Budd*, 346 Ill. App. 385, 390 (1952). Do the contracts upon which plaintiffs rely present a justifiable issue under the Fair Trade Act of Illinois with some probability of success on the part of plaintiffs?

Defendants argue that the contracts in question may not be employed to invoke the protection of the Act for three reasons: (1) that the contracts do not contain the immediate vendor-vendee relationship required by the Act; (2) that the contracts lack mutuality and consideration; and (3) that the plaintiffs are not the proper parties to enter into such contracts inasmuch as they are neither the producers nor the owners of the trade-marked products. Each of the foregoing arguments presents a legal question which has not yet been resolved in this State. We need not reach an ultimate decision of those questions at this time, but must determine only if on the basis of authority on which plaintiffs rely there is a reasonable probability of the ultimate resolution of those questions in their favor.

[*Vendor-Vendee Relationship*]

There appears to be ample authority in support of plaintiffs' contention that the contracts in controversy fall within the scope of the Act although there is no vendor-vendee relationship between the parties to the contracts and plaintiffs are exclusive distributors rather than the outright owners of the trade-marks or brand names for which protection is sought. In *General Electric Co. v. Kimball Jewelers* [1956 TRADE CASES ¶ 68,291], 333 Mass. 665, 132 N. E. 2d 652 (1956), the Supreme Judicial Court of Massachusetts held that the provisions of the Massachusetts Act identical to those of the Illinois Act now under consideration permitted a producer to enter into a fair trade contract with a retailer, although the producer traded only with wholesalers who in turn supplied retailers with the merchandise in question. There the court said (132 N. E. 2d at 655):

> "The contract gives the dealer the benefit of the price support afforded by General Electric's price lists—not only the one attached to the contract but any subsequent ones while the contract is in effect. The furnishing of a current price list is the mainspring that continues the operation of the scheme. See *Doyle v. Dixon*, 97 Mass. 208, 213; *Wit v. Commercial Hotel Co.*, 253 Mass. 564, 572-573, 149 N. E. 609. It was held in *Chandler, Gardner & Williams, Inc. v. Reynolds*, 250 Mass. 309, 145 N. E. 476, which was a suit in equity to enforce the restrictive provisions of a contract of employment where the employer reserved to itself the exclusive privilege of discharging the employee, that the contract of employment did not lack consideration. It has been settled that contracts similar to the one introduced in evidence in this case are supported by sufficient consideration. *Houbigant Sales Corp. v. Woods Cut Rate Store*, 123 N. J. Eq. 40, 43-44, 47-48, 196 A. 683; *General Electric Co. v. Masters, Inc.*, 307 N. Y. 229, 120 N. E. 2d 802, appeal dismissed sub nomine; *Masters, Inc. v. General Electric Co.*, 348 U. S. 892, 75 S. Ct. 215, 99 L. Ed. 701; *General Electric Co. v. S. Klein-on-the-Square, Inc.*, Sup., 121 N. Y. S. 2d 37; *Seagram Distillers Co. v. Corenswet*, Tenn., 281 S. W. 2d 657, 661. Williston, *Contracts* (Rev. ed.) s. 102. The execution of the contract by the dealer might well have been thought to be a benefit to him, otherwise he would not have signed it. He might well have thought that the making of the contract would tend to free him from cut rate competition, or lessen the competition, in one branch of his business and that the more signers the plaintiff secured in the trade area served by the dealer the better it would be for the dealer. The dealer executed the contract freely and voluntarily and secured for his own benefit the establishment of a fair trade program."

And in *Norman M. Morris Corporation v. Hess Brothers, Inc.* [1957 TRADE CASES ¶ 68,660], 243 F. 2d 274 (3rd Cir. 1957), the Court of Appeals for the Third Circuit held that an exclusive distributor for the entire United States could enter into valid fair trade contracts with retailers in Pennsylvania. The court noted that the Pennsylvania Act, like the Illinois Act, designates the party who may stipulate resale prices only as "vendor." There the court found support in decisions by the courts of New York, New Jersey and California, but relied particularly on the opinions of the United States Supreme Court and the Illinois Supreme Court in the *Old Dearborn* and *Triner* cases, emphasizing that in those cases a distributor and not the producer or owner of the trade-mark had stipulated the resale price.

In *General Electric Co. v. Kimball Jewelers, supra*, the Massachusetts court also held

that there was sufficient consideration to support the contract. On this point the court reasoned as follows (132 N. E. 2d 656):

"A fair trade contract may be made between a producer and a retailer who do not trade directly with each other. The statute applies not only to contracts between the parties, but to any contract 'relating to the sale or resale of a commodity', whether the sale is between the parties or not, because the object is to protect the trade mark, brand or name of the producer or owner, whoever makes the sale. *General Electric Co. v. Masters, Inc.*, 307 N. Y. 229, 120 N. E. 2d 802, appeal dismissed sub nomine; *Masters, Inc. v. General Electric Co.*, 348 U. S. 892, 75 S. Ct. 215, 99 L. Ed. 701; *General Electric Co. v. Sabreen*, D. C., 128 F. Supp. 900. *Seagram Distillers Co. v. Corenswet*, Tenn., 281 S. W. 2d 657."

The contracts in the instant case provide that the "owner" reserves the right to change the schedule of prices from time to time upon five days' written notice to the retailer.

[*Temporary Injunctions Justified*]

We believe that the foregoing cases and the cases cited therein give the plaintiffs a tenable position which justified the issuance of the temporary injunctions by the trial court.

[*Constitutional Question*]

We decline to pass on the constitutional question raised by defendants. This court has jurisdiction on an interlocutory appeal to review constitutional questions. *People v. Kostaken*, 10 Ill. 2d 549, 550 (1957); *Webb v. Marozas*, 268 Ill. App. 338 (1932); *Klever Shampay Karpet Kleaners, Inc. v. City of Chicago*, 238 Ill. App. 291 (1925). However, we do not believe that the trial court in issuing the temporary orders passed on any constitutional defense which might be available to defendants in a trial on the merits. Orders affirmed.

McCormick, Presiding Justice, and Schwartz, Justice, concur.

[¶ 69,250] United States v. Columbia Pictures Corporation, Screen Gems, Inc., and Universal Pictures Company, Inc.

In the United States District Court for the Southern District of New York. Civ. 132-86. Filed January 22, 1959.

Case No. 1378 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Price Fixing Agreement—Legality—Determination of Competitive Relationship Between Parties to Agreement.—An agreement under which motion picture producer A granted a wholly-owned subsidiary of motion picture producer B an exclusive license to distribute certain of its pre-1948 films for television exhibition could not be adjudged illegal per se under the Sherman Act on a motion for summary judgment. It was contended that motion picture producer B, through its wholly-owned subsidiary, undertook the television distribution of motion picture producer A's films on terms and conditions which were formulated jointly by the two producers, and that such an arrangement constituted a price fixing agreement between competitors which was illegal per se under the Sherman Act. While not every agreement affecting prices is illegal per se, it has been held that agreements between competitors to fix prices are illegal per se. However, before the instant agreement could be classified as illegal per se, it had to be determined whether or not the two producers were competitors in the distribution of films embraced within the agreement. This required a consideration of the nature and type of their products and the demands and requirements of the market in which those products were offered. Since this required a determination of issues of fact, summary judgment was denied.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Enforcement of Section 7, Clayton Act—Department of Justice—Preliminary Injunction—Nature of Relief—Proof.—In a Government action charging that a wholly-owned subsidiary of a motion picture producer acquired the exclu-

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sive television distribution rights of another producer's pre-1948 films in violation of Section 7 of the Clayton Act, the Government's motion for a preliminary injunction to restrain the subsidiary and its parent from further sub-licensing films under the agreement by which the films were acquired was denied. Before a Section 7 violation can be found, there must be a showing of a reasonable probability of foreclosure or substantial lessening of competition in a substantial share of the relevant market. In view of the fact that the two producers never competed in the television market and other evidence, it could not be said that the combination of the two producers' films in unified distribution by the subsidiary limited to specific pre-1948 films was likely to result in an undue reduction in the number of firms selling programming material for television showing. An injunction in the form requested would drastically interfere with the orderly release of films under the agreement. This would result in losses which might never be recouped. It was not until eight months after the Government first questioned the legality of the acquisition agreement that it brought suit, and it was not until six months after the suit was filed that temporary injunctive relief was sought. There was little likelihood that a serious detriment to the public interest would ensue, in view of the fact that the suit would be tried shortly. The defendants had raised issues which seriously questioned the Government's theory of suit, and success by the Government was far from clear. However, the motion was partially granted to maintain the status quo. The subsidiary would be restrained from sub-licensing additional films at a rate greater than 50 in any six-month period.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209.225, 4209.250.

For the plaintiff: Victor R. Hansen, Assistant Attorney General, Antitrust Division, by John Sirignano, Jr., Edward J. Harrison, and George Reycraft, Attorneys, Department of Justice.

For the defendants: Schwartz & Frohlich (Arthur H. Schwartz and Stewart G. Schwartz, of counsel) and Davis, Polk, Wardwell, Sunderland & Kiendl (Theodore Kiendl, Taggart Whipple, Richard H. Pershan, and Henry L. King, of counsel) for Columbia Pictures Corp. and Screen Gems, Inc. Adolph Schimel and Harold Lasser for Universal Pictures Co., Inc.

[*Nature of Action*]

The Court [Ryan, District Judge, *In full text*]: This civil anti-trust suit, filed by the United States on April 10, 1958 under Section 4 of the Sherman Act (15 U. S. C. Sec. 4) and Section 15 of the Clayton Act (15 U. S. C. Sec. 26) alleges that the defendants violated Section 1 of the Sherman Act (15 U. S. C. Sec. 1) and Section 7 of the Clayton Act (15 U. S. C. Sec. 18). The Government charges that these violations find origin in the making of and performance under the contract between Universal Pictures Company, Incorporated, and Screen Gems Incorporated executed on August 2, 1957 and dated as of July 1, 1957. The contract, described by the parties to it as the "Distribution Agreement", grants to Screen Gems, a wholly-owned subsidiary of Columbia Pictures Corporation, an exclusive license to distribute for exhibition over television certain listed and specified pre-August 1948 feature films of Universal.

Concurrently, Columbia, Universal and Screen Gems entered into a "Guaranty Agreement" wherein Columbia guaranteed to Universal the full, faithful and timely performance of the "Distribution Agreement" by Screen Gems, and by which Columbia further warranted, represented and agreed that Screen Gems would continue to be, during the term of the "Distribution Agreement", "the sole and exclusive licensee of the right to distribute for television exhibition substantially all motion pictures not constituting 'new motion pictures' . . . ever produced by Columbia or released for television by Columbia."

[*Government Motions*]

The suit comes before us on motions made by the Government for partial summary judgment adjudging that the defendants, by the making of these agreements and performance under them, have violated and are violating Section 1 of the Sherman Act; the Government also asks for an injunction *pendente lite*. The injunctive relief presently sought would not prevent the defendants from performance of sub-licensing agreements covering Universal films which have already been entered into by Screen Gems;

the Government now seeks only to enjoin defendants from further sub-licensing these pre-August 1948 Universal feature films during the pendency of the action.

[*Distribution Agreement*]

The contract between Universal and Screen Gems consists of 57 printed pages of apparently carefully drawn and considered provisions. The agreement deals with "all of the feature photoplays released for theatrical exhibition in the United States by or through Universal or its predecessors under the respective titles listed" in two schedules, "A" and "B", which are annexed to and are part of the agreement. The Universal pre-August 1948 feature films subject to the agreement number about 600 of which 586 had not been previously released for television exhibition; some of them are allegedly of poor quality, of little or no value and unusable in the television market. The total number of usable Universal films did not exceed 535.

In August 1957, prior to the agreement, the inventory of Screen Gems had in it about 950 films, comprising the feature films of Columbia and those of the Hygo Television Films, Inc. The Hygo pictures numbered about 450; they practically had seen their run of the television market; they had been telecast numerous times (15 or more) and were of inferior quality as compared with the Columbia and Universal productions.

The Columbia feature film catalogue consisted of no more than 500 pre-August 1948 productions, and 247 had been in national release for varying periods of time and had produced about 62% of their projected and estimated total income potential.

The Government states that Screen Gems "has available for future release 211 pre-1948 Columbia features and 434 pre-August 1948 Universal features." To date, 152 Universal pre-August 1948 feature films have been placed in distribution by Screen Gems under the agreement of August 2, 1957. There are left 383 Universal feature films still to be distributed under the agreement. This was not a release for distribution with unholy haste, when we consider that Section V.6 of the agreement obligates Screen Gems to release a minimum of 78 Universal feature films per year.

To date since the agreement, a total of 249 programs have been released by Screen Gems in four separate package offerings. These packages contain, in addition to 152 Universal feature films, 89 Columbia film programs and 8 Screen Gems re-runs. The four packages released by Screen Gems after execution of the Distribution Agreement consisted of the following films:

1. September, 1957—52 Universal films entitled "Shock Package";

2. December, 1957—9 Universal and 11 Columbia features entitled "Son of Shock";

3. January, 1958—52 Universal and 52 Columbia films, along with 8 "Playhouse 90" productions, called "Triple Crown" package;

4. June, 1958—39 Universal and 26 Columbia features in "Sweet 65" package.

In three out of the four packages released, Universal films were licensed together with Columbia features of the same general classification in the same package.

We are concerned then with the future distribution and licensing of the remaining 383 Universal feature films, all of the pre-August 1948 vintage.

[*Price Fixing*]

The Government maintains in its motion for summary judgment that the distribution contract on its face constitutes an illegal agreement to fix prices in violation of Section 1 of the Sherman Act.

The statute, in pertinent part, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ." 15 U. S. C. Sec. 1.

Sections V.3, V.14, V.7, XI.1 and XI.2, together with the Columbia guarantee, are pointed to as demonstrating that the licensing agreement on its face provides for price fixing condemned by the Supreme Court. *United States v. Socony Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150 (1939).

Section V.3 calls for the joint participation of Screen Gems and Universal in formulating "sales and other policies and decisions" relating to the pictures and their distribution. Section V.14 provides for four classifications of Universal films, according to

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audience appeal and income potential, to be made jointly by the parties; no Universal film may be classified inferior to any motion picture of the same appeal, quality, and value of Columbia. In Section V.7 the parties agree that prior to release of any film, Screen Gems shall submit to Universal a "rate schedule" setting forth minimum sub-licensing fees; if Universal objects to the fees, Screen Gems and Universal are to confer to work out the objection; Screen Gems "shall at no time grant any sub-license on terms less favorable to Distributor (and thus to Universal) than for Columbia Product (or other motion pictures from time to time distributed by it) of similar or comparable appeal and value in similar situations at approximately the same time."

[*Modification of Agreement*]

Although we do not consider it to be determinative on these motions, the defendants modified the distribution contract after service of the Government's motion for summary judgment. Defendants argue that the amendments remove the "price fixing" objections by eliminating entirely the above provisions and substituting the "fair market value" as the yardstick for sub-licensing fees of Universal films. The Government, on the other hand, argues that the amendments do not reveal a termination of the price fixing conspiracy; Screen Gems would be influenced by the fees received for Columbia films in determining the "fair market value" of Universal films; and Screen Gems is still required to permit Universal to inspect books and records relating to sub-licensing of both Columbia and Universal films. Because of the disposition being made of the instant motions, we need not resolve the conflicting views on the amendments to the contract.

[*Other Contract Provisions*]

The other contract provisions pointed to by the Government require Screen Gems to maintain complete accounts, books and records of each sub-licensing of Universal films as well as each such transaction of Distributor from January 1, 1956 to the termination of the license term for Columbia pictures (Section XI.1). It is provided further that Universal has the right to examine and make copies of all such "books, records, papers, documents, contracts, agreements, sub-licenses, correspondence, cancelled checks, vouchers, bills and statements" relevant to Columbia or Universal pictures (Section XI.2).

[*Guaranty Agreement*]

In the guaranty agreement, Columbia undertakes to maintain working control of Screen Gems during the license term; Screen Gems will continue to be sole licensee of Columbia films; Columbia guarantees payment to Universal of all moneys to become due under the license agreement, as well as full, faithful and timely performance of all obligations of Screen Gems to Universal.

[*Government's Position*]

The Government's position, as stated in its memorandum, is "that, although Columbia and Universal hitherto have been competitors in the licensing of their own feature film libraries for theatrical showing, Columbia has now undertaken (through its wholly-owned subsidiary, Screen Gems) television distribution of Universal's films on the 'terms and conditions' which are 'formulated jointly' by the two companies . . . In other words, the agreement provides that Columbia (through Screen Gems) and Universal shall jointly determine the prices at which Universal's films will be licensed, and that such terms shall be no less favorable for Universal than for Columbia pictures." This makes the agreement, in the Government's point of view, a price-fixing arrangement "illegal *per se*" (*United States v. Masonite Corporation* [1940-1943 Trade Cases ¶ 56,209], 316 U. S. 265 (1942); *United States v. Line Material Co.* [1948-1949 Trade Cases ¶ 62,225], 333 U. S. 287 (1948); *United States v. Paramount Pictures* [1948-1949 Trade Cases ¶ 62,244], 334 U. S. 131 (1948)).

[*Defendants' Position*]

The defendants, denying any unlawful "price-fixing", argue that the legality of the "Distribution Agreement" (which they characterize as a "common sales agency") is not to be tested by abstract "per se" rules but by application of "the rule of reason" requiring an analysis of the market in which these films are offered and ascertaining the effect of the operation of agreement in that market. If this be so, then summary judgment cannot be granted because the parties have basically different views as to their respective positions in the

market relevant to the inquiry in this suit and as to the competitive quality of their film in that market.

[*Sherman Act*]

The purpose and theory of the Sherman Act, as well as of all antitrust laws, is to foster competition and strike down combinations, agreements or conspiracies designed to, or effecting, unreasonable restraints of trade or commerce. Within the broad framework of this ultimate purpose, however, not every agreement affecting prices is illegal *per se*. In the words of Mr. Justice Brandeis in *Chicago Board of Trade v. United States,* 246 U. S. 231 (1918) at page 238:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

The basic principles of *Chicago Board of Trade, supra,* are still applicable and contractual restraints fall under the condemnation of Section 1 only when their purpose and effect is found to have imposed an undue restraint on commerce. This is to be determined in the light of the market in which the contracting parties compete and the products they offer. The standard of reasonableness is still "to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." *Standard Oil Co. v. United States,* 221 U. S. 1, 60 (1911).

[*"Per Se" Violations*]

It was by the application of standards of reasonableness and through the "rule of reason", experience and logic, that it has been held that some contractual restraints imposed by agreements between competitors can, as a matter of law, operate only as unlawful and condemned restraints, which if left to continue may eventuate in monopolization. Thus, by the use of reason, logic and experience, it has been declared that agreements between competitors to fix prices (*United States v. Socony-Vacuum Oil Co.* [1940-1943 Trade Cases ¶ 56,031], 310 U. S. 150 (1940)); to allocate territory (*Addyston Pipe & Steel Co. v. United States,* 175 U. S. 211 (1899)); to tie in on sale patented with unpatented products (*International Salt v. United States* [1946-1947 Trade Cases ¶ 57,635], 332 U. S. 392 (1947)); and to boycott other competitors (*Eastern States Lumber Association v. United States,* 234 U. S. 600 (1914)), are unlawful without occasion or necessity for further judicial factual inquiry. Such contractual restraints agreed to by competitors, actual or potential, have been labelled "per se" violations of Section 1. However, before we may say that such agreements are inherently unlawful, we must find that the agreements were made between competitors, actual or potential, dealing in competing products in a relevant market. This was the Supreme Court's approach in *Kiefer-Stewart Co. v. Seagrams & Sons* [1950-1951 Trade Cases ¶ 62,737], 340 U. S. 211 (1951) when it said:

> "The Court of Appeals erred in holding that an agreement *among competitors* to fix maximum retail prices of their products does not violate the Sherman Act . . ." (p. 213) italics supplied.

And in *United States v. Masonite Corporation* [1940-1943 Trade Cases ¶ 56,209], 316 U. S. 265 (1942) upon which the Government relies on this motion, the Court found that all defendants "maintain selling organizations and to a large extent compete in the same markets"; furthermore, "in this case the price regulation was based on mutual agreement among distributors of competing products, some of whom had competing patents . . ." In the light of these findings, the Court said:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition."

[*Competitive Relationship*]

Our inquiry is directed to determine whether Columbia and Universal are competitors in the distribution of films embraced within the agreement. This leads to a consideration of the nature and type of their products and the demands and requirements of the market in which these products are offered.

The Government has attempted to spell out that Columbia and Universal occupy competitive positions as a matter of fact and law. In this effort, several sections of the "Distribution Agreement" are pointed out, including provisions relating to theatri-

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cal distribution of the films, and the reservation to Universal of the right to license the films for closed circuit, toll or subscription home television.

Defendants maintain that while Columbia and Universal "were and still are competitors in the production and distribution of motion pictures for theatrical exhibition, Universal has never competed in producing or distributing film for television programming (except for one disastrous effort); . . . Universal had none of the experience or personnel required to enter the quite different market of distributing film for television programming."

Defendants also deny that their feature films are competitive in the television market; rather, they say, Columbia and Universal feature films complement each other. This is so, it is urged, because effective programming requires the availability of numbers of similar types of pictures for showing in a series. The defendants contend that neither Columbia nor Universal had sufficient pre-August 1948 films to offer an attractive programming package for series presentation, and that therefore they are not in a position to offer competitive products to the television purchasing public. That there is, at this posture of the suit, some plausibility to this contention may be seen from the fact that in three of the four "packages" of films, released by Screen Gems since execution of the challenged agreement, both Columbia and Universal films were included.

Concerning the market in which feature films are distributed for television showing, the defendants urge that feature films have of recent years developed an "audience appeal" that they did not formerly enjoy, that feature films formerly scheduled for a showing on programs late in the evening when the maximum audience was not available now have become competitive with the offerings of the network transmissions and with the syndicated film offerings. It seems, if this be true, that feature films today compete for a market which embraces all the available time for television showings, not only on the smaller local stations not part of a large or national network, but on all stations, large and small when measured from the location of the station, its power or area of broadcast and possible or available audience.

The defendants also urge that the market in which they now jointly are selling these films, is not restricted to feature films alone, but includes the offerings of network programs and the offerings of syndicated and similar programs; and, too, that the field includes all hours of broadcasting and not the less desirable hours of poor "audience appeal". With the Government taking the position that individual feature films of the type embraced in the agreement are the requirement of the market, a factual issue is presented for trial for it may not be found that Universal and Columbia are competitors without first determining the market and its demands.

Substantial evidence is submitted by defendants, by way of affidavits, that in determining the market for consideration of the "Distribution Agreement" all television programming material must be considered together. This includes live shows, kinescopes of programs originally presented live, feature films, half-hour, hour and hour-and-a-half shows produced for initial television viewing, cartoons and shorts. The affidavits of responsible television officials who are familiar with the needs of programming and the buying of material state that feature films, offered separately or in "packages" are not considered in a class apart from other material; their choice of programs is based on prices of all available shows, programs offered by competing stations, "audience appeal", station variety, and other similar factors. In short, a substantial question is raised which must await a trial as to whether the separate and limited available offerings of Universal and of Columbia do in fact constitute salable or competitive products.

[*Summary Judgment Denied*]

We conclude that this suit cannot be disposed of summarily by motion, but must await a full hearing at which disputed genuine issues of fact may be resolved. The summary judgment procedure is not designed to eliminate a trial of contested issues going to heart of the controversy presented by this suit, or by stamping the challenged agreement with an "illegal per se" label without first finding whether Universal and Columbia are in fact competitors with reference to the pre-August 1948 feature films made subject to the agreement.

¶ 69,250

[*Preliminary Injunction Sought*]

We turn now to the Government's motion for a preliminary injunction pendente lite. Here it is sought, during the pendency of this suit, (1) to enjoin Columbia and Screen Gems from taking any steps for the further sub-licensing of or otherwise distributing any of the 152 Universal films already placed in distribution by Screen Gems, provided that Screen Gems may take whatever steps may be necessary to perform sub-licensing agreements covering any feature films entered into prior to the issuance of the injunction, and (2) to enjoin Columbia and Screen Gems from releasing, sub-licensing or otherwise distributing any other Universal feature films covered by the distribution agreement. The justification for a preliminary injunction is "the detriment to the public interest which will ensue, if this Court is unable to render adequate relief in the event plaintiff is successful after trial."

The yardstick to be applied in determining whether the Court in the exercise of discretion should grant the drastic remedy of preliminary injunction, which in this case will be tantamount to the final relief sought, has been stated by the Court of Appeals for this Circuit:

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after trial, be absolutely certain, wholly without doubt; if the other elements are present (i. e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that, the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.* [1953 TRADE CASES ¶ 67,517], 206 F. 2d 738, 740 (2 Cir., 1953).

[*Clayton Act, Sec. 7*]

What we have said on the summary judgment motion is applicable to a consideration of the questions raised "going to the merits" of the Section 1 Sherman Act claim in this suit. In the Clayton Act phase, the Government alleges that the distribution agreement constitutes the illegal acquisition of an asset by Screen Gems in violation of Section 7.

Section 7 of the Clayton Act provides:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Admitting that there is a factual question, at least as to the relevant market, before a Section 7 violation can be established, the Government did not seek summary judgment on this aspect of its complaint. The approach to a Section 7 case has recently been succinctly stated by Judge Hincks in *American Crystal Sugar Company v. The Cuban-American Sugar Company* [1958 TRADE CASES ¶ 69,155], — F. 2d — (2 Cir., dec. Oct. 1, 1958):

> "Section 7 in its present content, so far as here relevant, now forbids the acquisition of the whole or any part of the stock or assets of a corporation where, in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. 15 U. S. C. A. Sec. 18. The legislative history of the amendment makes it plain that Congress intended by Sec. 7 to forbid mergers which were beyond the reach of the Sherman Act as judicially interpreted. Sen. Rep. 1175, 81st Cong., 2d Sess. 4-5 (1950). Thus under Sec. 7 as amended the Sherman Act test is no longer appropriate, H. R. Rep. 1191, 81st Cong., 1st Sess. 8 (1949), and conduct may fall under the ban of amended Sec. 7 before it has attained the stature of an unreasonable restraint of trade. See *Pillsbury Mills, Inc.*, 50 F. T. C. 555, 569 (1953). And the ban on a substantial lessening of competition "in any line of commerce in any section of the country," requires, for determination of a violation, first, a definition of a relevant market in which a lessening of competition has probably occurred and, second, analysis of the nature and extent of the competition within that market. Consequently, the parties are agreed that an acquisition is not illegal because of its impact on competition between the corporations involved: that the proper test is one of the *qualitative* substantiality of the resulting effect on competition in the relevant market. We too agree. We

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hold that only an acquisition which in the long run may reasonably be expected to substantially lessen competition within a relevant market, will violate Sec. 7 as amended."

We have previously noted the differing views of the demands of the market applicable to this suit. Before a Section 7 violation can be found, there must be a showing of a reasonable probability of foreclosure or substantial lessening of competition in a substantial share of the relevant market. Defendants point not only to the fact that Columbia and Universal have never competed in the television market, but also to the fact that no less than 65 companies license feature films for television exhibition. Defendants consider as competitors at least 235 distributors of filmed material, together with numerous sellers of live programming which are also competing with Screen Gems.

[*Issue*]

In the face of this evidence, can we say, at this time that the combination of Universal and Columbia films in unified distribution by Screen Gems limited to these specific pre-August 1948 feature films is likely to result in undue reduction in the number of firms selling programming material for television showing? We think not.

[*Injunction Too Broad*]

An injunction in the form suggested by the Government will drastically interfere with the orderly release of films under the Agreement. Films for greatest income potential, it seems, must be available in series, and licensing arrangements are made months in advance. So far as the information is available presently to the Court, neither Columbia nor Universal alone has sufficient feature films available for profitable packaging. Serious interruption in the orderly release of films by Screen Gems will result in losses which may never be recouped even though the Government be not successful in the final judgment.

We cannot lose sight of the delay in seeking injunctive relief. The contract was executed on August 2, 1957 and dated as of July 1, 1957. Prior to its execution, representatives of the Government were aware of the impending agreement and held conferences with the defendants. Shortly after August 2, 1957 copies of the "Distribution Agreement" were furnished to the Government. It was not until eight months later that this suit was filed on April 10, 1958 and still no injunctive relief was sought. The motion for a preliminary injunction was brought on by order to show cause dated October 14, 1958.

No act of the defendants can account for the fourteen months delay during which the Government permitted Universal films to be sub-licensed under the agreement. During that time, defendants released only 152 Universal films in what appears to be an orderly exercise of prudent business judgment. No dumping of films or release with inordinate haste has been undertaken. Moreover, both the Government and defendants have expressed a willingness to be ready for trial within three months of the filing of this decision. Accordingly, we cannot say that the "balance of hardships tips decidedly toward plaintiff".

There is little likehood, if the past rate of release is continued, that a serious detriment to the public interest will enuse because of the number of films which will be released between now and the trial, which can be had within three months. Prudent business judgment, on the part of defendants would seem to preclude anything but an orderly release of films which the agreement envisions over the period of the next twelve years. The stake is too high to permit of any other course of release. Defendants have raised issues which seriously challenge the Government's theory of action, and success by the plaintiff is far from clear.

[*Injunction*]

The motion for preliminary injunction at this time is partially granted, to maintain the status quo, without prejudice to the right of the Government to apply further for injunctive relief if, subsequent facts should develop warranting renewal of this motion, and Screen Gems will be restrained hereafter and until trial from sub-licensing additional Universal films at a rate greater than 50 in any six months period, with leave to the defendants to apply for modification if the Government unduly delays the commencement of the trial or subsequent events warrant modification.

Settle order.

[¶ 69,251] **Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., et al.**

Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., et al.

In the United States Court of Appeals for the Second Circuit. Nos. 84, 83—October Term, 1958. Docket Nos. 25211, 25210. Argued January 8, 1959. Decided January 26, 1959.

Appeal from the United States District Court for the Southern District of New York, ARCHIE O. DAWSON and FREDERICK VAN PELT BRYAN, Judges.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Dismissal of Action for Failure to Prosecute—Exigency Created by Disqualification of Attorney.—Motion picture theatres' treble damage actions against producers and distributors, after having been dismissed for failure to prosecute, were restored to the district court's docket for eventual trial and adjudication. The theatres had been faced with an exigency in the disqualification of their attorney and were not guilty of inordinate delay in trying to find new counsel. Disqualification of an attorney should be restricted to its prime purpose of keeping the attorney-client relationship undefiled and should not be made a step in depriving a litigant of his day in court. The newly retained counsel promptly took steps to revive the actions and promised to press them with vigor. Also, the producers and distributors were at least equally responsible for the not unusual delay in the progress of the cases. They must have known that their vigorous pressing of the disqualification issue would involve additional delay and obviously concluded that the elimination of the theatres' counsel was a sufficiently necessary tactical step to justify that delay.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

For the appellants: Stanley L. Kaufman of Kaufman, Taylor & Kimmel (Irwin M. Taylor of Kaufman, Taylor & Kimmel, on the brief), New York, N. Y.

For the appellees: John F. Caskey of Royall, Koegel, Harris & Caskey, and E. Compton Timberlake, all of New York, N. Y.

Reversing and remanding a decision of the U. S. District Court, Southern District of New York, 1958 Trade Cases ¶ 68,956. For prior opinions of the U. S. Court of Appeals, Second Circuit, see 1957 Trade Cases ¶ 68,793 and 1956 Trade Cases ¶ 68,577. For prior opinions of the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 69,035 and 1956 Trade Cases ¶ 68,441, 68,431.

Before: CLARK, Chief Judge, MOORE, Circuit Judge, and GIBSON, District Judge.

[*Appeal*]

Colonial Drive-In Theatre, Inc., and Harmar Drive-In Theatre, Inc., appeal from the dismissals for want of prosecution of their actions against Warner Bros. Pictures, Inc., and other motion picture producers and distributors for violation of the antitrust laws—first entered conditionally by Judge Dawson, D. C. S. D. N. Y., 21 F. R. D. 331 [1958 TRADE CASES ¶ 68,956], and later made absolute by Judge Bryan. Reversed and remanded.

[*Dismissal for Failure to Prosecute*]

PER CURIAM [*In full text*]: In these two antitrust actions this court, reversing the district court, entered orders disqualifying the plaintiffs' counsel; this proceeding terminated, after attempts to obtain a rehearing failed, with the denial of certiorari by the Supreme Court on October 14, 1957. *Harmar Drive-In Theatre v. Warner Bros. Pictures* [1956 TRADE CASES ¶ 68,577], 2 Cir., 239 F. 2d 555, rehearing denied 2 Cir., 241 F. 2d 937 [1957 TRADE CASES ¶ 68,793], certiorari denied 355 U. S. 824. Thereafter the plaintiffs, experiencing difficulty in obtaining new counsel to represent them, succeeded in retaining present counsel only shortly before the absolute dismissals from which these appeals are taken. Meanwhile on January 30, 1958, the defendants moved to dismiss for failure to prosecute. On February 12, Judge Dawson gave plaintiffs thirty days to comply with certain pretrial orders entered before the disqualification issue came to a head, and entered conditional dismissals, D. C. S. D. N. Y., 21 F. R. D. 331 [1958 TRADE CASES ¶ 68,956]. A motion to extend this time limit was

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denied by Judge Noonan on March 25, and final dismissals were entered by Judge Bryan essentially *pro forma* on April 2, 1958. Due to the natural course of motion practice, the issues as to delay came before the district court in a piece-meal fashion. Thus this appeal represents the first occasion for a view of the entire situation in perspective.

[*Delay—Disqualification of Attorneys*]

Plaintiffs were faced with a real exigency in the loss of their counsel who had had sole responsibility for their representation in these important cases. We cannot find them guilty here of inordinate delay in trying to find new counsel. Moreover, the newly retained counsel promptly took steps to revive the actions, and they promise to continue to press them with vigor. These cases had been instituted in June 1955; and defendants, on the facts presented to us in some detail, must bear at least equal responsibility for the not unusual delay in their progress. Moreover, defendants must have known that their vigorous pressing of the disqualification issue—including their appeal from the district court's original refusal—would necessarily involve additional delay; they obviously concluded that counsel's elimination was a sufficiently necessary tactical step to justify the delay thus caused. We think that the interests of justice require that these actions be restored to the district court's docket for eventual trial and adjudication. Disqualification of an attorney should be restricted to its prime purpose of keeping the attorney-client relationship pure and undefiled and should not be made a step in depriving a litigant of his day in court.

[*Reversed and Remanded*]

The orders of dismissal are reversed and the actions are remanded for trial.

[¶ 69,252] Herbert Reed, Tony Williams, Paul Robi, David Lynch and Zola Taylor, individually and collectively known as "The Platters" v. King Records, Inc. and Federal Records, Inc.

Federal Records, Inc. v. Mercury Record Corp. and Buck Ram.

In the United States District Court for the Southern District of New York. Civil Actions Nos. 105-75 and 105-217, respectively. Filed January 20, 1959.

California Antitrust (Cartwright) Act

Combinations and Conspiracies Under State Law—Practices—Contracts Not to Compete—Agreements Prohibiting Artists from Making Additional Recordings of Specific Songs—Validity.—Covenants of recording contracts under which a group of singers agreed not to record for another any composition recorded under the contract for a period of five years after such recording did not foreclose the singers "from engaging in a lawful profession, trade, or business" to their detriment and that of the public in violation of the California Antitrust (Cartwright) Act. The singers retained the right to make night-club, radio, television, and other appearances; they also retained the right to record any other popular songs. Moreover, the recording company may well have had a legitimate interest in retaining the exclusive rights to a recorded performance for a reasonable time.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.05.

For the plaintiffs: Paul Wilensky and Milton Somerfield for "The Platters." Jack Pearl for Federal Records, Inc.

For the defendants: Jack Pearl for King Records, Inc. and Federal Records, Inc. Paul Wilensky and Milton Somerfield for Buck Ram; Paul J. Kern for Mercury Records Corp.

Memorandum

[*Consolidated Actions*]

Bryan, District Judge [*In full text except for omissions indicated by asterisks*]: These two consolidated actions involving claims for unfair competition, breach of contract and inducing breach of contract, arise out of the release of two recordings of the

popular song "Only You" by two different record companies. Counterclaims have been interposed in each action. Each party in both actions has moved for summary judgment pursuant to Rule 56(a) or (b), F. R. C. P. There are thus what are tantamount to four motions and four cross-motions for summary judgment before me for decision.

[*Parties*]

The plaintiffs in the first action are Herbert Reed, Tony Williams, Paul Robi, David Lynch and Zola Taylor, who comprise a group of popular singers known as "The Platters". The defendants are Federal Records, Inc., a recording company, and King Records, Inc., which promotes and distributes Federal recordings.

Jurisdiction is grounded on diversity of citizenship. Plaintiffs alleged that they are residents of California. Both defendants are incorporated in Ohio.

The second action is brought by Federal Records, Inc. against Buck Ram "manager" of "The Platters" and Mercury Records, Inc., also a recording company. Mercury Records, Inc. is an Illinois corporation and Ram is a resident of California.

[*Summary Judgment Denied*]

All of the motions for summary judgment must be denied.

[*Contracts*]

Out of this confusing and illy documented welter of facts the following appears to be undisputed; On June 2, 1953 Samuel Anthony (Tony) Williams entered into a contract with Federal Records, Inc. This contract provided that Williams was to record a minimum of four records sides, granting to Federal the sole use of the records to manufacture, produce, sell and distribute. For the term of the contract Williams agreed not to record for anyone else, and, in any event, not to record for another any "musical composition recorded hereunder" for a period of five years after a recording made for Federal. The contract bears the signatures of Williams, Sydney Nathan, the vice-president of Federal Records, and Ralph Bass, an employee of Federal in charge of artists and repertoire.

On September 15, 1953 a similar contract was executed which bears the signatures of Alex Hodge, Herbert Reed, Joe Jefferson and Cornelius Gunter, who were collectively referred to in the contract as "The Platters". The contract was signed for Federal by Bass and its president Kelley. This contract differed from the June contract by requiring a minimum of eight record sides. Except for these differences, and the periods covered by the contracts, the two are identical.

[*Recordings Made*]

Between September 1953 and September 1954 recordings of sixteen popular songs were made for Federal by "The Platters" at four recording sessions, September 15, 1953, March 16, May 20 and September 28, 1954. Fourteen of these were released and publicly sold. Two of the four songs recorded on May 20, 1954 had not been released by the start of the present litigation. One song recorded on May 20, 1954 which was released and sold is "Only You", the subject of this litigation.

In February 1955 the individuals who apparently now comprise the group known as "The Platters" (a somewhat different group than the "Federal" group) signed a recording contract with Mercury Records, Inc. Pursuant to this contract the song "Only You" was recorded for Mercury by "The Platters" in April 1955. This song was released by Mercury in May 1955. Federal Records, Inc. released the version which had been recorded for it in May of 1954, in September or October 1955, some five months later.

On November 10, 1953, March 30, 1954 and June 3, 1954 Federal Records, Inc. drew checks to the order of "The Platters" for $150.00.

* * *

[*Counterclaim*]

3. Defendant Federal, in the first action, counterclaims against "The Platters" alleging breach of the covenants against recording for another during the term of the June 2 and September 15, 1953 contracts and the covenant not to record a song recorded for Federal for five years.

* * *

4. Plaintiffs have moved on the counterclaim for summary judgment against Federal. They argue that (a) the five year restrictive covenant contained in both contracts is void, (b) there is no mutuality of obligation between the parties, (c) Federal is barred by laches, and (d) the Statute of

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Frauds is a bar to proof of the plaintiffs' alleged adoption or ratification of the 1953 contracts.

[*The Five Year Restrictive Covenant*]

Plaintiffs allege that § 16,600 of the California Business Law which outlaws contracts by which a person is restrained from engaging in a lawful profession, trade or business, applies to the 1953 contracts.[4] The plaintiffs rely on *Gardella v. Chandler* [1948-1949 TRADE CASES ¶ 62,368], 2 Cir., 172 F. 2d 402. However, *Gardella* does not support them. A covenant which prohibits an artist from making additional recordings of a few specific songs for five years and a clause which has the result of "* * * the blacklisting of the [baseball] player so that no club in organized baseball will hire him", have quite different legal consequences. *Gardella v. Chandler, supra,* at 410. "The Platters" retained the right to make night-club, radio, television and other appearances and they may record any other popular song. Merely because it later appears that the song was highly successful and would provide other lucrative recording opportunities does not outlaw the contractual restraint. An improvident contract is not necessarily unlawful.[5] Moreover, Federal may well have had a legitimate interest in retaining the exclusive rights to a recorded performance for a reasonable time.

Section 16,600 does not by its terms prohibit the contractual restraint as it only provides that a contract is void when "anyone is restrained from engaging in a lawful profession, trade or business * * *." The contracts at issue do not foreclose plaintiffs from a "profession, trade or business" to to their detriment and that of the public.

* * *

[¶ 69,253] Johnson & Johnson, Inc. v. G. E. M. Sundries Company, Inc.

In the Supreme Court of Hawaii. No. 4055. Argued November 20, 1958. Decided January 16, 1959.

Appeal from Circuit Court First Circuit, HON. ALBERT M. FELIX, Judge.

Hawaii Fair Trade Act

Fair Trade—Constitutionality of Hawaii Fair Trade Act—Power of Territorial Legislature to Enact Fair Trade Act—"Rightful Subjects of Legislation."—The Legislature of the Territory of Hawaii had as much power to enact a Fair Trade Act as any of the states whose fair trade statutes had been sustained by the Supreme Court of the United States. The territorial legislature has, except as restricted by congressional act, the power of a state legislature. The Organic Act of Hawaii provides that the legislative power of the Territory shall extend to all "rightful subjects of legislation" not inconsistent with the Constitution and laws of the United States which are locally applicable. The question of the rightful subjects of legislation is not to be settled by reference to the distinctions usually made between legislative acts and those that are judicial or administrative in their character, but by an examination of the subjects upon which legislatures have been in the practice of acting with the consent and approval of the people they represented. Inasmuch as the legislatures of 46 states and two territories have passed fair trade acts, it cannot be questioned that such acts are "rightful subjects of legislation."

See Fair Trade, Vol. 1, ¶ 3085.13.

Fair Trade—Hawaii Fair Trade Act—Constitutionality Under Sherman Act, Section 3—Validation of Fair Trade Act by Miller-Tydings and McGuire Acts—Applicability to Territories.—The Hawaii Fair Trade Act is not in conflict with the Sherman Antitrust Act as amended by the Miller-Tydings and McGuire Acts. The court below disregarded the plain wording of those statutes in finding that neither of them amended Section 3 of the Sherman Act, which declares illegal contracts in restraint of trade in any territory of the

* * *

[4] All the parties urge that the law of California applies to these actions. For the purpose of considering these motions I will make the same assumption.

[5] At this stage no facts on the fairness of the Federal contract have been presented.

United States. The Miller-Tydings Act was intended to permit the states and territories to legalize the fair trade statutes then existing or thereafter to be passed. That Act was interpreted, however, as modifying the Federal antitrust laws with respect to actual signers of fair trade contracts but not with respect to fair trade rights against non-signers. The McGuire Act, which specifically covers non-signers, provided that nothing contained in "any of the Antitrust Acts" should render unlawful fair trade contracts which were lawful as applied to intrastate transactions under the laws of "any State, Territory, or the District of Columbia." The lower court based its opinion that Section 3 of the Sherman Act was not amended by the Miller-Tydings or McGuire Acts on the fact that the preamble of the McGuire Act mentioned only states and did not, therefore, apply to territories, although the words "any State, Territory, or the District of Columbia" were specially used in the Act. While the constitutions of many states and the Organic Law of Hawaii require that each law enacted shall embrace but one subject which shall be expressed in its title, there is no such restriction upon Congress. The title of an act cannot be used to extend or restrain any positive provisions contained in the body of the act. Since the effect of the Miller-Tydings and McGuire amendments to the Sherman Act was to remove the only obstacle to the enforcement of the fair trade acts, re-enactment of the Hawaii Fair Trade Act was unnecessary.

See Fair Trade, Vol. 1, ¶ 3080.13, 3085.13.

Fair Trade—Constitutionality of Hawaii Fair Trade Act—"Non-Signer" Provision—Necessity for Privity of Contract—Knowledge of Price Restrictions—Due Process—Delegation of Price-Fixing Power.—Price restrictions imposed by fair trade contracts entered into pursuant to the Hawaii Fair Trade Act were binding upon dealers who were not parties to the contracts but had knowledge of the existing price restrictions. The trial court's decision that the enforcement of fair trade prices depended upon privity of contract was without merit. The Supreme Court of the United States, the Hawaiian court, and the weight of authority hold that no privity of contract is necessary for the owner of a trade-mark, when authorized by statute, to protect himself by fixing the price at which a retailer may sell; the only requirement is that the retailer have knowledge of the restriction on the sales price. Such restrictions do not violate the due process clause of the Fourteenth Amendment to the United States Constitution, are not an unlawful delegation to private persons of the power to control the disposition of the property of others, and are not arbitrary, unfair, or unreasonable. The essence of the statutory prohibition contained in the Fair Trade Act is not the mere disposal of a commodity, but the use of the trade-mark, brand, or name in the accomplishment of such disposition.

See Fair Trade, Vol. 1, ¶ 3085.13, 3258.

For the appellant: Frank D. Padgett (Robertson, Castle & Anthony with him on the briefs).

For the appellee: Robert G. Dodge (Heen, Kai, Dodge & Lum on the briefs).

Amici curiae: Stanley A. Weigel (Landels, Weigel & Ripley, and Pratt, Tavares & Cassidy with him on the brief) for Parker Pen Company as *amici curiae.* (Roy A. Vitousek, Jr., present but did not argue.)

Reversing a decision of the Hawaii Circuit Court, First Judicial Circuit, 1958 Trade Cases ¶ 68,936.

RICE, C. J., STAINBACK and MARUMOTO, JJ.

Opinion of the Court

By STAINBACK, J. [*In full text*]: This action was brought under the provisions of the Hawaii Fair Trade Act (chapter 205, Revised Laws of Hawaii 1955) to enjoin the defendant-corporation from selling the products of appellant at less than the fair-trade price fixed by appellant.

The complaint alleges that the appellant is a New Jersey corporation transacting business in the Territory of Hawaii, while appellee is a Nevada corporation also transacting business in the Territory; that the appellant produces various products sold bearing its registered trade-mark and all such products are sold in containers bearing

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the name of the producer and are in fair and open competition with commodities of the same general class produced by others; that appellant entered into contracts with various retailers in the City and County of Honolulu who agreed not to sell appellant's products at less than specified minimum price at retail as fixed by appellant from time to time; that the appellee had notice of the existence of the fair-trade contracts but despite such notice sold appellant's products at less than the fair-trade price fixed by such contracts and, unless restrained, will continue to do so; that the continuance of such sales would do irreparable damage to appellant in its business, and appellant has no speedy and adequate remedy at law.

All the facts alleged in the complaint were stipulated to or found by the court to be true.

[*Motion to Dismiss*]

Appellee made a motion to dismiss upon the following points: (1) the complaint fails to state a cause of action against defendant that would entitle it to any relief; (2) the Hawaii Fair Trade Act was illegal at the time of its enactment for the reason that it was in violation of Sections 1 and 3 of the Sherman Act; (3) assuming the power of the legislature of the Territory of Hawaii to enact such a fair-trade act, following the amendment to Section 1 of the Sherman Act by the Miller-Tydings Act no such reenactment has been accomplished; (4) the Hawaii Fair Trade Act, and more particularly the so-called "nonsigner" provision thereof, is unconstitutional for the reason that the same is a price-fixing statute and the legislature is without power to fix prices at which commodities may be sold unless the business or property involved is affected with a public interest; (5) assuming the power of the legislature to fix prices and its authority to delegate that power, any such delegation to be valid must provide a primary standard or general rule to be followed in discharging the delegated power, and the Hawaii Fair Trade Act provides no such standard or rule; (6) the Hawaii Fair Trade Act is unconstitutional because it interferes with the right of the seller and the purchaser to freely contract and agree upon a price of their choice, and that this right to contract is a property right protected by the Fifth and Fourteenth Amendments to the Constitution of the United States; (7) the Hawaii Fair Trade Act is void as an invalid exercise of a police power, being an attempt to use that power for a private and not a public purpose; (8) the Hawaii Fair Trade Act is invalid and inoperative in so far as it purports to authorize the enforcement of minimum fair-trade resale prices against any person who is not a party to the contract by which the minimum resale prices were established.

[*Findings of Lower Court*]

The court below found the Hawaii Fair Trade Act was contrary to Section 3 of the Sherman Antitrust Act, that neither the Miller-Tydings amendment nor the McGuire Act validated the Hawaii Fair Trade Act nor provided any authority for the enactment of such an Act in the future. It also found the Hawaii Fair Trade Act makes only those contracts in privity enforceable and refused to enjoin the defendant from selling at less than the fair-trade price fixed by the holder of the registered trade-mark.

[*Issues on Appeal*]

The case comes to this court upon appeal from the order dismissing the complaint.

The case presents to this court the questions of (1) whether Section 3 of the Sherman Act invalidates the Hawaii Fair Trade Act and (2) whether enforcement of the Hawaii Fair Trade Act depends upon privity of contract.

The case of *Auto Rental Co. v. Lee,* 35 Haw. 77, held that the Fair Trade Act is a rightful subject of legislation within the provisions of Section 55 of the Organic Act; that there is no inconsistency between the provisions of the Fair Trade Act and the provisions of the Sherman Antitrust Act, as amended; that the provisions of the Fair Trade Act are not contrary to the due-process clause of the Constitution of the United States; and that there need be no privity of contract between the owner of the trade-marked brand or name and the dealer, but that the Act binds all noncontract dealers who have knowledge of the terms of the subsisting contract in the trade-marked commodity. The latter may possibly be dictum; however, the point was well reasoned and considered by the court in making its decision. Thus, *Auto Rental Co. v. Lee, supra,* appears conclusive of this case unless we desire to overrule it.

[*Police Power*]

As was noted in the case of *Auto Rental Co. v. Lee, supra,* the enforcement of the Fair Trade Act is an exercise of the *police power* of the Territory for "giving protection to trade-mark owners, producers and the general public, against injurious and uneconomic practices in the distribution of certain commodities." (*Auto Rental Co. v. Lee,* 35 Haw. 77, 84, citing *Triner Corporation v. McNeil,* 363 Ill. 559, 2 N. E. [2d] 929.) It is not an action to enforce a contract between the parties thereto.

The Fair Trade Act is calculated to prevent price cutting upon the sale of trade-marked articles sold in competition with articles of a similar class, the minimum sale price of which has been established by the producer or distributor. Unfair competition, as defined in the Act, consists "not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition." (*Old Dearborn Co. v. Seagram Corp.* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 193.)

[*Economic Theory*]

Protecting patents and trade-marks, etc., for economic benefit is a rightful subject of legislation within the meaning of that term as employed in Section 55 of the Organic Act. It is an exercise of the police power. (*Auto Rental Co. v. Lee, supra.*) It is not the court's duty to pass upon the soundness of the economic theory upon which such Acts are passed, as that is a matter of public policy for the legislature. However, the economic theory is clearly not so unreasonable as to cause any interference by the courts.

Old Dearborn Co. v. Seagram Corp., 299 U. S. 183, at 195-196, states:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature. *Radice v. New York,* 264 U. S. 292, 294; *Zahn v. Board of Public Works,* 274 U. S. 325, 328, and cases cited."

A justification of the economic theory of the Fair Trade Act is well set forth by Mr. Justice Brandeis, famous as an economist as well as a lawyer, in an article published in *Harper's Weekly* (November 15, 1913), from which the following is an excerpt:

> "* * * when a dealer has to use somebody else's name or brand in order to sell goods, then the owner of that name or brand has an interest which should be respected. The transaction is essentially one between the two principals—the maker and the user. All others are middlemen or agents; for the product is not really sold until it has been bought by the consumer. Why should one middleman have the power to depreciate in the public mind the value of the maker's brand and render it unprofitable not only for the maker but for other middlemen? Why should one middleman be allowed to indulge in a practice of price-cutting, which tends to drive the maker's goods out of the market and in the end interferes with people getting the goods at all?
>
> "When a trade-marked article is advertised to be sold at less than the standard price, it is generally done to attract persons to a particular store by the offer of an obviously extraordinary bargain. It is a bait—called by the dealers a 'leader.' But the cut-price article would more appropriately be termed a 'misleader'; because ordinarily the very purpose of the cut-price is to create a false impression." (The Social and Economic Views of Mr. Justice Brandeis, pp. 405, 406.)

[*Power of Territorial Legislature*]

The territorial legislature has, except as restricted by congressional act, the power of a state legislature. Section 55 of the Organic Act provides:

> "That the legislature power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

Since the organization of the Territory of Wisconsin in 1836 the several Terri-

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tories in the United States have been granted powers of local self-government under provisions that do not differ substantially from Section 55 of our own Organic Act. (*Maynard v. Hill,* 125 U. S. 190.) Let us, therefore, examine some of the decisions to see what, under this provision, are "rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

Under a similar provision for the Territory of Utah, the Supreme Court of the United States in *Clinton et al. v. Englebrecht,* 80 U. S. 434, under the Organic-Act provision that "The legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act" the court, in holding that the mode of procuring jurors is a "rightful subject of legislation," stated:

> "The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress."

Under a similar provision of the Organic Act of the Territory of Montana, the United States Supreme Court in *Hornbuckle v. Toombs,* 85 U. S. 648, 655, held that the practice, pleadings, forms and modes of proceedings of the territorial courts were intended by Congress to be left to the legislative action of territorial assemblies, stating:

> "The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature; and the jurisdiction of the Territorial courts is collectively co-extensive with and correspondent to that of the State courts. * * *"

In *Cope v. Cope,* 137 U. S. 682, 684, under a Utah territorial statute making "illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children," it was held that the child of the polygamous or plural wife inherited from his father in spite of the Act of Congress forbidding polygamy in the Territory. The court said, among other things:

> "* * * *the power of the Territorial legislature was apparently as plenary as that of the legislature of a State. Maynard v. Hill,* 125 U. S. 190, 204. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of State cognizance, and are such as were within the competence of the Territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress." (Italics added.)

Finally, the case of *Puerto Rico v. Shell Co.,* 302 U. S. 253, 261, in upholding the adoption by the legislature of Puerto Rico of a local Antitrust Act very similar to the Sherman Act (although Puerto Rico as a Territory came under the provisions of the Sherman Antitrust Act) states:

> "The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories."

In view of the foregoing examples of what are "rightful subjects of legislation" under this provision of the Organic Act, let us quote the definition as given in *Maynard v. Hill, supra.* This case stated the question of rightful subjects of legislation "is not to be settled by reference to the distinction usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented."

Inasmuch as the legislatures of 46 States and 2 Territories have passed Fair Trade Acts, it cannot be questioned that Fair Trade Acts are "rightful subjects of legislation."

[*U. S. Constitution*]

The next question is whether the Hawaii Fair Trade Act is contrary to the Constitution or laws of the United States.

[*Contentions*]

The contentions are made that the Hawaii Fair Trade Act conflicts with the Sherman Antitrust Act and is therefore invalid and, further, assuming that the Hawaii Fair Trade Act is valid, it re-

quires privity of contract between the owner of the registered trade-mark and the retailer who sells the same.

[*Miller-Tydings Act*]

The first would be true under the Sherman Antitrust Act prior to the Miller-Tydings Act and the McGuire Act amending the same. In 1911 the Supreme Court of the United States held in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, that resale price maintenance in interstate commerce conflicted with the Sherman Antitrust Act. However, in 1937 Congress passed the Miller-Tydings Act which was intended to permit the States and Territories to legalize the fair-trade statutes then existing in States and Territories or thereafter be passed to exempt such price maintenance from the provisions of the Sherman Antitrust Act.

[*Nonsigners—McGuire Act*]

However, the plan of Congress was partly upset when a divided Supreme Court in interpreting the amendment held that the Act did modify the Federal antitrust law but with respect to actual signers of fair-trade contracts but not with respect to fair-trade rights against nonsigners. In delivering the opinion of the court, Mr. Justice Douglas stated that had the Congress desired to eliminate this provision, "different measures would have been adopted—either a nonsigner provision would have been included or resale price fixing would have been authorized without more." (*Schwegmann Bros. v. Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 390.) Thereafter, to correct this interpretation by the Supreme Court, the Congress enacted the McGuire Act, which specifically covers nonsigners. Sections 2 and 3 of the McGuire Act are as follows:

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions *under any statute, law, or public policy now or hereafter in effect in any State, Territory,* or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any *statute, law, or public policy* now or hereafter in effect in any State, *Territory,* or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements *whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.*" (Italics added.)

[*Title of an Act*]

The court below in finding that "neither the amendment of 1937 [Miller-Tydings Act] nor the amendment of 1952 [McGuire Act] amended Section 3 of the Sherman Act" disregarded the express wording of the statutes, basing its opinion upon the fact that since the preamble of the statute mentioned only States, the Act did not apply to Territories although the terms "any State, Territory, or the District of Columbia" were specially named in the Act.

While the constitutions of many States, and our own Organic Act by Section 45, provide that each law shall embrace but one subject which shall be expressed in its title, there is no such restriction upon the Congress; time and time again so-called riders have been attached to Acts of Congress and the legality of such procedure is beyond question.

"Originally in England, bills were not given titles. Even when used, titles were not considered part of an act. Although a similar view was also followed in early American legislative history, the custom gradually developed to affix captions to legislative acts to identify the subject matter of the legislation. Eventually, the draftsmen of state constitutions inserted provisions in their documents, the effect of which was to require titles on all statutes. The federal constitution does not impose any limitation on the

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use of titles." (1 Sutherland, *Statutory Construction,* 3d ed., *Titles,* § 1701, pp. 283-284.)

In *Hadden v. The Collector,* 72 U. S. 107, a portion of the syllabus reads:

"The title of an act cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight."

The court stated on page 110:

"The title of an act furnishes little aid in the construction of its provisions. Originally in the English courts the title was held to be no part of the act;—'no more,' says Lord Holt, 'than the title of a book is part of the book.' It was generally framed by the clerk of the House of Parliament, where the Act originated, and was intended only as a means of convenient reference. At the present day the title constitutes a part of the act, but it is still considered as only a formal part; it cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

"These observations apply with special force to acts of Congress. Every one who has had occasion to examine them has found the most incongruous provisions, having no reference to the matter specified in the title."

The court then points out a number of incongruous provisions such as a rider to an appropriation Act which contained the provision that no witness should be excluded in the courts of the United States on account of color, etc., a law regulating appeals in Mexican land cases which contained a rider making appropriations for civil and diplomatic expenses of the government for the year 1853, etc.

Further, while the words "State," "States," or "United States," as used in the Constitution or the laws of Congress, usually apply only to States and not Territories (*Downes v. Bidwell,* 182 U. S. 244, at pages 250-251, 257, 259; *Alaska v. Troy,* 258 U. S. 101), yet the words "State," "States," or "United States," where the context so shows, may be construed in the broader meaning as including any separate political community such as a Territory. (*Wynne v. United States,* 217 U. S. 234, citing numerous cases.)

Ex Parte Reggel, 114 U. S. 642, 650, and *Kopel v. Bingham,* 211 U. S. 468, extradition cases, hold that the provisions of Section 2 of Article IV of the Constitution, providing that a person charged with crime in any State who shall flee from justice and be found in another State, shall on demand of executive authority of the State from which he has fled be delivered up to be removed to the State having jurisdiction of the crime, applies to one who flees from Puerto Rico to a State.

"In many contexts 'state' may mean only the several states of the United States. Here, however, we hold that its meaning includes the Territory of Hawaii." (*Andres v. United States,* 333 U. S. 740, 745.)

[*Necessity for Reenactment*]

The claim is made that the Hawaii Fair Trade Act being invalid when passed was not validated by the passage of the Miller-Tydings and the McGuire Acts or by the reenactment of the Fair Trade Act in the Revised Laws of Hawaii of 1945 and of 1955.

It will be noted that the amendment to the Sherman Antitrust Act is intended to legalize "any statute, law or public policy now or hereafter in effect in any State, Territory or the District of Columbia," thus expressly legalizing existing laws of the States or Territories which were not enforceable because of conflict with the Sherman Antitrust Act. The vast majority of decisions from the various States has held that reenactment of the fair-trade statutes was not necessary to make such statutes valid, although there is authority to the contrary.

In *In Re Rahrer,* 140 U. S. 545, 565, the Supreme Court of the United States held:

"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reenactment of the state

law was required before it could have the effect upon imported which it had always had upon domestic property."

Similarly, in *Central Pacific Railroad v. Nevada,* 162 U. S. 512, 523 (1896), the statement is made:

"No action on the part of the State or its legislature was necessary to signify its acceptance of the authority conferred by the Federal statute. * * *

"Nor, conceding that the General Statutes of Nevada were inoperative to authorize the taxation of these lands prior to the act of Congress of July, 1886, was any reenactment of those statutes necessary, since the effect of this act was merely to remove the only obstacle to their enforcement."

To the contrary is *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.* [1953 TRADE CASES ¶ 67,442], 209 Ga. 613, 75 S. E. (2d) 161, which held that a void statute can be made effective only by reenactment.

[*Privity of Contract*]

The decision of the lower court that the enforcement of rights against unfair competition depends upon privity of contract is without merit and contrary to *Old Dearborn Co. v. Seagram Corp.* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, sustaining the Illinois Fair Trade Act, and *Pep Boys v. Pyroil Sales Co.* [1932-1939 TRADE CASES ¶ 55,142], 299 U. S. 198, sustaining the California Fair Trade Act, and our own Supreme Court decision in *Auto Rental Co. v. Lee, supra.* These opinions are sweeping and passed upon all the contentions raised by the defendant, the appellee in this case. Price restriction is binding upon a dealer who has full knowledge of an existing price restriction imposed by contract between a producer and other retailers, does not violate the due-process clause of the Fourteenth Amendment, and is not an unlawful delegation of the power to private persons to control the disposition of property of others; it is not arbitrary, unfair or unreasonable; the essence of the statutory prohibition is not the mere disposal of the commodity, but for the use of the trade-mark, brand or name in accomplishing such disposition.

[*Knowledge of Price Restriction*]

While there are a number of decisions holding that there must be privity of contract, the Supreme Court of the United States, the Hawaiian court, and the weight of authority hold that when authorized by the statute no privity of contract is necessary for the owner of a trade-mark to protect himself by fixing the price at which a retailer may sell. To protect the good will and copyright of the producer, privity of contract is not necessary. The only requirement is that the retailer have knowledge of the restriction on the sales price.

We deem it unnecessary to review at length the many decisions upholding the constitutionality of Fair Trade Acts as to nonsigners and those holding to the contrary.

The case of *Esterbrook Pen v. San Juan F. Vilarino 5 Y 10* [1956 TRADE CASES ¶ 68,555], 144 F. Supp. 309 (1956), is interesting because Puerto Rico, like Hawaii, is a Territory and enacted its own Fair Trade Act.

There are also many decisions turning upon the point whether a defendant-retailer had knowledge of the restrictions imposed by the owner of the trade-mark. (*Lionel Corp. v. Grayson-Robinson Stores* [1954 TRADE CASES ¶ 67,717], 15 N. J. 191, 104 A. [2d] 304.)

[*District of Columbia*]

To the contention that because price-cutting sales in the District of Columbia are legal (citing *General Electric Co. v. Masters Mail Order Co.,* 244 F. [2d] 681), such sales would be legal in Hawaii, the complete answer of course is that there is no Fair Trade Act in the District of Columbia.

The further contention that it would require Congress to act for Hawaii just as it would for the District of Columbia is fully answered by the fact that the Territory has been given complete freedom of legislation on local matters while the District of Columbia is given no legislative authority on any matters but Congress legislates for it.

While Congress has plenary power over the Territory and might pass specific Acts for its benefit or might exempt the Territory from general Acts as it sees fit and thus could have exempted the Territory from the provisions of the Antitrust Act where the Fair Trade Act is involved, instead by the Miller-Tydings and the McGuire Acts Congress left the Territory in

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the same position as the various States, that is, the Territory could enact such fair-trade laws or not as it might deem desirable.

See *Christianson v. King County*, 239 U. S. 356, 365, where Mr. Justice Hughes, in holding that an escheat law was a proper subject of legislation by the Territory of Washington, stated "the local legislature has generally been entrusted 'with the enactment of the entire system of municipal law'" and continued:

> "In the case of the Territories, Congress could have dealt with this subject if it chose, but it did not see fit to establish a rule of its own. The matter, however, remained a 'rightful subject' of legislation and Congress did not except it from the broad grant of legislative power."

If it is desirable for States to have the power to exempt themselves by Fair Trade Acts from antitrust provisions of Federal laws, it is equally desirable for the Territory of Hawaii to have the same power.

The power of the territorial legislature being "as plenary as that of the legislature of a State" (*Cope v. Cope, supra*), the Territory has just as much right and power to enact a Fair Trade Act as Illinois or New York or any of the other States whose Fair Trade Acts have been sustained by the Supreme Court of the United States.

Reversed.

[¶ 69,254] Asheville Tobacco Board of Trade, Inc., et al. v. Federal Trade Commission.

In the United States Court of Appeals for the Fourth Circuit. No. 7678. Argued November 10, 1958. Decided January 20, 1959.

On Petition to Review and Set Aside an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Combining or Conspiring—Allocation of Selling Time to Tobacco Warehouses—Performance System—Gain or Loss Provision—New Warehouse Provision—Legality.—There was substantial evidence to support a Federal Trade Commission ruling that certain regulations of a tobacco board of trade concerning the allocation of selling time to warehousemen unreasonably restrained trade in the purchase and sale of tobacco in violation of Section 5 of the Federal Trade Commission Act. The board had adopted a performance system for the allotment of selling time. Under a pure performance system, selling time is allotted to each warehouse in direct proportion to the producers' sales in such warehouse during the preceding year. The board, however, had modified the system by a gain or loss provision: that the selling time allotted to any warehouse should not vary more than 3½ per cent from the selling time allotted to such warehouse for the preceding season. Under another provision, a new warehouse was allotted a unit of selling time equal to the average of the selling times of all warehouses on the market. The condemnation of the 3½ per cent limit was clearly justified; however, a reasonable limitation on the percentage of gain or loss in any one year would not violate the antitrust laws. The Commission's order did not prevent a reasonable limitation based upon a percentage of the total selling time rather than on the selling time allotted to the particular warehouse for the preceding season. The evidence clearly supported the condemnation of the new warehouse provision in connection with the gain or loss provision; however, it was not so clear that the new warehouse provision itself, or combined with a reasonable gain or loss provision, would unduly restrain trade. The validity of the new warehouse provision had been upheld by the North Carolina Supreme Court. When a performance system is used, it is necessary to adopt some kind of a new warehouse provision. The question is whether such a provision constitutes an unreasonable restraint of trade. The Commission's order with respect to the new warehouse provision was not entirely clear. The court was not certain whether the order meant that the board should give credit for the full size and capacity of a new warehouse or simply take such size and capacity into account and adopt a rule which gives reasonable weight to this factor.

See Unfair Practices, Vol. 2, ¶ 5033.15, 5033.31.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Tobacco Board of Trade's Regulations as State Activity—Effect of State Laws on Commission's Jurisdiction.—The Federal Trade Commission had jurisdiction to challenge a tobacco board of trade's regulations concerning the allocation of selling time to tobacco warehousemen as unfair methods of competition and unfair acts or practices in violation of the Federal Trade Commission Act. The contention that the board of trade was an administrative agency of the State of North Carolina, exercising powers delegated to it by the legislature, and was therefore beyond the jurisdiction of the Commission was rejected. It is not the purpose of Federal antitrust laws to restrain a state or its officers or agents from activities directed by its legislature. However, the regulations and activities of the board of trade, particularly the adoption and enforcement of such regulations, did not constitute activities of state officers or agents but were individual activities subject to the jurisdiction of the Commission. Action by the state had been confined to (1) the statutory requirement that the regulations adopted by tobacco boards of trade be just and reasonable and not in restraint of trade, and (2) decisions of the courts upon controversies arising between members. Essentially, the operation of the boards of trade was in the hands of private parties. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful. In determining the scope of the Federal Trade Commission Act, the court was not bound by the state's courts characterization of the boards.

See Unfair Practices, Vol. 2, ¶ 5201.361.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Tobacco Auction Market—Public Interest.—There is a substantial public interest in maintaining free and open competition among warehousemen in tobacco auction markets; therefore, the Federal Trade Commission had jurisdiction to challenge a tobacco board of trade's regulations concerning the allocation of selling time to tobacco warehousemen as unfair methods of competition and unfair acts or practices in violation of the Federal Trade Commission Act. Under the Tobacco Inspection Act of 1935, tobacco auction transactions are affected with a public interest. The public interest often is specific and substantial because the unfair method employed threatens the existence of present or potential competition. The contention that the instant case was a private controversy, involving no specific and substantial public interest, was rejected.

See Unfair Practices, Vol. 2, ¶ 5201.581.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Interstate Commerce—Regulation of Selling Time in Tobacco Auction Market.—The Federal Trade Commission has no jurisdiction to proscribe unfair methods of competition that merely affect interstate commerce; they must be in such commerce. However, the contention that the adoption of regulations governing "the internal allocation of selling time" to the warehouses in a tobacco auction market is not interstate commerce was rejected. Tobacco auctions are an integral and indispensable part of interstate commerce in tobacco. The practices of a tobacco board of trade in adopting such regulations are an essential part of such commerce.

See Unfair Practices, Vol. 2, ¶ 5005.83.

For the petitioners: Harold F. Baker (Williams & Williams; R. R. Williams; Howrey & Simon, and Richard L. Perry on brief). Malcolm B. Seawell, Attorney General of North Carolina, for the State of North Carolina *amicus curiae*.

For the respondent: J. B. Truly, Attorney, Federal Trade Commission (Earl W. Kintner, General Counsel; James E. Corkey, Assistant General Counsel, and Henry G. Pons, Attorney, Federal Trade Commission, on brief).

Remanding a decision of the Federal Trade Commission in Dkt. 6490.

Before SOPER, Circuit Judge, and THOMSEN and BOREMAN, District Judges.

[*Issues*]

THOMSEN, District Judge [*In full text*]: This petition to review a "cease and desist" order of the Federal Trade Commission raises two principal questions: (1) whether the case is within the jurisdiction of the

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Commission; and (2) whether there is substantial evidence in the record considered as a whole which supports the finding of the Commission that certain regulations adopted by petitioner Asheville Tobacco Board of Trade, Inc. (Board) unreasonably and unduly restrain trade in the purchase and sale of tobacco on the Asheville market and constitute unfair methods of competition and unfair acts or practices in commerce within the meaning of § (5) of the Federal Trade Commission Act, 15 U. S. C. A. 45.

[*Tobacco Sales*]

Tobacco, the principal agricultural commodity produced in North Carolina, is sold at auction through the facilities of tobacco warehouses by farmers to manufacturers of tobacco products and to independent buyers for shipment in interstate and foreign commerce. A tobacco market consists of a group of warehouses, which operate under public license. Burley tobacco of the North Carolina type is grown in eight states. There are three Burley tobacco auction markets in North Carolina, of which Asheville is by far the largest, and there are several such markets in eastern Tennessee. In 1954 about 11.5 million pounds of producers' tobacco were sold at Asheville, and in 1955 about 9.2 million pounds.[1]

[*State Regulation*]

Various aspects of the production and marketing of tobacco are subject to state or federal regulation. N. C. Gen. Stat. § 106-465 authorizes local tobacco boards of trade to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction, but does not authorize the control of prices or the making of rules and regulations in restraint of trade. The boards adopt regulations governing the allotment of selling time to the warehouses on the market, and to new warehouses. The need for such allocation is well settled. *Rogers v. Douglas Tobacco Board of Trade,* 5 Cir. [1957 TRADE CASES ¶ 68,706], 244 F. 2d 471; *In the Matter of Wilson Tobacco Board of Trade,* F. T. C. Dkt. No. 6262, 1956-57, C. C. H. TRADE REGULATION REPORTER [Transfer Binder] paras. 25,808, 26,180.

[*Petitioner*]

Petitioner Board is a non-stock corporation organized in 1931. Membership is open to warehousemen and purchasers of leaf tobacco. The twelve auction warehouses in the market are members, entitled to one vote each. Purchasers may hold either participating or non-participating memberships; participating members are entitled to vote, but only warehousemen or their general managers are eligible for membership on the Board of Directors, which is the governing body of the Board.

[*Selling Time*]

By common consent the Burley Tobacco Association, a voluntary interstate organization, assigns selling time to the several Burley tobacco markets. The auction season at Asheville begins around December 1 and lasts about six weeks. The major tobacco companies added a second set of buyers to the Asheville market in 1953, making possible two simultaneous auctions. Thereafter the total selling time available was eight hours a day, four hours for each set of buyers. A rotation system is used, each warehouse received its allotted percentage of selling time each day. If a warehouse does not have enough tobacco on its floor to consume all of its allotted time, "free time" results and passes on until the sale reaches a warehouse which has enough tobacco on hand to use the free time on that day. A warehouse is said to be "blocked" when it has more tobacco on its floor than can be sold in its allotted time.

[*Asheville Market*]

In 1953 the Asheville market had eleven warehouses, with a total of 475,182 square feet of floor space; four firms operated all of them. During the 1953 market season and for several years prior thereto, the Board, to the satisfaction of all members, had allotted selling time on the "floor space system", i.e. the percentage of the selling time allotted to each warehouse was in direct proportion to its floor space. However, members of the Board and their attorney had discussed possible amendments to its by-laws, including a change in the method of alloting sales time. They feared a building war like those which had taken

[1] These figures do not include resales of tobacco purchased at auction by the warehousemen themselves, which amounted to more than one million pounds in each of those years.

place elsewhere under the floor space system. On January 2, 1954, some of the warehouse members entered into a written agreement to govern the allotment of selling time among the warehouses for the 1954 and succeeding seasons, provided no new warehouse was built. They also petitioned the Board to adopt a regulation which would give new warehouses during their first year selling time based on 50% of their floor space, increasing to 75% during the second year, and to 100% in subsequent years. The proposed regulation was adopted, but never went into effect.

[*New Allocation System*]

On January 14, 1954, C. T. Day, an independent buyer of tobacco, who had been a member of the Board for many years, announced his intention of building a warehouse containing enough floor space to capture 25% of the total available selling time. Petitioner Walker took up Day's challenge, saying that every time Day drove a nail he would drive one too. During 1954 Day did build a new warehouse, which contained 125,000 square feet of floor space. Consequently, on October 2, 1954, the Board adopted new by-laws which (1) discarded the floor space system, (2) adopted a modified "performance system" for the allotment of selling time to existing warehouses, and (3) set up a "unit" system for the allocation of selling time upon the entry of a new warehouse. Under a pure performance system selling time is allotted to each warehouse in direct proportion to producers' sales in such warehouse during the year preceding the allotment. The Board, however, modified the performance system by a "gain or loss proviso": that the selling time allotted to any warehouse shall not vary more than 3½% from the selling time allotted to such warehouse for the preceding season. The "new warehouse proviso" adopted by the Board allots to a new warehouse a unit of selling time equal to the average of the selling times of all warehouses on the market, unless the new warehouse is smaller than the average, in which event its allotment is reduced.

After the meeting, the Board of Directors allotted selling time for the 1954 season in accordance with the new by-laws. Since Day's new warehouse raised to twelve the number on the market, it was allotted 8.33% of the selling time, i.e., one-twelfth of the total time available, although it contained 20.83% of the total selling space. The remainder of the time was divided among the other warehouses in accordance with their sales during the 1953 season.

[*Private Suit*]

Immediately after the allocation of his 1954 selling time, Day filed suit in the Superior Court of North Carolina for an injunction against enforcement of the new regulations. In November, 1954, that court denied the injunction after conducting a hearing and making findings of fact. Day appealed to the Supreme Court of North Carolina, which affirmed the judgment below, stating that "the rule by which the allotment was made to plaintiff by the Board appears fair and equitable. Indeed, it does not appear that there is any restraint of trade in the rule." *Day v. Asheville Tobacco Board of Trade* [1955 TRADE CASES ¶ 68,057], 242 N. C. 136, 144. During the 1954 season, despite the fact that Day's warehouse was blocked more often and for longer periods than any other warehouse, he succeeded in selling 20.19% of all producers' tobacco sold on the Asheville market. He was able to sell more tobacco than could be sold in his allotted selling time because of free time accruing to him on days when the other warehouses had sold all the tobacco they had on hand before their allotted time expired. The gain or loss proviso, however, limited any possible increase in Day's 1955 allotment to 3½% of the 8.33% allotted to him in 1954, so his allotment for the 1955 season was only 8.64% of the total selling time. Nevertheless, he sold 21.4% of the total tonnage in the 1955 season and over 27% in the 1956 season.

[*FTC Order*]

After the decision of the Supreme Court of North Carolina in *Day v. Asheville Tobacco Board of Trade,* Day lodged a complaint with the Federal Trade Commission. Hearings were held before an examiner. In his initial decision the examiner found that the acts and practices complained of "have had and now have a tendency and capacity to, and do, unreasonably and unduly restrain trade in the Asheville tobacco market in the purchase, sale and distribution of tobacco in commerce, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning

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of § 5 of the Federal Trade Commission Act," and issued an order to cease and desist. On appeal the Commission modified one paragraph in that decision, restricting its scope; otherwise, the Commission adopted the hearing examiner's decision.

The Commission's order requires petitioners, in connection with the movement of tobacco in interstate commerce, to cease and desist from "devising, adopting, using, adhering to, maintaining or cooperating in the carrying out of any plan, system, method, policy or practice which: 1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take into account and give reasonable credit for the full size and capacity of a new entrant; 2. Limits the possible gain or loss in selling time allotted to any warehouse, under the performance system or any other system, for any one selling season to 3½%, or any other specific percentage, of the selling time so allotted to such warehouse for the preceding selling season; or 3. Has the purpose or effect of foreclosing or preventing any new entrant warehouse on the Asheville tobacco market, or any other warehouse doing business on that market, from competing therein on a fair and equal basis."

JURISDICTION

[*Public Interest*]

Petitioners contend that this is a private controversy, involving no specific and substantial public interest. *F. T. C. v. Klesner,* 280 U. S. 19; *American Airlines v. North American Airlines,* 351 U. S. 79, 83. However, Congress has declared: "Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest * * *." Tobacco Inspection Act of 1935, 7 U. S. C. A. 511(a). This court has held that there is a substantial public interest in maintaining free and open competition among warehousemen on tobacco auction markets. *American Federation of Tobacco Growers, Inc. v. Neal,* 4 Cir. [1950-1951 TRADE CASES ¶ 62,675], 183 F. 2d 869. See also *Rogers v. Douglas Tobacco Board of Trade,* 5 Cir. [1957 TRADE CASES ¶ 68,706], 244 F. 2d 471. The Supreme Court noted in *Klesner* that the public interest often is specific and substantial because the unfair method employed threatens the existence of present or potential competition. 280 U. S. at 28. That is the basis for the jurisdiction of the Commission in this case.

[*Interstate Commerce*]

Petitioners further contend that the adoption of regulations governing "the internal allocation of selling time" to the several warehouses is not in interstate commerce. The Commission has no jurisdiction to proscribe unfair methods of competition that merely *affect* interstate commerce; they must be *in* such commerce. *F. T. C. v. Bunte Bros.* [1940-1943 TRADE CASES ¶ 56,098], 312 U. S. 349; *cf. Chamber of Commerce of Minneapolis v. F. T. C.,* 8 Cir., 13 F. 2d 673, 684. Tobacco auctions are an integral and indispensable part of interstate commerce in tobacco. *Currin v. Wallace,* 306 U. S. 1, 10, aff'g *Wallace v. Currin,* 4 Cir., 95 F. 2d 856, 859, 863. The practices of the Board and its members at issue in this case are an essential part of such commerce. *American Federation of Tobacco Growers, Inc. v. Neal,* 4 Cir. [1950-1951 TRADE CASES ¶ 62,675], 183 F. 2d 869.

[*State Regulation*]

Petitioners' final argument on jurisdiction is that the Board is an administrative agency of the State of North Carolina, exercising powers delegated to it by the legislature, and is therefore beyond the jurisdiction of the Commission.

In *Parker v. Brown* [1940-1943 TRADE CASES ¶ 56,250], 317 U. S. 341, 350, the Supreme Court held that it is not the purpose of the antitrust laws to restrain "a state or its officers or agents from activities directed by its legislature." On the other hand, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U. S. at 350, 351. See also *Schwegmann Brothers v. Calvert Distillers Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384. The question, therefore, is whether the activities of tobacco boards of trade, particularly the adoption and enforcement of the regulations involved in this case, constitute activities of state officers and agents within the rule of *Parker v. Brown.*

North Carolina Gen. Stat. § 106-465 authorizes tobacco warehousemen and purchasers to organize local tobacco boards of trade either as non-stock member corporations or as voluntary unincorporated associa-

tions, and "to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated". The statute also provides: "Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade."

In *Kinston Tobacco Board of Trade, Inc. v. Liggett & Myers Tobacco Co.*, 235 N. C. 737, and *Cooperative Warehouse v. Lumberton Tobacco Board of Trade* [1955 TRADE CASES ¶ 68,056], 242 N. C. 123, the court referred to the boards as "administrative commissions." In determining the scope of the Federal Trade Commission Act, however, this court is not bound by the State court's characterization of the boards. The interpretation of a federal statute is peculiarly the function of the federal courts.

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. * * * When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. * * *" *Sola Electric Co. v. Jefferson Co.* [1940-1943 TRADE CASES ¶ 56,245], 317 U. S. 173, at 176.

See also *Vanston Bondholders Committee v. Green*, 326 U. S. 156, 162; *Lyeth v. Hoey*, 305 U. S. 188, 194; *Lohman v. Commissioner*, 8 Cir., 133 F. 2d 977, 983; *Stuart v. Kleck*, 9 Cir., 129 F. 2d 400, 403; *cf. Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218; *Rice v. Board of Trade*, 331 U. S. 247.

Parker v. Brown suggests the standards which federal courts should apply in determining what is state action. In that case the Supreme Court was considering a program set up by state officials, under the provisions of a California statute, to control the production of raisins and to prevent unlimited competition therein. Upholding the program against a claim that it violated the Sherman Act, the court said:

> "* * * It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 317 U. S. at 352.

The teaching of *Parker v. Brown* is that the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials. *Rice v. Chicago Board of Trade*, 331 U. S. 247, 253, n. 4; *United States v. S. E. Underwriters' Association* [1944-1945 TRADE CASES ¶ 57,253], 322 U. S. 533, 562; *Schwegmann Brothers v. Calvert Distillers Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384. See also note in 95 Pa. L. Rev. 223, 229. But such action must be state action, not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful.

Before § 106-465 was passed, tobacco boards of trade existed at common law in North Carolina by common consent or by contract and exercised the power to make regulations governing auction sales of to-

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bacco. *Gray v. Warehouse,* 181 N. C. 166; *Cooperative Warehouse v. Lumberton Board of Trade,* 242 N. C. at 132, 133. It was recognized that the business was affected with a public interest and that those engaged in the business were obliged to operate in a way that was reasonable and beneficial to the trade.

The decisions of the North Carolina courts since the enactment of § 106-465 make it clear that the sale of tobacco at auction is of great public importance to the State of North Carolina, but they also show that the operation of the business is in the hands of private parties. A tobacco board of trade is organized primarily for the benefit of those engaged in the business; its articles of association and bylaws constitute a contract amongst the members by which each member consents to reasonable regulations pertaining to the conduct of the business. *Warehouse Assn. v. Warehouse,* 231 N. C. 142; *Cooperative Warehouse v. Lumberton Board of Trade, supra.*

As the Federal Trade Commission noted:

> "The State bears no part of the expense of operating boards of trade. The officers and directors of the Asheville Board, and of other boards, are neither elected by the people nor appointed by State authority; they are businessmen who own and operate warehouses on the tobacco market. They are not accountable to the State, and are not supervised in any manner by State officials."

The State officials did not require compliance with a North Carolina statute which directs each State agency to file with the Secretary of State all rules and regulations adopted by the agency for the performance of its functions. Action by the State has been confined to (1) the statutory requirement that the regualtions adopted by the boards be just and reasonable and not in restraint of trade, and (2) decisions of the courts upon controversies arising between members.

The regulations and activities of petitioners which are being considered in this case were not state action, but were individual activities subject to the jurisdiction of the Federal Trade Commission.

RESTRAINT OF TRADE

[*Performance System*]

The decision of the Commission did not condemn the use of a performance system for the allotment of selling time.[2] The Commission objected to the modification of the performance system by the 3½% "gain or loss proviso", and to the "new warehouse" provision. It held that "the new warehouse proviso and the gain or loss proviso, both separately and operating in conjunction with each other, are unreasonable and unfair and constitute an undue hinderance to and restriction upon fair competition in the Asheville tobacco market."

[*Gain or Loss Provision*]

With respect to the gain or loss provision the Commission said:

> "* * * The record demonstrates that, through its operation, established warehouses could not lose more than 3½% of their selling time in any given season by reason of marketing difficulties encountered during the preceding season and, also by reason of the proviso, that neither a new entrant nor any established warehouse could gain more than 3½% in any one season. Clearly, under this proviso, existing warehouses gained an unreasonable and unfair competitive advantage, since if a new entry, notwithstanding the fact that its allocated time was limited under the 'new warehouse proviso', still managed to compete by improving or changing service, the established warehouses remained secure in the knowledge that any newcomer would be limited arbitrarily to an increase in selling time each year to 3½%. As illustrative of this result, it appears that the new warehouse previously mentioned as having been granted 8.33% of available selling time in 1954 would have to wait about 28 years to be allocated the approximately 21% of selling time which it would have obtained under regulations in effect when it was constructed."

The Commission ordered petitioners to cease and desist from using any plan which

[2] F. T. C. Dkt. No. 6490, 1957-1958 CCH TRADE REGULATION REPORTER [Transfer Binder], para. 27,076. The legality of the performance method of allocating selling time had previously been sustained by the Commission, *Matter of Wilson Tobacco Board of Trade,* F. T. C. Dkt. No. 6262, 1956, 57 CCH TRADE REGULATION REPORTER [Transfer Binder], paras. 25,808, 26,180, by the Supreme Court of North Carolina in *Day v. Asheville Tobacco Board of Trade* [1955 TRADE CASES ¶ 68,057], 242 N. C. 136, and by the Fifth Circuit in *Rogers v. Douglas Tobacco Board of Trade,* 244 F. 2d at 480.

"limits the possible gain or loss in selling time allotted to any warehouse, under the performance system or any other system, for any one selling season to 3½%, or any other specific percentage, of the selling time so allotted to such warehouse for the preceding selling season."

The condemnation of the 3½% limit is clearly justified. *Rogers v. Douglas Tobacco Board of Trade,* 244 F. 2d at 842. This feature does not seem to have been considered by the Supreme Court of North Carolina in *Day v. Asheville Tobacco Board of Trade.* There are, however, a number of reasons why it may be desirable that there be some limit on the possible gain or loss to an individual warehouse in a single year. Loss or damage to a warehouse by fire or other casualty, illness of the warehouseman, or other fortuitous circumstances, may cause an abnormal reduction in the business of a warehouse in a particular year, which should not be perpetuated by a performance rule without some limiting proviso. Again, a warehouseman with large financial resources might attempt to monopolize the market through advertising campaigns, bidding in farmers' tobacco at prices above those which his competitors can afford, and other methods, which could be used for several years until his selling time is abnormally increased, and his competitors of more limited means are driven from the market, even though they have rendered adequate service and have helped to build up the market over the years. A reasonable limitation on the percentage of gain or loss in any one year would not violate the antitrust laws. The order of the Commission does not prevent a reasonable limitation based upon a percentage of the total selling time rather than on the selling time allotted to the particular warehouse for the preceding season.

[*New Warehouse Provision*]

The Commission condemned the "new warehouse" provision separately and in connection with the 3½% "gain or loss proviso", although that very provision had been approved by the Supreme Court of North Carolina in *Day v. Asheville Tobacco Board of Trade,* and a similar new warehouse provision had been approved by the Fifth Circuit in *Rogers v. Douglas Tobacco Board of Trade.* The evidence clearly supports the condemnation of the new warehouse provision in connection with the 3½% gain or loss proviso. But it is not so clear that the new warehouse provision itself, or combined with a reasonable gain or loss provision, would unduly tend to restrain trade or constitute an unfair practice or an unfair method of competition.

The Commission does not disapprove of the adoption of a performance system, as opposed to a floor space system or other method of allocating selling time. When a performance system is used, it is necessary to adopt some sort of new warehouse provision, and arguments suggest themselves for and against any type of new warehouse provision which might be adopted. On the one hand, the prevention of overbuilding and building wars is a legitimate objective; on the other hand, the owners of existing warehouses should not be allowed to prevent the construction of desirable new facilities. The controlling principles, as stated by the Supreme Court in *Federal Communications Commission v. R. C. A. Communications, Inc.,* 346 U. S. 86, 91, 92, and in the concurring opinion of Mr. Justice Frankfurter in *Associated Press v. United States* [1944-1945 TRADE CASES ¶ 57,384], 326 U. S. 1, 27, were quoted and applied by the Fifth Circuit in *Rogers v. Douglas Tobacco Board of Trade,* 244 F. 2d at 479. Competition is not an absolute. Every restraint of trade is not a violation of the antitrust laws; the decisive question is whether it is an unreasonable restraint, and this depends on the significance of the restraint in relation to the particular market under investigation.

The new warehouse provision adopted by the Board as part of its performance system tends to discourage overbuilding by limiting the amount of selling time which a new warehouse may receive in its first year. But combined with a reasonable gain or loss proviso, or with no limit at all on gains or losses, it need not unduly discourage necessary or desirable building operations; it need not prevent a new warehouse from obtaining a fair share of selling time after the first year, nor, indeed, a fair share of the business during the first year through the use of free time (defined above). Day's experience supports this conclusion; he promptly obtained a share of the business greater than his proportion of the total floor space, even though he was hampered by an unreasonable gain or loss proviso.

The Commission noted that the extra time which Day received during the first and subsequent years was the result of free

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time; they quoted with approval the statement of the hearing examiner that "[F]or any business to be forced by regulation to depend competitively upon such a fortuitous circumstance is clearly unfair." But it must be remembered that under the performance method, which the Commission has approved, the utilization of free time *is* the way in which a warehouse normally obtains a larger share of the business. The limitation which the national marketing quota imposes on the amount of tobacco produced in any market area, the competition between neighboring markets, and other factors, ordinarily result in free time which may be used by other warehousemen, adding flexibility to the system. The use of such free time by a warehouse in one year increases the allotment of selling time to that warehouse in the following year. Free time will ordinarily furnish reasonable opportunity for expansion under a performance system, so that the public, i. e. the farmers are not hurt.[8] Free time may not permit the builder of a new warehouse to expand as fast as he would like, but his personal complaint, like the complaint of Day against the Board, decided by the North Carolina courts, does not justify condemnation of the regulations unless they tend to discourage unduly the construction of new facilities which may be needed on the market. In considering the reasonableness of such restraint, the other side of the coin must also be considered—the evil of overbuilding and building wars. Unless the facilities on the market are inadequate in quantity or quality, the addition of new facilities may do more harm than good.

The Commission cited certain testimony to show that the new warehouse provision had a deleterious effect on farmers and on the Asheville tobacco market, namely, that some farmers' tobacco had to remain on the floor of the new warehouse for periods from three days to four weeks before selling time became available, and that because of this situation a few farmers took their tobacco to other markets. This testimony, however, is explained by uncontradicted evidence of the ordinary course of business on the Asheville market; of the custom of many farmers to bring their tobacco to the market before it opened, as a result of which the entire market was blocked for twelve days; of the custom of many farmers in the Asheville area to sell their tobacco in Tennessee; and of the efforts of the Tennessee warehousemen to obtain such business by giving such farmers preferred selling time and, in some cases, paying all or part of the additional hauling charges. A few farmers complained because they could not be assured when their tobacco would be sold in Asheville; but if the warehouses in Asheville or anywhere else already contain more tobacco than can be sold in one day or one week because of the custom of the farmers to bring in their tobacco before the auction season opens, then giving preference to one farmer necessarily results in delaying the sale of the tobacco of another farmer, since the hours of sale are fixed by the Burley Tobacco Association.

The State of North Carolina is vitally interested in the protection of its tobacco markets. The Supreme Court of North Carolina considered the new warehouse provision at issue in this case and held it fair and equitable and not in restraint of trade. *Day v. Asheville Tobacco Board of Trade,* 242 N. C. at 144. Although the reasons for that statement are not set out in that opinion, and the decision is not binding on the Commission or on this court, it is a factor which should be considered in determining the reasonableness of the new warehouse provision.

[*Case Remanded*]

The meaning of the first paragraph of the Commission's order is not entirely clear. It requires the Asheville Tobacco Board of Trade to cease and desist from adopting any play or system which "allots selling time to new entrant warehouses on the Asheville tobacco market or any basis or in any manner which fails to take into account, and give reasonable credit for, the full size and capacity of a new entrant." We are not certain whether this means that the Board shall give credit for the *full* size and capacity of a new warehouse or simply take such size and capacity *into account* and adopt a rule which gives reasonable weight to this factor. In order to correct this ambiguity, and in order that the Com-

[8] Unless more tobacco is offered for sale on the market than can be conveniently sold in the time allotted to the market by the Burley Tobacco Association, in which event no system will work satisfactorily.

mission may give further consideration to the questions which have arisen in this case and are discussed in this opinion, the case is remanded to the Commission for further proceedings.

Remanded.

[¶ 69,255] Beloit Culligan Soft Water Service, Inc.; Adolph H. Samuels, d. b. a. Culligan Soft Water Service; Merrill R. Fie, d. b. a. Culligan Soft Water Service of Denver; John J. Burnham and Irene Burnham, d. b. a. Culligan Soft Water Service Co. of Ogden, Utah; James W. Fisher and John W. Fisher, d. b. a. Culligan Soft Water Service, Santa Rosa, California; L. A. McRae, d. b. a. Culligan Soft Water Service of Palo Alto, California; and George W. Geiger, d. b. a. Culligan Soft Water Service of San Bruno v. Culligan, Inc.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 58 C 2208. Dated January 29, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Antitrust Violations as Defenses—Exclusive Dealing Provision in Franchise Agreements as Defense to Dealers' Enforcement Action.—Dealers in water softening equipment were granted a declaratory judgment requiring a supplier to recognize the validity of its franchise agreements with the dealers. The supplier had contended that such agreements were invalid because a provision of the agreements requiring the dealers not to deal in the products of the supplier's competitors was illegal under Section 3 of the Clayton Act. The supplier failed to establish that the agreements violated that statute. Moreover, even if such a violation had been proved, the illegality of the exclusive dealing provision (1) would not have excused performance by the supplier where the dealers, innocent of any violation, sought enforcement of the contract, and (2) would not have invalidated the agreements in their entirety since the parties had agreed that any provision held illegal was to be severed and the balance of the agreement considered valid and binding.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.475.

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibitions Against Exclusive Dealing—Effect of FTC Consent Order on Franchise Agreements.—A supplier of water softening equipment could not interpose a Federal Trade Commission consent order as a defense to an action by its dealers for a declaratory judgment recognizing the validity of their franchise agreements since the supplier had voluntarily agreed to the consent order. The order, which prohibited the supplier from enforcing the dealers' obligations under the franchise agreements not to purchase or deal in certain products offered by the supplier's competitors, was entered after the Federal Trade Commission charged that the agreements violated Section 3 of the Clayton Act. However, a consent order, while binding on the parties who are signatories, has no effect on the rights of others who are not parties. The consent order against the supplier did not affect the rights of the dealers under their franchise agreements and did not release or excuse the supplier from performing its contractual obligations under those agreements.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

Exclusive Dealing—Restrictive Trade Practices—Limited Requirements Contracts—Validity.—A supplier of water softening equipment failed to establish, by a preponderance of credible evidence, that its franchise agreements with its dealers were violative of Section 3 of the Clayton Act. Those agreements provided that the dealers would buy their requirements, as to specified equipment and material, from the supplier. However, the dealers could purchase from other suppliers equipment and material not specified in the agreements.

See Exclusive Dealing, Vol. 1, ¶ 4009.

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Illinois Antitrust Law

Combinations and Conspiracies—Illinois Antitrust Laws—Exclusive Dealing—Validity of Dealership Franchise Agreements—Applicability of State Antitrust Laws—Interstate Commerce.—A supplier of water softening equipment failed to establish, by a preponderance of credible evidence, that its dealership franchise agreements were violative of the Illinois Antitrust Act. Also, that Act is applicable only to intrastate commerce; since the supplier's products were transported in interstate commerce, the Act had no application to the agreements.

See Combinations and Conspiracies, Vol. 1, ¶ 2323.

For the plaintiffs: Leslie Hodson, E. Houston Harsha, Edward G. Proctor, and David R. Macdonald, all of Chicago, Ill.

For the defendant: Gerald E. White and B. L. Pollak, both of Chicago, Ill.

Findings of Fact and Conclusions of Law

[*Declaratory Judgment Sought*]

Michael L. Igoe, District Judge [*In full text*]: 1. This is a Complaint for Declaratory Judgment pursuant to § 2201 of the United States Judicial Code (62 Stat. 964, 63 Stat. 105, 68 Stat. 890, 28 U. S. C. A. § 2201), and is brought to require the defendant, Culligan, Inc., to recognize the validity of certain dealership franchise agreements entered into between Culligan and the respective plaintiffs. A case of actual controversy exists between the parties to this action over the validity of these franchise agreements.

[*Parties*]

2. The plaintiff, Beloit Culligan Soft Water Service, Inc., is a Wisconsin corporation with its principal place of business in Beloit, Wisconsin. The plaintiff, Adolph H. Samuels, is a citizen of Wisconsin, and resides in Beloit, Wisconsin. The plaintiff, Merrill R. Fie, is a citizen of Colorado, and resides in Denver, Colorado. The plaintiffs, John J. Burnham and Irene Burnham, are citizens of Utah, and reside in Salt Lake City, Utah. The plaintiffs, James W. Fisher and John W. Fisher, are citizens of California, and reside in Santa Rosa, California. The plaintiff, L. A. McRae, is a citizen of California, and resides in Palo Alto, California. The plaintiff, George W. Geiger, is a citizen of California, and resides in San Bruno, California. The defendant, Culligan, Inc., is a corporation incorporated under the laws of the State of Delaware with its principal place of business in Northbrook, Illinois. The requisite diversity of citizenship is present and the matter in controversy between each of the plaintiffs and the defendant, Culligan, Inc., exceeds, exclusive of interest and costs, the sum of $10,000.00. The Court has jurisdiction of the subject matter and the parties.

3. Culligan is the successor to a partnership consisting of Emmet J. Culligan, L. C. Culligan and J. M. Culligan, which was formed in 1937 and was the successor to the sole proprietorship of Emmet J. Culligan, who started the business in or about the year 1936; Culligan was incorporated on or about May 5, 1945, as Culligan Zeolite Company, but by amendment to its charter on or about September 2, 1952, changed its name to Culligan, Inc.; Culligan at the time of its incorporation assumed the rights and obligations of its predecessor's agreements with the plaintiffs set forth in the various franchise agreements under which the plaintiffs are operating.

[*Franchise Agreements*]

4. In the period 1945 to 1947, the plaintiffs Beloit, Fie, Burnham, Fisher and McRae entered into franchise agreements with Culligan, Inc., which are substantially identical, except for (a) the name of the dealer; (b) the territory; (c) the termination date; and (d) the number of service units that each dealer agrees to purchase during a specified period of time. These contracts are known as "First Post War Contracts."

5. In 1954 and 1956, respectively, the plaintiffs Geiger and Samuels entered into franchise agreements with Culligan, Inc., which are substantially identical, except for (a) the name of the dealer; (b) the territory; (c) the termination date; and (d) the number of service units that each dealer agrees to purchase during a specified period of time. These contracts are known as "Second Buff Contracts."

6. Common to each of the First Post War Contracts is the undertaking by Culligan to sell and by the respective plaintiffs to purchase all of the plaintiff's requirements of water softening units, equipment, parts and materials from Culligan. (Paragraph First of the First Post War Contracts.) Common to each of the Second Buff Contracts is the undertaking by the dealers to purchase specified equipment and material, including Culligan's water conditioning minerals and service tanks, and necessary fittings and parts, from Culligan, although equipment and material not specified may be purchased by the dealers from other suppliers. (Paragraph 2.2 of the Second Buff Contracts.) Culligan, prior to 1957, had partially waived the requirements provision of the First Post War Agreements to conform to the limited product requirements provision of the Second Buff Agreements. Defendant Culligan's company policy relating to dealers' purchases from it was based upon the Second Buff contracts and the Culligan Products Dealer Sales Agreement, regardless of the particular type of contract owned and held by the dealer. There are many items of supplies in addition to those listed in Schedule A of the Second Buff Contract which a dealer uses in connection with his Culligan water conditioning service operation which the dealer may at his option purchase from Culligan or others.

7. In addition to the foregoing, common to each of the First Post War Contracts is the undertaking by the dealer "to use his best endeavors in the sale and promotion" of water conditioning services and Culligan's products. (Paragraph 8a.) Common to each of the Second Buff Contracts is the obligation of the dealer "to diligently and loyally promote and foster" the increase of the use and acceptance of Culligan Soft Water service. (Paragraph 2.7.)

8. Moreover, under both the First Post War and Second Buff franchises, the dealer agrees that he will provide capital to establish and maintain offices, sales rooms and service plants acceptable to Culligan; (First Post War Agreement—Paragraph 8f; Second Buff Agreement—Paragraph 2.8); that he will maintain sufficient stock and equipment; (First Post War Agreement—Paragraph 8f; Second Buff Agreement—Paragraph 2.8); that he will maintain adequate books and records; (First Post War Agreement—Paragraph 8f; Second Buff Agreement—Paragraph 2.10(a)); that he will maintain in servicable and clean condition all service units in accordance with Culligan standards; (First Post War Agreement—Paragraph 8g; Second Buff Agreement—Paragraph 2.10(b)); that he will cooperate with the defendant in formulating sales promotion plans; (First Post War Agreement—Paragraph 8h; Second Buff Agreement—Paragraph 2.12).

9. Culligan has granted to each of those plaintiffs holding First Post War Agreements a designated territory, within which each plaintiff has the exclusive right to distribute Culligan's water conditioning products. (First Post War Agreement—Paragraph 2.) Culligan grants to those plaintiffs holding Second Buff Agreements a designated territory, within which each plaintiff has an exclusive right to operate under the Culligan plan which is a comprehensive soft water service plan. (Second Buff Agreement—Paragraph 2.1.)

10. Both types of agreements further provide that Culligan will render technical advice; (First Post War Agreement—Paragraph 7c; Second Buff Agreement—Paragraph 3.3); that Culligan will provide laboratory analyses of specimens of water; (First Post War Agreement — Paragraph 7a; Second Buff Agreement—Paragraph 3.1); that Culligan will provide the dealers with instruction in connection with any problems relating to the management and operation of the water conditioning business; (First Post War Agreement—Paragraph 7b; Second Buff Agreement—Paragraph 3.2); that Culligan will supply to the dealer bookkeeping and accounting information; (First Post War Agreement—Paragraph 7h; Second Buff Agreement—Paragraph 3.7); that Culligan will assist the dealers in promoting and developing their respective territories; (First Post War Agreement—Paragraph 7e; Second Buff Agreement—Paragraph 3.3).

[*Severability Clauses*]

11. Both types of agreements contain severability clauses. The First Post War Agreement provides (Paragraph 9j):

> "This is an Illinois agreement, and shall be construed according to the laws of the State of Illinois. If any provision of this Agreement is held to be invalid or unenforceable, this contract shall, as to

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such provisions, be considered divisible, and the balance of the agreement shall be valid and binding."

The Second Buff Agreement provides (Paragraph 4.17):

"This agreement shall be construed according to the laws of the State of Illinois. Any provision of this Agreement prohibited by law shall be ineffective to the extent of such prohibition without in any way invalidating or affecting the remaining provisions of this Agreement."

[*Dealers' Investment*]

12. Plaintiffs, pursuant to their individual franchise agreements with Culligan and in reliance thereon, have invested substantial sums of money to develop the territories which were granted to them by Culligan, and have at the present time a substantial capital investment in their respective business operations.

13. The plaintiffs have also expended large sums to develop an intangible asset of substantial value in the name "Culligan" in their respective areas, having done this in reliance upon the duration of their franchises and the exclusivity of their territories.

14. Included in such expenditures by plaintiffs has been extensive advertising through such media as newspapers, billboards, radio, television, and direct mailing. Advertising conducted by plaintiffs is done under the name "Culligan Soft Water Service" and plaintiffs do not advertise the name or names of their respective proprietors.

[*FTC Action—Consent Decree*]

15. On or about October 31, 1956, the Federal Trade Commission filed a complaint against Culligan, alleging that Culligan was violating Section 3 of the Clayton Act (15 U. S. C. A. Sec. 14) by requiring its dealers not to purchase or deal in water softening products made by competitors of Culligan; subsequently, Culligan negotiated with the Federal Trade Commission and voluntarily agreed to a Consent Order which was issued by the Federal Trade Commission and became effective on May 23, 1957; This Consent Order provided that Culligan cease and desist from:

"(1) Selling, or making any contract or agreement for the sale of, any such products on the condition, agreement, or understanding that the purchaser thereof shall not use, or deal in, or sell, similar or related products supplied by any competitor or competitors of respondent.

"(2) Enforcing, or continuing in operation or effect, any condition, agreement, or understanding in, or in connection with, any existing contract of sale, which condition, agreement, or understanding is to the effect that the purchaser of such products shall not use or deal in similar or related products supplied by any competitor or competitors of respondent."

The Order, however, also provided that:

". . . nothing in this order shall prohibit respondent from entering into an agreement with its dealers prohibiting them from using or selling for use, in the Culligan plan, parts, equipment or material which would adversely affect respondent's water conditioning service unit."

16. The plaintiffs and the other Culligan dealers were not made parties to the Federal Trade Commission proceeding against defendant, Culligan, Inc.

[*Termination of Franchises*]

17. Subsequent to the entry of the aforesaid Consent Order, and by letter dated July 9, 1957, Culligan notified its dealers including the plaintiffs, that the Consent Order ". . . by its nature invalidated all Culligan franchises . . ."

18. Subsequently, Culligan submitted a new form of franchise agreement to its dealers, including the plaintiffs.

19. The new form of franchise agreement terminated any pre-existing franchise, granted the dealer a non-exclusive territory and eliminated other important rights theretofore enjoyed by plaintiffs under their existing franchise agreements.

20. Plaintiffs declined to execute the new form of franchise agreement and contended that their respective existing franchise agreements were valid and binding agreements.

21. By letter dated December 29, 1958, Culligan wrote to each of the plaintiffs purporting to terminate and cancel the plaintiffs' existing franchise agreements on the sole ground that plaintiffs had failed to execute the new form of franchise. Culligan, in said letter, informed the plaintiffs that Culligan would no longer sell its products to them and demanded that they discontinue the use of the name "Culligan" in

their businesses and eliminate all use of Culligan trade names and trademarks.

22. Culligan's letter of termination of December 29, 1958, did not refer to any breach by plaintiffs of their franchise agreements.

[*Irreparable Harm*]

23. Culligan's refusal to sell to plaintiffs, refusal to acknowledge plaintiffs as its dealers, and refusal to perform its obligations under its franchise agreements with plaintiffs, and demand that plaintiffs discontinue use of the name "Culligan" in their businesses, will cause plaintiffs' businesses substantial and irreparable harm.

Conclusions of Law

[*Consent Decree as Defense*]

1. A consent order or consent decree, while binding on the parties signatory thereto, has no effect on the rights of others who are not parties thereto.

2. The Consent Order of April 15, 1957, to which Culligan is a party, does not affect the rights of plaintiffs under their franchise agreements with defendant Culligan and does not release or excuse Culligan from performing its contractual obligations under said franchise agreements.

3. While Culligan, by the terms of said Consent Order, cannot enforce plaintiffs' obligation under said franchise agreements not to purchase, use or deal in certain water softening products offered by competitors of Culligan, Culligan cannot interpose the Consent Decree as a defense in this action since Culligan voluntarily agreed to the Consent Order enjoining enforcement of such obligation.

[*Illinois Antitrust Act*]

4. The products sold by defendant Culligan to the plaintiffs are transported in interstate commerce. The Illinois Antitrust Act (Chapter 38, Section 569 *et seq.* Ill. Rev. Stat. 1957) is applicable only to intrastate commerce and hence said Act has no application to the franchise agreements entered into between defendant and plaintiffs.

5. Defendant has failed to establish by a preponderance of credible evidence that, even if such Anti-trust Act of Illinois were applicable here, that said franchise agreements are violative of said Act.

[*Clayton Act, Section 3*]

6. Defendant has failed to establish by a preponderance of credible evidence that said franchise agreements, or any provision thereof, are violative of Section 3 of the Clayton Act (15 U. S. C. A. Sec. 14).

7. Section 3 of the Clayton Act can be violated only by a seller who exacts from the purchaser an undertaking or agreement not to purchase, use or deal in the products of a competitor of the seller. Said Act is intended for the protection of purchasers as well as the public.

[*Innocent Party Entitled to Enforcement*]

8. Even had defendant proved that it had violated Section 3 of the Clayton Act by its exaction from plaintiffs of an undertaking not to purchase, use or deal in products of competitors of defendant, such illegality would not excuse performance by the defendant of its contract obligations where plaintiffs, innocent of any violation, seek enforcement of the contract.

[*Severability*]

9. Even had defendant proved that it had violated Section 3 of the Clayton Act by its exaction from plaintiffs of an undertaking not to purchase, use or deal in products of competitors of defendant, such illegality would not invalidate the franchise agreements in their entirety since the parties had agreed, in the event any provision of the agreement was held illegal, that such provision be severed and that the balance of the agreement be valid and binding.

[*Mutuality and Consideration*]

10. Even had defendant proved that it had violated Section 3 of the Clayton Act said franchise agreements would not be void or voidable for lack of mutuality or consideration since the plaintiffs are still obligated by said agreements to use their best efforts in the promotion of defendant's products and services.

[*Injunction Granted*]

11. Defendant has failed to establish any valid defense to plaintiffs' cause of action.

12. Plaintiffs are entitled to a declaratory judgment in their favor and are entitled to the issuance of a permanent injunction to prevent defendant from causing irreparable injury to the businesses of plaintiffs.

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[¶ 69,256] United States v. Northern Pacific Railway Company and Northwestern Improvement Company.

In the United States District Court for the Western District of Washington, Northern Division. Civil No. 2277. Filed January 28, 1959.

Case No. 979 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Tying Arrangements—Industrial Leases—Requiring Lessees to Ship Incoming and Outgoing Freight Over Specified Railroad.—A railroad was prohibited by a consent decree from entering into, enforcing, or renewing any provision contained in its industrial leases which required lessees to ship any outgoing or incoming freight over the railroad's own lines or over the lines of a railroad designated by it. The decree also prohibited the railroad from entering into or claiming any rights under any agreement which restricted the mode of transportation which might be used to ship freight to or from any industrial site purchased or leased from the railroad.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.848; Monopolies, Vol. 1, ¶ 2610.850.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Cancellation of "Preferential Routing" Clauses in Industrial Leases.—A railroad was ordered by a consent decree to cancel provisions in its industrial leases which required lessees to ship any outgoing or incoming freight over its own railroad lines or over the lines of a railroad designated by it.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; and W. D. Kilgore, Jr., Charles L. Whittinghill, and Margaret H. Brass, Attorneys, Department of Justice.

For the defendants: M. L. Countryman, Jr., Dean H. Eastman, and Harold G. Boggs.

For a prior opinion of the U. S. Supreme Court, see 1958 Trade Cases ¶ 68,961, affirming a decision of the U. S. District Court, Western District of Washington, Northern Division, 1956 Trade Cases ¶ 68,401.

[*Consent Decree*]

George H. Boldt, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein; defendants, Northern Pacific Railway Company and Northwestern Improvement Company, having appeared and filed their answer to the complaint; the Partial Final Judgment entered herein on August 31, 1956, affirmed by the Supreme Court of the United States on March 10, 1958, having adjudged unlawful and ordered termination of every provision of any lease (except industrial leases as hereinafter defined) or sale of land or timber providing that the lessee or purchaser shall ship outgoing or incoming freight over the lines of Northern Pacific, and plaintiff and defendants, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein with respect to the claims involved in this action based upon defendants' industrial leases and without said judgment constituting evidence or an admission by any party hereto with respect to any such issue; and counsel for defendants having advised the court that defendants have caused to be served upon each of their lessees who is party to an industrial lease a notice of cancellation of traffic clauses contained therein, a copy of such notice being attached hereto, marked "Exhibit A" and made a part of this Judgment;

Now, Therefore, without trial or adjudication of any issue of fact or law herein with respect to such claims based upon defendants' industrial leases, and upon consent as aforesaid, it is hereby

Ordered, Adjudged and Decreed as follows:

I.

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto.

The complaint states claims for relief against defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "Northern Pacific" means the defendant Northern Pacific Railway Company, a Wisconsin corporation having its principal office at St. Paul, Minnesota;

(B) "Northwestern" means the defendant Northwestern Improvement Company, a Delaware corporation having its principal office at St. Paul, Minnesota;

(C) "Industrial leases" mean leases of sites leased for commercial and industrial purposes, and shall include grain elevator and grain warehouse leases;

(D) "Traffic clauses" mean clauses contained in leases which specify that the lessee shall ship incoming or outgoing freight over the railroad of the Northern Pacific or over the lines of a railroad to be designated by either defendant.

III.

[*Applicability*]

The provisions of this Final Judgment shall apply to the defendants Northern Pacific and Northwestern, their officers, directors, agents, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with any defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Industrial Leases—Specific Relief*]

Each of the defendants is enjoined and restrained from adhering to, enforcing, reviving or renewing any provision contained in defendants' industrial leases providing that the lessee shall ship any outgoing or incoming freight over the railroad of the Northern Pacific, or over the lines of a railroad to be designated by either defendant, and the defendants are ordered and directed to file within sixty (60) days from the date of entry of this Judgment proof by affidavit of service upon all holders of industrial leases from defendants of notice of cancellation of any provision contained in such leases providing that the lessee shall ship any outgoing or incoming freight over the railroad of the Northern Pacific or over the lines of a railroad to be designated by either defendant.

V.

[*Prohibited Agreements*]

Defendants Northern Pacific and Northwestern are enjoined and restrained from entering into, adhering to, or claiming any rights under:

(A) Any provisions of any industrial lease which are identical with or similar to those described in Section IV hereof, or

(B) Any contract, agreement or understanding restricting the mode of transportation which may be used to ship freight to or from any industrial site purchased or leased from either defendant.

VI.

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted (1) access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matter contained in this Final Judgment, and (2) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers and employees of such defendant, who may have counsel present, regarding any such matter. Upon such request the defendants shall submit such reports in writing to the Department of Justice with respect to any of the matters contained in this Final Judgment as from time to time may be necessary to the enforcement of this Final Judgment. No information obtained by means provided in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which

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the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VII.

[*Jurisdiction Retained*]

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 69,257] Niash Refining Co. v. Avedon Mfg. Corp.

In the New York Supreme Court, New York County, Special Term, Part I. 141 N. Y. L. J., No. 8, page 11. Dated January 13, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defense—Attacking Validity of Patent by Licensee—Licensing Agreement as Price-Fixing Arrangement. —A patentee's action to recover royalties under a licensing agreement was dismissed on the ground that the licensing agreement, which provided that neither the patentee nor the licensee would sell at less than agreed prices, was an invalid attempt at price fixing. A restriction on the price of articles entering interstate commerce is a violation of the Sherman Antitrust Act, unless the restriction is within the protection of a lawfully granted patent monopoly. The patent involved in the instant action had been adjudged invalid, and the licensee was permitted to urge that invalidity in order to attack the licensing agreement as a price-fixing arrangement in violation of the Sherman Antitrust Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.810; Private Enforcement and Procedure, Vol. 2, ¶ 9041.450, 9044.05.

[*Patent Licensing Agreement*]

HOFSTADTER, Justice [*In full text*]: Plaintiff moves for an order striking out the answer containing denials and two defenses and for judgment on the complaint and for severance with respect to the counterclaim. The action is to recover royalties under a non-exclusive licensing agreement between the plaintiff patentee and the defendant.

[*Invalidity of Patent*]

The involved patent has been adjudged invalid. Such invalidity may be urged by the licensee in order thereby to be enabled to attack the licensing agreement as a price-fixing arrangement and thus in violation of the Sherman Act. Plaintiff contends that there is here involved a single licensing agreement which is incapable of generating an unlawful restraint. It becomes necessary, therefore, to examine the agreement. It provides, among other things: "Licensor hereby grants to Licensee a non-exclusive indivisible right and license, * * * to manufacture and sell * * *. Licensor and Licensee respectively covenant and agree not to sell * * * for less than the price rates set forth in Schedule A annexed hereto. * * * If Licensor has granted or shall in the future grant a license under the invention * * * which is in any respect more favorable in terms than this agreement, then Licensor agrees to modify this agreement to give Licensee the benefit of the more favorable terms. * * * Licensor and Licensee respectively agree that neither party shall sell any other model * * * at prices lower than those set in Schedule A, without written consent of the other party."

[*Price-Fixing*]

The quoted provisions constitute an invalid attempt at price-fixing. In striking down the licensing agreement involved in *Sola Electric Company v. Jefferson Company* [1940-1943 TRADE CASES ¶ 56,245] (317 U. S. 173), the court stated: "The contract provided that the license was granted on condition that the 'prices, terms, and conditions of sale, for use or sale' throughout the licensed territory should not be more favorable to petitioner's customers than those

prescribed from time to time by respondent for its own sales and those of its other licensees. * * * The present license contract contemplates and requires that petitioner, on sales of the licensed transformers throughout the United States, shall conform to the prices fixed by respondent for the sale of competing patented articles by other licensees and by respondent. Such a restriction on the price of articles entering interstate commerce is a violation of the Sherman Act save only as it is within the protection of a lawfully granted patent monopoly. * * * Agreements fixing the competitive sales price of articles moving interstate, not within the protection of a patent, are unlawful because prohibited by the Sherman Act."

[*Defense of Illegality*]

In *American Optical Company v. New Jersey Optical Company* (50 F. Supp. 806), the court stated: "The licensor reserved the right to determine and fix prices, sales plans and terms. * * * An illegal price-fixing clause may so permeate the whole contract as to render the entire agreement violative of the Sherman Act."

And in *National Transformer Corporation v. France Manufacturing Company* [1954 TRADE CASES ¶ 67,824] (215 F. 2d 343), at page 361 the court stated: "It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. * * * The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff. * * * Appellants also submit that inasmuch as the right of price control never came into being, appellee never had the right to challenge the validity of the license patents. The fact is, however, that appellee always had the right, under the contract, to invoke the price-fixing provision whenever its interests required it, and we are of the view that, under *Sola Electric Co. v. Jefferson Co., supra,* the price-fixing stipulation was unlawful and gave appellee the right to challenge the validity of the patents."

Accordingly, plaintiff is not entitled to rely upon the agreement for the recovery of claimed unpaid royalties and defendant is entitled to judgment dismissing the complaint. Since the counterclaim is based on the asserted violation of the illegal price-fixing provisions of the agreement, it too must fall, as the defendant concedes. Hence, there is no occasion for severance.

The complaint is dismissed and, on the defendant's consent, the counterclaim is likewise dismissed and the clerk is directed to enter judgment accordingly.

[¶ 69,258] United States v. American Greetings Corporation.

In the United States District Court for the Northern District of Ohio, Eastern Division. Civil Action No. 32986. Dated December 2, 1958.

Federal Trade Commission Act

Unfair Practices—Interfering with Competitors or Their Goods—Violation of Federal Trade Commission Cease and Desist Order—Civil Penalty Suit.—A manufacturer of greeting cards violated a Federal Trade Commission cease and desist order when it removed competitors' greeting cards from mounts which bore their trade-marks or trade names and placed the competitors' cards on blank mounts. The Commission's order clearly applied to names which appeared on the mounts themselves as well as to names printed on the cards. While the order did not make illegal the practice of remounting competitors' cards, which was common in the industry, it was illegal to remove trade-marked mounts, remount the cards on blank mounts, and display them in the same cabinet with mounts bearing the trade-mark of the defendant manufacturer. However, by placing the cards in transparent sleeves, trade-marks appearing on the back of the cards were not defaced, destroyed, or obscured. The remounting of a competitor's cards on a blank mount could not be considered a violation of the order where the competitor's previous mount was blank. Also, the evidence sustained charges that the manufacturer violated the order when it (1) arranged with a retail dealer for the display of cards of both the manufacturer and its competitors in the same cabinet over which appeared a sign bearing only the manufacturer's name or motto, and (2) checked over a retailer's supply of competitors' cards, removed the cards deemed to be unsaleable, placed them in a box

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which was taken and destroyed by an employee of the retailer, and gave the retailer credit for the destroyed cards.

See Unfair Practices, Vol. 2, ¶ 5075.12.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Scope of Cease and Desist Orders—Order as Too Broad.—The Federal Trade Commission is not restricted to prohibiting the illegal practice in the precise form in which it was engaged, but it can go further and inhibit variations of the same practice which it considers necessary to achieve the desired result.

See Unfair Practices, Vol. 2, ¶ 5201.481.

Federal Trade Commission Enforcement and Procedure—Civil Penalties for Violation of FTC Order—Fixing Amount of Penalty—Mitigating Circumstances.—A Federal District Court assessed only a nominal penalty on three counts of a complaint charging a manufacturer with violating a Federal Trade Commission order, where the Commission's failure to speak out against the questioned practice, while fully cognizant of it for a period of approximately four years, might have led the manufacturer to believe that the Commission was not objecting to the practice. While it may be true that the Commission's failure to speak out against the practice did not create an estoppel to assert the practice as a violation of the Commission's order, this factor was a circumstance to be considered in ascertaining the amount of the penalty to be imposed for violation of the order. The nominal penalty imposed was $200 on each of three counts. On another three counts, the penalties were: $5,000, $2,500, and $2,500.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8661, 8661.50.

For the plaintiff: Russell E. Ake, Cleveland, Ohio; and P. B. Morehouse, Berry W. Stanley, and Frank C. McAleer, Federal Trade Commission, Washington, D. C.

For the defendant: Robert W. Poore and James T. Lynn, of Jones, Day, Cockley & Reavis, Cleveland, Ohio.

Imposing civil penalties for violation of a Federal Trade Commission cease and desist order in Dkt. 5982.

Memorandum

[*Civil Penalty Suit*]

Weick, District Judge [*In full text*]: This is a civil action, brought under Section 5(1) of the Federal Trade Commission Act [15 U. S. C. § 45(1)], to recover $40,000 in penalties for alleged violations of a cease and desist order of the Federal Trade Commission. The complaint originally contained 11 counts, 3 of which have been dropped. A penalty of $5,000 on each count is sought in the eight remaining counts. The defendant denies violating any of the provisions of the Order.

The defendant is a corporation engaged in an interstate business in the manufacture and sale of greeting cards.

[*FTC Order*]

The provisions of the cease and desist order which defendant is alleged to have violated are as follows:

(A) Offering to buy or buying and taking over stocks of greeting cards sold and distributed by competitors to retail sellers.

(B) Agreeing or arranging with retail sellers to junk and destroy stocks of greeting cards distributed to such retail sellers by competitors.

(D) Agreeing or arranging with retail sellers of greeting cards distributed to such retail sellers by competitors to take over and remount so as to obscure and to make difficult the identification of trademarks and trade names of competitors.

(E) Acting to return, through interstate commerce, to retail sellers, greeting cards produced by competitors after identification has been obscured and otherwise made difficult through various ways and means, including those specified in the immediately preceding subparagraph; and

(F) Arranging or acting to have its salesmen and its other representatives make arrangements of displays of greeting cards in stores of retail sellers in such way that greeting cards produced by its competitors are displayed as if they were products of respondent.

[*Card Displays*]

Greeting cards are normally displayed for sale attached to mounts, and contained in a wood or metal cabinet. A mount is a stiff cardboard backing to which the greeting card is attached, either directly or in a transparent cellophane sleeve glued to the mount. In some instances the manufacturer's trade-mark or trade name appears on the mount itself, while in others the mounts are blank. These mounted cards are for display purposes only as the sales inventory is kept in drawers in the cabinet. By displaying the cards on mounts they are kept neat, clean and orderly and shoppers may handle and inspect them without soiling.

[*Alleged Violations of Order*]

Defendant is alleged in Counts 1, 2, 3, 4, 7, 8 and 10 to have violated Paragraphs "D" and/or "E" of the Federal Trade Commission's Order when it removed competitors' greeting cards from mounts which bore the trade-mark and trade name of the producer or distributor of the greeting card and placed such competitors' greeting cards on mounts without any trade name or trade-mark appearing thereon.

These blank mounts were mounts of the American Greetings Corporation from which the American Greetings name was blanked out, originally by means of ink or china pencil and later by covering the name American Greetings with a black masking tape. This procedure was followed when American Greetings acquired a new account who had previously dealt with a competitor and had a carry-over inventory of the competitor's cards. It was necessary to do so to enable all greeting cards, old and new, to be displayed in an integrated manner in an American Greetings style display cabinet.

[*Contentions*]

The Government contends that the Order was violated (1) in the removing of the competitor's cards from a mount bearing the competitor's legend and placing them in blank mounts, and (2) in placing the card in a sleeve which is glued to the mount, so that the trade-mark or trade name on the back of the greeting card itself may only be observed by bending the sleeve up or removing the card from the mount.

The defendant contends that Paragraph "D" of the Order is ungrammatical and ambiguous and was not intended to prohibit this practice of remounting competitors' cards, which it asserts was common in the industry.

Defendant asserts that the Order has reference only to obscuring trade names which appear on the cards themselves and that they are not obscured when placed in a transparent sleeve which reveals the names and marks when it is bent upward or when the card is removed from the mount. It is also the claim of defendant that the Order has no application to trade names on the mounts themselves.

[*FTC Act*]

The purpose of the Trade Commission Act was to outlaw unfair methods of competition and deceptive acts or practices in commerce. 15 U. S. C. § 45(a).

The Supreme Court has declared that:

> "The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'. 'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.' *Federal Trade Commission v. Sinclair Co.,* 261 U. S. 463, 476 . . . In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are 'unfair' . . . ." *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 647 (1931).

[*Remounting of Cards*]

The Order proscribes remounting of cards of competitors "so as to obscure and make difficult the identification of trade-marks and trade names." It clearly applies with equal force to names which appear on the mounts themselves as well as to names printed on the cards.

If the competitors' cards had previously been mounted on blank mounts containing no trade-mark or trade name, then it could hardly be claimed to be an unfair practice for defendant to remount the cards in exactly the same manner as before.

It was certainly not intended by the Order to make illegal the practice of remounting competitors' cards, which was common in the industry.

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Nor would it be unlawful to remount on blank mounts competitors' cards which previously had been displayed loosely and unmounted. There was no obligation on the part of defendant to advertise the products of its competitors.

By placing the cards in transparent cellophane sleeves, the trade-marks or trade names appearing on the back of the cards are in no manner defaced, destroyed or obscured. The trade names may be seen by simply turning up the sleeves and looking at them or by sliding the cards out of the sleeves.

It is an entirely different matter, however, for the defendant to remove competitors' cards from mounts which bore the competitors' trade-marks or trade names and remount them in blank mounts. Here the trade-marks and trade names have not merely been obscured or made difficult to read, but they have been entirely obliterated. The cards are being displayed differently than before and to the advantage of the defendant and the disadvantage of the competitors. While there may be no duty on the part of defendant to advertise the cards of its competitors, it is unfair to remove their trade-marked mounts and remount the cards in blank mounts and to display them in the same display cabinet with mounts bearing the trade-mark or trade name of defendant.

Defendant claims that this precise activity was not prohibited by the express terms of the Order; that the subject of the Federal Trade Commission's investigation related to remounting of competitors' trade-marked cards in mounts which bore defendant's trade name or to the stamping of defendant's trade names over the competitors' trade names on the cards themselves.

Even if this were true, the Commission was not restricted to prohibiting the illegal practice in the precise form in which it was engaged, but could go further and inhibit variations of the same practice which it considered necessary to achieve the desired result. This it could do by a general order which is entitled to a liberal construction to encompass variations of the practice.

In *Federal Trade Commission v. Ruberoid Co.* [1952 Trade Cases ¶ 67,279], 343 U. S. 470, 473 (1952) the Supreme Court said:

> "Orders of the Federal Trade Commission are . . . to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain objectives Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has travelled; it must be allowed effectively to close all roads to the prohibited goal, so that its orders may not be bypassed with impunity."

The evidence in Counts 1, 2 and 7 establishes a violation of Paragraph "D" of the Order, and it follows that Paragraph "E" which relates to interstate shipments of prohibited mounts was also violated.

In Counts 3, 4, 8 and 10 the evidence failed to establish to the satisfaction of the Court that the competitor's trade-mark or trade name appeared on the former mounts.

As previously pointed out, the remounting of a competitor's card on a blank mount could not possibly be considered a violation of the Order where the competitor's previous mount was blank and had no trademark or trade name.

Since Paragraph "D" of the Order was not violated in Counts 3, 4, 8 and 10, it follows that there was no violation of Paragraph "E" which relates to interstate shipment of prohibited remounts.

[*Display Cabinets*]

Violations of Paragraph "F" of the Federal Trade Commission's Order are also alleged in Counts 3, 4 and 5. The basis for these alleged violations was that defendant arranged with the retail dealer for the display of cards of both American Greetings and its competitors in the same cabinet over which appeared a lighted sign bearing only the American Greetings name or motto.

It is obvious that a shopper would thereby be led to believe that this was a display only of American Greetings' cards. The only name he could readily see was American Greetings which was on the sign and also on some of the mounts. Competitors' cards were displayed on blank mounts and unless the shopper went through the motions of turning up the sleeve and looking for a trade-mark on the back of the card or removing the card from the sleeve,

he would not know that the blank mount contained the card of a competitor. This was done by the dealer under arrangements with defendant. The evidence sustains the charge in Counts 3, 4 and 5 of violation of Paragraph "F".

[*Destroying Competitors' Cards*]

Finally, a violation of Paragraphs "A" and "B" of the Order is charged in Count 4.

Gordon Harris, the owner of a retail drug store, testified that defendant's salesman Allan Warneke (now deceased) went through his cabinet and checked over the supply of competitors' cards and removed the cards deemed to be unsaleable and put them in a box which was taken and destroyed by an employee of Harris.

Mr. Harris also testified that he believed he received a credit from defendant of 50% of the retail price of the destroyed cards.

Defendant's sales-manager produced a record of the company which did not show any such credit.

There would seem to be no good reason for Harris to testify as to receiving a credit from defendant if it were not true. He was not unfriendly to defendant and was still doing business with it.

It makes no difference that the cards were unsaleable. *Hastings Mfg. Co. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,436], 153 F. 2d 253 (CA 6, 1946).

The participation of defendant's salesman in the transaction and the giving of credit violated Paragraphs "A" and "B" of the Order.

[*Penalties*]

The remaining question to be considered relates to the penalty to be imposed by the Court on the defendant for violation of Counts 1, 2, 3, 4, 5 and 7.

In its Report of Compliance filed with the Federal Trade Commission, defendant stated its intention to assume the practice of remounting competitors' cards on blanked out American Greetings mounts (Par. 6 Report of Compliance). No objection was made to this proposal nor was its propriety at all questioned. This fact assumes greater significance in view of the statement made in the last letter from the Federal Trade Commission to American Greetings prior to the filing of the report of compliance:

> "If you will give us all the relevant facts in the report of compliance, we will give careful consideration to the report and advise you as to anything lacking . . . ."

Subsequent to the issuance of the Order and prior to the institution of this action American Greetings had dealings with a Federal Trade Commission representative, Mr. Donald Brady. In all the discussions with Mr. Brady the issue of the propriety of the use of a blank remount card was never raised. Rather, it appears that Mr. Brady suggested means of improving the method of blanking out the American Greetings name.

It is asserted by the Government that this failure of the Federal Trade Commission, its officers or employees, to speak out against the practice of remounting competitors' cards on blank mounts does not create an estoppel to assert that practice as a violation of the Commission Order. *Utah Power & Light Co. v. U. S.*, 243 U. S. 389, 409 (1917). This may very well be true, but it is certainly a circumstance to be considered in ascertaining the amount of the penalty to be imposed for violation of the Order. The Government's failure to speak out against this practice while fully cognizant of it for a period of approximately four years might lead the defendant to believe that the Government was not objecting to it, and impels the Court to assess only a nominal penalty. Two Hundred Dollars penalty on each Count is hereby fixed for violation of Counts 1, 2 and 7.

Considerations of acquiescence or estoppel by the Commission are not involved in Counts 3, 4 and 5 and a penalty of $2,500 on Count 3, $5,000 on Count 4 and $2,500 on Count 5 is fixed for the violation thereof by defendant.

[*Judgment*]

This memorandum is adopted as findings of fact and conclusions of law. Judgment may be entered in favor of plaintiff and against the defendant for $10,600 and in favor of defendant and against the plaintiff on Counts 8 and 10.

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[¶ 69,259] United States v. Harte-Hanks Newspapers, Inc., et al.

In the United States District Court for the Northern District of Texas, Dallas Division. Criminal No. 15393. Filed January 21, 1959.

Case No. 1413 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Newspaper's Acquisition of Competitor—Legality Under Sections 1 and 2 of Sherman Antitrust Act—Economic Advantage to Public.—A newspaper which bought out a competitor, after a "fight for survival" in which each of them lost over $100,000, did not violate the antitrust laws. The Government charged, among other things, that the surviving newspaper, which was the property of a financially strong chain of papers, had sought to curtail the credit of its competitor. However, the newspaper's inter-office correspondence discussing the competitor's financial straits, together with the other evidence, could not be said to establish a planned design to destroy competition to the detriment of the advertising public. Advertisers, after the newspaper bought out its competitor, paid some 25 cents per inch less for advertising than they paid before the merger because they had to advertise in only one paper instead of two. Competition between rival enterprises does not create a condition necessarily desirable for the production of either the convenience or economic advantage of the public. Discontinuance of competition is not a violation of the antitrust laws where there is no room for such competition. Although the smallest city in Texas to have more than one newspaper was a city of 300,000 population, the two papers in the instant case were published in a town of only 17,000. One of the penalties of freedom of enterprise is the fact that if two shops of a kind are set up in a village which can support only one, then one of the two will have to go down.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.460; Monopolies, Vol. 1, ¶ 2510.625, 2610.120, 2610.680.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; Charles L. Whittinghill, Henry M. Stuckey, and Kenneth N. Hart, Attorneys, Department of Justice; and W. B. West, United States Attorney.

For the defendants: Dan Moody, Austin, Tex.; Arnold, Fortas & Porter, Washington, D. C.; and T. J. McMahon, Abilene, Tex.

For a related opinion of the U. S. Court of Appeals, Fifth Circuit, see 1958 Trade Cases ¶ 69,032.

[*Competition Between Two Newspapers*]

T. Whitfield Davidson, District Judge [*In full text*]: To Counsel and to the Jury:

We have before us a contest between two newspapers. According to one view it may have been for domination of the other and of the area. According to another view it may have been a fight for existence.

We bear in mind that this is not a civil suit of course between the two papers. One of the papers bowed out of the contest accepting a price of $300,000.00. There was the severest competition between these two papers for a term of years. Much of the evidence discloses the zeal and earnestness of the contestants in this competition with each other.

[*Effect on Public*]

The Government brings this prosecution based on the charge that the prevailing paper in the contest violated the anti-trust law and thereby destroyed competition between the advertising public and the surviving paper.

The advertising public, however, after the contest, according to the evidence, paid some 25¢ per inch less for their advertising than they did before. This came about by having to advertise only in one paper, whereas before they had advertised in two.

It is insisted that Greenville, a town of only 17,000, could not profitably support two daily papers and that this was apparent to the owners who for several years prior to the merger made proposals and counter proposals to buy out each other.

During this fight between the papers which we might call a fight for survival they each lost over $100,000.00. The Banner sold out to the defendants in this case,

some of whom constitute a group or chain of Texas newspapers. Thus the Banner became the property of a financially strong concern and put in more money into its plant and more solicitors in the field and was gaining ground in point of circulation in the Greenville area.

At this stage the Herald agreed to sell and did receive $300,000.00 for its plant.

Our attention is called to the fact that the day of the old hand press with a few sheets of local news when a paper could be operated on a plant of little cost has gone by and that the public are demanding daily papers with ample advertising space and adequate news columns. The machinery to produce papers of this type has become more expensive so that the small papers have disappeared. Where formerly almost every town had two or more local papers this no longer now exists. In fact, the evidence shows that Fort Worth, a city of more than 300,000 people, is the smallest city in Texas to have two daily papers and that Greenville was the last of the smaller towns in which the two papers survived.

[*Alleged Destroying of Competition*]

It is insisted by the Government that the Banner with its financial backing sought to curtail the credit of the Herald. Mention of the financial status of the papers had taken place in correspondence. One of the letters offered in evidence was from a Fort Worth bank to a Greenville banker advising them that they were acquainted with the Harte-Hanks organization that had bought the Greenville Banner and that they were very reliable people and worthy of credit. In the inter-office correspondence among the defendants appear communications and letters in which they discuss the effect of the financial strain which the Herald would be undergoing. These comments were no more than an expression of the natural outcome of a fight between two papers wherein one of them had received large financial support by reason of its new owners and that both papers had been losing money would in all probability put the Herald in bad financial straits. We think this correspondence simply calls attention to that condition and are not prepared to say that it together with all the other evidence contained in the Government's case in the light of the stipulations made between the parties was a planned design to destroy competition to the detriment of the advertising public.

[*Public Advantage*]

The evidence shows that newspaper advertising is now considered a necessity to the successful operation of public enterprises. So completely apparent has this become true that their need is regarded as a quasi public service. This service may be performed by one paper or several. The trend of events and commercial activity has seemingly limited it to one paper in most cities. Moreover, competition between rival enterprises doesn't create a condition necessarily desirable for the production of either the convenience or economic advantage of the public. As an example of which might be cited the numerous small telephone systems which in the memory of some of you existed in different small communities and even in small cities. They not only became an added expense but the owner never knew which phone to use and part of his customers might be subscribers to one system and another part to the other. In this case it was a great relief to the public to see one of the concerns buy the other one out and take one of the unnecessary phones off of their tables. It is the contention of the defendants in the case that what was true of the dual telephone system has in a measure become true in the newspaper operation.

Our higher courts have held that even though there is a consolidation of papers in the larger cities that a violation of the anti-trust law does not necessarily follow. Only recently the New Orleans Picayune, a large paper in a large city, acquired its rival the New Orleans Item. They each had a large circulation. The question went to the court, the decision being found in 345 U. S. 594 [*Times-Picayune Publishing Co. v. United States,* 1953 TRADE CASES ¶ 67,494] in which the Supreme Court said:

> "The daily newspaper, though essential to the effective functioning of our political system, has in recent years suffered drastic economic decline.
>
> * * *
>
> "Advertising is the economic mainstay of the newspaper business. Generally, more than two-thirds of a newspaper's total revenues flow from the sale of advertising space. * * * Obviously, newspapers must sell advertising to survive. And while newspapers in 1929

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garnered 79% of total national advertising expenditures, by 1951 other mass media had cut newspapers' share down to 34.7%."

[*Freedom of Enterprise*]

There must be space and room and subject matter involved to afford a competition such as the law requires and where these things do not exist then discontinuance of competition it has been held is not a violation of the anti-trust law. Judge Learned Hand observed in the *United States Aluminum Company of America* [1944-1945 Trade Cases ¶ 57,342], 148 F. 2d 416:

> "A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster; finis opus coronat."

Justice Holmes has said that a man has a right to set up a shop in a small village which can support but one shop of the kind and although there may be one shop of the kind already in town. It then naturally follows that one of the two will have to go down. This is one of the penalties of the freedom of enterprise.

[*Issues of Fact*]

The parties to this case have very properly reduced to writing extensive stipulations thus saving a long record. Each stipulation is supported by facts that might have been produced in evidence in court. In the light of the facts as contained in these stipulations and in light of the testimony that has been offered in the case we are unable to find any well defined issue of fact that may be submitted to the jury that has not already become a question of law which the Court must decide. In other words, what can the Court tell the jury to find from the evidence in this case that is not already apparent?

[*No Antitrust Violations*]

The case as developed does not disclose in our judgment any violation of the antitrust law. It is therefore withdrawn from the jury and judgment entered for the defendants.

[¶ 69,260] United States v. The Procter & Gamble Company, et al.

In the United States District Court for the District of New Jersey. Civil Action No. 1196-52. Filed January 27, 1959. (*Addendum* filed March 19, 1959, 1959 Trade Cases ¶ 69,333.)

Case No. 1150 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures—Cut-Off Date for Taking of Evidence.—An action charging a conspiracy to fix prices and to monopolize the manufacture and sale of household soaps and detergents was to be tried in two stages where the war period (1941-1945) created a natural gap between the evidence of a violation proximate to the complaint (filed in 1952) and evidence as to a much earlier inception of the alleged conspiracy. The Government had admitted that the war period would not evidence the alleged conspiracy. The first trial stage would be confined to evidence as to the postwar period down to the time of the filing of the complaint. In connection with such trial, the court would consider written representations of all counsel as to prewar evidence of the alleged conspiracy. Such representations, if material and substantial, might become the issues to be tried at the second trial stage. The second stage of the trial might never occur if the Government's evidence of a violation in the postwar years clearly overcomes the defendants' evidence or if it should appear clear that no violation of the Sherman Act existed in the postwar period. To entitle the Government to injunctive relief, it must establish not only that the conspiracy

once existed, but that it still existed close to the time of the filing of the complaint so as to create a probable continuing danger to the public.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.

For the plaintiff: Chester A. Weidenburner, United States Attorney, by Charles H. Hoens, Jr., Assistant United States Attorney; and Joseph E. McDowell, Antitrust Division, Department of Justice.

For the defendants: O'Mara, Schumann, Davis & Lynch, and Cahill, Gordon, Reindel & Ohl, by Mathias Correa, for Colgate-Palmolive Co. Bailey & Schenck, and Arnold, Fortas & Porter, by Abe Fortas, for Lever Brothers Co. Toner, Crowley, Woelper & Vanderbilt; Royall, Koegel, Harris & Caskey, by Kenneth C. Royall; Dinsmore, Shohl, Sawyer & Dinsmore, by Joseph Dinsmore; and Taft, Stettinius & Hollister, by Charles Sawyer, for Procter & Gamble Co. Davies, Richberg, Tydings & Landa, by Shelby Fitze; and McCarter, English & Studer, for Association of American Soap & Glycerine Producers.

For a prior opinion of the U. S. Supreme Court, see 1958 Trade Cases ¶ 69,046, reversing a judgment of the U. S. District Court, District of New Jersey, 1956 Trade Cases ¶ 68,488. For prior opinions of the District Court, see 1956 Trade Cases ¶ 68,457 and 68,335, 1955 Trade Cases ¶ 68,228, 1954 Trade Cases ¶ 67,677, and 1953 Trade Cases ¶ 67,497.

Opinion Re Cut-Off Date

[*Contentions*]

HARTSHORNE, District Judge [*In full text*]: Defense counsel have moved the Court in this case to fix a cut-off date for the taking of evidence to begin immediately subsequent to World War II and some six years prior to the filing of the complaint herein on December 11, 1952. Plaintiff Government asks to have the evidence extend back to 1926, or thereabouts, in order to prove the inception of the alleged conspiracy, same being one to fix prices and to monopolize the manufacture and sale of soaps and detergents for household use throughout the United States. The Government admits that it does not desire to give evidence as to the intermediate war period from, presumably, 1941 to 1946, when the Government's wartime regulations of business were in effect.

[*Principles*]

In determining this question, certain general principles must be borne in mind:

(1) All agree that these Government antitrust cases, generally characterized as the "Big Case," should be kept down to manageable proportions, not only to enable the Court to serve the many other litigants besieging its doors, but because justice is more apt to emanate from fresh and vigorous intellects than from intellects exhausted by a trial lasting for months on end.

(2) The purpose of a civil injunction suit of this nature is not to punish defendants but to prevent a continued violation of the Sherman Act, to the injury of the public.

(3) To entitle the Government to these equitable remedies, it must establish not only (a) that such a conspiracy once existed, but that (b) it still existed close to the time of the filing of the complaint so as to create a probable continuing danger to the public. Indeed, due to the unusual lapse of time which has existed between the time of the filing of the complaint herein and this motion, due to an act of God, an appeal to the United States Supreme Court, and otherwise, it may even be necessary, should a violation proximate to the complaint be proven, to take further evidence as to the time after the filing of the complaint, to see if any danger of the continuance of any such conspiracy down to date does exist. But that angle of the matter, as to relief, we pass by, pending the determination of the question of the scope of the evidence, as to whether a postwar violation existed reasonably close to the time of the filing of the complaint.

(4) But, even though a conspiracy may have its inception many years previous to the filing of the complaint, that early evidence, here prewar, may still have a bearing on the crucial evidence of violation proximate to the complaint, because this earlier evidence may show the relationship of the parties and the intent with which they acted, not only years ago, but presumptively thereafter. For instance, if parties have been in close and long relationship, it would take much less time and formality to agree to continue a plan of action than if the situation were otherwise.

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(5) On this matter of the fixing of cut-off dates, precedents are of little aid, because not only is the world full of "all sorts and conditions of men," as was long ago said by Sir Walter Besant, but, for that very reason, their activities generally, and specifically in fixing prices and creating monopolies, have infinite variations. Of course, it is these very variant facts which we are now determining how to try.

[*Application of Principles*]

Applying the above principles to the case at bar, the result is:

The prime point which must be established by the Government is that this conspiracy existed proximate to the complaint —from 1946 down to the filing of the complaint in December, 1952. Unless this is established, plaintiff will not have proved a violation of the Sherman Act presently endangering the public. Defendants claim not only that the Government will not be able to prove this conclusion, but call attention to the fact that it will require evidence over the course of some six years, as to the activities of these, the three largest soap and detergent manufacturers in the United States, in regard to their countrywide activities, plus the activity of the Association, to prove this crucial issue. They further call attention to the fact that to prove the entire possible gamut of the case, even omitting the entire war period, for reasons hereafter stated, will more than treble this evidence— to cover more than twenty years, and test the memory of witnesses as to incidents occurring over thirty years ago. Government counsel admit that their discovery so far has resulted perchance in their desire to use almost a million documents, and that even if the bulk of these documents can be submitted to the Court in graph or summary form, subject to checking by the defendants, there will be many hundred crucial documents which must be put individually in evidence.

Obviously, the simpler this maelstrom of papers can be kept, the more likely it is that the human mind will reach a sound and just conclusion. Furthermore, the Government admits that the war period of some five years, from 1941 to 1945, will not evidence this conspiracy, but creates a natural gap between the evidence of a violation proximate to the complaint, crucial to the Government's case, and its potential evidence as to the much earlier inception of the conspiracy.

If, then, this natural gap of the war years is used to separate the trial into stages, several advantages may well result: (a) the first stage of the trial will be expedited, due to the lessening of the preliminary discovery from twenty-odd to six years, (b) the human mind will be better able to cope with two trials, each lasting several weeks, than with a single trial lasting months on end, (c) the second stage of the trial may never have to occur at all. This last will result, if the Government's evidence of a violation in the postwar years clearly overcomes the defendants' evidence. It may result again if the following occurs: Upon the taking of the postwar evidence at this first trial stage, the Court will expect the Government to make explicit written representations as to its prewar evidence covering the fifteen years from 1926 to 1941 concerning the relationship between the defendants and their intent as to a violation of the Sherman Act at that time, and as presumably continuing through the postwar period. If, upon the basis of such representations by the Government, and as well upon the similar representations of the defendants as to their claimed countervailing factors, plus the actual proof as to the postwar period, it should appear clear that no violation of the Sherman Act existed postwar, it would then do no good to take such prewar evidence covering such fifteen year period. On the other hand, if, upon the basis of such actual proof as to the postwar violation, and the above representations as to the prewar period as continuing postwar, there should be a real question as to the existence of postwar violations by the defendants, then the second stage of the trial should occur as to their relations and intent prewar and the fact of its presumptive continuance postwar. For certainly, even assuming a prewar violation, since there was admittedly no violation during the period of the war, if there is no proof of a violation postwar, i.e., no proof of a violation of the Sherman Act by these defendants for the entire ten years before the filing of the complaint, any probability of a present danger to the public therefrom would be simply nonexistent, and it is such danger which can alone justify the granting of equitable relief by this Court.

Of course, the above trial procedure has the disadvantage of proving postwar evidence prior to the possible proof of prewar evidence, and if these two periods were not separated by the war period of some six years, when no evidence of conspiracy admittedly exists, some confusion might perchance be caused thereby. However, this admitted gap of some six years should clearly suffice to obviate confusion on the part of all concerned. Thus that disadvantage cannot outweigh the possibly unnecessary burden of the more than trebled period of proof placed on all concerned, if from the very first the discovery and the trial is to cover not six, but more than twenty years.

[*Use of Precedents*]

While, as noted previously, specific precedents as to the use or nonuse of cut-off dates by the courts in these "Big Cases" are of small help, due to the infinite variation in the facts in each case, it might be noted that the two Seminars conducted during the last two years in New York City and Palo Alto on "Protracted Cases," under the auspices of the Judicial Conference of the United States, and upon the basis of the well-known Prettyman Report, reached conclusions closely paralleling the above. Specifically, at the New York conference, in 1957, the resolution was adopted that "In determining whether cut-off dates will be established the particular facts of each case must be considered. Varying dates may be adopted for different issues." Similar conclusions were alluded to at Palo Alto. Further, in the 1954 Report of the American Bar Association Committee on Practice and Procedure in the Trial of Antitrust Cases, that study concluded as follows:

"In civil as well as criminal cases, for example, it would seem entirely appropriate for the court to require the plaintiff to present evidence that tends to show a case of present violation of law before permitting any evidence as to the origin of the conspiracy or the background of the industry. Such period could be rather strictly limited to perhaps five or six years."

[*Procedure*]

Thus, the first trial stage in this cause will be confined to evidence as to the postwar period down to the time of the filing of the complaint, December 11, 1952. In connection with such trial, the Court will consider the written representations of all counsel, pro and con, as to the relationship between, and the intent of, the defendants prewar, as above, as perchance continuing and coloring the postwar evidence in that regard. Should these representations appear material and substantial, such representations will then become the issues to be tried at the second trial stage. See Chaps. *VII. Separation of Issues,* and *VIII. Period of Inquiry, Procedure in Anti-Trust and Other Protracted Cases, A Report Adopted by the Judicial Conference of the United States, September 26, 1951* (Prettyman Report).

Finally, due to the exceptional factors of delay in this case occurring before this Court took control of the situation, it may be necessary, if the plaintiff has established a postwar violation of the Sherman Act; to give further opportunity to the parties to establish by evidence, as to the years succeeding the filing of the complaint in 1952, the extent of the present danger to the public as bearing upon appropriate relief. But no attempt should be made to cross that bridge before it is reached.

An order may be entered accordingly.

[¶ 69,261] United States v. Maryland State Licensed Beverage Association, Inc., et al.

In the United States District Court for the District of Maryland. Civil Action No. 9122. Final Judgments filed October 6, 1958, October 6, 1958, and October 14, 1958, respectively.

Case No. 1302 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Resale Price Fixing—Prices Fixed by Agreement.—Liquor manufacturers, a wholesaler, an association of retail dealers, and an officer of the retail association were prohibited by a consent decree from entering

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into any agreement to (1) fix prices at which alcoholic beverages not manufactured by them should be sold in the State of Maryland, (2) induce or compel any person to establish or enforce adherence to fixed prices, (3) suggest or prescribe the prices at which alcoholic beverages should be sold to any Monopoly County (County Liquor Control Board or Department of Liquor Control selling alcoholic beverages under a county dispensary system in the State of Maryland), or (4) induce or compel any manufacturer to make sales to any Monopoly County upon the condition that it resell at designated prices.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181; Monopolies, Vol. 1, ¶ 2610.600, 2610.660; Resale Price Fixing, Vol. 1, ¶ 3015.20, 3015.80.

Combinations and Conspiracies—Monopolies—Resale Price Fixing—Practices Enjoined—Boycotts—Refusal to Deal.—Liquor manufacturers, a wholesaler, an association of retail dealers, and an officer of the retail association were prohibited by a consent decree from entering into any agreement to (1) boycott or otherwise refuse to deal with any person engaged in the purchase, sale, or distribution of alcoholic beverages in the State of Maryland, (2) induce or compel any person to boycott or otherwise refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland, and (3) induce or compel any manufacturer to refuse to sell directly to any Monopoly County or to require that sales to such Monopoly County be made through wholesalers. The decree also prohibited the coercing of manufacturers for the purpose of requiring them to (1) enforce resale prices, (2) refrain from selling to any person or class of persons, or (3) boycott or otherwise refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland. Also, the manufacturers were prohibited from combining, conspiring, or agreeing to (1) refuse to sell to any Monopoly County, (2) refuse to sell to any Monopoly County at prices less than the customary wholesale price to licensed retailers, or (3) refuse to sell to any Monopoly County except upon the condition that it resell at designated prices.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.262; Monopolies, Vol. 1, ¶ 2610.720. Resale Price Fixing, Vol. 1, ¶ 3015.70.

Combinations and Conspiracies—Monopolies—Resale Price Fixing—Consent Decree—Practices Enjoined—Coercion and Intimidation.—Liquor manufacturers, a wholesaler, an association of retail dealers, and an officer of the retail association were prohibited by a consent decree from (1) coercing any manufacturer to establish or enforce adherence to minimum or suggested resale prices for the sale of alcoholic beverages in Maryland, (2) communicating with any manufacturer, wholesaler, or other person for the purpose of coercing any manufacturer or wholesaler to refrain from selling to any person or class of persons, (3) giving preference to, or coercing any other person to give preference to, any specific brand of alcoholic beverage upon the condition that the manufacturer thereof enforce suggested resale prices, boycott, or otherwise refuse to deal with any person engaged in the purchase, sale, or distribution of alcoholic beverages, or (4) hindering the sale of, or coercing any other person to hinder the sale of, alcoholic beverages for the purpose of coercing the manufacturer thereof to enforce suggested retail prices, boycott, or otherwise refuse to deal with any person engaged in the purchase, sale, or distribution of alcoholic beverages.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.091; Monopolies, Vol. 1, ¶ 2610.800.

Combinations and Conspiracies—Trade Associations—Consent Decree—Practices Enjoined—Association Membership as Means of Trade Restraint.—An association of retail liquor dealers was prohibited by a consent decree from (1) discussing or acting upon, at any of its meetings, any matter or thing enjoined or restrained by the decree, (2) accepting contributions from any manufacturer or non-member, (3) having as a member any wholesaler or distiller not engaged in the retail selling of alcoholic beverages, and (4) organizing, being a member of, or participating in the activities of any organization whose purposes are contrary to the decree.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121, 2017.198.

Combinations and Conspiracies—Trade Associations—Consent Decree—Practices Enjoined—Coercion and Enforcement Provisions.—An association of retail liquor dealers was prohibited by a consent decree from (1) maintaining any program, shopping service, or other means for the purpose of policing or enforcing the prices of alcoholic beverages in the State of Maryland, (2) inducing or coercing any person to establish or police prices, or (3) inducing or coercing any person to boycott or otherwise refuse to deal with any person engaged in the purchase, sale, or distribution of alcoholic beverages.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.300.

Department of Justice Enforcement and Procedure—Consent Decree—Contingent Provisions—Cancellation of Fair Trade Contracts—Dissemination of Price Information.—A consent decree provided that upon the entry of a final judgment against one or more liquor manufacturers named in the complaint requiring a suspension of fair trading in the State of Maryland for any period of time, the consenting manufacturers, wholesaler, and individual, as to alcoholic beverages included in such suspension, shall (1) cancel all fair trade contracts to which he is a party and which fix or control the resale price of such alcoholic beverages, (2) be enjoined from entering into any fair trade contract, and (3) be enjoined from enforcing resale prices. The manufacturers and the wholesaler were also to be enjoined from disseminating price lists or other price information containing suggested resale prices, except as provided by Article 2B, § 109, Annotated Code of Maryland, 1957, which directs the state Comptroller to require the filing of schedules of prices and proposed price changes.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8341.20.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Order to Sell on Non-Discriminatory Terms.—Liquor manufacturers were ordered by a consent decree to sell various brands of liquor to the Department of Liquor Control for Montgomery County, Maryland, at prices which were not higher than those charged to wholesalers, and without discrimination as to availability or other terms or conditions of sale.

See Private Enforcement and Procedure, Vol. 2, ¶ 8301.50, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; W. D. Kilgore, Jr., Wilford L. Whitley, Jr., John H. Earle, Charles F. B. McAleer, and John C. Fricano, Attorneys, Department of Justice; and Leon H. A. Pierson, United States Attorney.

For the defendants: Gerhard A. Gesell, James C. McKay, and J. Sarsfield Sweeny for Hiram Walker & Sons, Inc., Hiram Walker Inc., Gooderham & Worts Limited, and Jas. Barclay & Co. Limited; William L. Marbury and John Martin Jones, Jr., for Natl. Distillers and Chemical Corporation; Robert E. Coughlan, Jr., of Lord, Whip & Coughlan, for McKesson & Robbins, Inc.; Reuben Shiling for Maryland Package Liquor Stores Association, Inc., and Jack Wulfert; and F. Joseph Donohue for The Kronheim Co., Inc.

For a prior consent decree entered in the U. S. District Court, District of Maryland, see 1958 Trade Cases ¶ 69,142; for a prior opinion of the Court, see 1958 Trade Cases ¶ 69,213.

Final Judgment

[Hiram Walker & Sons, Inc.; Hiram Walker, Inc.; Gooderham & Worts Ltd; Jas. Barclay & Co. Ltd.; Natl. Distillers and Chemical Corp.; and McKesson & Robbins, Inc.—October 6, 1958]

THOMSEN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on September 11, 1956, and the plaintiff and the undersigned defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by any party with respect to any such issue, and the Court having considered the matter and being duly advised,

Now, Therefore, upon consent of all the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of all parties signatory hereto. The complaint states claims upon which relief may be granted against

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the defendants signatory hereto under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means an individual, partnership, firm, corporation, association, trustee or any other business or legal entity, including County Liquor Control Boards and Departments of Liquor Control;

(B) "Alcoholic Beverage" means any whiskey, rum, gin, brandy, cordial, wine, cider, alcohol or any other spiritous, vinous, malt or fermented liquor, liquid or compound, by whatever name called, containing one-half of one per centum or more of alcohol by volume, which is fit for beverage purposes, except any brewed alcoholic beverage including beer, ale, porter and stout;

(C) "Manufacturer" means a person who operates a plant within the United States for distilling, rectifying, blending, fermenting or bottling any alcoholic beverage, or imports into the United States any alcoholic beverage from outside the United States for resale therein, or is a distributor selling to a wholesaler for resale to a retailer or other purchasers for resale;

(D) "Wholesaler" means any person engaged in the business of purchasing or acquiring alcoholic beverages from manufacturers for resale or distribution to retailers or other purchasers for resale;

(E) "Retailer" means any person engaged in the business of selling alcoholic beverages to consumers;

(F) "Consenting defendants" means the defendants signatory hereto and each of them;

(G) "Monopoly County" means any County Liquor Control Board or Department of Liquor Control selling alcoholic beverages under a county dispensary system in the State of Maryland.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any consenting defendant shall apply to such defendant, its officers, agents, servants, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with such defendant who receive actual notice of this Final Judgment by personal service or otherwise. For the purpose of this Final Judgment, a consenting defendant and its affiliates (whether or not a defendant herein) and their respective officers, agents, servants and employees shall be deemed to be one person. An affiliate of a consenting defendant shall mean any company wholly-owned or substantially wholly-owned by such consenting defendant, any parent company that directly or indirectly wholly-owns or substantially wholly-owns such consenting defendant and any company wholly-owned or substantially wholly-owned by such parent.

IV

[*Price Fixing*]

(A) The consenting defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining, furthering, or reviving, directly or indirectly, any contract, agreement, understanding, plan or program with any other person to:

(1) Control, fix, adopt, stabilize or maintain prices, markups, margins of profit, terms or conditions at which alcoholic beverages are sold or offered for sale to third persons in the State of Maryland;

(2) Induce, compel or coerce, or attempt to induce, compel or coerce, any person to establish, adopt, issue, adhere to, or to police or enforce adherence to prices, markups, margins of profit, terms or conditions at which alcoholic beverages shall be sold or offered for sale to third persons in the State of Maryland.

(B) The consenting defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining, furthering, or reviving, directly or indirectly, any contract, agreement, or understanding, plan or program with any other person to:

(1) Boycott or otherwise refuse to deal with, or threaten to boycott or otherwise refuse to deal with, any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland;

(2) Induce, compel or coerce, or attempt to induce, compel or coerce, any person to boycott or otherwise refuse to deal with any person engaged in the purchase, sale

or distribution of alcoholic beverages in the State of Maryland;

(3) Induce, compel or coerce, or attempt to induce, compel or coerce, any manufacturer or wholesaler to refuse to make sales of alcoholic beverages directly to any Monopoly County or to require sales to said Monopoly Counties to be made through wholesalers;

(4) Suggest, designate, prescribe or otherwise influence, or attempt to influence, the price or prices at which sale of alcoholic beverages shall be made by manufacturers or wholesalers to any Monopoly County;

(5) Induce, compel or coerce, or attempt to induce, compel or coerce, any manufacturer or wholesaler to make sales to any Monopoly County upon the condition or understanding that said Monopoly County resell alcoholic beverages at a suggested, prescribed or designated price or prices, or otherwise require said Monopoly County to resell at a suggested, prescribed or designated price or prices.

V

[*Coercing Manufacturers*]

Each of the consenting defendants is enjoined and restrained from, directly or indirectly:

(A) Requiring, compelling or coercing any manufacturer or wholesaler to establish, adopt, issue, adhere to, or police or enforce adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale at which alcoholic beverages are sold or offered for sale in the State of Maryland;

(B) Communicating with any manufacturer, wholesaler or other person for the purpose or with the effect of urging, compelling or coercing any manufacturer or wholesaler to refrain from selling alcoholic beverages to any person or to any group or class of persons in the State of Maryland;

(C) Urging, compelling or coercing, or attempting to urge, compel or coerce any person to promote the sale of, or give preference to, specific brands of alcoholic beverages not manufactured by such defendant upon any condition, agreement or understanding, that the manufacturer thereof establish, adopt, issue, adhere to, or police and enforce adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale thereof, or boycott or otherwise refuse to deal with persons engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland;

(D) In any manner hindering the sale of, or urging, compelling or coercing, or attempting to urge, compel or coerce any other person to refuse to buy, refuse to promote or in any manner hinder the sale of alcoholic beverages not manufactured by such defendant for the purpose or with the effect of urging, compelling or coercing the manufacturer thereof to establish, adopt, issue, adhere to, or police and influence adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale thereof, or boycott or refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland.

[*Permissive Provisions*]

Nothing in Subsections (B)(1) and (2) of Section IV, or Subsections (B) and (D) of Section V, shall be construed to prohibit any consenting defendant from negotiating, entering into and adhering to a contract designating a wholesaler as a distributor, on an exclusive basis or otherwise; provided, however, that such designation shall not directly or indirectly prevent any Monopoly County from acquiring alcoholic beverages direct from any source.

Nothing in this Final Judgment shall be deemed to prohibit the consenting defendants from (a) proposing or supporting legislation or the adoption of local, state or Federal regulations relating to the purchase, sale or distribution of alcoholic beverages, (b) from individually taking action required by local, state or Federal legislation or regulations, or (c), except as specifically provided to the contrary by Section VI hereof, from doing the things they may legally do under the fair trade laws of the United States and the State of Maryland.

VI

[*Contingent Provision*]

Upon the entry of a Final Judgment in this case not subject to further appeal against one or more of the defendant manufacturers named as such in the complaint in this case requiring any suspension of fair trading in the State of Maryland for any period of time, each consenting defendant shall:

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(A) Within thirty days after the entry of such Final Judgment, cancel all fair trade contracts for the State of Maryland to which it is a party and which fix or control the resale price of alcoholic beverages and shall give to all its Maryland customers and Maryland licensed retailers handling such products notice of such cancellation and termination, informing each of them that the retailer shall individually determine his resale price without reference to fair trade prices theretofore established thereon;

(B) Be enjoined and restrained from entering into or adhering to any fair trade contract in the State of Maryland for the shortest period of any such suspension or two years, whichever is less;

(C) Be enjoined and restrained for the shortest period of any such suspension, or two years, whichever is less, from disseminating or preparing for dissemination to any person in the State of Maryland price lists or other price information containing minimum or suggested resale prices, markups, margins of profit, terms or conditions at which such alcoholic beverages are to be resold or offered for sale, except as provided by Article 2B, Section 109 of the Annotated Code of Maryland;

(D) Be enjoined and restrained for the shortest period of any such suspension, or two years, whichever is less, from shopping, policing, reporting or otherwise enforcing, minimum suggested retail prices, markups, margins of profit, terms or conditions at which such alcoholic beverages are to be sold or offered for sale in the State of Maryland;

Provided that, if no such suspension is decreed as to any one of such defendant manufacturers, the provisions of Section VI shall not apply to the consenting defendants.

VII

[Refusal to Sell—Specific Relief]

(A) Consenting defendants are enjoined and restrained from conspiring, combining or agreeing with each other or with any Wholesale Association, Retail Association, or with any Manufacturer, Wholesaler or Retailer to refuse:

(1) To sell any alcoholic beverage to any Monopoly County;

(2) To sell any alcoholic beverage to any Monopoly County at prices less than the customary wholesale price to licensed retailers, or

(3) To sell any alcoholic beverage to any Monopoly County except upon the condition or understanding that the Monopoly County resell the alcoholic beverages at a suggested, prescribed or designated price or prices or otherwise require the Monopoly County to resell at a suggested, prescribed or designated price or prices.

(B) Each consenting defendant shall offer to sell and shall sell upon request to the Department of Liquor Control for Montgomery County those brands listed on Appendix A [not reproduced herein], and those brands which are hereafter offered for sale to any monopoly state, at prices which are not higher than those then currently charged to the wholesalers in Maryland, and without discrimination as to availability or other terms or conditions of sale: Provided, however, that if any such brand is withdrawn by the consenting defendant from all markets of the United States, such defendant will not thereafter be obligated to sell or offer to sell such brand to the Department of Liquor Control for Montgomery County for such time as it is so withdrawn.

VIII

[Enforcement and Compliance]

(A) For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant, made to its principal office, be permitted:

1. Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents prepared or written after the date of this Final Judgment in the possession or under the control of said defendant relating to any matters contained in this Final Judgment; and

2. Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters.

(B) Upon receipt of a written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division to any consenting defendant, said defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of said Judgment;

(C) No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Final Judgment

**[Maryland Package Liquor Stores Assn., Inc., and Jack Wulfert—
October 6, 1958]**

THOMSEN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on September 11, 1956, and the plaintiff and defendants signatory hereto, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by any party with respect to any such issue; and the Court having considered the matter and being duly advised;

Now, therefore, upon consent of all the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of all parties signatory hereto. The complaint states claims upon which relief may be granted against the defendants signatory hereto under Sections 1 and 2, of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means an individual, partnership, firm, corporation, association, trustee or any other business or legal entity, including County Liquor Control Boards and Departments of Liquor Control;

(B) "Alcoholic Beverage" means any whiskey, rum, gin, brandy, cordial, wine, cider, alcohol or any other spirituous, vinous, malt or fermented liquor, liquid or compound, by whatever name called, containing one-half of one per centum or more of alcohol by volume, which is fit for beverage purposes, except any brewed alcoholic beverage including beer, ale, porter, and stout;

(C) "Manufacturer" means a person who operates a plant within the United States for distilling, rectifying, blending, fermenting or bottling any alcoholic beverage, or imports into the United States any alcoholic beverage from outside the United States, or is a distributor selling to a wholesaler for resale to a retailer;

(D) "Wholesaler" means any person engaged in the business of purchasing or acquiring alcoholic beverages from manufacturers for resale or distribution to retailers or other purchasers for resale;

(E) "Retailer" means any person engaged in the business of selling alcoholic beverages to consumers;

(F) "Consenting defendants" means the defendants Maryland Package Liquor Stores Association, Inc., and Jack Wulfert, and each of them;

(G) "Monopoly County" means any County Liquor Control Board or Department of Liquor Control selling alcoholic beverages under a county dispensary system in the State of Maryland.

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III

[*Applicability*]

The provisions of this Final Judgment applicable to any consenting defendant shall apply to such defendant, its officers, agents, servants, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with such defendant who receive actual notice of this Final Judgment by personal service or otherwise. For the purpose of this Final Judgment, a defendant and its respective officers, agents, servants and employees shall be deemed to be one person.

IV

[*Price Fixing*]

(A) The consenting defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining, furthering, or reviving, directly or indirectly, any contract, agreement, understanding, plan or program between themselves, or with any wholesaler or group of wholesalers or with any retailer or group of retailers, to:

(1) Control, fix, adopt, stabilize or maintain prices, markups, margins of profit, terms or conditions at which alcoholic beverages not manufactured by such defendant are sold or offered for sale to third persons in the State of Maryland;

(2) Induce, compel or coerce, or attempt to induce, compel, or coerce, any person to establish, adopt, issue, adhere to, or to police or enforce adherence to prices, markups, margins of profit, terms or conditions at which alcoholic beverages not manufactured by such defendant shall be sold or offered for sale to third persons in the State of Maryland.

(B) The consenting defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining, furthering, or reviving, directly or indirectly, any contract, agreement, or understanding, plan or program between themselves, or with any other person, to:

(1) Boycott or otherwise refuse to deal with, or threaten to boycott or otherwise refuse to deal with, any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland;

(2) Induce, compel or coerce, or attempt to induce, compel or coerce, any person to boycott or otherwise refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland;

(3) Induce, compel or coerce, or attempt to induce, compel or coerce, any manufacturer to refuse to make sales of alcoholic beverages directly to any Monopoly County or to require sales to said Monopoly Counties to be made through wholesalers;

(4) Suggest, designate, prescribe or otherwise influence, or attempt to influence, the price or prices at while sales of alcoholic beverages shall be made by manufacturers or wholesalers to any Monopoly County;

(5) Induce, compel or coerce, or attempt to induce, compel or coerce, any manufacturer or wholesaler to make sales to any Monopoly County upon the condition or understanding that said Monopoly County resell alcoholic beverages at a suggested, prescribed or designated price or prices, or otherwise require said Monopoly County to resell at a suggested, prescribed or designated price or prices.

[*Permissive Provision*]

Nothing in this Final Judgment shall be deemed to prohibit the said consenting defendants from proposing or supporting legislation or the adoption of local, state, or federal regulations, relating to the purchase, sale or distribution of alcoholic beverages or from individually taking action required by local, state or federal legislation or regulation.

V

[*Coercing Manufacturers*]

Each of the consenting defendants is enjoined and restrained from, directly or indirectly:

(A) Urging, compelling or coercing any manufacturer to establish, adopt, issue, adhere to, or police or enforce adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale at which alcoholic beverages are sold or offered for sale, in the State of Maryland;

(B) Communicating with any manufacturer, wholesaler or other person for the purpose or with the effect of urging, compelling or coercing any manufacturer or wholesaler to refrain from selling alcoholic beverages to any person or to any group or class of persons;

(C) Promoting the sale of, or giving preference to, or urging, compelling or coercing, or attempting to urge, compel or coerce any person to promote the sale of, or give preference to, specific brands of alcoholic beverages upon any condition, agreement or understanding, that the manufacturer thereof establish, adopt, issue, adhere to, or police and enforce adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale thereof, or boycott or otherwise refuse to deal with persons engaged in the purchase, sale or distribution of alcoholic beverages;

(D) Refusing to buy, refusing to promote the sale of, or in any manner hindering the sale of, or urging, compelling or coercing, or attempting to urge, compel or coerce any other person to refuse to buy, refuse to promote or in any manner hinder the sale of alcoholic beverages for the purpose or with the effect of urging, compelling or coercing the manufacturer thereof to establish, adopt, issue, adhere to, or police and influence adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale thereof, or boycott or refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages.

VI

[*Permissive Provision*]

Nothing in Subsections (B)(1) and (2) of Section IV, or Subsections (B) and (D) of Section V, shall be construed to prohibit defendant Jack Wulfert, acting as a retailer, from negotiating, entering into and adhering to a contract authorizing said defendant to sell alcoholic beverages with such defendant's private brand or label; provided, however, that such designation shall not directly or indirectly prevent any monopoly county from acquiring alcoholic beverages direct from any source.

VII

[*Contingent Provision*]

Upon the entry of a Final Judgment in this case not subject to further appeal against one or more of the defendant manufacturers named as such in the complaint in this case requiring a suspension of fair trading in the State of Maryland for any period of time, consenting defendant Jack Wulfert as to alcoholic beverages included in such suspension which he sells, for and during the period of such suspension, shall:

(A) Within thirty days after the entry of such Final Judgment, cancel all fair-trade contracts to which he is a party and which fix or control the resale price of such alcoholic beverages;

(B) Be enjoined and restrained from entering into or adhering to any fair-trade contract;

(C) Be enjoined and restrained from shopping, policing, reporting, or otherwise enforcing, minimum or suggested retail prices, markups, margins of profit, terms or conditions at which such alcoholic beverages are to be sold or offered for sale.

VIII

[*Association Activities*]

The defendant Maryland Package Liquor Stores Association, Inc. is enjoined and restrained from:

(A) Discussing, evolving or acting upon any matter or thing enjoined and restrained by any provision of this Final Judgment in any meeting of its members, officers, directors or any committee meeting of the Association;

(B) Accepting financial contributions from any manufacturer, non-member retailer or another non-member association;

(C) Having as a member any wholesaler or distiller not also engaged in the business of retail sales of alcoholic beverages;

(D) Organizing, being a member of, or participating in any trade association or other organization, the purposes or functions of which are contrary to any provision of this Final Judgment;

(E) Maintaining any plan, program, shopping service or other means the purpose or effect of which is to determine, report to any person, police, supervise or enforce prices of alcoholic beverages in the State of Maryland;

(F) Inducing, compelling or coercing, or attempting to induce, compel or coerce, any person to establish, adopt, issue, adhere to, or to police or enforce adherence to prices, markups, margins of profits, terms or conditions at which alcoholic beverages will be sold or offered for sale;

(G) Inducing, compelling or coercing, or attempting to induce, compel or coerce, any

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person to boycott or otherwise refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages.

IX

[*Enforcement and Compliance*]

(A) For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant, made to its principal office, be permitted:

(1) Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters;

(B) Upon receipt of a written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of said Judgment;

(C) No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Final Judgment

[The Kronheim Co.—October 14, 1958]

THOMSEN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on September 11, 1956, and the plaintiff and the defendant, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by any party with respect to any such issue; and the Court having considered the matter and being duly advised;

Now, Therefore, upon consent of all the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of all parties signatory hereto. The complaint states claims upon which relief may be granted against the defendant signatory hereto under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means an individual, partnership, firm, corporation, association, trustee or any other business or legal entity, including County Liquor Control Boards and Departments of Liquor Control;

(B) "Alcoholic Beverage" means any whiskey, rum, gin, brandy, cordial, wine, cider, alcohol or any other spiritous, vinous, malt or fermented liquor, liquid or compound, by whatever name called, containing one-half of one per centum or more of alcohol by volume, which is fit for beverage purposes, except any brewed alcoholic beverage including beer, ale, porter, and stout;

(C) "Manufacturer" means a person who operates a plant within the United States for distilling, rectifying, blending, fermenting, or bottling any alcoholic beverage, or imports into the United States any alcoholic beverage from outside the United States, or is a distributor selling to a wholesaler for resale to a retailer;

(D) "Wholesaler" means any person engaged in the business of purchasing or acquiring alcoholic beverages from manufacturers for resale or distribution to retailers or other purchasers for resale;

(E) "Retailer" means any person engaged in the business of selling alcoholic beverages to consumers;

(F) The "consenting defendant" means the Kronheim Co., Inc.;

(G) "Monopoly County" means any County Liquor Control Board or Department of Liquor Control selling alcoholic beverages under a county dispensary system in the State of Maryland.

III

[*Applicability*]

The provisions of this Final Judgment shall apply to the defendant, its officers, agents, servants, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with said defendant who receive actual notice of this Final Judgment by personal service or otherwise. For the purpose of this Final Judgment, the defendant and its respective officers, agents, servants and employees shall be deemed to be one person.

IV

[*Price Fixing*]

(A) The consenting defendant is jointly and severally enjoined and restrained from entering into, adhering to, maintaining, furthering, or reviving, directly or indirectly, any contract, agreement, understanding, plan or program with any wholesaler or group of wholesalers, or with any retailer or group of retailers, to:

(1) Control, fix, adopt, stabilize, or maintain prices, markups, margins or profit, terms or conditions at which alcoholic beverages not manufactured by such defendant are sold or offered for sale to third persons in the State of Maryland;

(2) Induce, compel or coerce, or attempt to induce, compel, or coerce, any person to establish, adopt, issue, adhere to, or to police or enforce adherence to prices, markups, margins of profit, terms or conditions at which alcoholic beverages not manufactured by such defendant shall be sold or offered for sale to third persons in the State of Maryland.

(B) The consenting defendant is enjoined and restrained from entering into, adhering to, maintaining, furthering, or reviving, directly or indirectly, any contract, agreement, or understanding, plan or program with any other person, to

(1) Boycott or otherwise refuse to deal with, or threaten to boycott or otherwise refuse to deal with, any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland;

(2) Induce, compel or coerce, or attempt to induce, compel or coerce, any person to boycott or otherwise refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages in the State of Maryland;

(3) Induce, compel or coerce, or attempt to induce, compel or coerce, any manufacturer to refuse to make sales of alcoholic beverages directly to any Monopoly County or to require sales to said Monopoly Counties to be made through wholesalers;

(4) Suggest, designate, prescribe or otherwise influence, or attempt to influence, the price or prices at which sales of alcoholic beverages shall be made by manufacturers or wholesalers to any Monopoly County;

(5) Induce, compel or coerce, or attempt to induce, compel or coerce, any manufacturer or wholesaler to make sales to any Monopoly County upon the condition or understanding that said Monopoly County resell alcoholic beverages at a suggested, prescribed or designated price or prices, or otherwise require said Monopoly County to resell at a suggested, prescribed or designated price or prices.

Nothing in this Final Judgment shall be deemed to prohibit the said defendant from proposing or supporting legislation or the adoption of local, state, or federal regulations, relating to the purchase, sale or distribution of alcoholic beverages or from taking action required by local, state or federal legislation or regulation.

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V

[*Coercing Manufacturers*]

The consenting defendant is enjoined and restrained from directly or indirectly:

(A) Urging, compelling or coercing any manufacturer to establish, adopt, issue, adhere to, or police or enforce adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale at which alcoholic beverages are sold or offered for sale in the State of Maryland;

(B) Communicating with any manufacturer, wholesaler or other person for the purpose or with the effect of urging, compelling or coercing any manufacturer or wholesaler to refrain from selling alcoholic beverages to any person or to any group or class of persons;

(C) Promoting the sale of, or giving preference to, or urging, compelling or coercing, or attempting to urge, compel or coerce any person to promote the sale of, or give preference to, specific brands of alcoholic beverages not manufactured by such defendant upon any condition, agreement or understanding, that the manufacturer thereof establish, adopt, issue, adhere to, or police and enforce adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale thereof, or boycott or otherwise refuse to deal with persons engaged in the purchase, sale or distribution of alcoholic beverages;

(D) Refusing to buy, refusing to promote the sale of, or in any manner hindering the sale of, or urging, compelling or coercing, or attempting to urge, compel or coerce any other person to refuse to buy, refuse to promote or in any manner hinder the sale of alcoholic beverages not manufactured by such defendant for the purpose or with the effect of urging, compelling or coercing the manufacturer thereof to establish, adopt, issue, adhere to, or police and influence adherence to minimum or suggested resale prices, markups, margins of profit, terms or conditions of sale thereof, or boycott or refuse to deal with any person engaged in the purchase, sale or distribution of alcoholic beverages.

VI

[*Permissive Provision*]

Nothing in Subsections (B)(1) and (2) of Section IV, or Subsections (B) and (D) of Section V, shall be construed to prohibit the consenting defendant, acting as a wholesaler or manufacturer, from negotiating, entering into and adhering to a contract designating said defendant or another wholesaler as a distributor, on an exclusive basis or otherwise; provided, however, that such designation shall not directly or indirectly prevent any monopoly county from acquiring alcoholic beverages direct from any source.

VII

[*Contingent Provision*]

Upon the entry of a Final Judgment in this case not subject to further appeal against one or more of the defendant manufacturers named as such in the complaint in this case requiring a suspension of fair trading in the State of Maryland for any period of time, the consenting defendant wholesaler as to alcoholic beverages included in such suspension which it sells, for and during the period of such suspension, shall:

(A) Within thirty days after the entry of such Final Judgment, cancel all fair-trade contracts to which he is a party and which fix or control the resale price of such alcoholic beverages and shall give to all Maryland licensed retailers handling such products notice of such cancellation and termination, informing each of them that the retailer shall individually determine his resale price without reference to fair-trade prices theretofore established thereon;

(B) Be enjoined and restrained from entering into or adhering to any fair-trade contract;

(C) Be enjoined and restrained from disseminating or preparing for dissemination to any person price lists or other price information containing minimum or suggested resale prices, markups, margins of profits, terms or conditions at which such alcoholic beverages are to be resold or offered for sale, except as provided by Article 2B, Section 109 of the Annotated Code of Maryland.

(D) Be enjoined and restrained from shopping, policing, reporting, or otherwise enforcing, minimum suggested retail prices, markups, margins of profit, terms or conditions at which such alcoholic beverages are to be sold or offered for sale.

VIII

[*Enforcement and Compliance*]

(A) For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to its principal office, be permitted:

1. Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment; and

2. Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters;

(B) Upon receipt of a written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of said Judgment;

(C) No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 69,262] Staten Island Motors, Inc. v. American Motors Sales Corporation (New York Zone).

In the United States District Court for the District of New Jersey. Civil Action File No. 38-58. Filed January 21, 1959.

Automobile Dealer Franchise Act

Suit for Damages Under Automobile Dealer Franchise Act—Elements of Violation—Coercion or Intimidation—Good Faith.—An automobile sales company did not fail to act in good faith (1) in performing or complying with the terms of an automobile dealer's 1957 franchise or (2) in not renewing the dealer's franchise for 1958, since there were no acts of coercion or intimidation or threats thereof on the part of the automobile sales company. The plain meaning of the Automobile Dealer Franchise Act indicates that the restrictions which it imposes extend only to those dealings between parties wherein coercion or intimidation or threats of the same are involved. This is borne out in the legislative history of the Act. It was stated in House Report No. 2850 (84th Congress, 2nd Session) that "The term 'fair and equitable' as used in the bill is qualified by the term so as to guarantee the one party freedom from coercion, intimidation or threats of coercion or intimidation from the other party.' In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation."

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.60.

Suit for Damages Under Automobile Dealer Franchise Act—Non-Renewal of Franchise—Coercion or Intimidation—Good Faith.—An automobile sales company did not fail to act in good faith in not renewing an automobile dealer's franchise for 1958. The company, in refusing to renew the dealer's franchise, acted without coercion or intimidation or

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threats of coercion or intimidation. The dealer did not allege that he resisted pressure of any sort by the company and that this resulted in the non-renewal of his franchise. In view of the fact that the company's representatives never saw or were able to communicate with the dealer personally on his premises during the last half of 1957, the company could have hardly threatened to coerce or intimidate him. This was one of the reasons why the franchise was not renewed. The company in no way attempted to force the dealer to accept automobiles or supplies that he did not want on the pain of non-renewal of his franchise. The Automobile Dealer Franchise Act does not prohibit a manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation or curtail the manufacturer's right to cancel or not renew an inefficient or undesirable dealer's franchise. Furthermore, the dealer could not allow his business, for which he was solely responsible, to be conducted by persons who had not reached their majority, and then seek relief under the Act when the company decides that such conduct affords inadequate representation for its product.

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.

Suit for Damages Under Automobile Dealer Franchise Act—Performing or Complying with Terms of Franchise—Coercion or Intimidation—Good Faith.—An automobile sales company did not fail to act in good faith in performing or complying with the terms of an automobile dealer's 1957 franchise, since there were no acts or coercion of intimidation or threats thereof on the part of the sales company. Coercion was not exerted on the dealer when the company withheld the delivery of automobiles which were ordered orally by the dealer's minor son, who had no authority to act on behalf of his father. Furthermore, the order was not in accordance with the terms of the franchise. The act of signing the franchise in New Jersey against the dealer's will rather than at the dealer's place of business in Staten Island resulted in no injury to the dealer. With respect to a provision of the franchise requiring the dealer to submit monthly reports, the dealer, even assuming that he signed the franchise against his will and that there was coercion with respect to this provision of the franchise, failed to show how he was damaged as a result of his compliance with the provision. Furthermore, the dealer could not complain that certain other provisions of the franchise were unfair and inequitable. The provisions were not complained of nor even mentioned by the dealer when he signed the franchise. In fact, he did not even read the provisions of the franchise before signing it. Since he did not trouble himself to read the provisions at the time of signing the contract, it cannot be said that he was constrained to sign the contract and accept the provisions against his will. The fact that the dealer did not immediately receive a copy of the franchise after it was signed was immaterial, since it appeared that he did not read the contract until he was later informed that his franchise would not be renewed for 1958.

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.

Suit for Damages Under Automobile Dealer Franchise Act—Effect of Act on Federal Antitrust Laws—Non-Renewal of Franchise.—In holding that an automobile sales company did not violate the Automobile Dealer Franchise Act when the company refused to renew the franchise of a dealer because he did not adequately represent its product, the court noted that even under the Federal antitrust laws, of which the Act is a supplement, a manufacturer does not violate the Sherman Act when he cuts off the franchise of a dealer who is admittedly doing a good business of selling the manufacturer's product. In this connection, the Automobile Dealer Franchise Act provides that no provision of the Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.45.

For the plaintiff: Saul A. Wittes, by John J. Brennan (New York Bar).

For the defendant: Dickinson R. Debevoise.

Opinion

[*Causes of Action*]

WORTENDYKE, District Judge [*In full text*]: This is a motion for summary judgment by defendant, American Motor Sales Corporation (Sales). Plaintiff Staten Island Motors, Inc. (Motors) has brought suit against Sales as a result of the notification of Motors by Sales that its automobile distribution franchise for American Motors' automobiles would not be renewed for the year 1958. The causes of action alleged by Motors against Sales are breach of contract, violation of New York General Business Law § 197, and violation of the Federal Automobile Dealers' Day in Court Act, 70 Stat. 1125 (1956), 15 U. S. C. §§ 1221-25 (Supp. V, 1958).

[*Non-Renewal of Franchise*]

Sales, a Delaware corporation having its headquarters in New Jersey, is engaged in distributing cars made by American Motors Corporation, of which Sales is a wholly owned subsidiary, to franchised dealers in the New York metropolitan area. During the year 1957 Motors, a New York corporation, was one of three dealers of American Motors' automobiles on Staten Island. Since 1936 Motors had sold automobiles under franchise agreements with Sales or its predecessors. The franchise agreements between Motors and Sales were operative for one year only, a practice general in the automobile industry. Each year a new agreement would be entered into for the following year. Motors sold defendant's automobiles under one such agreement during the year 1957. This agreement had been executed by Francis DePaolo, president and sole stockholder of Motors, and by a representative of Sales, some time in the latter part of 1956. By its terms this franchise agreement expired at the end of 1957. In October 1957, the zone manager of Sales notified DePaolo that "[a]fter much study and deliberation, we wish to advise you that we do not contemplate entering into a new Franchise Agreement with you [for 1958] at the expiration of the present agreement."

The reasons given by Sales for the nonrenewal of the franchise were that plaintiff's sales for the year did not reflect the increased success of most of the other dealers in the zone in selling defendant's cars; that DePaolo was not personally present at its place of business during a substantial portion of the year; that when he was so absent he left the conduct of its business to his twenty-one year old daughter and nineteen year old son and one mechanic; and that plaintiff did not have a suitable place for display of defendant's automobiles.

[*Breach of Contract*]

Motors has based its alleged cause of action for breach of contract on the fact that in September 1957, it had ordered eight 1958 Nash Rambler automobiles from Sales, which the latter did not subsequently deliver. Failure of Sales to deliver these automobiles, which is alleged to have been a breach of the franchise agreement, is claimed to have resulted in a corresponding loss of business to Motors. However, it appears that this order for cars was not placed by DePaolo, to whom Sales looked as the key man of the corporation, and who, under the 1957 franchise agreement, was the sole qualified representative of Motors. The order was made orally by DePaolo's nineteen-year-old son at an automobile show in New York. DePaolo's son asked a representative of Sales to ship *any* eight new 1958 automobiles to Motors. It would take little imagination to visualize that, in a business as complex as is involved in the distribution of new automobiles, Sales would require more definite specifications before such an order could be filled, even if the order were initially made by DePaolo himself. Indeed such specificity would seem to be the reason why the franchise agreement provides that "All orders for motor vehicles shall be submitted in writing on Car Purchase Order Forms supplied by Zone." Plaintiff admits that no written forms were submitted to Sales requesting the automobiles in question, and there is no evidence before me that order forms were requested of Sales or that Motors submitted any written correspondence to Sales concerning the allegedly ordered cars. Motors cannot complain of Sales' inaction in failing to fill the order when it has not fulfilled its obligation to make such request in writing. *Jones v. United States*, 96 U. S. 24 (1877); Williston, Contracts §§ 663, 672 (Rev. Ed. 1936). Plaintiff further complains that Sales breached the 1957 franchise agreement when it disseminated the information that it was not going to renew Motors' franchise for 1958. The dissemina-

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tion by Sales of this information of an already existing fact to its own employees cannot be said to have caused any damages to Motors. Cf. *Schwing Motor Co. v. Hudson Sales Corp.*, D. C. Md. 1956, [1956 Trade Cases ¶ 68,292] 138 F. Supp. 899, aff'd [1956 Trade Cases ¶ 68,564] 239 F. 2d 176, cert. den. 355 U. S. 823 (1957). It does appear that one prospective customer of Motors did cancel an order with Motors in favor of another dealer. However, in light of the subsequent disposition of this action, such damages as DePaolo might there prove would be far below the jurisdictional amount which governs this Court's cognizance of contract actions based on diversity of citizenship. 28 U. S. C. § 1331 (1952). There being no other justiciable issue of fact as to the alleged breach of contract, this cause of action must be dismissed.

[*New York Law*]

The second cause of action alleged by Motors arises from an alleged violation by Sales of New York General Business Law § 197, which provides:

> "No manufacturer or distributor, or any agent of such manufacturer or distributor shall *terminate* any contract, agreement, or understanding or renewal thereof for the sale of new motor vehicles to a distributor or dealer, as the case may be, except for cause." (Emphasis supplied.)

It is clear beyond doubt that the New York statute only covers the situation where the manufacturer *terminates* an existing contract with its franchised dealer, as compared to the Federal Day in Court Act, *infra*, and other similar State statutes, which cover terminations or cancellations by manufacturers of dealers' franchises and failures to renew such franchises. Brown and Conwell, *Automobile Manufacturer-Dealer Legislation*, 57 Col. L. Rev. 219, 224 (1957); and compare e. g. Virginia Code of 1950, Section 46.1-547 (1958 Supp.) and South Dakota Code Supp. Section 54.1103 (1952) to e. g. Ark. Stats. (1947), Section 75-1504 (1957 Replacement) and Minn. Stat. Ann. Section 168.27, Subd. 14 (Supp. 1957). The franchise agreement involved in the present case was not terminated by the letter of October 1957 from Sales to Motors. The agreement was simply allowed to expire without being succeeded by a new form of agreement for the year 1958. Plaintiff, however, contends that defendant's failure to fill his oral order for eight new automobiles constituted an implied termination of the agreement. What has been said previously concerning defendant's obligation in this regard disposes of this contention. Motor's asserted cause of action under the New York statute consequently must fail.

[*Federal Act*]

Motor's third alleged cause of action is predicated on the Federal Automobile Dealers Day in Court Act of 1956 *supra*.[1] No reported case has come to my attention which applies the term "good faith" as used in the Act to a particular set of factual circumstances. In *Miller Motors v. Ford Motor Co.*, 4 Cir. 1958 [1958 Trade Cases ¶ 68,937], 252 F. 2d 441, 451, the issue was withdrawn from consideration by the Court. The plain meaning of the Act indicates that the restrictions which it imposes extend only to those dealings between parties wherein coercion or intimidation or threats of the same are involved. This is borne out in the legislative history. It is stated in H. R. 2850, 1956 U. S. Code, Cong., and Admin. News Vol. 3, p. 4596 at p. 4603, that

> "The term 'fair and equitable' as used in the bill is qualified by the term 'so as to guarantee the one party freedom from

[1] So much of the Act as is applicable herein is as follows:

"Sec. 2. An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after (August 8, 1956) to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith." 15 U. S. C. § 1222.

"Good faith" is defined as "the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." 15 U. S. C. § 1221(e).

coercion, intimidation or threats of coercion or intimidation from the other party.' In each case arising under this bill, good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation." See also Note, 70 Harv. L. Rev. 1239, 1249 (1957).

A careful analysis of the admitted facts here presented discloses, as a matter of law, the absence of any of the prohibited acts of coercion or intimidation or threats thereof on the part of Sales.

[*1957 Franchise—Practices*]

Plaintiff first complains that Sales violated the Act and coercion was exerted on Motors by its action in withholding the automobiles which were ordered by DePaolo's son at the automobile show. The son admittedly had no authority to act on behalf of his father. What has been stated previously concerning plaintiff's non-compliance with the express terms of the franchise agreement regarding orders of new automobiles in writing disposes of this issue raised by plaintiff.

DePaolo next alleges coercion on the part of Sales when the matter of signing the 1957 franchise agreement came up between the parties in the latter part of 1956. A representative of Sales called at DePaolo's office on Staten Island and insisted that the franchise renewal had to be signed by DePaolo in New Jersey rather than in DePaolo's Staten Island office. The representative told DePaolo that, if he did not go to New Jersey, the company "would not renew the contract." DePaolo subsequently went to New Jersey to sign the contract. This is the act which DePaolo did against his will. However, the act of signing the 1957 franchise agreement in New Jersey against his will rather than in Staten Island resulted in no injury or damage to DePaolo. The agreement was the same whether the instrument was executed in Staten Island or New Jersey. DePaolo further claims that at this time he desired to obtain some relief from the terms of the agreement which required him to submit monthly financial statements to the Company. He had not fulfilled this requirement during 1956, and Sales was insistent that he comply with this provision. DePaolo states that he was told, while attempting to negotiate a modification of this provision, "This is the contract. Sign it." Even if we assume that DePaolo signed the agreement against his will and that there was coercion under the Act with respect to this particular provision concerning the monthly reports, plaintiff has failed to indicate in any way how he was damaged as a result of his compliance with the provision during the period of the 1957 agreement. Further it would appear that such terms in dealer franchises are in the ordinary course and dictated by sound business practice. See *United States v. General Motors Corp.*, 7 Cir. 1941 [1940-1943 TRADE CASES ¶ 56,139], 121 F. 2d 376, 386-87; Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract,* 66 Yale L. J. 1135, 1144 (1957).

Now that the franchise has not been renewed, DePaolo claims that certain provisions of the 1957 agreement governing the obligations of Sales during the term of the agreement and also the obligations of Sales with regard to repurchase from DePaolo and delivery of new cars and equipment on hand at the date of expiration of the agreement, and a provision for reimbursement for rental of the building occupied by DePaolo are unfair and inequitable. No opinion is expressed as to the fairness of these terms, especially the provision relating to reimbursement for leases entered into by the dealers for their premises. See *Ford Motor Co. v. Kirkmeyer Motor Co.,* 4 Cir. 1933, 65 F. 2d 1001, 1005-06. However, the acceptance of these provisions in the 1957 agreement were not against the will of DePaolo. These provisions were not complained of nor even mentioned by DePaolo at the time of signing the 1957 franchise. Despite the age-old warning against signing a document without reading it, DePaolo did not even read the provisions of the 1957 agreement when he signed it. He further complains that a copy of the agreement was not received by him until the following March of 1957. However, it does not appear at that time that he undertook to read the terms of his contract nor to complain of the provisions. What does appear is that apparently after DePaolo found the franchise was not to be renewed, he for the first time and with the aid of his attorney picked out and listed those provisions of the 1957 agreement which he now claims are burdensome. If we accept the common definition of coercion to be "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done" *Web-*

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ster's International Dictionary (2d Ed. 1936), we see that as to these criticized provisions DePaolo was not coerced. As he did not even trouble himself to familiarize himself with such provisions at the time of signing the contract, it cannot be said he was constrained to sign the contract and accept these provisions against his will.

[*Non-Renewal of Franchise*]

One last point must be considered, i. e., whether under the Act Sales acted without coercion or intimidation or threats thereof in failing to renew Motors' franchise for 1958. If DePaolo had alleged that he resisted pressure of any sort by Sales and this resulted in the non-renewal of his franchise, he would spell out a good cause of action under the Act. H. R. 2850, 1956 U. S. Code, Cong. and Admin. News, *supra,* at 4603. However, it is uncontradicted that during the last half of 1957 defendant's representatives never saw or were able to communicate with DePaolo personally on his premises. Under such circumstances they could hardly have threatened to coerce or intimidate him. Indeed, the fact that Sales' representatives could not even communicate a simple business request to DePaolo, their franchised dealer, for several months, was one of the reasons for discontinuing the relationship. Sales in no way attempted to force Motors to accept automobiles, parts, accessories or supplies it did not want, or could not dispose of on the market, on pain of non-renewal of its franchise. Cf. *Ford Motor Co. v. United States* [1948-1949 Trade Cases ¶ 62,325], 335 U. S. 303, 316-18 (1948). Certainly a manufacturer has the right to expect its dealer to provide a suitable outlet for its products. If the dealer fails in this respect he must suffer the consequence that the manufacturer will prefer to channel his products through another more acceptable outlet. The Act clearly "does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the [Act] curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise," nor "freeze present channels or methods of automobile distribution." H. R. 2850, 1956 U. S. Code, Cong. and Admin. News, *supra,* at p. 4603. DePaolo cannot allow his business, for which he was solely responsible, to be conducted by persons who had not reached majority, and then seek relief under the Act when the manufacturer decides that such conduct affords inadequate representation for his product. Indeed, in cases brought under the Federal Anti-Trust Laws, of which the Act is a supplement, 70 Stat. 1125, the manufacturer does not violate the Sherman Act when he cuts off the franchise of a dealer who is admittedly doing a good business of selling the manufacturer's autos. *Packard Motor Car Co. v. Webster Motor Car Co.,* D. C. Cir. 1957 [1957 Trade Cases ¶ 68,682], 243 F. 2d 418, cert. den. 355 U. S. 822; *Schwing Motor Co. v. Hudson Sales Corp., supra.* In this connection the Act (15 U. S. C. § 1224) further provides that "no provision of this chapter shall repeal, modify, or supersede, directly or indirectly any provision of the antitrust laws of the United States." The asserted third cause of action of Motors under the Dealers' Day in Court Act, *supra,* must fail.

[*Constitutionality*]

Defendant has further raised the questions of the constitutionality of the New York and Federal statutes. In the light of the foregoing views, I do not reach these questions.

[*Order*]

An order may be presented in accordance with this opinion.

[¶ 69,263] Globe Lighting Products, Inc. v. City of Long Beach, et al.

In the Superior Court of the State of California, in and for the County of Los Angeles. No. 699,496. Dated January 22, 1959.

California Antitrust (Cartwright) Act

Combinations and Conspiracies Under State Antitrust Laws—California Antitrust (Cartwright) Act—Applicability to Acts of Municipality.—In an action by a manufacturer of electrical lighting fixtures against a municipality, it was held that the California Antitrust (Cartwright) Act was not applicable to a political subdivision of the state. In the

absence of express words to the contrary, the state and its subdivisions are not included within the general terms of a statute. It could not be said, from a reading of the Act, that it was the intent of the legislature to apply the provisions of the statute to the state or its subdivisions. Also, there were no extraneous or affirmative reasons for believing that the sovereign was intended to be affected by the Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2377.

Combinations and Conspiracies Under State Antitrust Laws—California Antitrust (Cartwright) Act—Refusal to Deal—Breach of Contract to Purchase Lighting Fixtures—Reasonableness of Restraint.—A contractor which allegedly breached its contract to purchase lighting fixtures from a manufacturer and agreed, in furtherance of an alleged conspiracy, that only fixtures produced by another manufacturer would be used in constructing an underpass for a municipality, did not prevent competition in the manufacture, sale, or purchase of merchandise in violation of the California Antitrust (Cartwright) Act. Only those restraints which are unreasonable are forbidden by the Act. The manufacturer was still free to manufacture and sell its products; it was not prevented from competing in other fields and was not restrained from selling its products to other persons not parties to the action. The only effect of the alleged conspiracy was a breach of contract which was not, in any sense, a restraint of trade as defined by the Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2337.

For the plaintiff: Samuel Reisman, Los Angeles, Cal.

For the defendants: Denio, Hart, Taubman & Simpson, Long Beach, Cal.; Walhfred Jacobson, City Attorney, and Clifford E. Hayes, Deputy City Attorney, Long Beach, Cal.; and Monteleone & McCrory, Los Angeles, Cal.

Memorandum Decision

[*Contract*]

BENJAMIN LANDIS, Judge [*In full text except for omissions indicated by asterisks*]: Defendant, City of Long Beach, entered into a contract with defendant Boespflug Construction Company for the improvement of the Long Beach Municipal Airport. One provision of the contract called for the installation of certain lighting fixtures in and on the airport facilities which were to be submitted for approval within thirty (30) days of awarding of the contract.

Thereafter, defendant Contractor entered into a sub-contract with defendant Subcontractor for furnishing all labor, material and equipment necessary to complete the electrical work required under the terms of the contract; the defendant Subcontractor then placed a purchase order with the General Electric Supply Company for the furnishing of the lighting fixtures; and the General Electric Supply Company then placed a purchase order with plaintiff for the manufacture of the lighting fixtures.

However, in the contract between defendant Subcontractor and General Electric Supply Company, the purchase order stated that delivery of samples for approval were to be made within four (4) to six (6) months. Plaintiff's contract with General Electric Supply Company contained the same provision.

[*Alleged Breach of Contract*]

Plaintiff, in its complaint, alleges that defendant City, acting through its employees, officers and agents, refused to accept any lighting fixtures manufactured by plaintiff or any other company other than Sunbeam Lighting Company. Defendant City notified defendant Contractor that it would not accept plaintiff's fixtures, and thereby intentionally induced defendant Contractor to breach the contract between himself and defendant Subcontractor, and further thereby injured the other Subcontractors, including this plaintiff.

[*California Antitrust Act*]

Plaintiff claims its contract with General Electric Supply Company was breached as a result of the acts of the City and other defendants, and brought this action for damages for tortious interference with contractual relations and for violation of the California Anti-Trust Act.

* * *

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Demurrer of Defendant, City of Long Beach

* * *

III

[*Alleged Restraint of Trade*]

For its Second Cause of Action, plaintiff alleges that defendant City, by its conduct, restrained plaintiff from engaging in the business of manufacturing and selling lighting fixtures, all in violation of the Cartwright Act (California Business and Professions Code, secs. 16,700-16,758). This Act forbids unlawful combinations and conspiracies to create or carry out restrictions in trade or commerce.

[*Applicability to City*]

The question is whether or not the Cartwright Act can be held to apply to defendant City. It is the decision of this court that it cannot.

It is well settled that the absence of express words to the contrary, neither the State, nor its subdivisions, are included within or bound by the general terms of a statute. (*Inglewood v. Los Angeles County* (1929), 207 Cal. 697, 280 Pac. 360; *Miller Estate* (1936), 5 Cal. 2d 588; 55 P. 2d 491; *City of Los Angeles v. Los Angeles County* (1937), 9 Cal. 2d 624, 72 P. 2d 138.)

> ". . . Unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected, or unless the general statutory limitations on the rights of citizens embrace the State and its agencies by express words or necessary implication, general terms do not have the effect of restricting sovereign or governmental powers of the State or its subdivisions, and cannot injuriously affect its capacity to perform its functions or establish rights of action against it." (45 Cal. Jur. 2d sec. 25, p. 551, and cases cited therein.)

From a reading of Sections 16,700-16,758 of the California Business and Professions Code, it cannot be said that it was the intent of the Legislature to apply the provisions of the Cartwright Act to the State or its subdivisions. Therefore, since the State was not expressly included within the provisions of the statute, and since this court has not found, nor has counsel presented, any extraneous or affirmative reasons for believing that the sovereign was intended to be affected, the general rule holds true. The same rule is applicable to a county or city, each being a political subdivision of the State, as the same is applied here. (*Inglewood v. Los Angeles County* (1929), 207 Cal. 697, 280 Pac. 360; *Miller Estate* (1936), 5 Cal. 2d 588, 55 P. 2d 491; *City of Los Angeles v. Los Angeles County* (1937), 9 Cal. 2d 624, 72 P. 2d 138.)

[*Demurrer Sustained*]

The Demurrer of the City of Long Beach to plaintiff's Second Cause of Action is sustained. The Motion to Strike as to the Second Cause of Action is ordered off calendar.

Demurrer of Defendant, Boespflug Construction Co.

* * *

IV

[*Alleged Conspiracy*]

Defendant Boespflug by his Demurrer raises the question whether or not as against him plaintiff's complaint states a cause of action under the provisions of the Cartwright Act? (Calif. Bus. & Prof. Code, secs. 16,700-16,708.)

Plaintiff contends that defendant Contractor conspired with others to carry out restrictions in trade and to prevent competition in manufacturing and selling fluorescent lighting fixtures manufactured by any company other than Sunbeam Lighting Co.; that in furtherance of such conspiracy, defendants agreed that only Sunbeam lighting fixtures would be accepted for installation in the underpass.

[*Cases Considered*]

In *Field v. Barber Asphalt Company* (1903), 194 U. S. 618, plaintiff claimed a violation of the Sherman Anti-Trust Act because the Board of Aldermen of Westport, Missouri, made a contract with defendant for certain paving, and required paving to be constructed of Trinidad Lake asphalt. Said asphalt was a product of a foreign country, and there were other deposits in the States from which suitable asphalt could be obtained. As a result of the requirement of such asphalt, competitive bidding was eliminated. The court in this case held that the Sherman Act was inapplicable as the Act was not intended to affect contracts which have re-

mote and indirect bearing upon commerce between the States.

The facts in the *Field* case and the instant case are distinguishable in that a specific asphalt was called for in the original contract in the *Field* case, while in the instant case the specific lighting fixtures [Sunbeam] were not called for in the original contract, but were later made a specification by the defendant City. However, analogy can be drawn between the two cases as to the effect of requiring a specific product and its effect upon restraint of trade. The effect was to eliminate other competitors from supplying their product in both cases. But, this did not prevent them from further competition in the sale of their products in other markets. There was at most an indirect bearing on restraint of trade, and as pointed out in the *Field* case, the antitrust laws were not meant to cover such situations.

Since the Cartwright Act differs from the Sherman Act primarily in that the Cartwright Act concerns itself with intrastate commerce, while the Sherman Act deals with interstate commerce, the court is of the opinion that the *Field* case is applicable here.

Also in *Schweizer v. Local Joint Executive Board* [1953 TRADE CASES ¶ 67,620] (1953), 121 Cal. App. 2d 45, 52; 262 P. 2d 568, the court held:

". . . It is true, as pointed out in *Kold Kist v. Amalgamated Meat Cutters* [1950-1951 TRADE CASES ¶ 62,695], 99 Cal. App. 2d 191 [221 P. 2d 724], that combinations for the purpose of controlling prices and creating a monopoly are not the only ones forbidden by the Cartwright Act since that act also forbids combinations for the purpose of carrying out restrictions in trade or commerce, limiting or reducing the production of any commodity or preventing competition in the sale or purchase of any commodity. It does not follow, however, that any agreement or combination which has the effect of interfering to some extent with the purchase or sale of merchandise, is covered by the act and not unlawful by reason thereof. As we read that case, it supports the conclusion that the real test in a particular case is the primary purpose of the agreement or combination in question, and that if this primary purpose is to interfere with the trade in, and prevent the sale of, certain products the agreement or combination is unlawful."

[*Reasonableness of Restraints*]

In *Milton v. Hudson Sales Corp.* [1957 TRADE CASES ¶ 68,791] (1957), 152 Cal. App. 2d 418, 313 P. 2d 936, it was held that the antitrust laws are concerned only with unreasonable restraints.

In *Rolley, Inc. v. Norman (Merle) Cosmetics, Inc.* [1955 TRADE CASES ¶ 67,937], 129 Cal. App. 2d 844, defendant offered to furnish his cosmetics to certain retailers on condition they handle his brand exclusively. Four retailers agreed to such arrangement. Plaintiff, a competing manufacturer, then sued defendant and the retailers for illegal restraint of trade. The court, in sustaining defendant's demurrer, held that the contracts between defendant and the retailers would in no way prevent competition so as to sustain a cause of action under the Cartwright Act.

And so it is with the instant case. The alleged acts of defendants did not in any sense operate to prevent competition by the plaintiff in other fields—he was and is still free to manufacture and sell his products and is not restrained from doing so by the defendants, or any of them.

Thus, it appears from a reading of the cases that the Cartwright Act is not so broad as to include every and all combinations which result to some extent in a restraint of trade. Rather, it is only those restraints which are unreasonable that are forbidden, such as restraints which include all of commodity or trade, or create restrictions which materially affect freedom of commerce and those in which the primary purpose is to interfere with trade.

[*Effect of Alleged Conspiracy*]

It now becomes necessary to determine if defendants' activities had the tendency to accomplish any of the results which the Cartwright Act was designed to prevent. What was the effect of defendants' alleged conspiracy?

From the complaint, it appears that the acts of the defendants operated only to prevent the plaintiff from installing his lighting fixtures in the underpass. This may have constituted in itself a tort but plaintiff was not restrained in any manner from further conducting the manufacture and sale of his lighting fixtures to other persons not parties to this action. The fact that a person causes

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another to breach his contract with resulting injury to a complainant does not, of itself, establish a conspiracy in restraint of trade which is actionable under the Cartwright Act, though the complainant may well have a cause of action for wrongful interference with contractual relations.

Thus, the effect of the alleged conspiracy was not to prevent competition in the manufacture, sale, or purchase of merchandise in violation of the Cartwright Act. Its only effect was to cause a breach of contract which cannot, in any sense, be deemed a restraint of trade as defined by the provisions of the California Business and Professions Code, secs. 16,700-16,758.

[*Demurrer Sustained*]

The Demurrer of defendant Boespflug Construction Company to plaintiff's Second Cause of Action is sustained. The Motion to Strike as to the Second Cause of Action is ordered off calendar.

[¶ 69,264] Montana-Dakota Utilities Co. v. Williams Electric Cooperative, Inc.

In the United States Court of Appeals for the Eighth Circuit. No. 16,014. Dated February 10, 1959.

Appeal from the United States District Court for the District of North Dakota.

North Dakota Contracts in Restraint of Trade Law

Combinations and Conspiracies Under State Laws—Contract Not to Compete—Territorial Division of Markets—Legality—Rule of Reason—Application of Prohibitions to Public Utilities.—A contract under which a public utility and an electrical cooperative (1) divided the territory within which each would render electric service to customers and (2) agreed not to solicit each other's customers for electric service is contrary to public policy and is therefore void and unenforceable. Such contracts are illegal under North Dakota law. The contentions that under the rule of reason, the contract did not constitute an unreasonable restraint of trade, and that the public policy of North Dakota, as exemplified by statute, is opposed to unrestricted competition between corporations engaged in the distribution of electrical power, were rejected. While resort must be had to the rule of reason in determining liability under the Sherman Act and analogous statutes, the general rule is that contracts between quasi-public corporations, having for their object the division of territory, are against public policy, and being so, are absolutely void, untempered by any application of the rule of reason. Parties engaged in rendering service which is public in nature cannot disable themselves from performing the public duties which they have undertaken. Also, it is not necessary to establish that the contract has proved detrimental to the public. Furthermore, the Supreme Court of North Dakota had held that one of the companies had the right to render electrical service in the territory allocated to the other company.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.36, 2345, 2383, 2429.

For the appellant: William R. Pearce (Armin M. Johnson; Cox, Pearce & Engebretson, and Faegre & Benson were with him on the brief).

For the appellee: Frank F. Jestrab (Harry M. Pippin and Bjella, Jestrab & Neff were with him on the brief).

Before JOHNSEN, VOGEL and MATTHES, Circuit Judges.

[*Breach of Contract*]

MATTHES, Circuit Judge [*In full text*]: This is an action for damages for alleged breach of a contract in which Williams Electric Cooperative, Inc., a North Dakota corporation, plaintiff below, recovered a jury verdict and judgment for $35,000 against Montana-Dakota Utilities Co., a Delaware corporation. Failing in its effort to obtain favorable action on its after trial motion for judgment, the defendant has brought the case to this court.

[*Contract—State Proceedings*]

On July 21, 1952, plaintiff and defendant entered into the contract, here in question,

in which it was recited that the Cooperative (plaintiff) and the Company (defendant) have electric facilities available for the distribution of electricity in the Williston, North Dakota, community, and with expansion and growth in that community taking place, a dispute has arisen between the parties concerning the right to serve customers in that area. In order to settle differences between the parties amicably, they agreed, *inter alia:*

"1. That the map attached hereto marked Exhibit 'A' and made a part hereof is a true representation of the Williston community and surrounding area experiencing growth and development wherein the dispute exists between the parties as to the right to serve new customers with electricity and there is indicated thereon by a heavy red line the boundary to be observed by the parties, the Cooperative to render electric service to new customers situated to the west, north and east of said red line and the Company to render electric service to new customers within the boundaries of said line."

"4. Neither party will solicit the customers of the other party for electric service."

After the contract was entered into, events occurred which form the basis for this litigation, in that defendant, upon formal consumer request to do so, extended its facilities whereby it was enabled to and did furnish service to three electric consumers that were located in the area designated by the contract as plaintiff's territory. This provoked a dispute between the two companies and ultimately resulted in plaintiff's filing a complaint before the Public Service Commission of North Dakota in which that agency was requested to issue an order restraining defendant from serving present and prospective customers in the prohibited area. In support of its complaint before the Commission, plaintiff relied, first, on the contract here in question, and second, on the charge that defendant was acting within the disputed area without authority of a certificate of public convenience and necessity, contrary to § 49-0301 N. D. R. C., 1943, 1953 Supp. The Commission dismissed the complaint and this action was subsequently affirmed in all respects by the Supreme Court of North Dakota, which ruled that the extensions of service by defendant, although made without a certificate of public necessity, were lawful within the exceptions of Paragraph 3 of § 49-0301, *supra,* which allowed extensions without certificates "* * * into territory contiguous to that already occupied by it and not receiving similar service from another utility, or electric cooperative * * * or if no certificate of public convenience and necessity has been issued to any other public utility."[1] *Williams Electric Coop. v. Montana-Dakota Util. Co.,* 79 N. W. 2d 508. The court further held that the Commission properly declined to determine the contractual rights of the parties, this being a judicial function for the courts, stating at p. 517: "If any contractual rights exist between the appellant and the respondent under the agreement dated July 21, 1952, *which we do not determine,* the enforcement of such rights must be sought in the courts of this state." (Italics supplied.)

Being unsuccessful in its effort to force defendant to discontinue furnishing electric service in its claimed territory, plaintiff instituted this action for damages, thus bringing the question of the validity of the contract squarely into issue.

[*Division of Territory—Legality*]

Defendant contends that since the contract in question has for its principal object the dividing of trade territory between parties affected with a public interest, it is contrary to public policy and is therefore void and unenforceable. This position is sound and must be sustained.[2]

[*North Dakota Statutes*]

In general, a contract which unreasonably restrains trade is contrary to public policy and void. This is such an elementary and universally recognized rule of law that citation of authorities should not be necessary.

[1] Apparently, under Rule 23, *Standards of Electric Service,* promulgated by the North Dakota Public Service Commission, the defendant could have been *compelled* to furnish service to outlying areas, upon proper consumer application. This rule provides: "A utility will be required to make extensions * * * where the estimated net income will yield a net return of approximately six per cent (6%) on the investment to be made." The manager of the Cooperative conceded in his testimony that the return on investments made in the disputed area "would be well over 6 per cent."

[2] The trial judge instructed the jury that the contract was valid and binding, and that service in the disputed area was not required of defendant by statute or rule.

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For discussion and survey of the principle both at common law and under more modern statutes, see *United States v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271, modified 175 U. S. 211, and consult *Corbin on Contracts*, Vol. 6, Chap. 80; Vol. II, *Restatement of the Law of Contracts*, §§ 513-517; *Williston on Contracts*, Rev. Ed. Vol. 5, § 1633 et seq.; 17 C. J. S. Contracts § 238. North Dakota, like many states, has outlawed such contracts by statute. Section 9-0806, N. D. R. C. 1943, provides:

> "Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind is to that extent void, except * * * (Two exceptions not here present are set out)."

See also § 51-0801 *et seq.* N. D. R. C. 1943, relating to Pools and Trusts.

[*Rule of Reason*]

Plaintiff does not dispute the foregoing principle, but takes the position that under the "rule of reason," the contract does not constitute an unreasonable restraint on trade. As a corollary proposition, plaintiff suggests that the public policy of North Dakota, as exemplified by the enactment of Chapter 235, S. L. N. D. 1927, now § 49-0301 N. D. R. C. 1943, 1953 Supp., *supra*, "is unalterably opposed to unrestricted competition between corporations engaged in the transmission and distribution of electrical power and, on the contrary, supports firmly any method of eliminating competition without detriment to the consuming public." We agree that, with the exception of certain "illegal per se" situations,[3] resort must be had to the "rule of reason" in determining liability under the Sherman Act and analogous statutes. As this court said in *Adams Dairy Company v. St. Louis Dairy Company* [1958 TRADE CASES ¶ 69,158], 260 F. 2d 46, p. 53: "(T)he principle is firmly entrenched that in determining whether a restraint is unreasonable and therefore illegal and violative of the Sherman Act, resort must be had to the Rule of Reason." The rule has been adhered to since its promulgation by the Supreme Court in 1911 in *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, and was applied by the Supreme Court of Minnesota to a state statute modeled after the Sherman Act in *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 182 Minn. 159, 234 N. W. 453, where a manufacturer had agreed not to solicit work in a particular locality.

[*Quasi-Public Corporations*]

However, of paramount importance to our case is a consideration of the nature of the business of the contracting parties. One is a public utility, the other, an electrical cooperative corporation — quasi public in character—both engaged in supplying a commodity to the public in the territory they are authorized to serve. In determining the relative freedom to contract and the validity of contracts which tend to restrict trade, the courts have definitely distinguished the limited power of corporations impressed with a public trust and duty, from the greater freedom allowed to private enterprise. By the great weight of authority in this country, the rule has been promulgated and consistently applied that contracts between quasi-public corporations, having for their object the division of territory between such companies, are against public policy, and being so, are absolutely void, untempered by any application of the "rule of reason." A concise summation of the pronouncements made on this precise question is the following in 36 Am. Jur., Monopolies, Combinations, etc. § 97:

> "Many cases hold that all contracts, combinations, and agreements between competing carriers and other *public utilities* for the elimination of competition, fixing of rates, *division of territory*, or pooling of profits, are illegal and void as tending toward monopoly or the restraint of trade and competition *to the public detriment;* and this is held to be true regardless of the fact that the restraint is partial *and without regard to whether or not actual injury has resulted to the public.*" (Italics supplied.)

Typical of such holdings is *Chicago Gas-Light & C. Co. v. People's Gas-Light & C. Co.*, 121 Ill. 530, 13 N. E. 169, where the contract purported to divide the city of Chicago between two gas companies, each having charters to serve all of the city, and

[3] E. g. Price fixing, *United States v. Trenton Potteries Co.*, 273 U. S. 392, 397; division of territory among producers; *United States v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271, modified, 175 U. S. 211. For discussion, see *Northern Pac. R. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1, 5 (tying agreements), and *United States v. Aluminum Co. of America*, 2 Cir. [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416, 427-428 (contracts creating monopolies which thereby indirectly fixed prices).

actually undertaking so to serve, prior to the contract under which one covenanted not to serve a particular section of the city. In a thorough and well-reasoned opinion, the court refused specific performance, stating at page 175:

> "The ordinary rule, that contracts in partial restraint of trade are not invalid, does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city."

In *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 399, the Supreme Court was concerned with a contract between two gas companies, which contained, among others, the following provision:

> "5. Neither party hereto shall solicit any business belonging to the other, but either party may take such consumers of the other as may voluntarily, without any solicitation, desire to change from one to the other."

While the contract also attempted to fix prices, which is not a subject of the contract under consideration here, the court was careful to point out, at page 406, that the contract provided: "that one of the companies should lay no more pipes or mains for the supply of gas in the city; * * * (i)t will be perceived that this was an agreement for the abandonment by one of the companies of the discharge of its duties to the public, * * *." Getting down to the law, the Court stated at pp. 409-410:

> "There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. * * * Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld. * * * *It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken,* and by agreement compel itself to make public accommodation or convenience subservient to its private interests." (Italics supplied.)

Of more recent vintage is *Pennsylvania W. & P. Co. v. Consolidated G., E. L. & P. Co.*, 4 Cir., 1950 [1950-1951 TRADE CASES ¶ 62,704], 184 F. 2d 552, certiorari denied, 340 U. S. 906, where a contract between two utilities fixing prices and dividing territory was held to violate the Sherman Act, despite the fact that the public might actually benefit. Pertinent to the instant question, the Court stated, at p. 558:

> "Similarly illegal is any agreement for the division of territory between competitors which in this case was effectuated by permitting Consolidated to determine to what customers and in what territory Penn Water might sell. *U. S. v. Aluminum Co.*, 2d Cir., 148 F. 2d 416; *U. S. v. Addyston Pipe & Steel Co.*, 6 Cir., 85 F. 271, 291, 46 L. R. A. 122."

See also and compare, *South Chicago City Ry. Co. v. Calumet Elec. St. Ry. Co.*, 171 Ill. 391, 49 N. E. 576; *Huntington Telephone Co. v. Public Utilities Comm.*, 118 Ct. 71, 70 A. 679; *Union Trust & Savings Bank v. Kinloch Long-Distance T. Co.*, 258 Ill. 202, 101 N. E. 535; *Custer Public Pow. Dist. v. Loup River Public Pow. Dist.*, 162 Neb. 300, 75 N. W. 2d 619, 162 Neb. 821, 77 N. W. 2d 590; *Wattsburg Tel. Coop. Ass'n v. Pennsylvania P. U. Com'n*, 182 Pa. Super. 594, 128 A. 2d 160; *Doane v. Chicago City Ry. Co.*, 160 Ill. 22, 45 N. E. 507; *Taylor v. Santa Fe Northwestern Ry. Co.*, 38 N. M. 457, 34 P. 2d 1102; *Portland Natural Gas & Oil Co. v. State*, 135 Ind. 54, 34 N. E. 818; *Sammons v. Kearney Power & I. Co.*, 77 Neb. 600, 110 N. W. 308, 8 L. R. A. N. S. 404; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; Anno. 58 A. L. R. 804.

We recognize the general rule that public utilities have the right to enter into contracts between themselves free from control or supervision of the State—see 73 C. J. S. Public Utilities, § 5, and compare *Georgia Power Co. v. Georgia Pub. Serv. Com'n*, 211 Ga. 223, 85 S. E. 2d 14—and we have considered the decisions cited by plaintiff upholding contracts between utilities which did restrain trade, either because there was no showing of detriment to the public, or because affirmative benefit to the public resulted therefrom. *McKinley Telephone Co. v. Cumberland Telephone Co.*, 152 Wis. 359, 140 N. W. 38; *Weld v. Gas & Electric Light Com'rs*, 197 Mass. 556, 84 N. E. 101; *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. 495. Although these few cases do to some extent support plain-

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tiff's contention, they are definitely minority holdings. The decision in *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 182 Minn. 159, 234 N. W. 453, *supra*, also cited by plaintiff, may be readily distinguished because there, private companies were involved.

[*Detriment to Public*]

From the overwhelming majority of cases, it is quite clear that parties engaged in performing a duty or rendering service which is public in nature, such as the companies here involved, cannot disable themselves by contract from performing the public duties which they have undertaken. Further, it is not necessary to establish that the contract has proved detrimental to the public. Williston states, after pointing out that in England contracts of such nature have been upheld—"In the United States, however, such agreements have been held illegal whether they were proved in fact to be detrimental to the public or not." § 1648, Vol. 5, Rev. Ed. See *Custer Public Pow. Dist. v. Loup River Public Pow. Dist.*, 162 Neb. 300, 75 N. W. 2d 619, 628; *Pennsylvania W. & P. Co. v. Consolidated G., E. L. & P. Co.*, 4th Cir. [1950-1951 TRADE CASES ¶ 62,704], 184 F. 2d 552, 559, certiorari denied, 340 U. S. 906; 36 Am. Jur. Monopolies, Combinations, etc. § 97, quoted *supra*. As to illegality of contracting away public duties which might arise in the future, see *South Chicago City Ry. Co. v. Calumet Elec. St. Ry. Co.*, 171 Ill. 391, 49 N. E. 576, 578:

> "The interest of these companies, and the interest of the public, to have the streetcar lines extended as the demand therefor should arise, are the same. * * * Any contract which tended to deprive the public of that benefit is clearly violative of the public right, against public policy, and void. The principle is that such corporation shall not bind themselves by contract not to serve the public interest as the demand arises. To say the defendant was not bound to extend its lines, though it might be necessary to do so to serve the public convenience, is one thing; but to say that it shall not do so, because of the binding force of its contract with an individual or corporation, is quite another, and very different, thing."

Compare *Doane v. Chicago Ry. Co.*, 160 Ill. 22, 45 N. E. 507; *Custer Public Pow. Dist. v. Loup River Public Pow. Dist.*, 162 Neb. 300, 75 N. W. 2d 619, 162 Neb. 821, 77 N. W. 2d 590 (Increased power needs called for erection of new plant); *Union Trust & Savings Bank v. Kinloch Long-Distance T. Co.*, 258 Ill. 202, 101 N. E. 535 (although utility not bound to furnish long distance service, once it is undertaken, the assumed duty cannot be fettered by exclusive dealing contract).

[*Extensions Lawful*]

In the case before us, and apart from any affirmative duty imposed by Rule 23 of the North Dakota Public Service Commission,[4] it was conclusively determined by the Supreme Court of North Dakota in *Williams Electric Coop. v. Montana-Dakota Util. Co.*, 79 N. W. 2d 508, *supra*, that defendant's extensions here complained of were lawful and within the contemplation of § 49-0301 N. D. R. C., 1943, 1953 Supp., *supra*. As seen before, one of the complaints made by plaintiff in the proceeding inaugurated by it before the Public Service Commission was that defendant's extensions into the disputed territory were unlawful and in violation of the foregoing statute. In a careful analysis of the statute, and in view of the factual situation existing, this contention was disallowed. Thus, although apparently the territory was not included within defendant's existing certificate of public convenience and necessity, nevertheless, because of the circumstances which brought defendant within Paragraph 3 of § 49-0301, *supra*, it had the legal right to serve the disputed area. That being the situation, we cannot escape the conclusion that the parties could not impair or restrict by contract the right, power, and correlative duty of defendant to serve all within that area desiring service.

[*Contract Void*]

Examination of the contract discloses that its sole and only purpose and function was to divide and set apart the territory each was to serve, with the further agreement that neither would solicit the customers of the other party for electric service. It of course follows that if legal sanction is given to such an agreement, consumers of electricity in the area, which the competing companies have divided, without pretense of authority from the proper regulatory body,[5]

[4] See discussion, footnote 1, *supra*.

[5] Compare *Ohio-Midland L. & P. Co. v. Columbus & South. Ohio E. Co.* (Ohio, 1954) 123 N. E. 2d 675; *Petition of Grand River Dam Authority* (Okla., 1957), 320 P. 2d 706.

would be completely and effectively deprived of the right to electric service from the utility which was legally empowered to render such service. In our view, such a contract adversely affects the public interest, and apart from the fact that such contracts are denied specific enforcement, we further determine that, being void, this contract cannot support an action and judgment for damages.

[*Reversed*]

The judgment is reversed.

[¶ 69,265] **United States v. American Natural Gas Company; Northern Natural Gas Company; Peoples Gas, Light and Coke Company; Ralph T. McElvenny; John F. Merriam; and James F. Oates, Jr.**

In the United States District Court for the Eastern District of Wisconsin, Branch I. No. 58-CR-58. January 21, 1959.

Case No. 1384 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Jurisdiction of United States District Courts—Transfer of Proceedings—Convenience of Parties and Witnesses.—A criminal action charging three natural gas companies with engaging in a combination and conspiracy to unreasonably restrain and monopolize the transmission and sale of natural gas was transferred from the United States District Court for the Eastern District of Wisconsin to the United States District Court for the Northern District of Illinois, Eastern Division. The evidence was overwhelming that the convenience of all parties and the interests of justice would best be served by the transfer. Affidavits by the companies indicated that a subsidiary of one of the companies was the only alleged co-conspirator with offices in the Eastern District of Wisconsin; that witnesses located outside of both districts would have readier transportation to Chicago than to Milwaukee; that trial in Milwaukee would result in additional expense; and that the companies' businesses would suffer less disruption if the case were transferred to Chicago. The Government would undergo no hardship by reason of the transfer; the documents upon which it intended to rely were located in Washington, D. C., and the majority of its witnesses, as indicated by those it summoned before the grand jury, were more conveniently located with respect to Chicago than to Milwaukee. The court rejected the Government's argument that the State of Wisconsin was entitled to a "front row seat" in the controversy because the Governor of the State, as a result of natural gas shortages in Wisconsin, made the complaint that gave rise to the proceeding.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.125.

For the plaintiff: Fred D. Turnage and Robert J. Levy, Attorneys, Department of Justice.

For the defendants: John T. Chadwell and Theodore A. Groenke of Snyder, Chadwell, Fagerburg & Keck, Chicago, Ill.; Carl McGowan and Roland D. Whitman of Ross, McGowan & O'Keefe, Chicago, Ill.; Ray T. McCann, Milwaukee, Wis.; and Clayton R. Hahn of Wickham, Borgelt, Skogstad & Powell, Milwaukee, Wis., for The Peoples Gas, Light and Coke Co. and James F. Oates, Jr. John F. Dooling, Jr., and George C. Kern, Jr., of Sullivan & Cromwell, New York, N. Y.; and Maxwell H. Herriott of Quarles, Herriott & Clemons, Milwaukee, Wis., for Northern Natural Gas Company and John F. Merriam. Arthur R. Seder, Jr., and H. Blair White of Sidley, Austin, Burgess & Smith, Chicago, Ill.; James F. Doyle; and Vernon W. Swanson of Fairchild, Foley & Sammond for American Natural Gas Company and Ralph T. McElvenny.

Opinion

[*Motion for Change of Venue*]

The Court [Robert E. Tehan, Chief Judge, *In full text*]: This case is before the Court on the joint motion of the defendants, filed December 1, 1958, for transfer of this action to the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to the provisions of Rule 21 (b), Federal Rules of Criminal Procedure.

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[*Indictment*]

On April 30, 1958, the Grand Jury in the Eastern District of Wisconsin, returned an indictment against the defendants herein, none of whom are residents of this State, charging them with (1) engaging in a combination and conspiracy to monopolize interstate trade and commerce, (2) engaging in a combination and conspiracy unreasonably to restrain interstate trade and commerce, (3) attempting to monopolize interstate trade and commerce, and (4) monopolizing interstate trade and commerce in the transmission and sale of natural gas in the States of Wisconsin, Minnesota, and parts of Illinois and Michigan in violation of Title 15 U. S. C., §§ 1 and 2.

[*Prior Proceedings*]

On June 26, 1958, the defendants moved for a bill of particulars for use on contemplated motions attacking venue in this District or seeking a transfer of the proceedings to the Northern District of Illinois, Eastern Division. The Government voluntarily furnished a Partial Bill of Particulars specifying acts allegedly justifying venue in this District. The Court denied defendant's motion relative to particularization of events and occurrences in the Northern District of Illinois when the Government stipulated that venue would properly lie in that District. Absent particulars as to events and occurrences in the Northern District of Illinois, and upon the representation of counsel for the Government that it would rely substantially in the presentation of its case upon documents now in its possession as a result of subpoenas *duces tecum* issued in connection with the Grand Jury hearing, the defendants have relied on facts within their knowledge or obtained through their knowledge of the Grand Jury proceedings in presenting this motion.

[*Affidavits—Convenience of Parties*]

The defendants have filed twelve affidavits in support of their motion to transfer, the material substance of which is uncontroverted. All of these affidavits indicate that Chicago is more accessible than Milwaukee to witnesses coming from places removed from either forum because of its superior transportation facilities.

The affidavits filed on behalf of defendant, Peoples Gas Light and Coke Company, herein called Peoples, indicate that none of the documents furnished to the Grand Jury related to meetings, conversations or conferences in this District, nor did Peoples furnish any letters sent to or received from this District. Peoples conducts no business in this District, and has no offices here. Its office, wherein are located all of the records pertinent to this case, is in Chicago. Its officers, and the officers of its subsidiaries, live in the Chicago area, with the exception of three officers who live in Texas. The Northern District of Illinois would be, clearly, a more convenient forum for those persons and other employees of Peoples and trial there would result in less disruption of business than would trial in this District. The additional expense incurred in the event of trial here (assuming a three-month trial period) is estimated to be $104,900.00.

The defendant, James F. Oates, Jr., former Chairman of Peoples Board, states in his affidavit that, although he presently resides in New York, his duties as Chairman of the Board of Equitable Life Assurance Society of the United States could be more easily performed and his business less disrupted if this motion were granted, since Equitable maintains a large office in Chicago. He further states that all of the records to which he will refer are located in Chicago and since he has been absent from the company's office for over a year he will have to spend considerable time reviewing them in preparation for the trial.

Affidavits filed on behalf of the defendant, American Natural Gas Company, and the defendant, Ralph T. McElvenny, its President, indicate that many of American's files are in Chicago. The majority of the meetings upon which the Government relies to prove its charges were held in Chicago, and only one was in this District. Milwaukee Gas Light Company, a subsidiary of American, is the only alleged co-conspirator with offices here, and that company was able to produce only four documents and two letters in response to a Grand Jury subpoena. No officers of that company were called to testify before the Grand Jury. The expense of temporary offices, not necessary if this case is transferred, would result from trial in Milwaukee.

Affidavits of the defendant, Northern Natural Gas Company, herein called Northern, indicate that of the documents it presented to the grand jury, 296 related to Chicago meetings, and 15 related to two meetings here.

The affidavit of John F. Merriam, President of Northern, stated that trial in Chicago would permit him to attend to business and personal affairs with less disruption and better prepare for trial in the City of Chicago.

[*Government's Affidavit*]

The affidavit filed by the Government states that 53 of its tentative witnesses are Wisconsin residents and would be less inconvenienced by trial here than by trial in Illinois. These witnesses include persons present with representatives of American at one meeting held in Madison, Wisconsin, in August 1955, and persons contacted by one F. H. McIntire, a representative of American, on tours to Wisconsin during which he contacted officials of local gas distributing companies and city officials. The defendants suggest that these witnesses would be called to establish venue of the action here, an issue that would disappear were the case transferred. The Government, however, indicates that *some* of the witnesses will be called to prove the substance of the charges made in the indictment.

[*Most Convenient Forum*]

We think, on the whole of the record before us, that the evidence is overwhelming that the convenience of all parties and the interest of justice will be best served by a transfer.

It appears that the Northern District of Illinois is by far the most convenient forum for the parties defendant and their witnesses, and a transfer would impose no hardship, or a minimal one, on the Government or its material witnesses. The defendants, American and Peoples, have shown that trial here would result in additional expense. All defendants have shown that their businesses would suffer less disruption if the case is transferred. Witnesses located outside of both Districts will have readier transportation to Chicago than to Milwaukee.

[*Hardship*]

In addition to the added convenience to the defendants and their witnesses, it would appear that the Government would undergo no hardship by reason of the transfer of this case to the Northern District of Illinois. The documents upon which it intends to rely are presently located in Washington, D. C. Only one or two of the 52 companies or individuals summoned to appear before the Grand Jury is more conveniently located with respect to this District than with respect to the Northern District of Illinois, and in most cases the latter District is much more accessible. The Government has indicated that the documents presented to the Grand Jury will form the basis of its case. Although it is true that the Government does not have to present its entire case to the Grand Jury, it is reasonable to assume that the witnesses and documents subpoenaed are representative of the general nature of the proof and the type of witnesses upon which the Government intends to rely. The statistical studies made by the defendants, while limited in scope by the material available, indicate that the overwhelming balance of convenience is in favor of the Northern District of Illinois.

[*Other Considerations*]

This is a criminal case and a matter of grave concern to the defendants as well as to the Government. There are very real considerations to the defendants even beyond the express penalties of the Act. No one who has had experience in protracted litigation involving important stakes such as are involved here can be at all realistic and not recognize the need and value of close contact between clients, officers of corporations, and records, and attorneys immediately prior to and during the course of the trial. The contact could best be maintained by most of the parties if trial were held in the Northern District of Illinois.

[*Applicable Case Law*]

Under the facts of this present case we see no need to elaborate on the law, except to state that we find that this case falls within the scope of such cases as *United States v. National City Lines, Inc.* [1946-1947 TRADE CASES ¶ 57,600], 7 F. R. D. 393 (S. Dist. Calif., 1947) and *United States v. American Linen Supply Company* [1955 TRADE CASES ¶ 68,149], 134 F. Supp. 21 (East. Dist. Wis., 1955).

[*State's Connection With Case*]

The Government has argued that the State of Wisconsin has a substantial connection with the case, as evidenced by the fact that the Governor of Wisconsin made the complaint giving rise to this proceeding because of the natural gas shortages in some areas and complete lack of natural gas in other

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areas of the State, all of which entitles Wisconsin to a "front row seat" in this controversy.

There are disturbing implications in this position, which, however, we will not go into upon the assurance of the Government, which we accept, that it does not mean thereby to suggest that it wants any unfair advantage in the trial of this case.

[*Expeditious Trial*]

We are completely satisfied that the citizens of Wisconsin have the fullest confidence in the integrity of the Federal Courts and would want this case tried in a forum where the interests of justice would best be served. This forum, it is abundantly clear, is the Northern District of Illinois. Such a transfer imposes no burden on any party—plaintiff or defendant—but relieves parties, in varying degrees, of some burdens and, in addition, accrues to the parties, in varying degrees, positive conveniences, making for easy access to sources of proof, diminishing costs, and increases rapidity in bringing in witnesses, and reduces the burden on the businesses of the defendants during the trial, and would, moreover, promote every public interest in an expeditious trial.

Since criminal cases such as this must be given priority, all this can be achieved without delay of prompt disposition of this action.

[*Transfer of Venue Granted*]

The motion to transfer this proceeding to the Northern District of Illinois, Eastern Division, is therefore granted.

[¶ 69,266] United States v. Bakersfield Associated Plumbing Contractors, Inc.; Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc.; and Kern County Electrical Contractors Association, Inc.

In the United States District Court for the Southern District of California, Northern Division. Civil Action No. 1479-ND. Filed December 22, 1958.

Case No. 1242 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suits for Injunctive Relief—Injunctive Decrees—Modification—Approval of Plan for Operation of Bid Depository—Practices Enjoined.—A judgment, declaring that certain rules of a bid depository are illegal under the Sherman Act and enjoining certain bidding practices, was modified to permit the operation of a bid depository in accordance with a plan approved by the court. The modified judgment provided that the court is of the view that the method of operating a bid depository as outlined in the plan does not violate the antitrust laws. The original judgment contained a provision permitting the defendants to submit, for court approval, a plan for the operation of a bid depository. The modified judgment (1) was made applicable to any user of any bid depository operated by the defendants who has actual notice of the judgment, (2) prohibited any agreement or practice found to have been unlawful and certain other bidding practices, and (3) specified the manner in which bid openings should be conducted.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.503, 2011.065; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.275, 8233.325, 8233.900.

For the plaintiff: Laughlin E. Waters, United States Attorney, by James M. McGrath and Edward H. Minor.

For the defendants: Mack, Bianco, King & Eyherabide, Bakersfield, Cal.

Modifying a judgment of the U. S. District Court, Southern District of California, Northern Division, 1958 Trade Cases ¶ 69,087.

Modified Final Judgment

[*Operation of Bid Depository*]

Leon R. Yankwich, Chief District Judge [*In full text*]: This is a proceeding filed by the Government on June 28, 1955 against the above-named defendants, alleging an unlawful combination and conspiracy in unreasonable restraint of interstate trade and commerce in plumbing, heating and ventilating, sheet metal, and electrical supplies, materials and fixtures, in violation of Section 1 of the Sherman Act. The relief sought is of an equitable nature. The defendants appeared and filed their joint and several answer to such complaint denying

the substantive allegations thereof. The case was tried by the Court sitting without a jury.

After trial, the Court considered the evidence presented, the proposed findings and counter-findings prepared respectively by counsel for plaintiff and defendants, in accordance with the Court's Order of December 30, 1957, and after having held hearings on April 25, 1958 and May 2, 1958 for the purpose of settling such findings and judgment in this matter the Court on May 26, 1958 filed its findings of fact, conclusions of law, and judgment. The aforesaid judgment which was entered in the docket of the above-entitled Court on May 29, 1958, provided in part as follows:

> "Provided, however, that the defendants may within a period of one year after the entry of this judgment, upon notice to the Government, present to the Court a plan for the operation of a bid depository, and if, after hearing, the Court approves of such plan or any modification thereof, the Court may, within said period of one year from the date of entry of this judgment, modify this judgment to permit the operation of a bid depository in accordance with such plan or modification thereof."

On October 21, 1958, pursuant to the aforesaid provision in such judgment, the defendants filed their petition for approval of a plan for the operation of a bid depository in accordance with certain rules which are fully set forth in such petition. A copy of such rules is attached as Exhibit A. On November 17, 1958, a hearing was held on said petition, at which evidence was offered by defendants in support of their petition for modification of such judgment.

[*Judgment Modified*]

The Court having considered the matters presented at the previous proceedings, having read such petition for modification of the judgment heretofore entered, having heard the evidence in support of such petition, and having found nothing objectionable in the rules which are attached as Exhibit A insofar as this proceeding is concerned,

It is ordered, adjudged and decreed that the judgment heretofore entered be modified to provide as follows:

I

[*Antitrust Violations*]

The Court has jurisdiction of the subject matter hereof and of the parties herein. The defendants Bakersfield Associated Plumbing Contractors, Inc., Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc., and Kern County Electrical Contractors Association, Inc., by adopting on or about October 27, 1954 and enforcing Rules 6, 8, and 12B of the Bakersfield Construction Industry Bid Depository hereinafter described, have combined and conspired among themselves and with others to unreasonably restrain interstate trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

II

[*Definitions*]

As used in this judgment:

(a) The term "Bakersfield Trade Area" shall refer to and include the city of Bakersfield, and the county of Kern, State of California.

(b) The term "construction supplies" shall refer to plumbing, heating and ventilating, sheet metal, and electrical supplies which are furnished by subcontractors in connection with the performance of construction contracts.

(c) The term "bid depository" shall refer to a facility through which bids of subcontractors are received and processed and made available to general contractors, in accordance with the rules for the operation of such bid depository.

(d) The term "Bakersfield Construction Industry Bid Depository" is a facility established, maintained, and operated by the defendants, through which bids of subcontractors are received and processed and made available to general contractors in accordance with the rules for the operation of such bid depository. A copy of such rules is attached to plaintiff's complaint as Exhibit A and has been incorporated in the findings of fact made by the Court in this action.

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III

[*Applicability of Judgment*]

The provisions of this judgment applicable to any defendant shall apply to such defendant, its officers, directors, members, managers, agents, employees, successors and assigns, and to all persons acting or claiming to act under, through, or on behalf of them, or any of them, and to any user of any bid depository operated by the defendants, or any of them, who shall have had actual notice of the provisions of this judgment.

IV

[*Practices Prohibited*]

The defendants, and each of them, are enjoined and restrained from:

(a) engaging in or participating in agreements, understandings, practices, or arrangements having a purpose or effect of continuing, reviving, or renewing the aforesaid combination or conspiracy;

(b) adopting, enforcing, or continuing in effect, any of the provisions of any rule for the operation of a bid depository which

(i) requires the submission of separate bids for plumbing, or separate bids for heating and ventilating;

(ii) attaches any condition with respect to the price at which any combination bid for plumbing and heating and ventilating may be submitted;

(iii) requires that subcontractors who have been awarded contracts as a result of bids deposited at such bid depository shall pay any fees which, in the aggregate and in combination with any other fees collected pursuant to any such rule, are in excess of the amount reasonably required for the operation and maintenance of such bid depository;

(c) coercing, inducing, or attempting to coerce or induce, any contractor who has submitted a bid through a bid depository operated by defendants, or any of them, to withdraw such bid after it has been opened, announced, or published at such bid depository; and

(d) soliciting, receiving, or accepting money or any other things of value as an inducement to the withdrawal of any bid submitted through a bid depository operated by the defendants, or any of them, after it has been opened, announced, or published at such bid depository.

IV A

[*Opening of Bids*]

The defendants are ordered and directed:

(a) to open in public at the office of any bid depository operated by the defendants, or any of them, a copy of each bid received at such bid depository, and to announce or publish such bid to those present at such bid opening at least six hours prior to the time specified by the awarding authority for the opening of general contractors' bids, and two hours prior to the time when the sealed bids received at such bid depository are available to the general contractors to whom they are addressed;

(b) to notify all general contractors and subcontractors known to be interested in bidding on any project through which bids have been or are invited to be received at a bid depository operated by the defendants, or any of them, of the time when such bids will be opened at such bid depository; that such bids shall be opened under the conditions specified in paragraph IV A(a) hereof and that they are at liberty to attend; and

(c) to notify all general contractors and subcontractors who in the past have taken bids from, or placed bids with, a bid depository operated by the defendants, or any of them, that bid openings are to be conducted under the conditions specified in paragraph IV A(a) hereof, and that they are invited to attend such openings.

IV B

[*Legality of Depository*]

The Court is of the view that the method of operating a bid depository as outlined in Exhibit A attached to this judgment, does not violate the antitrust laws of the United States, provided that the defendants in so operating shall, in all other respects, be subject to all of the provisions of this judgment.

V

[*Inspection and Compliance*]

For the purpose of securing compliance with this judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its prin-

cipal office, be permitted (1) access during the office hours of such defendant to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant which relate to any of the subject matters contained in this judgment; and (2) subject to the reasonable convenience of such defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present. No information obtained by the means provided in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized employee of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

VI

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling either party to this judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this judgment, for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

VII

[*Costs*]

Judgment is entered against the defendants, and each of them, for all costs to be taxed in this proceeding.

Exhibit A

Bakersfield Construction Industry Bid Depository

Bakersfield Associated Plumbing Contractors, Inc.

Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc.

Kern County Electrical Contractors Association, Inc.

Dated .....

1. *PURPOSE:* These rules are established for the purpose of providing fair and open competition between the members of the plumbing, heating and ventilating, sheet metal and electrical industries and to eliminate the unfair practice of bid peddling.

2. *APPLICABILITY:* The rules herein established shall govern any proposal, tender or offer to contract the installation of plumbing, heating and ventilating, sheet metal or electrical, upon all projects within the Counties of Kern, Inyo and Mono for the plumbing, heating and ventilating, and sheet metal industries, and the County of Kern for the electrical industry, wherein the awarding authority has designated and advertised a specific time for the opening of contract bids for the performance of work upon said project by a user of the bid depository or member of the associations.

3. *DEPOSITORY:* To achieve the objects of this agreement, the Bakersfield Associated Plumbing Contractors, Inc., Kern, Inyo and Mono Counties Sheet Metal Contractors Association, Inc., and the Kern County Electrical Contractors Association, Inc., hereinafter referred to as the associations, will establish and maintain a bid depository at 1421-24th Street, Bakersfield, California. The bid depository box shall be equipped with two locks; the first two persons depositing bids on any specified project that will be present for the opening of such bids will lock the depository box and retain the keys thereto; upon the specified time for the opening of such bids, the persons retaining the keys will unlock the box; all bids will then be publicly announced and tabulated by the respective associations' secretaries.

4. *DEPOSIT OF BIDS:* The bid depository maintained by the associations shall be available to all plumbing, heating and ventilating, sheet metal and electrical contractors desiring to bid upon the designated project.

5. *TIME OF DEPOSIT:* All bids must be received by the depository normally not later than six hours prior to the time designated for the opening of bids by the awarding authority; provided, however, that if the time designated by the awarding authority for opening bids is such that deposit six hours prior thereto would not be during normal working hours, then the Board of Directors of each association shall coordinate and designate the time at which bids must be deposited; in the event of time designation by the association Board of Directors all bidders known to be interested in bidding the project shall be notified sufficiently in advance of the time of deposit by the office of the depository. Bids received later than the time hereinabove provided shall be returned to the bidding contractor unopened.

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6. *COMBINATION BIDS:* Contractors submitting bids to the depository may submit separate bids for plumbing, heating and ventilating, sheet metal and electrical work, and may submit a bid representing a combination of all or any two or more thereof. All bids are to be submitted to the depository upon the condition that either the plumbing, or heating and ventilating, or sheet metal or electrical portion of any bid may be used by the general contractor with any other plumbing, or heating and ventilating, or sheet metal or electrical bid or portion of a bid submitted through the depository. Any bid purporting or attempting to restrict such use in combination with other depository bids shall be invalid.

7. *BID OPENING:* The procedure for submission and opening of bids shall be as follows:

A. To assure uniformity of bids, all bids must be submitted upon the bid forms supplied by the depository; forms will be mailed by the depository to all contractors indicating an intent to bid the project; bids not submitted upon the depository bid form will not be recognized.

B. Bidders shall submit to the depository a separate, sealed bid addressed to each general contractor with whom the bidding contractor intends to bid, and shall submit an additional bid addressed to the depository.

C. Bids addressed to the depository will be opened at 1421-24th Street, Bakersfield, California, six hours prior to the bid opening of the awarding authority, unless a different time has been designated in Paragraph 5; bids will be opened at such time solely for the purpose of determining whether the bids conform to depository requirements; bids so opened shall not be deemed an offer to any general contractor at the time of such opening.

D. Bids addressed to the general contractors shall be available to the general contractors two hours following the opening of bids addressed to the depository; provided, however, that no bid shall be delivered to a general contractor until said contractor has agreed in writing to accept the bid if it is the low bid accepted through the depository.

E. Bids shall be opened, in public, and all general contractors and subcontractors, known to be interested in bidding on the project, shall be notified that they are at liberty to attend and witness the opening of bids; likewise all general contractors who have in the past, taken bids from the depository shall be notified in writing by the secretaries of the respective associations, contract awarded to each bidder for plumb- that bid depository openings are open to the public and that they are invited to attend all bid openings.

8. *DEPOSITORY FEE:* The successful bidder or bidders shall pay to the depository fund, as a depository fee, a sum equal to one-half of one per cent (½ of 1%) of the contract awarded to each bidder for plumbing, one-half of one per cent (½ of 1%) of the contract for heating and ventilating, one-half of one per cent (½ of 1%) of the contract for sheet metal and one-half of one per cent (½ of 1%) of the contract for electrical; provided, however, that the depository fee pertaining to any one of the aforementioned subcontracts shall not exceed $250.00. The depository fee shall be paid at the time the contractor receives the first payment on the contract. A contractor failing to pay the required depository fee within thirty (30) days of the date specified herein shall be denied the privileges of the depository until the fee has been paid.

9. *COLLECTION OF DELINQUENT FEES:* In the event of litigation to collect a delinquent depository fee, or to collect a delinquent withdrawal fee, the delinquent contractor shall pay all attorneys' fees, costs of suit, and other expenses reasonably incurred in connection with such litigation.

10. *REOPENING OF PROJECTS:* When bids for a specified project are once opened, there shall be no further bidding on said project for a period of one hundred twenty (120) days by contractors who did not bid such project in the first instance unless the plans and specifications have been revised in an amount exceeding twenty-five per cent (25%) of the work and/or materials prescribed in the original plans and specifications.

11. *CONDITIONS OF BID:* All plumbing, heating and ventilating, sheet metal and electrical bids shall be submitted upon the condition that the bid may be used only in combination with a plumbing, heating and ventilating, sheet metal or electrical bid which has been submitted through the depository. Said condition of bid will be printed upon the bid form provided by the depository.

12. *WITHDRAWAL OF BID:* The procedure for withdrawal of a bid shall be as follows:

A. Any bid in the depository may be withdrawn, without penalty, at any time prior to the opening of bids as outlined in Paragraph 7 hereof.

B. After the opening of bids as outlined in Paragraph 7 hereof, a bid may be withdrawn prior to the time that bids are made available to the general contractors; provided, however, that a bid may be withdrawn at that time only upon payment of

one per cent (1%) of the total amount of said bid, said penalty not to exceed $1,000.00. Payment of the penalty herein provided must be made within ten (10) days of the withdrawal. Notification that a bid is to be withdrawn must be made by the contractor or his agent.

C. In the event that a bid is not withdrawn prior to delivery to the general contractor, the bid shall become an irrevocable offer to the general contractor and shall not be withdrawn thereafter; the consideration for the option herein provided shall be the execution by the general contractor of the agreement to accept low bid at the time of receipt of the subcontract bid.

13. *NAMING OF SUBCONTRACTORS:* In the event that any plumbing, heating and ventilating, sheet metal, or electrical contractor intends to subcontract a part of his bid to another contractor signatory to this agreement, such contractor shall designate the name of said subcontractor to be used by him on the bid form; subcontractors so named shall not be changed thereafter in the absence of showing good cause therefor.

14. *RECORDATION OF BIDS:* All bids submitted through the depository shall be accurately recorded and placed on file in the office of the depository; said bids will be available for inspection by any participant or user of the depository or any other person or persons approved by the Board of Directors. All such bids shall be maintained in the files of the depository for a period of one year after date of opening.

In consideration of the observance of the foregoing rules by other participants in the depository, and in consideration of the maintenance of the bid depository, I hereby agree to abide by the rules and conditions hereinabove prescribed, and to pay any fee or fees provided in said rules and conditions.

Date

Name of Firm
Signature

[¶ 69,267] United States v. General Electric Company; Westinghouse Electric Corporation; and N. V. Philips' Gloeilampenfabrieken.

In the United States District Court for the Southern District of New York. Civil No. 140-157. Filed February 5, 1959.

Case No. 1424 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Civil Suit for Injunctive Relief —Motions and Defenses—Pretrial Determination of Jurisdiction Over Defendant.—A Government motion for a preliminary hearing to determine whether or not the court had jurisdiction over the person of a defendant was granted. Under the Federal Rules of Civil Procedure, it is within the discretion of the court to hear such an affirmative defense before or at the trial. If there is no jurisdiction over that defendant, there is no reason why he should be put to the unnecessary expense of time and effort involved in a long antitrust case. The question should be determined promptly and before trial.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.

For the plaintiff: Richard B. O'Donnell, New York, N. Y.

For the defendants: Cravath, Swaine & Moore; Berle, Berle & Brunner; and Simpson, Thatcher & Bartlett, New York, N. Y.

Memorandum

[*Jurisdiction*]

DAWSON, District Judge [*In full text*]: In this case the plaintiff United States of America has moved for an order pursuant to Rule 12(d) of the Rules of Civil Procedure directing that a preliminary hearing be held to hear and determine before trial the issue of jurisdiction over the person of defendant N. V. Philips' Gloeilampenfabrieken.

[*Affirmative Defense*]

This is an anti-trust action brought by the Government against three defendants. In the answer of the defendant N. V. Philips' Gloeilampenfabrieken this defendant alleges as an affirmative defense that the Court is without jurisdiction of the person of the defendant.

Rule 12(d) of the Rules of Civil Procedure provides that when such defense is interposed the defense "shall be heard and

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determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." Whether the court should direct that the defense be heard before trial, or be reserved for the trial, is a matter of discretion of the judge. *United States v. Central States Theatre Corp.* [1957 TRADE CASES ¶ 68,902], 159 F. Supp. 552 (D. C. D. Neb. 1959 [1957]).

[*Unnecessary Expense*]

There is every good reason why this preliminary question of jurisdiction over the defendant in a major anti-trust case should be determined before trial. If the Government does not have jurisdiction over the person of this defendant there is no reason why it should be put to the unnecessary expense of time and effort involved in a long anti-trust case. If it does have jurisdiction the issue of that jurisdiction should be determined promptly and before the trial.

[*Preliminary Hearing Ordered*]

The motion of the plaintiff is therefore granted and it is ordered that the defense of lack of jurisdiction over the person of the defendant shall be heard and determined before trial of the action. This will require that an application be made to the Chief Judge for the assignment of a judge to hear this particular aspect of the case. See Rule 2 of the Calendar Rules of the Southern District of New York. It is so ordered.

[¶ 69,268] Robert Demeulenaere, Marcel Demeulenaere, Jeanne Demeulenaere, Irma Demeulenaere, Irene Demeulenaere, Paul Demeulenaere, Alfred Demeulenaere, and Universal Cash Register Corporation, Plaintiffs; Universal Machines, Inc., C. E. Schroeder, and Marcel Anthony D'Ochain, Intervener Plaintiffs; Raymond Flasselaerts, Andre Mattyssens, and Auguste Lambiotte, Additional Intervening Plaintiffs v. Rockwell Manufacturing Company, Ohmer Corporation, The National Cash Register Company, and John O. Ekblom, Defendants.

In the United States District Court for the Southern District of New York. Civil No. 74-115. Filed January 28, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Dismissal of Action as to Certain Plaintiffs—Failure to Appear for Examination.—A treble damage action would be dismissed with prejudice as to five of the plaintiffs who were residents of Belgium, unless they appeared for examination by the defendants within the time specified by the court. The defendants had sought the dismissal of the action as to all of the plaintiffs for the failure of the five to appear for examination. They had contended that the five plaintiffs were indispensable parties to the action, and that without them the action must fall as to all of the plaintiffs. Also, the defendants as well as intervening plaintiffs contended that their cases would be prejudiced if the action was dismissed as to the five plaintiffs. The court ruled that the issue of indispensable parties was not properly raised by the defendants' instant motions, but could be raised when the five plaintiffs are no longer parties to the action. In giving the five plaintiffs a final opportunity to appear for examination, the court took into consideration the interests of the intervening plaintiffs and the other original plaintiffs.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

For the plaintiffs: Luttauer & Ullman, and Philip Handelman, New York, N. Y.

For the defendants: Shearman & Sterling & Wright; Fulton, Walter & Halley; and Cahill, Gordon, Reindel & Ohl, New York, N. Y.

For prior decisions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,586 and 1952 Trade Cases ¶ 67,329.

Memorandum

[*Motion to Dismiss*]

BRYAN, District Judge [*In full text*]: Defendant National Cash Register Company moves, pursuant to Rules 37(d) and 41, F. R. C. P., to dismiss this action with prejudice against all of the plaintiffs for failure of five of them to appear for examination in New York pursuant to orders of this court, or, in the alternative, for such

a dismissal unless these five plaintiffs duly submit to such examination. The other defendants join in the motion.

Plaintiffs cross-move, pursuant to Rule 12, F. R. C. P., to dismiss the complaints of the intervener and additional intervener plaintiffs upon the ground that they are not proper parties to the suit.

[*Nature of Action*]

This action, commenced in 1952, has had a long and spotty career. It is brought to recover treble damages in the sum of $75,000,000 for alleged conspiracy by defendants to destroy plaintiffs' cash register business in violation of the Sherman Act, 15 U. S. C. §§ 1, 2, 3 and 5. The individual plaintiffs, all members of the same family, are Belgians, five of whom, Jeanne, Irma, Irene, Paul and Alfred, are residents of Belgium, and the other two of whom reside in the United States. They are collectively referred to in the complaint as "The Demeulenaeres", and are alleged to have been the owners and inventors of cash registers and other calculating and registering machines which were patented, some of which were licensed to the other plaintiff, Universal Cash Register Corporation. Alleged acts of the defendants in preventing the production and marketing of these machines are the gravamen of the complaint.

[*Prior Proceedings*]

At times this litigation has been dormant. At others it has been fairly active. Recently, after a period of lethargy, it appears to have been revived with some vigor upon the substitution of a new attorney for the plaintiffs about a year ago.

However, it has been on the assignment calendar twice and was finally stricken therefrom in April of 1956. Since then it has been on the dismissal calendar four times, and on each occasion plaintiffs' time to file a note of issue has been repeatedly extended on one excuse or another.

The defendants' motions to dismiss arise out of the failure of the five Belgian Demeulenaeres to appear for examination in New York pursuant to notices to take their depositions here, served by the defendants in 1952, immediately after the commencement of the action. These examinations were adjourned by numerous stipulations, the last two of which were approved by order of the court, and on April 8, 1953 an order entered by Judge Knox provided that these examinations should be taken after a preliminary deposition of the plaintiff Marcel Demeulenaere had been completed "without loss of priority of [defendants'] right to conduct and complete the said noticed examinations before plaintiffs examine defendants".

The preliminary examination of Marcel was concluded on August 19, 1953, and thereafter Robert Demeulenaere, the other individual plaintiff resident here, was produced for examination. His examination has not yet been completed and there is further examination to be taken of Marcel.

When plaintiffs' new attorney was substituted (on the eve of a dismissal for lack of prosecution) counsel for the defendants rescheduled the depositions of the five Belgian plaintiffs. None of them appeared for examination on the rescheduled dates. Thereafter these plaintiffs twice moved to require the examinations on which they had already defaulted to be taken by written interrogatories instead of by oral examination in New York. Such relief was twice denied them.

On the last occasion, March 11, 1958, a plea for such relief was again made upon the grounds of financial hardship. Judge Cashin found such hardship had not been shown and refused to permit written interrogatories instead of oral examination in New York. He ordered that the depositions proceed on the basis of the original notices for oral examination in New York. The plaintiffs apparently still refuse to appear and their attorney has indicated that they have no intention of so doing.

There is no doubt that these five plaintiffs are in default for failing to appear for examination pursuant to orders of this court as their attorney concedes, and that their testimony is material and necessary to the defense of the action.

[*Contentions*]

The attorney for the five plaintiffs apparently has no very serious objection to the dismissal of the complaint as against them because of their default since he now asserts that they are not proper parties to the suit anyway. He strenuously objects, however, to dismissal as to all the plaintiffs.

The position of the defendants, on the other hand, is that the action should be dismissed against all of the plaintiffs because

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of the default of the five Belgian plaintiffs. Defendants assert that the five Belgian plaintiffs are indispensable parties to the action and that therefore without them the action must fall as to all of the plaintiffs. They therefore argue that since they are entitled to dismiss as to the Belgian plaintiffs the court must, at the same time, dismiss as to the other three for lack of indispensable parties.

They urge, moreover, that to dismiss as to the five Belgian plaintiffs only would merely operate to deprive them of the opportunity of examining these plaintiffs and prevent them from obtaining material essential to their defense, and that the only remedy which would afford them relief to which they are entitled would be a dismissal as to all.

The intervener and additional intervener plaintiffs take the position that the dismissal of the actions as to the five Belgian plaintiffs would be highly prejudicial to them since as a practical matter a substantial portion of the proof in the action is in their hands and that for the same reason dismissal as to all would destroy the possibility of their establishing their causes of action.

[*Indispensable Parties*]

I do not think that the position of the defendants that the complaint should be dismissed with respect to all eight plaintiffs because five of them have failed to appear for examination is well taken. The issue as to whether or not the five Belgian plaintiffs are indispensable parties so as to require the dismissal of the complaint as to the other three plaintiffs if the Belgian plaintiffs are eliminated, is not properly raised by defendants' motions under Rules 37(d) and 41(b). These motions relate only to dismissal for failure to appear for examination and to comply with orders of the court. There is no showing here that there has been any such lack of compliance by plaintiffs Robert and Marcel Demeulenaere and Universal Cash Register Corporation. If the complaint be dismissed as to the five Belgian plaintiffs and they are no longer parties to the action then the defendants may properly move for dismissal of the complaint for lack of indispensable parties pursuant to Rule 12(c). Such a motion has not been made and indeed is not appropriate now.

[*Last Opportunity*]

In view of the importance of the question as to whether the action on behalf of the three remaining plaintiffs can be maintained if the Belgian plaintiffs are eliminated and the possible prejudice to the intervener plaintiffs which would arise, I am not prepared to dismiss as to the five Belgian plaintiffs without giving them a last opportunity to appear for examination in New York in compliance with the court's orders. The defendants themselves, by their prayer for alternative relief, plainly envision such a disposition. It may well be that the parties to this suit who are interested in keeping these plaintiffs in to preserve their position in the action may be able to persuade them to appear in New York for examination. That is up to them.

[*Ruling*]

I will therefore dispose of the defendants' motions by directing, as to each of the five plaintiffs, Jeanne, Irma, Irene, Paul and Alfred Demeulenaere, that unless they appear for examination by the defendants in New York within forty-five days of the date of the order to be entered on this motion the complaint will be dismissed with prejudice as to each of them who does not do so. As an alternative to examination in New York they may agree to submit to examination in Belgium under the Federal Rules within such forty-five day period after providing defendants' counsel with sufficient funds to cover defendants' expenses, including counsel fees, for such examination.

[*Intervener Plaintiffs*]

Plaintiffs' motion to dismiss the complaints of the intervener and additional intervener plaintiffs requires little discussion. The intervener plaintiffs were permitted to intervene in the action by order of the court pursuant to stipulation of the parties. The additioial intervener plaintiffs were permitted to intervene by Judge Palmieri in his memorandum decision of January 2, 1957, after a hearing on the merits. The plaintiffs have shown no grounds whatsoever for overriding these previous dispositions of the questions they now seek to raise. Their motion to dismiss is in all respects denied.

Settle order on notice.

[¶ 69,269] **Gilbert M. Turner, et al. v. Dan W. Robinson, et al.**

In the Supreme Court of Georgia. No. 20285. Decided February 9, 1959.

Georgia Antitrust Laws

Combinations and Conspiracies Under State Antitrust Laws—Employee's Contract Not to Compete With Former Employer—Legality—Reasonable Limitations as to Time and Territory.—A restrictive covenant under which an employee agreed that he would not engage in the business of tunnel digging in a five-state area for a period of two years after the termination of his employment was held valid and enforceable. Although contracts in general restraint of trade are void, a contract concerning a useful and lawful business in partial restraint of trade, reasonably limited as to time and place and not otherwise unreasonable, is not void. The two-year restraint as to time was unquestionably reasonable. Since tunneling and boring work is limited and is scattered over a wide area, the five-state area was required for profitable operations and was conceded to be a reasonably sized territory.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.12.

For the plaintiffs: Charles A. Moye, Jr., James C. Hill, and Harold N. Hill, Jr., all of Gambrell, Harlan, Russell, Moye & Richardson, Atlanta, Ga.

For the defendants: Edward E. Carter and William R. Harp, both of Atlanta, Ga.

[*Syllabus*]

By the Court: 1. Although contracts in general restraint of trade are void (Code, Ann., § 20-504), a contract concerning a useful and lawful business in partial restraint of trade and reasonably limited as to time and place, and not otherwise unreasonable, is not void. The restraint as to time of two years in this case is reasonable.

2. The restriction to any territory assigned to him within two years next preceding termination of his employment, which in this case included the states of Alabama, Florida, Georgia, North Carolina and South Carolina, under the facts and circumstances of his employment, was reasonable and valid.

3. In the absence of evidence to support the allegation that the corporation was aiding or abetting the defendant Robinson in the violation of the restrictive covenant in his contract of employment, or that Robinson acting as agent or officer of the corporation was doing so, the trial judge did not err in denying an injunction against the defendant, Robinson Tunneling Company, Inc.

[*Contract Not to Compete*]

The petition is for injunction to restrain defendants, Dan W. Robinson and Robinson Tunneling Company, Inc., from breaching a restrictive covenant contained in an employment contract entered into by defendant Dan W. Robinson with plaintiffs. The following is the restrictive covenant in question: "As part of the consideration of this agreement, Employee agrees that for two (2) years following the termination of his employment with Employer, regardless of how such termination is brought about, he will not engage in the business of boring, digging or drilling horizontal holes or tunnels in the earth, either as a principal, partner, employee, stockholder, or otherwise, within any territory assigned to him at any time during his employment by Employer, within two years next preceding such termination, and Employee understands that this is a material part of his agreement with Employer, and that Employer would not have hired or employed him unless this condition is a part of this agreement."

[*Territory*]

The territory assigned to defendant in the contract was the "Dixie Division" of plaintiff corporation, consisting of the states of Georgia, Florida, Alabama, South Carolina and North Carolina, which territory could be changed at any time by plaintiffs.

[*Prior Proceedings*]

After a hearing at which both parties presented evidence, the trial judge denied an interlocutory injunction prayed for. In their bill of exceptions, the plaintiffs assign as error the ruling of the trial judge.

[*Time Limitation*]

MOBLEY, Justice [*In full text*]: 1. While contracts in general restraint of trade are

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void (Code, Ann., § 20-504), a contract concerning a useful and lawful business in partial restraint of trade and reasonably limited as to time and place, and not otherwise unreasonable is not void. *Black v. Horowitz,* 203 Ga. 294 (1) (— S. E. 2d —), and cases cited. See also *National Linen Service Corporation v. Clower,* 179 Ga. 136, 145 (— S. E. —), and *Shirk v. Loftis Bros. & Co.,* 148 Ga. 500 (— S. E. —). The restraint as to time in this case, two years, is unquestionably reasonable. *Aladdin, Inc. v. Krasnoff* [1958 TRADE CASES ¶ 69,167], 214 Ga. 519 (— S. E. 2d —), and cases cited.

[*Territorial Limitation*]

2. In determining the question as to reasonableness of territorial limitation, ". . . the court will consider the nature and extent of the trade or business, the situation of the parties, and all the other circumstances" . . . "all such contracts are void, if considered only in the abstract, and without reference to the situation or objects of the parties, or other circumstances under or with reference to which they were made . . . But if, considered with reference to the situation, business, and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid." *Rakestraw v. Lanier,* 104 Ga. 188, 195 (— S. E. —). See also *Hood v. Legg,* 160 Ga. 620, 625 (— S. E. —), and *Orkin Exterminating Co. of South Ga. v. Dewberry,* 204 Ga. 794, 803 (— S. E. 2d —).

It is clear that the territorial limitation fixed by the contract is that specific territory assigned to him within two years before termination of his employment; and at the time of his employment, the territory was defined in the contract as the "Dixie Division," consisting of the states of Alabama, Georgia, Florida, North Carolina and South Carolina. The contract provided that this territory could be changed at any time. There was no change in the defendant's territory during his employment.

[*Employee's Duties*]

At the time of his employment, defendant was living in Texas and had had no prior experience in the tunneling or boring business. The "Dixie Division" of the company was then in existence with headquarters in Birmingham, Alabama. He moved there and later to Decatur, Georgia, where for three years he was the alter ego of the company in the five states. To the trade, he was the company in his territory, personally conducting its business with all customers and potential customers throughout his territory. At the company's expense, he traveled his territory, becoming personally acquainted with contractors, public utilities, and other customers and prospective customers, submitting bids on jobs and performing other duties for the company. The evidence demands the conclusion that the business acquired by the company in this territory depended largely upon the establishment by the defendant of close personal contacts and of the confidence and friendship of those requiring tunneling or boring work to be done. He did all this at the expense of the company.

The defendant admits that he is now competing with the company in this territory, that he has secured work when he was not the low bidder because of personal friendship established while in the employ of and in pursuance of his work with the company. He admits that he entered the contract understanding fully its terms.

[*Territory Reasonable*]

It is conceded that the five states composing the "Dixie Division" of the company are a reasonably sized territory, because the tunneling and boring work is limited and is scattered over a wide area, and this much territory is required for profitable operations.

The company has done jobs in all five states since the establishment of the Dixie Division. The defendant worked all five states, submitted bids on jobs in each and secured jobs in all except the State of Florida.

The facts and surrounding circumstances in this case clearly establish that the limitation as to territory was reasonably necessary to protect the interests of the plaintiffs; that the defendant voluntarily and with knowledge of its provisions entered the contract and allowed the plaintiffs to expend large sums of money building up the defendant in this territory as their representative; and that for him now to engage in a competing business will work great harm to

plaintiffs. The interests of the public will not be unduly prejudiced, as the evidence discloses keen competition in this field in this territory. The limitation as to territory is valid.

[*Contract Valid*]

The facts material to the decision of this case are not in dispute. The contract is valid, and the evidence is uncontradicted that the defendant is violating it. The trial judge, accordingly, erred in denying the interlocutory injunction as prayed against the defendant Robinson. *Ballard v. Waites*, 194 Ga. 427, 429 (2) (— S. E. 2d —); *Habif v. Maslia* [1959 TRADE CASES ¶ 69,246], case number 20264.

[*Corporate Defendant*]

3. The petition alleged that, "The defendant Robinson Tunneling Co., Inc., by and through its President and employee, had knowledge of the above-quoted provision of the employment contract, and even so, wilfully caused, aided and abetted Dan W. Robinson to breach his contract with petitioners," and also alleged that the defendants were violating the terms of the restrictive covenant in the contract. However, the only evidence as to the defendant corporation is that elicited from the defendant Robinson, to wit: "I am the stockholder and president of Robinson Tunneling Company. I organized that as a corporation. I was granted charter the thirtieth day of June. I obtained my charter the last day of June, and before that I worked for Boring and Tunneling Company of America until, I believe, the fifteenth of June." This is not sufficient to establish a case for the plaintiffs against the defendant corporation. There is no evidence that the corporation has done anything; that it has aided and abetted the defendant Robinson in violating the contract as charged; or that Robinson, acting as president or agent of the corporation, has violated the contract. See *Kessler v. Puritan* Chemical Co., 213 Ga. 845 (2) (— S. E. 2d —). The trial judge did not err in denying the grant of an interlocutory injunction as to the defendant corporation, Robinson Tunneling Company, Inc.

[*Judgment*]

Judgment reversed in part and affirmed in part. All the Justices concur.

[¶ 69,270] Surgitube Products Corp. and Louis Hochman v. Scholl Mfg. Co., Inc.

In the United States Court of Appeals for the Second Circuit. No. 91—October Term, 1958. Docket No. 25106. Argued January 15, 1959. Decided January 30, 1959.

Plaintiff's appeal from a judgment of the District Court for the Southern District of New York, ARCHIE O. DAWSON, J., 158 F. Supp. 540 [1958 TRADE CASES ¶ 68,974], dismissing their suit for patent infringement because the claims of the patent lacked invention. Affirmed.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Violations as Defenses—Misuse of Patent—Mootness.—A trial court's ruling that a patent was invalid for lack of invention was affirmed on review. Therefore, other defenses to the patentee's enforcement action were rendered moot; it was not necessary to examine the trial court's further ruling that the patentee had improperly marked its boxes with a patent notice with intent to restrain trade in an unpatented product and had thereby misused its patent so as to foreclose its right to bring suit.

See Combinations and Conspiracies, Vol. 1, ¶ 2013; Private Enforcement and Procedure, Vol. 2, ¶ 9041.157.

For the plaintiffs: Stanton T. Lawrence, Jr., New York, N. Y. (W. Brown Morton and Pennie, Edmonds, Morton, Barrows & Taylor, New York, N. Y., on the brief).

For the defendant: Stephen H. Philbin, New York, N. Y. (Stephen G. Cox, New York, N. Y., on the brief).

Affirming a decision of the U. S. District Court, Southern District of New York, 1958 Trade Cases ¶ 68,974.

Before: MEDINA, LUMBARD and BURGER, Circuit Judges.

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[*Patent Infringement Action*]

LUMBARD, Circuit Judge [*In full text*]: The outcome of the plaintiffs' appeal from the dismissal of their suit for patent infringement turns on whether there is invention in a bandage which is made by taking an open-ended tubular fabric, placing part of it over the member to be bandaged, twisting the fabric intermediate its ends and then retroverting it over the member to make a double thickness. We agree with Judge Dawson that this was not invention, 158 F. Supp. 540 [1958 TRADE CASES ¶ 68,974], and accordingly affirm the judgment.

[*Facts*]

The facts are undisputed. In 1941 Louis Hochman, president of the plaintiff, Surgitube Products Corporation, applied for a patent on a bandage to be constructed of any tubular fabric. The patent, 2,326,997, was issued to him on August 17, 1943. On April 1, 1943, Surgitube, as exclusive licensee of Hochman, and defendant Scholl Mfg. Co., Inc., made a contract granting to Scholl the exclusive distributorship of the unpatented tubular gauzes then used for making the bandage. Scholl purchased the gauze from Surgitube for resale. In August 1944, one year after the bandage patent was issued, Scholl exercised a right to cancel the contract and made other arrangements to obtain tubular gauze so as to continue its business of selling gauze for closed-end bandaging.

In November 1948 Surgitube and Hochman sent two written notices to Scholl claiming infringement of the Hochman patent. The following month Surgitube sued Scholl in the Supreme Court of New York alleging unfair competition by reason of Scholl's selling tubular gauze similar to "gauze manufactured under the Surgitube patent by plaintiff." It is conceded that this New York state action has slumbered ever since. In December 1948 Scholl first purchased the unpatented seamless tubular gauze which since 1949 it has sold under the name of "Tubegauz" and which was specially developed for use with its applicators in closed-end bandaging. It was apparently not until 1949 that both parties began selling unpatented instruments specially developed to aid in applying the bandage. In 1953 Scholl first introduced an additional unpatented instrument adapted to the application of large bandages which it called a "cage." Scholl attributes its subsequent business success to the introduction of the "cage."

This action against Scholl for contributory infringement, in which no claim of unfair competition has been made, was not actually commenced until February 1955.

Claim 1 of the patent is conceded to be typical and reads:

> A bandage produced from an open-ended tubular fabric structure twisted intermediate its ends and one portion being returned over the remaining portion to provide a tubular covering open at one end and closed at the other end.

[*Lack of Invention*]

It is conceded that any material can be used which is tubular and which can be twisted and then retroverted or folded backwards. Since the specially made gauze and specialized instruments for use in applying and twisting the gauze to create the bandage are unpatented, the sole element for which invention is claimed is the technique of the bandage itself.

Such a double covering or bandage is not novel. Housewives have long used old stockings in this way. A covering so constructed was claimed in prior patents, as for example in connection with a scouring ball in 1927 when a patent was issued to one Kingman. Claim 2 of the Kingman patent refers to:

> an exterior tubular cover body of knitted metallic fabric twisted together intermediate its ends with one section folded back upon itself to provide a plurality of thicknesses and at the same time close one end of the cover body thus constructed.

The district court properly rejected Hochman's claim that the mere application of this technique to bandaging involves sufficient invention to justify the issuance of a patent. 35 U. S. C. § 103 (1952); *Welsh Mfg. Co. v. Sunshine Products Co.*, 236 F. 2d 225 (2 Cir. 1956); *Young's Rubber Corp. v. Allied Lastex Corp.*, 188 F. 2d 945, 948 (2 Cir. 1951).

Plaintiff's challenge to this conclusion is based primarily on the testimony of doctors and nurses that they required special instruction in the use of the bandage in order to comprehend and exploit its usefulness. But this need for instruction, like the parties' tardy commercial success, appears

to have resulted from the introduction of the unpatented applicators previously referred to, and not from anything inherent in the claimed invention.

[*Patent Misuse—Mootness*]

Since the lack of invention in the patent renders moot any question of laches in the commencement of the action, we need not pass on that defense. Similarly, we need not examine the alternative ground of Judge Dawson's decision below, namely, that Surgitube had improperly marked the box containing the gauze with a patent notice "with intent to deceive the public and to restrain trade in an unpatented tubular gauze" and thus had misused the patent so as to foreclose its right to bring suit.

[*Judgment Affirmed*]

Judgment affirmed.

[¶ 69,271] Revlon, Inc. v. Henry Modell & Co., Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 141 N. Y. L. J., No. 21, page 11. Dated January 30, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Notice of Fair Trade Contracts—Receipt of Notice After Purchase of Merchandise—Failure to Allege Facts Specifically.—A fair trader was granted a temporary injunction against a concessionaire which contended that notice of the fair trade pricing came to its attention "after some delay" and after it had purchased substantial quantities of the fair trade merchandise. The concessionaire's failure to more specifically state the date when it received notice and purchased its stock of merchandise, and to relate those facts to the dates of the offending sales, rendered the defense insufficient. Moreover, the concessionaire failed to state that it made no purchases after receiving notice of the fair trade pricing.

See Fair Trade, Vol. 1, ¶ 3268.34.

Fair Trade—Defenses to Enforcement Action—"Concessionaire" Defense.—In a fair trade enforcement action, the court rejected the defendants' "concessionaire" defense where the offending sales were made at the defendants' place of business. The facts and circumstances of the offers for sale, at the place of sale, were sufficiently established to warrant temporary injunctive relief.

See Fair Trade, Vol. 1, ¶ 3252.34.

Fair Trade—Defenses to Enforcement Action—Resale Price Fixing—Fair Trade Contracts Between Competitors—Manufacturer's Retail Selling as Part of Advertising Program.—A manufacturer's fair trade enforcement action was not defeated by its operation, as a part of its advertising program and as an incident to its consulting service, a salon in which the manufacturer sold its products at retail. Under these circumstances, the court rejected the contention that the manufacturer could not enforce its fair trade program because of its retail sales in competition with the retail trade.

See Resale Price Fixing—Fair Trade, Vol. 1, ¶ 3100.

[*Fair Trade Action*]

HOFSTADTER, Justice [*In full text*]: Plaintiff moves for temporary injunction in enforcement of the Feld-Crawford Act. The offending sales were made at the place of business operated by the defendants. In a subsequent action brought against another defendant, a similar application is before the court. On both motions, defendants urge the "concessionaire" defense, which alone require any consideration. The facts and circumstances of the offers for sale at the place of sale are sufficiently established to warrant temporary injunctive relief. The concessionaire's position is based on evasion. It is stated on behalf of that defendant that the notice given to the other defendants and dated November 7, 1958, came to its attention "after some delay" and after it had purchased substantial quantities of merchandise for sale for the next several months. The offending sales were

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made as early as November 19, 1958, and as late as January 15, 1959. The failure to more specifically state the date when the defendant received notice and made, as claimed, the purchase of its present stock, and to relate these facts to the dates of the offending sales, renders the defense insufficient, at this time at least, to defeat the present application. Indeed, it is not stated that there were no purchases made since the time when the defendant received notice. Defendants urge that plaintiff may not enforce its fair trade program because it sells at retail in competition with the retail trade. This contention is based on the operation by plaintiff of a salon on Fifth Avenue in New York City, which it maintains as part of its advertising program and where alone it sells at retail at the fair traded prices as an incident to its consulting service, also offers as part of the advertising campaign. In these circumstances, the application is not thereby defeated. The motions are granted and the bond is fixed in each instance in the sum of $500. Settle orders accordingly.

[¶ 69,272] In Re: P. Lorillard Company.

In the United States Court of Appeals for the Fourth Circuit. No. 7692. Dated January 7, 1959. As amended by Order of January 14, 1959.*

A proceeding for contempt growing out of case No. 6140, *P. Lorillard Company, a corporation, v. Federal Trade Commission.*

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Enforcement of Commission Misrepresentation Order by Court of Appeals—Violation of Court Order—Contempt of Court—Failure to Apply for Modification of Order.—A tobacco company was held to be in contempt of court when it advertised that the nicotine and tar content of its cigarette is less than the nicotine and tar content of other leading brands of cigarettes in violation of a decree of a United States Court of Appeals enforcing, on the company's petition for review, a Federal Trade Commission order prohibiting the company from misrepresenting the nicotine or tar content of its brand of cigarettes. In enforcing the order, the court had ruled that if, in the future, advertising of the sort prohibited should become truthful because of a change in the character of the cigarettes, application could be made to the Commission for a revision of the order. In the instant action, the court found that the advertisements found to be in violation of its decree were released by the company without having applied for or obtained from the court or the Commission a revision of the order. The Commission advanced no contention that the advertisements were in fact false. The company was fined $40,000, and its petition for modification, which was filed after the advertisements were made, was dismissed, with leave to the company to petition the Commission for modification of its order.

See Unfair Practices, Vol. 2, ¶ 5081.114; FTC Enforcement and Procedure, Vol. 2, ¶ 8621.150.

For the Federal Trade Commission: Earl W. Kintner, General Counsel; James E. Corkey, Assistant General Counsel; and Jno. W. Carter, Attorney, FTC.

For the respondent: Edward F. Howrey and Robert L. Wald, Washington, D. C.

Imposing a fine for violation of a decree of the U. S. Court of Appeals, Fourth Circuit, 1950-1951 Trade Cases ¶ 62,747, enforcing a Federal Trade Commission cease and desist order in Dkt. 4922.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Findings, Judgment and Order

[*Prior Proceedings*]

[*In full text*]: On December 29, 1950, in a proceeding in this Court entitled "*P. Lorillard Company, a corporation, v. Federal Trade Commission,* No. 6140," which was a petition by the said company for review of a cease and desist order issued against it by the Federal Trade Commission, the

* The order read as follows: "It is ordered by this Court that the caption of the order filed and entered in the above entitled matter on January 7, 1959, be corrected by deleting therefrom the word 'criminal.' "

Court refused to set aside the order of the Commission but enforced it and enjoined the company to abide by and perform the directions of the Commission therein contained, requiring the company, among other things, to cease and desist to "represent by any means, directly or indirectly: . . .

"(3) That Old Gold cigarettes or the smoke therefrom contains less nicotine, or less tars and resins, or is less irritating to the throat than the cigarettes or the smoke therefrom of any of the six other leading brands of cigarettes;" [1950-1951 TRADE CASES ¶ 62,747] 186 F. 2d 52, 54 (1950).

In the opinion of this Court it was said:

". . . If, in the future, advertising of the sort prohibited should become truthful because of a change in the character of the cigarettes to which it has reference, a very remote contingency, application can be made to the Commission for a revision of the order. It will be time enough to give consideration to that matter when the occasion for it arises. . . ."

[*Violation of Decree*]

On June 5, 1958, the Federal Trade Commission brought to the Court's attention an alleged violation of its decree by the company, by the dissemination through the medium of television broadcasts and newspapers of advertisements in various cities and towns throughout the United States, in inter-state commerce, the representation that the nicotine and tar content of its tobacco products, Old Gold cigarettes, are less than the nicotine and tar content of other leading brands of cigarettes.

The broadcasts and advertisements complained of were released by P. Lorillard Company without having applied for or obtained from this Court or the Commission a revision of the order.

[*Contempt—Fine*]

Thereupon, after notice to the said P. Lorillard Company, hearings were held by this Court at Richmond, Virginia, on October 23, 1958, and at Charlotte, North Carolina, on January 7, 1959. Upon consideration of the answers of the company, and the representations and affidavits filed on its behalf and the statements contained therein, and counsel having been fully heard, the Court finds that the P. Lorillard Company has violated the order of December 29, 1950, and is in contempt of this Court.

Upon consideration of the facts above set forth and the explanations offered by the P. Lorillard Company through its counsel and the affidavits submitted on its behalf, and the Federal Trade Commission having advanced no contention in this proceeding that the advertising complained of is in fact false, we hereby order and impose a fine of $40,000 to be paid to the Treasurer of the United States within sixty (60) days.

[*Modification*]

And It Is Further Ordered that the Petition for Modification filed by P. Lorillard Company in this Court on August 22, 1958, be and the same is hereby dismissed with leave to P. Lorillard Company to petition the Federal Trade Commission for modification of its order.

[¶ 69,273] Life Music, Inc. v. Broadcast Music, Inc.; American Society of Composers, Authors and Publishers; Sesac Inc.; Radio Corporation of America; National Broadcasting Company, Inc.; Columbia Broadcasting System, Inc.; Columbia Records, Inc.; Columbia Music Publishing Company; Master Records, Inc.; and Okeh Music Publishing Company.

In the United States District Court for Southern District of New York. Civil Action No. 106-159. Filed February 9, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Summary Judgment—Issues of Material Fact—Applicability of Summary Judgment Rule to Cases Involving Substantial Industry.—In a treble damage action alleging a conspiracy to drive a licensor of performance rights in musical compositions from the business, the licensor was denied summary judgment on the ground that the moving papers showed numerous issues of material facts which were controverted in the case. Also, the court

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noted that the application of the summary judgment rule to important cases involving a substantial industry was questionable.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.675.

For the plaintiff: Sidney W. Rothstein, New York, N. Y.

For the defendants: Rosenman, Goldmark, Colin & Kaye; Cahill, Gordon, Riendl & Ohl; Schwartz & Froelich; and Cravanth, Swaine & Moore, all of New York, N. Y.

Memorandum

[Conspiracy Charged]

DAWSON, District Judge *[In full text]*: This is a motion for summary judgment under Rule 56 of the Rules of Civil Procedure.

The action is a treble damage action under the anti-trust laws, in which plaintiff alleges a conspiracy among the defendants to prevent plaintiff from engaging in, and to drive it from, the business of licensing performance rights in musical compositions. The complaint is lengthy and there are numerous defendants. By its motion plaintiff seeks to secure summary judgment for a substantial part of the relief demanded in the complaint, including an injunction against licenses issued by BMI and a divestiture of its stock.

[Issues of Fact]

On a motion for summary judgment the first issue to be determined by the Court is whether there is "no genuine issue as to any material fact." The papers submitted on this motion show that there are numerous issues of fact which are controverted in this case. The motion is of the type referred to by Judge Learned Hand in *Bozant v. Bank of New York,* 156 F. 2d 787 (2d Cir. 1946), where Judge Hand pointed out in that case

> ". . . that the case is another mistaken effort to save time by an attempt to dispose of a complicated state of facts on motion for summary judgment." (P. 790)

The Court cannot reach the conclusion that there are no genuine issues as to material facts. Under those circumstances the Court cannot conclude that the moving party is entitled to a judgment as a matter of law. Furthermore, this is an important case involving a substantial industry and the application of the summary judgment rule to such an action is questionable. *United States v. Bethlehem Steel Corporation* [1958 TRADE CASES ¶ 68,914], 157 F. Supp. 877 (S. D. N. Y. 1958).

It would be much better if this case is tried on the facts. See *Lawlor v. National Screen Service Corp.* [1957 TRADE CASES ¶ 68,630], 352 U. S. 992 (1957), which reversed a summary judgment entered in a triple damage anti-trust action; *Syracuse Broadcasting Corp. v. Newhouse* [1956 TRADE CASES ¶ 68,468], 236 F. 2d 522 (2d Cir. 1956).

The motion for summary judgment is denied.

[¶ 69,274] The American Securit Company v. Shatterproof Glass Corporation.

In the United States District Court for the District of Delaware. Civil Action No. 1691. Dated September 15, 1958.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Consent Decree—Misuse of Patents and Violation of Decree—Jurisdiction of Court to Determine Issues—Power to Enjoin Relitigation of Issues by Private Parties.—Where the United States District Court for the District of Delaware had ruled that a patentee could not enforce its patents against a defendant because of their misuse and the patentee's actions in violation of a Government antitrust consent decree entered in the United States District Court for the Northern District of Ohio, the Delaware court subsequently enjoined the patentee from relitigating

in the Ohio court matters dealt with adversely to the patentee and in favor of the defendant in the Delaware court. The Delaware court ruled that the patentee should not be permitted to proceed against the defendant in the Ohio court to litigate anew the issues upon which the Delaware court had already ruled. The contention that the Ohio court had primary jurisdiction over the matters since the Government consent decree was entered in that court was rejected. Under the circumstances in the instant action, jurisdiction to construe the consent decree did not rest exclusively with the Ohio court. The jurisdiction which the Ohio court acquired by the initiation of the Government action which eventuated in the consent decree gave it no jurisdiction over the defendant in the instant proceeding. Also, the Ohio court did not acquire jurisdiction over the defendant when it applied to that court for a determination of a reasonable royalty for the patents involved in the Government suit. The fact that no order had been entered upon the Delaware court's opinion was of no moment. The significance of the opinion was to show the advance point to which the patent misuse and decree violation issues had been litigated in the Delaware court.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401, 8421; Private Enforcement and Procedure, Vol. 2, ¶ 9041.

For the plaintiff: H. Eugene Savery, Wilmington, Del.; John L. Seymour (of Bauer & Seymour), New York, N. Y.; and Joseph W. Burns (of Fulton, Walter & Halley), New York, N. Y.

For the defendant: Caleb S. Layton (of Richards, Layton & Finger), Wilmington, Del.; and William C. McCoy and William C. McCoy, Jr. (of McCoy, Greene & TeGrotenhuis), Cleveland, Ohio.

For a prior decision of the U. S. District Court, District of Delaware, see 1957 Trade Cases ¶ 68,802.

Memorandum

[Injunctive Order]

Edwin D. Steel, Jr., District Judge *[In full text]*: The Court has today signed an injunctive order to which reference is made for a statement of the facts which gave rise to its issuance. The entry of the order was based upon the legal conclusions that the Court possessed the power to grant injunctive relief and that in the exercise of its discretion it should do so. The considerations upon which these legal conclusions were based are stated herein.

[Duplicate Litigation]

In *Crosley Corporation v. Hazeltine Corporation,* 122 F. 2d 925 (3d Cir. 1941) it was held that the District Court in which a declaratory judgment action had been brought to adjudicate the invalidity and non-infringement of a defendant's patents had the power to, and in the exercise of its discretion should, enjoin the defendant from prosecuting an action begun 17 days later in another District Court for infringment of certain of the patents involved in the first suit, the parties being the same in both actions. This decision was based upon the view that it is important to litigants to have a single determination of their controversy, that a party who first brings an issue into a court of competent jurisdiction should be free from the vexation of subsequent litigation over the same subject matter, and that the issuance of an injunction would prevent the economic waste involved in duplicating litigation which would necessarily adversely affect the prompt and efficient administration of justice. Upon parallel facts the same conclusion was arrived at in *Crosley Corporation v. Westinghouse Electric & Manufacturing Co.,* 130 F. 2d 474 (3d Cir. 1942); cert. den. 317 U. S. 681 (1942) even though the second action was brought only one day after the first suit had been begun.

Here, unlike in the *Crosley* cases, it is not the plaintiff (Securit) who seeks to protect at an early stage of the case the jurisdiction which it has invoked. It is the defendant (Shatterproof) who seeks to have the plaintiff (Securit) prohibited from running away from the court of its choice long after a judicial pronouncement has been rendered upon a controlling aspect of the litigation. The principles of the *Crosley* cases therefore have *a fortiori* application to the situation at bar, and substantiate the power of the Court to grant injunctive relief and the

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wisdom of its doing so as a matter of discretion.

[*Parties and Issues*]

Securit argues that the *Crosley* cases are without application unless the same parties and issues are involved in both actions; and it points out that neither the United States nor the Hamilton Glass Corporation are parties to the Delaware litigation although both are parties in the Ohio proceeding. Furthermore, Securit asserts that the issues involved in Ohio are broader than those dealt with by Judge Leahy. These distinctions are not important. The injunction which has been issued is limited to the prevention of the relitigation between Securit and Shatterproof of the matters dealt with adversely to Securit by Judge Leahy. It does not foreclose Securit from litigating against the United States, Hamilton Glass Company, or anyone else any issues which it pleases. Nor does it foreclose Securit from litigating in Ohio against Shatterproof any matters other than those dealt with adversely to Securit by Judge Leahy in his opinion. *Triangle Conduit & Cable Co. v. National Electric Products Corporation,* 138 F. 2d 46 (3d Cir. 1943) relied upon by Securit does not require the Court to deny injunctive relief of the limited scope which is indicated. Indeed, that decision, when read in the light of *Triangle Conduit & Cable Co. v. National Electric Products Corporation,* 125 F. 2d 1008 (3d Cir. 1942); cert. den. 316 U. S. 676 (1942) supports the propriety of the injunctive order which has been entered.

In *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.,* 189 F. 2d 31 (3d Cir. 1951); aff'd 342 U. S. 180 (1952) it was held error for this Court to enjoin litigation in the Illinois District Court between a patentee and an alleged infringing manufacturer who were parties in Delaware and a customer of the alleged infringer which was not a party to the Delaware action. A mere reading of the opinion will disclose its several points of distinction from the case at bar. But if the test of determining precedence of judicial action stated in *Kerotest* is applied—viz., expedition in affording relief, it is clear that Securit should not be permitted to proceed against Shatterproof in Ohio to relitigate anew the issues upon which Judge Leahy has already spoken.

[*Decree—Primary Jurisdiction*]

Securit resists the issuance of an injunction upon the asserted ground that Ohio has primary jurisdiction with which this Court should not interfere. But the jurisdiction which Ohio acquired by the initiation of the anti-trust action which eventuated in the Toledo decree in 1948 gave it no jurisdiction over Shatterproof. Even under Securit's theory the earliest time when the Ohio Court acquired jurisdiction over Shatterproof was in July, 1955 when Shatterproof filed its application with the Ohio Court seeking a determination of a reasonable royalty for the patents in suit. While it may be assumed that some of the issues which the Ohio Court might have decided in connection with that application * were identical with those with which Judge Leahy dealt, still the submission of these issues to the Ohio Court was subsequent to the institution of the suit in Delaware and, in any event, the Ohio Court dismissed the application. In the order of dismissal jurisdiction was neither reserved over Shatterproof nor over the subject matter of Shatterproof's application. Securit's contention that the Ohio Court had primary jurisdiction of such kind as to foreclose the granting of injunctive relief by this Court is therefore untenable.

[*Absence of Order*]

Securit attempts to make capital of the fact that no order has been entered upon Judge Leahy's opinion. This is of no moment. The opinion is not relied upon as a basis of res judicata or a collateral estoppel. Its significance is to show the advance point to which the patent misuse and Toledo decree violation issues have been litigated in Delaware. This is a consideration of obvious importance in determining whether an injunction should issue.

[*U. S. Gypsum Case*]

The power of the Court to grant injunctive relief is not negatived by *United States Gypsum Co. v. National Gypsum Co.* [1957 TRADE CASES ¶ 68,627], 352 U. S. 457 (1957). There it was held that the Court rendering

* The application prayed *inter alia* that plaintiff be required to comply with the Toledo decree.

an anti-trust decree had jurisdiction in the anti-trust action to construe the decree as between the parties to it, to enjoin litigation in other courts between such parties which involved a construction of the decree, and following a construction which would bar the other actions, to direct the plaintiffs therein to dismiss the same with prejudice. The Court did not hold directly or by implication that a court other than that rendering an anti-trust decree is without power to construe the decree, or in the exercise of its discretion should restrain from doing so, when it has litigation before it between a party to the decree and a non-party thereto in connection with which the interpretation of the decree is pertinent and no interpretive relief antedating the suit has been sought from the anti-trust court. That is the situation which confronts this Court. Under comparable circumstances it was held in *American Securit Company v. Hamilton Glass Company* [1958 TRADE CASES ¶ 69,018], 254 F. 2d 889, 895 (7th Cir. 1958) that jurisdiction to construe the Toledo decree did not rest exclusively with the Ohio Court but that the Indiana District Court was empowered to do so. This conclusion, it held, was not inconsistent with the *Gypsum* decision.

The Ohio Court, having rendered the Toledo decree, is of course peculiarly competent to construe it and to determine whether the activities of Securit have been in derogation of its terms. But this is only one factor to be considered in determining whether in the exercise of its discretion the Court should direct the issuance of an injunction. This factor is substantially outweighed in the case at bar by the duplication of judicial effort and the inconvenience and expense to the parties which will necessarily be occasioned if Securit, which has chosen this Court as the forum for litigating its rights, should be permitted to proceed against Shatterproof in Ohio for a determination thereof long after Judge Leahy's opinion has been rendered upon an issue critical to the patent infringement aspect of the litigation in this Court.

Undoubtedly, a timely application for the construction of an anti-trust decree made to the Court rendering the decree will, in some instances, as illustrated by the circumstances of the *Gypsum* case, avoid multiple litigation and conflict of decisions. This consideration is scarcely relevant to the pending motion in view of the current status of the Delaware litigation and the long delay by Securit in soliciting the aid of the Ohio Court after previously invoking this Court's jurisdiction.

[*Scope of Relief*]

The restraint which has been granted is narrower than that sought by Shatterproof's motion. The relief prayed for in the motion, counsel for Shatterproof concede, was unduly broad. The scope of the relief which has been granted corresponds to that which counsel for Shatterproof requested at the argument. Particularization in phraseology of the order is accounted for by the requirement of Rule 65(d).

[¶ 69,275] The American Securit Company v. Shatterproof Glass Corporation.

In the United States District Court for the District of Delaware. Civil Action No. 1691. Dated September 22, 1958.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defense—Unfair Competition Claims—Misuse of Patents and Violation of Government Consent Decree—Relation Between Patent and Unfair Competition Claims.—Unfair competition claims asserted by a patentee in its patent infringement action were dismissed where it had been held that the patentee was not entitled to enforce its patents because of its misuse of the patents and actions in violation of a Government antitrust consent decree. The unfair competition claims were related to the patent claims. Since the patentee could not enforce its patents against the defendant, the defendant's alleged acts of unfair competition with respect to those patents did not constitute actionable wrongs. In other words, unless the patentee was entitled to enforce its patents against the defendant, the defendant's alleged acts of unfair competition constituted no invasion of any right possessed by the patentee. The substantive infirmity of the unfair competition claims could not be cured by characterizing such claims as a cause of action sounding in fraud, duplicity,

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or bad faith. Also, the patentee's motion to amend its complaint was denied on the ground that the proposed amendments would be similarly defective.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.640.

For the plaintiff: H. Eugene Savery, Wilmington, Del.; John L. Seymour (of Bauer & Seymour), New York, N. Y.; and Joseph W. Burns (of Fulton, Walter & Halley), New York, N. Y.

For the defendant: Caleb S. Layton (of Richards, Layton & Finger), Wilmington, Del.; and William C. McCoy and William C. McCoy, Jr. (of McCoy, Greene & TeGrotenhuis), Cleveland, Ohio.

For prior decisions of the U. S. District Court, District of Delaware, see 1959 Trade Cases ¶ 69,274 and 1957 Trade Cases ¶ 68,802.

Opinion

Edwin D. Steel, Jr., District Judge [*In full text except for omissions indicated by asterisks*]: The action is before the Court upon the motion of defendant to dismiss Counts V and VI of the complaint and upon the motion of plaintiff to amend the complaint. In addition to disposing of these motions the opinion contains an explanation why the Court, acting under Rule 54(b), has today entered a final judgment dismissing Counts I through IV, and acting similarly will today enter a final judgment dismissing Counts V and VI, notwithstanding the existing fringe issues as yet undecided.

Motion To Dismiss Counts V and VI

[*Jurisdiction*]

The jurisdiction of the Court to adjudicate Counts V and VI will first be considered. *Underwood v. Maloney,* 256 F. 2d 334, 340 (3rd Cir. 1958).

The complaint contains six counts. Counts I to IV each allege plaintiff's ownership of a different patent and the defendant's infringement thereof. Counts V and VI each purport to state a cause of action for unfair competition related to and growing out of the patent infringement.[1] Jurisdiction over the patent infringement claims, sometimes herein denominated "federal claims", is conferred by 28 U. S. C. § 1338(a). Since both parties are Delaware corporations, the unfair competition claims must find jurisdictional support, if at all, under 28 U. S. C. § 1338(b). It provides:

"The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws."

Under this section jurisdiction of an unfair competition claim in a non-diversity case exists only when it is joined with a claim under the patent laws which is both "substantial" and "related".

* * *

Judged by these standards, it is clear that the claims asserted by plaintiff under the patent laws are substantial. The complaint alleges patent infringement in conventional terms. No evidence has been adduced to indicate that the claims are frivolous or colorful or contrary to controlling decided cases. The fact that in the case at bar it has been held that the patents are not enforceable because of their misuse and plaintiff's actions in violation of an antitrust decree to which it was a party (*American Securit Company v. Shatterproof Glass Corp.* [1957 Trade Cases ¶ 68,802], 154 F. Supp. 890 (1957); reh. den. Sept. 18, 1957 and Jan. 17, 1958)[3] does not deprive the patent claims of their jurisdictional substantiality. *Schreyer v. Casco Products Corp.,* 190 F. 2d 921, 923-924 (2d Cir. 1952); cert. den. 342 U. S. 913 (1952). This is conceded by defendant.[4]

* * *

Accordingly, I hold that the so-called unfair competition claims alleged in Counts V and VI are not separate and distinct causes of action from the patent claims alleged in Counts I to IV. On the contrary, when Counts V and VI are taken in conjunction with each of the respective patent claims, they, together with each such patent claim, constitute a single cause of

[1] Par. 5, Complaint.
* * *

[3] The opinion is the subject of a note "Mandatory Package Licensing: A New Patent Misuse" in 44 *Va. Law Rev.* 727.

[4] Supplemental brief in support of motions to dismiss Counts V and VI of the complaint, filed September 10, 1958, at p. 7.
* * *

action. The claims for unfair competition are therefore sufficiently related to the patent infringement claims to come within the jurisdiction of this Court under § 1338(b).

[*Right to Enforce Patents*]

Jurisdiction to adjudicate Counts V and VI having been determined, the question remains whether substantively those counts allege valid causes of action. As stated, both counts charge that defendant has infringed plaintiff's patents. It was defendant's deception in simulating a desire to take a license which, according to the complaint, lulled plaintiff into deferring infringement action to its injury. It has now been determined, however, in this very litigation that plaintiff is not entitled to enforce its patents against defendant, and a final judgment has been entered under Rule 54(b) dismissing Counts I to IV. This fact must be recognized even though ordinarily the sufficiency of a complaint should be determined solely upon the basis of the pleaded facts. Since it has been adjudged that plaintiff cannot enforce its patents against defendant, it is clear that defendant's alleged deception constituted no actionable wrong. Unless plaintiff was legally entitled to enforce its patents against the defendant, defendant's alleged guile in inducing plaintiff to forebear action constituted no invasion of any right possessed by plaintiff. Furthermore, if Counts V and VI were held to state good causes of action without regard to the patent infringement charges as plaintiff contended at the argument,[7] then Counts V and VI would be dismissible because of lack of jurisdiction. On the stated hypothesis Counts V and VI would be so clearly unrelated to Counts I to IV that § 1338(b) would be of no jurisdictional help.

Plaintiff argues that Counts V and VI, if not alleging a good cause of action of unfair competition, nevertheless states a valid cause of action sounding in fraud, duplicity or bad faith. But the substantive infirmity of Counts V and VI is not cured by the manner in which they are characterized.

A final judgment will be entered under Rule 54(b) dismissing Counts V and VI of the complaint.

Motion To Amend The Complaint

The proposed amendment to the complaint withdraws charges of infringement of two patents and substitutes charges of infringement of two other patents. Otherwise the proposed amendment is substantially the same as the original complaint.

During the argument plaintiff conceded that if the patent misuse and the anti-trust decree violations are valid defenses to the infringement charges made in the original complaint, they would likewise be valid defenses to the infringement charges made in the proposed amendment.[8]

The unfair competition charge in the proposed amendment is substantially identical with that alleged in the original complaint. Since for the reasons previously stated in this opinion no valid unfair competition cause of action has been alleged in the original complaint, the proposed amendment, if permitted, would be similarly defective. Under these circumstances the Court is warranted, in the exercise of its discretion, in denying leave to file the amendment, *Stephens v. Reed,* 121 F. 2d 696, 699 (3d Cir. 1941). The motion to amend is therefore denied.

An order will be entered accordingly.

The Entry of Final Judgments Pursuant to Rule 54(b)

Acting under Rule 54(b) I have today entered a final judgment granting the motion of defendant for summary judgment addressed to Counts I to IV and dismissing those Counts. Acting under similar authority I propose to enter a final judgment dismissing Counts V and VI of the complaint for failure to state a cause of action. A word of explanation for my actions appears desirable.

The judgments referred to will completely dispose of the litigation except with respect to the following matters:

(a) A motion to dismiss the counterclaim is pending. The counterclaim seeks a declaratory judgment of invalidity, noninfringement and misuse of the patents sued on. The misuse issue was settled by the judgment dismissing Counts I to IV. This judgment likewise probably makes moot

[7] Transcript of argument, September 11, 1958, pp. 107-108.

[8] Transcript of argument on September 11, 1958, p. 122.

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the invalidity and non-infringement issues, but I am reluctant to dispose of the counterclaim without giving counsel an opportunity to be heard. In any event, if the issues of invalidity and non-infringement have not been rendered moot, they are so completely unrelated to the matters adjudged by the judgments as to make it undesirable to delay further giving the judgments finality status.

(b) Plaintiff has one or more motions for costs and attorneys fees incurred in connection with pre-trial discovery. The parties agree that it is desirable that these be decided at the end of the litigation.[9] These motions will involve limited considerations unrelated to the merits of the final judgments.

The final judgment which has been entered dismissing Counts I to IV reserves jurisdiction to the Court to pass on these two matters. The final judgment dismissing Counts V and VI will also do so.

Summary judgment dismissing Counts I to IV was sustained by opinion over a year ago. Plaintiff asserts its desire to obtain an early review of that decision. This is made possible by the final judgments. They will, in my opinion, expedite a final disposition of the litigation and, in the event of a reversal of either or both of the judgments, the issues for trial will have been constructively defined. The entry of the judgments, it is believed, is not inconsistent with the *caveat* in *Panichella v. Pennsylvania R. Co.*, 252 F. 2d 452 (3d Cir. 1958).

[¶ 69,276] Mohawk Refining Corporation and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, Individually and as Officers of Mohawk Refining Corporation v. Federal Trade Commission.

In the United States Court of Appeals for the Third Circuit. No. 12,606. Filed February 12, 1959.

On Petition for Review of an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresenting Character of Product—Failure to Make Material Disclosures—Disclosure of Motor Oil's Previous Use—Defenses—Quality of Product—Absence of Harm to Public.—A Federal Trade Commission order prohibiting an oil company from selling previously used motor oil without disclosing the fact of its previous use was affirmed. There was sufficient evidence upon which the Commission could find that dealers and the purchasing public were misled by a mistaken belief that the company's products were derived from crude or virgin oil rather than re-refined from crankcase drainings. Many jobbers and members of the purchasing public preferred to buy unused oil. The fact that the reclaimed oil was in no respect inferior to that refined from virgin oil was beside the point; substitution would be unfair even if equivalence were shown. The public is entitled to buy what it chooses. The court rejected the company's defense that there was no showing of a specific or substantial public interest because its products were identical in quality with all other finished motor oils and that no harm, therefore, could come to the public. The statute prohibiting unfair and deceptive practices would be emasculated if manufacturers could surreptitiously substitute their judgment for that of the purchaser as to the article to be purchased. Also, the offense was not lessened by being one of omission; one who deceives by telling less than the whole truth cannot excuse the deception by relying upon the truthfulness of the partial truth by which it has been accomplished.

See Unfair Practices, Vol. 2, ¶ 5081.552, 5105.61; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.13, 8611.65.

Federal Trade Commission Enforcement and Procedure—Procedure Against Unfair Practices—Expert Testimony—Relevancy of Evidence.—The Federal Trade Commission did not err in striking from the record evidence of expert witnesses who testified that it was not the practice of the oil industry to disclose to the trade or to the purchasing

[9] Transcript of argument, September 11, 1958, pp. 124-125.

public the sources of motor oils. That industry practice was immaterial to the Commission's charge that an oil company violated Section 5 of the Federal Trade Commission Act by failing to disclose that motor oil had been previously used. The record amply demonstrated that dealers and the purchasing public preferred not to dispense or buy motor oils re-refined from crankcase drainings; it was irrelevant that some dealers and some customers were not misled by the company's practices.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.27, 8611.71.

Federal Trade Commission Enforcement and Procedure—Procedure Against Unfair Practices—Variance Between Complaint and Proof.—A Federal Trade Commission complaint which charged an oil company with selling "reclaimed" oil was at variance with the proof since the evidence offered by the Commission's witnesses demonstrated that the company produced its lubricating oil by "re-refining." However, even if the proceedings before the Commission were conducted as strictly as a suit at law, that variance would be deemed too insubstantial to be material.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.93.

Federal Trade Commission Enforcement and Procedure—Procedure Against Unfair Practices—Discovery—Production of Documents—Undue Influence by Commission—Timeliness of Motion for Production.—The Federal Trade Commission did not commit error in denying an oil company's motion for the production of correspondence between the Commission's staff and witnesses. It was contended that witnesses who testified as to whether or not the public had a preference for motor oil refined from virgin oil, as distinguished from that re-refined from crankcase drainings, were unduly influenced by such correspondence. "Good cause" was not shown for production of the correspondence; the company's reference to the testimony of witnesses who received questionnaires from the Commission established no more than that the witnesses were made aware of reclaimed oil as distinguished from virgin oil. Moreover, the formal motion for production was not made until more than four months after the termination of the hearings. In view of the delay, it was not error for the Commission to deny the motion on the ground that the information sought was confidential and could only be released pursuant to Section 1.134(b) of the Commission's Rules.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.17, 8611.87.

For the petitioners: Seymour Friedman, Washington, D. C.

For the respondent: E. K. Elkins, Federal Trade Commission.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6588.

Before Biggs, Chief Judge, and Maris and McLaughlin, Circuit Judges.

Opinion of the Court

[*Labeling Motor Oil*]

By Biggs, Chief Judge [*In full text*]: The Federal Trade Commission charged that the petitioners, in violation of Section 5(a) of the Federal Trade Commission Act, 66 Stat. 632, 15 U. S. C. § 45(a)(1952), engaged in the business of "reclaiming used motor oil and in selling and distributing such lubricating oil, or a blend of such oil and new oil, in [interstate] commerce to jobbers and dealers for resale to the purchasing public"; that the petitioners' oil consisted "in whole or in substantial part of used motor oil, obtained from drainings of motor crankcases and from other sources, which has been reclaimed by subjecting the used oil to a treatment designed to remove the impurities therefrom"; that the petitioners' "[O]il . . . [was] sold in containers of the same general size, kind and appearance as those used for new oil, and has the appearance of new and unused oil"; that "The containers have no markings of any kind indicating that . . . [the] product is reclaimed used oil"; and that the petitioners' practices mislead the dealers who in turn mislead the purchasing public into believing erroneously that the petitioners' oil is "new oil".

[*Proof Offered*]

The proof offered before the Hearing Examiner demonstrates that the petitioners do not engage in the business of "reclaim-

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ing" used motor oil except as a necessary preliminary to their re-refining process, and that the petitioners' finished product results from a series of processes which may be defined as re-refining crankcase drainings of previously used lubricating oils to produce a finished motor lubricating oil though sometimes the oil re-refined is blended with "crude" oil not used prior to its use by the petitioners and sometimes called virgin oil.[1] It appears also that the petitioners' lubricating oil is sold by them in interstate commerce under various brand names in containers which do not disclose that the oil is re-refined from used oil and that many purchasers have been deceived or misled into buying the petitioners' oil thinking it to be oil refined from crude oil, virgin oil, not oil previously used in motor crankcases; that during each of the years 1954 and 1955 the petitioners sold approximately two million gallons of oil, from which they realized about $500,000; and that of this total between 75% and 90% represented oil produced by the petitioners by their re-refining processes as distinguished from crude oil purchased by them for blending purposes; and that the sales of the petitioners in interstate commerce were substantial and in competition with individuals, firms and corporations engaged in the production and sale of lubricating oil.

The record also shows that the Society of Automotive Engineers' viscosity rating of the petitioners' oils was up to the standards required by the trade, and no charge or implication was or is made that their oil was lacking in lubricating qualities, in efficiency, or in adaptability for the purpose for which it is sold, or was in any respect inferior to lubricating oil refined from crude oil, virgin oil. The proof shows also that many jobbers and members of the purchasing public prefer to buy oil refined from crude oil, virgin oil, as opposed to oil such as the petitioners' which has been re-refined from oil previously used, and that the public buys motor oil largely on the basis of price, believing that higher priced oils will give better service in a motor vehicle.

[*FTC Order*]

The Commission entered an order requiring the petitioners forthwith to cease and desist "from representing . . . that their lubricating oil is refined or processed from other than previously used oil" and from advertising, offering for sale or selling oil which has been "reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising, in sales promotion material, and by a clear and conspicuous statement to that effect on the container." The petition to review followed.

[*Alleged Errors*]

The petitioners attack the opinion and the final order of the Commission as arbitrary and capricious and contend that each lacks substantial supporting evidence. They assert also that the Commission erred as a matter of law in holding that the failure to disclose the source or origin of the petitioners' finished product was a violation of Section 5 of the Federal Trade Commission Act. The petitioners contend as well that the Commission committed prejudicial error in excluding from the record the testimony of certain witnesses and exhibits offered by them and in refusing to permit them to examine certain Commission records and correspondence on which, it is alleged, the Commission wrongfully relied.

[*Purchasers Misled*]

It will be observed that there was a variance between the charge set out in the complaint and the proof in that the Commission charged the petitioners with selling "reclaimed" oil, as distinguished from "re-refined" oil. Even were the proceedings before the Commission conducted as strictly as a suit at law this variance would be deemed too insubstantial to be material. The evidence offered by the Commission's witnesses demonstrated that the petitioners produce their lubricating oil by re-refining and that the factor of reclamation was a minor one. The evidence shows also that without notification to the trade and to the customer that the petitioners' oil was not manufactured from crude oil, virgin oil, many persons in the trade and individual customers thought that the petitioners' product was manufactured from crude oil. The record proves further that such persons

[1] Both witnesses and counsel, the Hearing Examiner and the Commission, on occasion have used the term "new oil" to refer to lubricating motor oil refined from virgin oil, crude oil and have employed the term "used oil" to refer to lubricating motor oil re-refined from used crankcase oil.

preferred to distribute and sell and to buy lubricating oil manufactured from crude oil or virgin oil, and not oil re-refined from crankcase oil, and thought that they were doing so. Accordingly, there was sufficient evidence upon which the Commission could find that dealers and the purchasing public were misled by a mistaken belief that petitioners' products were derived from crude oil.

[*Quality of Substituted Product Immaterial*]

It is true, as the petitioners point out and as the Commission found, that the petitioners' oil is as satisfactory for lubricating purposes as lubricating oil produced from crude oil or virgin oil, but this is beside the point. As was said by the Supreme Court through Mr. Justice Cardozo in *Federal Trade Commission v. Algoma Lumber Co.* [1932-1939 TRADE CASES ¶ 55,041], 291 U. S. 67, 77-78 (1934): "We have yet to make it plain that the substitution would been unfair though equivalence were shown. . . . The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. . . . Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightfully named, are diverted to others whose methods are less scrupulous." Moreover, it does not serve to palliate the petitioners' offense by the fact that their sin was one of omission in failing to label the containers or make known to the purchasers that their oil was not produced from crude oil. Chief Judge Parker put this succinctly in *P. Lorillard Co. v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,747], 186 F. 2d 52, 58 (4 Cir. 1950), when he said: "To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness *per se* of the partial truth by which it has been accomplished."

[*Public Interest*]

The petitioners assert as a defense that there was no showing here of a specific and substantial public interest because their products are identical with all other finished motor oils as to composition, quality and utility and hence no harm can come to the purchasers or to the public generally. But as has been indicated the public is entitled to buy what it chooses. A manufacturer may not surreptitiously substitute his judgment for that of the purchaser as to the article to be purchased, even if the manufacturer's judgment is equal or even superior to that of the dealer or the customer. If this were not so, the substituted judgment of the manufacturer would always prevail over the will of the dealer or customer and the provision of the statute prohibiting unfair and deceptive practices would be emasculated. The public has the right to purchase motor oil manufactured from crude oil, if it desires to do so, and that desire may not be balked by a failure to disclose pertinent facts.

[*Industry Practice*]

For the reasons stated the Commission did not err in striking from the record evidence of two expert witnesses of the petitioners who testified that it was not the industry practice to disclose to the trade or to the purchasing public the sources of motor oils and that these are bought and sold on the basis of grades established by the Society of Automotive Engineers and service classifications made by the American Petroleum Institute. These facts are immaterial to the issue raised by the Commission or on the instant appeal. The fact that some dealers and some customers were not misled by the petitioners' practices, even if such persons were in large numbers, is irrelevant. As we have said the record amply demonstrates a desire on the part of the dealers and purchasing public not to dispense or buy motor oils re-refined from crankcase drainings. Cf. *Federal Trade Com'n v. Winsted Co.*, 258 U. S. 483 (1922) and *Independent Directory Corp. v. Federal Trade Com'n*, [1950-1951 TRADE CASES ¶ 62,817], 188 F. 2d 468, 471 (2 Cir. 1951).

[*Undue Influence*]

The petitioners also contend that the Commission committed error by withholding from them and from the record in the instant case correspondence between the Commission's staff and witnesses who appeared on behalf of the Commission. They assert that by such correspondence witnesses testifying on behalf of the Commission on the factual issue as to whether or not the public had a preference for motor oils refined from crude oil, virgin oil, as

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distinguished from motor oils re-refined from crankcase drainings, might have been and were unduly influenced. The petitioners assert also that, being deprived of this correspondence they were limited in their cross-examination.

The hearings before the Hearing Examiner began on September 20 and were concluded on December 11, 1956, being held on six different days. The fourth day of hearing was November 20. It then appeared, apparently for the first time, that witnesses appearing on behalf of the Commission had received the letters referred to. On that day petitioners' counsel moved orally that the Hearing Examiner require the Commissioner to produce all the correspondence.[2] The Hearing Examiner stated that though he felt that the correspondence should be produced that he could not require the Commission to produce it. It was not until April 26, 1957 that the petitioners filed a motion with the Hearing Examiner that the correspondence should be produced and incorporated in the record. The matter was referred to the Commission. The Commission, by an administrative order dated May 10, 1957, denied the motion, stating that the information sought was confidential and the correspondence could be released only pursuant to the provisions of the Commission's Rules, Section 1.134(b).[3]

[*"Good Cause"*]

We cannot say that "good cause" was shown as to why the correspondence should have been produced. Petitioners' assertion that there was actual influence exerted by the Commission through the correspondence is not supported by the record. Petitioners' reference to testimony of witnesses who had received questionnaires establishes no more than that the witnesses were made aware through the questionnaires of re-refined, reprocessed, or reclaimed oil as distinguished from crude, virgin, oil.

[*Delay*]

Moreover, the formal motion for production and incorporation in the record was not made to the Hearing Examiner until more than four months after the termination of the hearings and nearly one month after the petitioners had submitted proposed findings of fact and conclusions of law to the Trial Examiner. The validity of the Commission's Rules of Practice is not questioned by petitioners and in view of the delay it was not error for the Commission, relying upon Section 1.134(b), to deny the motion. Cf. *NLRB v. General Armature & Mfg. Co.*, 192 F. 2d 316 (3 Cir. 1951); *NLRB v. Adhesive Products Corp.*, 258 F. 2d 403, 406 (2 Cir. 1958).

[*Order Affirmed*]

We can perceive no error in the Commission's decision. Consequently, it will be affirmed. An appropriate judgment will be entered in this court requiring the petitioners to comply with the order of the Commission.

[¶ 69,277] United Banana Company, Inc., et al. v. United Fruit Company, et al.

In the United States District Court for the District of Connecticut. Civil No. 7141. Filed February 10, 1959. Amended and supplemented, February 19, 1959 (1959 TRADE CASES ¶ 69,299).

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Federal Statute of Limitations—Claims Barred Under State Law Prior to Federal Statute's Effective Date. —A treble damage action brought on March 4, 1958, was governed by the Federal four-

[2] One letter, dated October 11, 1956, from the Federal Trade Commission to Topline Store was produced by trial counsel for the Commission from his file and was introduced as respondents' (here petitioners') exhibit No. 1. It is in the form of a questionnaire and dealt in substance with the issue of whether or not the motor oil was invoiced to Topline as re-refined oil and whether it was represented by Topline to its customers as re-refined oil and similar questions, with Topline's answers thereto.

[3] 16 C. F. R. § 1.134 (Supp. 1958) states: "§ 1.134 *Release of confidential information.* (a) Upon good cause shown, the Commission may by order direct that certain records, files, papers, or information be disclosed to a particular applicant.

"(b) Application by a member of the public for such disclosure shall be in writing, under oath, setting forth the interest of the applicant in the subject matter; a description of the specific information, files, documents, or other material inspection of which is requested; whether copies are desired; and the purpose for which the information or material, or copies, will be used if the application is granted. Upon receipt of such an application the Commission will take action thereon, having due regard to statutory restrictions, its rules, and the public interest."

year statute of limitations. Application of that statute limited banana distributors' claims against an importer and its subsidiary to those claims which arose after March 4, 1954. However, the Federal statute contains a provision that it is not to be construed to revive rights which had expired under state law prior to its effective date, January 7, 1956. It was accordingly asserted that all claims accruing more than one year before that date were barred under a Connecticut one-year statute of limitations, which was applicable to suits for forfeitures on penal statutes, and that, therefore, January 7, 1955, was the cut-off date. However, Connecticut courts would not hold the instant action for treble damages to be one for a forfeiture; therefore, the applicable state statute was a three-year statute, which was applicable to torts. That did not, however, entitle the distributors to go back beyond March 4, 1954. It only meant that rights of action between that date and January 7, 1955, had not been lost on January 7, 1956. The proviso of the Federal statute that no dead rights should be revived did not mean that all rights then existing were to remain preserved forever.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100.

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Statute of Limitations—Tolling of Limitation Period During Pendency of Government Action.—Connecticut banana distributors seeking treble damages against a banana importer for alleged Sherman Act violations were held to have a recovery period of more than seven years. The running of the Federal four-year statute of limitations was tolled, under Section 5(b) of the Clayton Act, for more than three years by the pendency of a Government action against the importer. The instant action was brought within one year after the termination of the Government action and was "based in whole or in part" on the matters complained of in the Government action. The Government's allegations of a combination and conspiracy were paralleled by specific allegations in the distributors' complaint; the acts, conspiracies, and purposes were the same in both actions. However, the distributors were limited to a four-year recovery period as to alleged violations of the Robinson-Patman Price Discrimination Act. No references were made in the Government's action to any violations of that statute; therefore, the limitation period, as to those charges, was not tolled by the Government action. Also, the distributors were limited to a four-year recovery period as to all of their charges against a subsidiary of the importer. The four-year statute of limitations was not tolled by the pendency of the Government action as to the subsidiary since it was not a party to the prior Government action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275.

Monopolies—Monopolization—Monopoly "Thrust" Upon Defendant—Justification.—Banana distributors which charged a banana importer and its subsidiary with monopolization of the banana trade were denied a motion to strike the defense that the importer's position was "thrust" upon it by reason of its superior skill, natural advantages, and efficiency. The distributors contended that the defense was good only if the monopoly position were achieved solely as a result of those facts alleged in the defense. The importer and its subsidiary were entitled to explain and justify their position, and the issue of justification was raised by the pleadings as they stood.

See Monopolies, Vol. 1, ¶ 2510.300.

For the plaintiff: Robert E. Nickerson and Ernest Leff, Greenwich, Conn.

For the defendant: Frank E. Callahan of Wiggin & Dana, New Haven, Conn.

Memorandum of Decision

[*Statute of Limitations*]

ANDERSON, District Judge [*In full text*]: This is a suit by several Connecticut banana distributors against the United Fruit Company (hereinafter called United Fruit) and its subsidiary, the Fruit Dispatch Company (hereinafter called Fruit Dispatch). Count 1 of the complaint alleges violations of the Sherman Act, and Counts 2 and 3 allege violations of the Robinson-Patman Act. The answer sets up, *inter alia,* the defenses of the Federal four year statute of limitations and the Connecticut one year statute of limitations with the Connecticut three year statute of limitations in the alternative. The defendants also especially plead in their answer a justification of their economic position by attributing it to their superior skill

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and to the operation of natural forces. The plaintiffs have moved to strike the defenses of the statutes of limitations as to the defendant United Fruit on the ground that they were tolled during the pendency of a criminal anti-trust action brought against United Fruit in a United States District Court in Louisiana, and to strike the justification for so-called "thrust upon" defense because that defense does not expressly allege that the defendants acquired their economic position *solely* by virtue of matters beyond their control. The plaintiffs have also moved for the production of certain documents.

[*Applicable Statute*]

Prior to the passage of Section 4B of the Clayton Act, 15 U. S. C. Section 15b, there was no federal statute of limitations governing civil anti-trust suits, and state statutes were applied by the federal courts. Section 4B became effective on January 7, 1956, and this suit, brought March 4, 1958, is governed by its provisions. *LaRouche v. United Shoe Machinery Corp.*, 166 F. Supp. 633 (D. Mass. 1958); *Goodfriend v. Kansas City Star Co.* [1958 Trade Cases ¶ 69,023], 158 F. Supp. 531 (W. D. Mo. 1958); *Cardinal Films Inc. v. Republic Pictures Corp.* [1957 Trade Cases ¶ 68,584], 148 F. Supp. 156 (S. D. N. Y. 1957). Therefore, the application of the federal statute limits claims against these defendants to those claims arising after March 4, 1954. However, Section 4B contains a provision that it is not to be construed to revive rights which had expired under state law prior to the effective date of its passage, and the defendants accordingly assert that all claims accruing before January 7, 1955, (i. e. one year before the effective date of the federal statute), should be barred. It is, of course true that if prior to January 7, 1956, the effective date of the federal statute, the Connecticut one year limitation applicable to suits for forfeitures on a penal statute applied to an anti-trust suit, January 7, 1955 would be the cut-off date. The plaintiffs, on the other hand, assert that it is not this one year statute but the Connecticut three year tort statute which applied. These sections of the 1949 Revision of the Connecticut General Statutes provide:

"Section 8325. *Suit for forfeiture on penal statute limited to one year.* No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."

"Section 8316. *Action founded upon a tort.* No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[*Construction of State Statutes*]

The applicability of state limitations on penalty suits to anti-trust litigation has caused a great deal of difficulty to courts in the past. See Report of the Attorney General's National Committee to Study the Anti-Trust Laws, March 31, 1955, p. 381, n. 71; Note, 60 Yale L. J. 553 (1951). Prior to the enactment of Section 4B, limitation was, as above stated, a matter of local law. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390 (1906); *Gordon v. Loew's, Inc.* [1957 Trade Cases ¶ 68,820], 247 F. 2d 451 (3rd Cir. 1957); *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.* [1950-1951 Trade Cases ¶ 62,925], 191 F. 2d 912 (7th Cir. 1951). And for the purpose of determining what causes of action had expired under state limitations statutes on the effective date of the federal limitation law, i.e., January 7, 1956, the federal courts must direct their inquiry to state statutes, and to local interpretations of those statutes. *Bauserman v. Blunt*, 147 U. S. 647 (1893); *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63 (1896); *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., supra; Greene v. Lam Amusement Co.* [1956 Trade Cases ¶ 68,309], 145 F. Supp. 346 (N. D. Ga. 1956).

Connecticut courts have construed Section 8325 on numerous occasions. The leading case, *Plumb v. Griffin*, 74 Conn. 132 (1901), was an action to recover treble damages from a defendant who had cut timber on the plaintiff's land. Holding that the action was not governed by the one year statute, the court said at page 134-135:

"The present suit is not barred by [the one-year limitation] unless Sec. 1345, on which it is brought, is a penal statute: one that declares a forfeiture, and one that deals with an offense. Moreover it must be a forfeiture and an offense in the sense in which these terms are used in a penal statute.

"A brief examination shows that Sec. 1345 is not a penal statute, within the meaning of Sec. [8325]. Penal statutes, strictly and properly, are those imposing punishment for an offense against the State; and the expression 'penal statutes', does not ordinarily include statutes which

> give a private action against a wrong-doer. Bouvier's Law. Dict. The words 'penal' and 'penalty' in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws. . . . [*A*] *statute which gives no more than a right of action to the party injured to recover increased damages, is not a penalty statute.*" (Italics added.)

An action to recover double damages for forgery was early held to be not governed by the one year statute. *Ross v. Bruce,* 1 Day 100 (Conn. 1803). And most recently a suit for double damages for violation of the Fair Labor Standards Act was held not limited by Section 8325. *Hitchcock v. Union & New Haven Trust Co.,* 134 Conn. 246 (1947). In the *Hitchcock* case, it is true, the court said it did not have to consider whether a "penalty" was involved, because it was bound by a United States Supreme Court determination that such recoveries were "liquidated damages". 134 Conn. at 257. But in the *Chattanooga Foundry* case, the United States Supreme Court held that an anti-trust treble damage claim was not a "penalty" within the meaning of a federal statute placing a five-year limitation on suits for penalties and forfeitures. 203 U. S. 390, 398 (1906).

[*Cases Distinguished*]

The cases cited by the defendants are not persuasive. The only decisions holding an action to be for a forfeiture within the meaning of Sec. 8325 are *Borough of Wallingford v. Hall,* 64 Conn. 426, (1894), *Atwood v. Lockwood,* 76 Conn. 555 (1904), and *Wells v. Cooper,* 57 Conn. 52 (1888). The *Wallingford* case involved a forfeiture of $25 to the Borough itself; *Atwood* concerned a forfeiture of $20 to anyone who sued a delinquent administrator; and *Wells* dealt with a forfeiture of $5 to anyone who sued a non-filing mortgagee. In none of these cases was there any relation between any actual damages and the amount recovered. Indeed, in two of them, anyone who sued might have recovered. This has long been considered a key distinction between penal and remedial statutes. See *Sullivan v. Associated Billposters and Distributors,* 6 F. 2d 1000, 1009; 42 A. L. R. 503, 515-516 (2nd Cir. 1925).

[*Action Not One for Forfeiture*]

It must, therefore, be concluded that Connecticut courts would not hold this action to be one for a forfeiture within the meaning of Sec. 8325. Discussions of the meaning of the word "penalty" in decisions not involving the statute of limitations have been cited by both the plaintiffs and the defendants, but they are only peripherally relevant. Compare *Swanson v. Boschen,* 143 Conn. 159 (1956); *Cristilly v. Warner,* 87 Conn. 461, 468-469 (1913) with *Hallenbeck v. Getz,* 63 Conn. 385 (1893) and *Porpora v. New Haven,* 122 Conn. 80, 96 (1936).

[*Federal Law*]

It is argued that the characterization of an action of this kind as penal or compensatory should be determined by reference to federal, rather than state law. A few courts adopting this theory have concluded that an anti-trust action is penal under federal authorities: see e.g., *Banana Distributors, Inc. v. United Fruit Co.* [1957 Trade Cases ¶ 68,881], 158 F. Supp. 160 (S. D. N. Y. 1957). But the majority of courts interpreting federal law have for the purpose of avoiding a short statute of limitations, found the cause of action to be compensatory. See *Fulton v. Loew's Inc.* [1953 Trade Cases ¶ 67,571], 114 F. Supp. 676 (D. Kan. 1953); *Electric Theater Co. v. Twentieth Century-Fox Film Corp.* [1953 Trade Cases ¶ 67,560], 113 F. Supp. 937 (W. D. Mo. 1953); *Wolf Sales Co. v. Rudolph Wurlitzer Co.* [1952 Trade Cases ¶ 67,321], 105 F. Supp. 506 (D. Colo. 1952); *Christensen v. Paramount Pictures* [1950-1951 Trade Cases ¶ 62,751], 95 F. Supp. 446 (D. Utah 1950). It is the conclusion of this court, however, as above stated, that for this purpose reference must be made to state law and that the applicable Connecticut statute is the three year, rather than the one year limitation.

Still, this finding does not entitle the plaintiffs to go back beyond March 4, 1954, it means only that the rights of action between that date and January 7, 1955 had not been lost on January 7, 1956, the effective date of the federal statute. Section 4B's proviso that no dead rights should be revived does not mean that all rights then existing were to remain preserved forever.

And since the federal statute rather than the Connecticut statute applies, the possible absence of the defendants from Connecticut for purposes of tolling the Connecticut statutes under Conn. Gen. Stat. Section 8330 (Rev. Ed. 1949) is not an issue in this case except as hereinafter noted [1959 Trade Cases ¶ 69,299]. Cf. *Banana Distributors Inc. v. United Fruit Co., supra.*

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[*Tolling of Statute*]

The plaintiffs have acknowledged that all claims against the defendant Fruit Dispatch are barred as of March 4, 1954 because Fruit Dispatch was not a party to the Government suit referred to below. *Schreiber v. Loew's, Inc.* [1957 Trade Cases ¶ 68,595], 147 F. Supp. 319, 323 (W. D. Mich. 1957); *Sun Theatre Corp. v. RKO Radio Pictures, Inc.* [1954 Trade Cases ¶ 67,722], 213 F. 2d 284 (7th Cir. 1954). However, as to the defendant United Fruit, the plaintiffs assert that all claims are open until July 3, 1950. They arrive at this date by virtue of Section 5B of the Clayton Act, 15 U. S. C. Section 16b, which provides:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the anti-trust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . ."

[*Government Action*]

The United States brought an anti-trust action against United Fruit in the District of Louisiana on July 2, 1954. This action was not terminated until February 4, 1958 at the earliest, and since the plaintiffs brought this suit within one year of that date, the federal statute of limitations as to United Fruit would be suspended during the pendency of the Government action. But such suspension only applies to the rights of action asserted here which are "based in whole or in part on any matter complained of" in the Government proceeding.

[*"Same Acts"*]

Section 16(b) has been strictly construed by the courts to limit the tolling effect of the Government action to situations where the United States and the private plaintiff complain of virtually identical acts. See *Steiner v. 20th Century-Fox Film Corp.* [1956 Trade Cases ¶ 68,304], 232 F. 2d 190 (9th Cir. 1956). In conspiracy cases, the test approved by the 9th Circuit Court of Appeals was: "The matters complained of in the private proceeding must be the same acts to achieve the same conspiracy complained of in the action brought by the United States." 232 F. 2d at 196.

The defendants claim that the acts or conspiracies alleged by the plaintiffs are different from those complained of in the Government action. "Of course, the test of the validity of [this] position is a comparison of the two suits." *Christensen v. Paramount Pictures* [1950-1951 Trade Cases ¶ 62,751], 95 F. Supp. 446, 451 (D. Utah 1951).

[*Comparison With Government Action*]

This comparison, made on the basis of the amended complaint, statement of issues of fact, and consent decree in the Government suit, juxtaposed against the complaint in the present action, leaves no doubt that the first count of the present action is based in whole or in part on matters complained of in the former suit. The statement of issues of fact sets forth United Fruit's monopolization of banana supply and distribution, its power to set prices and exclude others from the market, and its interference with banana jobber associations. The amended complaint alleges with considerable particularity the combination and conspiracy to monopolize trade in violation of Sections 1 and 2 of the Sherman Act. Such allegations are paralleled by specific allegations in the instant complaint. For an example directly on point Paragraph 54F alleged that "By withdrawing sources of supply, selling bananas as a jobber to retailers at unreasonably low prices, and by other means, [United] forced some banana jobbers in the New England area out of business and restricted the growth and operations of remaining jobbers in that area."

[*Statute Tolled*]

The four year federal statute is, therefore, tolled as to the allegations of the first count against United Fruit and the plaintiffs may go back to July 3, 1950 with respect to this part of the action.

If the plaintiffs can prove that the price overcharges, service charge discriminations and price discriminations were engendered by economic position illegally achieved, such acts will provide the basis for recovery of damages.

[*Amended Complaint*]

It is argued that the cut off date under the first count cannot be extended back to 1950 because while the Government action was brought on July 2, 1954, the Govern-

ment's amended complaint, carrying the specific references to the New England area set out above, was not filed until January 12, 1956. To support this proposition, the defendants cite *Momand v. Universal Film Exchanges, Inc.* [1948-1949 TRADE CASES ¶ 62,360], 172 F. 2d 37, 49 (1st Cir. 1948), where the plaintiff's amended complaint of 1934 was not allowed to relate back to 1931, when his action was brought. That case is clearly distinguishable, since the plaintiff in *Momand* did not possess his causes of action until 1933 when they were assigned to him. The present problem concerns an amended, rather than a supplemental complaint. Since the matters stated in the amendment merely clarify and particularize the original complaint, the amendment relates back to the date when the original pleading was filed. F. R. C. P. 15(c). cf. *Christensen v. Paramount Pictures, supra.*

[*Relationship of Parties*]

The defendants also contend that different acts or conspiracies must be involved in Count 1 than in the Government complaint, because the claims in the Government action related to customers of United Fruit. The defendants say the plaintiffs do not claim to be customers of United Fruit under the first count. But there can be no doubt that the plaintiffs are jobbers within the meaning of that term in Paragraph 54F, quoted above, and I am convinced, on reading of the Government complaint against Count 1 of the plaintiffs' complaint, that the essence of the acts, conspiracies and purposes is the same in both.

[*Robinson-Patman Act Allegations*]

On the other hand, Counts 2 and 3 of the instant complaint are not based in whole or in part on matters complained of in the Government action. No reference was made by the Government to Robinson-Patman Act violations.

While Paragraph 54F did charge United Fruit with interfering with jobbers "by other means" this is too vague an allegation to support tolling of the statute of limitations as to Robinson-Patman claims, when the Government suit was conceived and brought under Sections 1 and 2 of the Sherman Act. The cut off date under the 2nd and 3rd counts as to both defendants is, therefore, March 4, 1954.

Motion to Strike Thrust Upon Defense

In Paragraph 32 of the answer the defendants allege:

> "32. The matters complained of in the First Count of the complaint as being monopolization of the banana trade were necessary and proper consequences of the superior skill of the defendants, the superiority of their products, natural advantages, their economic and technological efficiency, scientific research, and other manifestations of diligence and industry on the part of the defendants, and were necessitated and justified by the nature of the banana business, and by conditions of the industry resulting from forces beyond defendants' control."

The plaintiffs moved to strike this defense as insufficient as a matter of law. The theory behind the motion is that the defense is good only if the defendants achieved their monopoly position *solely* as a result of the facts alleged in the defense. The plaintiffs assert that the defendants cannot, in good conscience, amend their answer to comply with that requirement.

The plaintiffs' motion is grounded on a statement by Judge Wyzanski in *United States v. United Shoe Machinery Corp.* [1953 TRADE CASES ¶ 67,436], 110 F. Supp. 295 (D. Mass. 1953) aff'd *per curiam* [1954 TRADE CASES ¶ 67,755], 347 U. S. 521 (1954). At page 342 Judge Wyzanski wrote:

> ". . . the defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages . . ."

Such a statement is not authority for requiring the defendants to plead as the plaintiffs suggest.

Existing case law clearly allows the defendants to explain and justify their position. See *United States v. Aluminum Co. of America* [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416 (2nd Cir. 1945); *United States v. E. I. duPont de Nemours & Co.* [1953 TRADE CASES ¶ 67,633], 118 F. Supp. 41 (D. Del. 1953); aff'd [1956 TRADE CASES ¶ 68,369], 351 U. S. 377 (1956). The issue is clearly raised by the pleading as it stands.

[*Judgment*]

The plaintiffs' motion to strike the defense of justification in Paragraph 32 of the answer is, therefore, denied.

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The plaintiffs may go back to July 3, 1950 with respect to the matters alleged in the First Count against United Fruit.

The plaintiffs may go back to March 4, 1954 with respect to the matters alleged in the First Count against Fruit Dispatch, and in the Second and Third Counts against both United Fruit and Fruit Dispatch.

[*Discovery Allowed*]

To conform with the rulings above, the order of this court dated September 17, 1958 is hereby amended to allow discovery, disclosure and production of documents back to July 3, 1950 as to United Fruit.

[¶ 69,278] Charles D. Bender v. The Hearst Corporation.

In the United States Court of Appeals for the Second Circuit. No. 20—October Term, 1958. Docket No. 25016. Argued December 10, 1958. Decided February 11, 1959.

Cross appeals from a judgment of the District Court for the District of Connecticut, Robert P. Anderson, J., sitting without a jury, dismissing plaintiff's claims for treble damages under the antitrust laws for insufficiency of proof, and awarding plaintiff $87,500 damages under the law of Wisconsin for loss of future profits caused by defendant's tortious inducement to plaintiff's supplier to terminate and thereby breach an exclusive distributorship agreement with plaintiff. Affirmed.

Sherman Antitrust Act

Combinations and Conspiracies—Practices—Acquisition of Assets of Competitor—Termination of Exclusive Distributorship—Legality Under Sherman Act, Section 1—Relevant Market.—A trial court's ruling that a publisher of an automobile repair cost manual did not unreasonably restrain trade in violation of Section 1 of the Sherman Act by acquiring all of the assets of a competitor was affirmed. A distributor of the competitor who lost his franchise as a result of the transaction appealed on the ground that the trial court incorrectly defined the relevant market to encompass the entire area of the manual's circulation rather than the more restricted area of the distributor's own exclusive sales territory. Approximately one-half of the total sales of the manual were made outside his territory. Buyers purchased in a national market, and there was neither allegation nor proof that they could not purchase outside their own area. Purchasers often had more than one manual in their library, and the ones chosen did not depend upon the geographical location of the seller. There was nothing to indicate that the only area of genuine competition, or even that the primary area of competition, was within the distributor's sales territory. The fact that he had competed with salesmen of the acquiring publisher did not make his sales territory a relevant market area; he was not a publisher but merely one of many conduits from a publisher to the consuming public. There was no proof whatever of an unreasonable restraint of a separate competitive enterprise of distribution in his territory.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.600, 2005.785; Monopolies, Vol. 1, ¶ 2510.500, 2515.40, 2520.30, 2610.120, 2610.720.

Clayton Antitrust Act

Private Enforcement and Procedure—Acquisition of Competitor's Assets Under Section 7 of Clayton Act—Necessary Averments to State Cause of Action—Injury to Plaintiff.—A publisher of an automobile repair cost manual which bought the assets of an individual competitor who also owned a sales corporation was not liable in damages for the termination of a distributorship agreement between the competitor and one of its distributors where the distributor claimed the acquisition of corporate assets as the cause of his injury. The sales corporation had been formed by the individual owner to act as his sales agent. The sales territory transferred to the corporation, however, did not include the distributor's exclusive sales territory. Therefore, even assuming a prohibited transfer of corporate assets to the publisher from the sales corporation, the termination of the distributor-

ship could not have resulted from any act of the corporation. Consequently, the distributor failed to allege or prove that he sustained any private injury as a result of the transfer of corporate assets.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4205, 4207; Private Enforcement and Procedure, Vol. 2, ¶ 9009.

For the plaintiff: Lewis E. Caplan, New Haven, Conn. (Dennis N. Garvey, Richard A. Dice, John W. Colleran and Caplan & Garvey, on the brief).

For the defendant: Lawrence V. Brock, New York, N. Y. (McCauley, Henry & Brennan, on the brief).

Affirming a judgment of the U. S. District Court, District of Connecticut, 1957 Trade Cases ¶ 68,750.

Before: CLARK, Chief Judge, HINCKS and LUMBARD, Circuit Judges.

[*Breach of Contract*]

LUMBARD, Circuit Judge [*In full text except for omissions indicated by asterisks*]: These are cross appeals from a judgment of the District Court for the District of Connecticut, Anderson, J., (1) awarding plaintiff $87,500 on his claim advanced in counts 1 and 2 of the complaint that the defendant tortiously induced one Reidl to commit a breach of an exclusive distributorship contract with plaintiff, and (2) awarding judgment to defendant on plaintiff's claim for treble damages under the antitrust laws for alleged violations growing out of the same transaction. The primary question presented on the defendant's appeal is whether and to what extent a distributor under the law of Wisconsin may recover damages from a third party who buys out his supplier with knowledge of a resulting breach of the exclusive distributorship agreement. There are subsidiary questions of the validity of the distributorship contract under the governing substantive law of Wisconsin. We hold that the facts as found by Judge Anderson, in his excellent opinion below, are supported by the record, and that under the law of Wisconsin the defendant's acts constituted an underprivileged invasion of the plaintiff's interest in the protection of his contract.

[*Restraint of Trade*]

The third and fourth counts of the complaint alleged claims for treble damages under § 4 of the Clayton Act based separately on §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act. The primary question presented by the plaintiff's appeal on the Sherman Act claims is whether the district court correctly defined the relevant market to determine the existence of an unreasonable restraint of commerce. We hold that the market was correctly defined and that the record supports the findings upon which Judge Anderson rested the conclusion that there was no unreasonable restraint. We do not reach the issues presented by the defendant's contention on the claim under § 7 of the Clayton Act that Crash Book Sales, Inc., the transferor of assets to the defendant Hearst Publishing Co., was not a corporation within the meaning of that statute, because we find that the plaintiff has failed to show that private injury resulted from the merger even if it was unlawful.

I—*The Facts*

[*Exclusive Distributorship*]

The facts stated in the opinion below are amply supported by the record. We repeat here only so much as is necessary to our disposition. Until 1953 the plaintiff, Bender, was an automobile damage appraiser. In December of that year he became a part-time distributor of a loose-leaf reporting service known as Crash Book Service which provided insurance companies, damage appraisers and automobile repair shops with data on the current costs of automobile repairs conveniently displayed in loose-leaf form. The copyright covering the book was held by one Reidl, who traded under the name Crash Book Service. In October 1954 the plaintiff was persuaded by Reidl to give up all other employment and enter an agreement to act as a full-time exclusive distributor of Crash Book Service in an area of the United States generally comprised of the New England and Middle Atlantic States. By October 10, 1956 when this agreement was terminated by the acts of Reidl and the defendant, plaintiff em-

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ployed three full-time and twenty part-time assistants in the distribution of Crash Book Service.

The distributorship agreement was partly established by letters and partly by oral conversations. It was primarily drafted by Reidl, who, by a letter in September 1955 attempted to integrate it. It included representations by Reidl that by plowing back into the distributorship the commissions on initial sales the plaintiff would profit, in the manner of insurance salesmen, from renewal commissions after a base of initial sales had been established in the first few years. The plaintiff acted upon these representations so that by September 30, 1956, after two years of full-time work, he had sustained a cash loss of a few hundred dollars, but had accounted for more than 3,000 sales, about one half of all sales of Crash Book Service. The agreement also provided prices to the distributor and for resale and certain wholesale discounts. Under it the plaintiff secured a commission of $10 on most initial sales and $5 on renewals, with smaller amounts on bulk sales.

The plaintiff's territory was defined, and it was provided that the agreement would continue in force so long as the distributor remained active in the territory, with activity measured by the maintenance of a reasonable number of subscribers. On the distributor's wrongful conduct all of Reidl's obligations under the contract were to cease, but if the distributor withdrew voluntarily and without wrongful behavior provision was made for him to receive the benefits of the contract for one year. If the distributor died payments were to be made to his family for two years. There was no express provision for the withdrawal of Reidl.

[*Competitors*]

Crash Book Service competed with four previously established publications, three of which were distributed nationally and the fourth primarily in the western states. One of the national publications was defendant's Motors Body Shop Flat Rate and Parts Manual (Motors Manual). Because of certain novel advantages of the display of information provided by Crash Book Service, and because of its monthly supplementation, it proved to be highly saleable. By October 1, 1956 the national circulation of Crash Book Service, the sole publication offered by Reidl, was approximately 7,000 as against 58,000, 10,000, 10,000 and 7,500 for its competitors, which were sold as part of lines consisting of a number of publications of use to the automotive trade.

In March of 1956 Reidl, from motives not here material, formed a corporation under the laws of Wisconsin known as Crash Book Sales, Inc., to act as sole sales agent for Crash Book Service. However, the corporation's agency did not overlap the plaintiff's, and he continued to act as Reidl's sole distributor in his exclusive territory.

[*Acquisition By Competitor*]

In March 1956 the defendant Hearst determined that its publication, Motors Manual, was no longer adequate. It decided to discontinue publication for the two years that would be required to revamp the publication in order to incorporate the advantages that had been suggested by Reidl's design. To avoid the undesirable competitive consequences of a withdrawal of part of its multiple line of publications from the market for so long a time, the defendant, a publisher with large resources, finally decided to attempt negotiations with Reidl looking to the purchase of his Crash Book Service and its incorporation in the defendant's line in place of Motors Manual.

At about the same time Reidl became concerned over the future of Crash Book Service because of seemingly reliable rumors that the defendant and others were undertaking revisions of their manuals to incorporate the Crash Book Service advantages, and because these competitors, with their national distribution systems and multiple publications, might prove too much for the small new organization handling Crash Book. The negotiaitions commenced in May 1956 and resulted in the execution of a written contract for the sale of Crash Book Service to Hearst, executed at Milwaukee, Wisconsin on September 25, 1956, under which Reidl received $42,500 in cash, a contract of employment as editor of the service, and a royalty of 50¢ on all future sales of Crash Book for ten years up to $100,000.

[*Knowledge of Distributor's Contract*]

Defendant knew of Reidl's contract with the plaintiff and was familiar with its terms as well as with the sales and renewals achieved by plaintiff in his territory. Defendant, as part of the inducement held out

to Reidl, agreed to defend him against any suit that Bender might bring, and to reimburse him for any recovery up to $2,500. By this and other inducements Hearst persuaded the reluctant Reidl to repudiate his contract with plaintiff. By the terms of its contract with Reidl, defendant became entitled to receive the profit on subsequent renewals of outstanding subscriptions, and on October 11, 1956 the defendant took steps to protect this interest by notifying plaintiff's customers that they were thereafter to deal only with its salesmen. After August 31, 1956 the plaintiff was neither paid nor credited with any of the profit due him on renewals, which averaged 80% of original sales.

* * *

III—*Sherman Act, § 1*

[*Relevant Market*]

On the claim advanced under § 1 of the Sherman Act[2] plaintiff rests his appeal on the ground that the district court incorrectly defined the relevant market to encompass too large a geographical area, and that this error rendered erroneous its otherwise proper determination that no unreasonable restraint of the market resulted from the transactions in suit. We find that the market was properly defined, and that the findings and conclusions below on which the absence of an unreasonable restraint was based are correct.

The district court found in its opinion that:

> The area of effective competition between * * * Crash Book Service and * * * Motor Body [&c.] * * * consisted of those states in plaintiff's distributorship territory, the remaining portions of states a part of which was in the plaintiff's territory, and Arizona, Colorado, Florida, Illinois, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, Texas and Wisconsin * * *

[*National Market*]

In Finding of Fact No. 16 the court found further that approximately one-half of the total sales of Crash Book Service to October 1, 1956 were made outside the plaintiff's territory. These findings are supported by the record. Plaintiff nevertheless contends that the relevant market here was a "prime market" supposedly represented by the area included in his former exclusive sales territory, and contends that the district court's allegedly improper definition of the market necessarily affects the determination that no unreasonable restraint resulted. We find that the district court correctly defined the relevant market.

The defendant and Reidl competed before the merger in the entire area of Crash Book's circulation, since the defendant's manual was distributed nationally. There is nothing to indicate that the only area of genuine competition, or even that the primary area of competition was within the plaintiff's sales territory, rather than in all the territory which Reidl sought to exploit. For example, there was neither allegation nor proof that "purchasers cannot, as a practical matter, turn to suppliers outside their own area," *Standard Oil Co. v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, n. 5 (1949). To the contrary, the record shows that in general purchasers often had more than one manual in their libraries, and that the manual chosen by a purchaser depended upon its desirability and not at all upon factors relating to the geographical location of the seller or mode of distribution of the product. It thus appears that buyers purchased in a national market, not a particular local area, while publishers sold wherever a buyer could be found.

These facts dispose of the plaintiff's reliance here on *Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.* [1932-1939 TRADE CASES ¶ 55,064], 293 U. S. 268 (1934), where the Supreme Court reversed a defendant's judgment which had been sustained by the court of appeals on the ground that measured in a national market there was no unreasonable restraint of trade. The Supreme Court's choice of the local market depended upon a salient fact recited in the opinion, and entirely absent from the record here:

> [P]etitioner * * * was a publisher * * * of farm papers. Each is a general, and not a vocational, paper; the larger part of its circulation is in the State where printed; it does not circulate in any substantial number throughout the country as a whole and is called a state or sectional paper in order to dis-

* * *

[2] No challenge is made to the district court's disposition of the claim asserted under § 2 of the Sherman Act, and we therefore do not discuss it.

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tinguish it from publications having a wider and what is referred to as a national circulation * * * (272)

It was thus alleged that the essentially local businesses of the plaintiffs were injured by the defendants' combination to offer reduced rates to advertisers buying space in all of the defendants' five sectional papers serving the same local area, and the Supreme Court found that the business fact alleged was sufficient to define a local or less-than-national market.

[*Separate Enterprise*]

Plaintiff appears at times ready to maintain that his exclusive territory defines local market area within the *Farmer's Guide* case because he himself was formerly in competition with defendant's salesmen. But plaintiff is not a publisher; he is merely one of many conduits to the consuming public from a publisher, who is in substantially national competition with other publishers. There is no proof whatever of an unreasonable restraint of a separate competitive enterprise of distribution in the plaintiff's former sales area which would render that restricted geographical market relevant.

IV—*Clayton Act*, § 7

[*No Private Injury*]

Although we affirm the district court's dismissal of the claim based on § 7 of the Clayton Act[3] alleging a wrongful transfer of corporate assets by Crash Book Sales, Inc., to Hearst Publishing Co., we find that on the undisputed facts the plaintiff has failed to assert or prove a private injury, and we consequently do not consider the defendant's contention here that the assets transferred by Crash Book Sales, Inc. were not corporate assets within the meaning of § 7 of the Clayton Act.

It is uncontested that when Crash Book Sales, Inc. was formed to act as exclusive sales agent for Crash Book Service the territory transferred to it by Reidl did not include the plaintiff's territory, and that the plaintiff continued to serve as Reidl's exclusive distributor in the territory agreed upon. Therefore even if we assume that Crash Book Sales was a corporation within the meaning of § 7 and that it did make a prohibited transfer of assets, the termination of plaintiff's distributorship, which is the only injury alleged or proved, could not have resulted from any act of the corporation. Thus plaintiff has failed to prove a private injury. Affirmed.

[¶ 69,279] Republic Productions, Inc., Republic Pictures Corporation, and Hollywood Television Service, Inc. v. American Federation of Musicians of the United States and Canada; James C. Petrillo, Samuel R. Rosenbaum, as Trustee; C. L. Bagley; Leo Cluesmann; Harry J. Steeper; Herman D. Kenin; George V. Clancy; Stanley Ballard; William J. Harris; W. M. Murdoch; and Does 1 to 100, inclusive.

In the United States District Court for the Southern District of New York. Civil 129-354. Filed January 30, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Service of Process—Non-resident Witness—Exemption.—An individual who allegedly resided and transacted his business in New Jersey was not immune from service of process in New York City by reason of the fact that his deposition as a witness was being taken there in connection with actions pending in a California state court. The exemption of a party from service of process is discretionary with the court. There is a strong presumption that the service is regular; therefore, the burden was upon the individual to affirmatively show that it was in the court's own interest to quash the service. The individual failed to meet that burden; he was an officer of a corporation which had its principal place of business in

[3] 15 U. S. C. A. § 18 (as amended 1950): No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

New York, and his affidavits seemed designed to conceal rather than reveal the extent of his New York activities. His own affidavits failed to give the location of his place of business or his residence; he left it to his attorney to state, by affidavits purporting to be on personal knowledge, that he resided and had his place of business in New Jersey, and that the controlling purpose in coming to New York was to attend the taking of the depositions. It was a fair inference that he regularly came in and out of New York and that he would have been there anyway if he had not been testifying on the particular day that he was served.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.

For the plaintiffs: Baer, Marks, Friedman, Berliner & Klein (W. Barnard Richland, of Counsel), New York, N. Y.

Appearing specially for Leo Cluesmann: Emanuel L. Gordon (Louis Lauer, of Counsel), New York, N. Y.

Opinion

[*Service of Summons*]

BRYAN, District Judge: [*In full text*]: Leo Cluesmann, named as a defendant in this action, moves to quash service of the summons and complaint upon him. The sole ground is that at the time Cluesmann was served he was in this jurisdiction for the purpose of having his deposition taken as a witness in five actions currently pending in the Superior Court of California for the County of Los Angeles, and was therefore exempt from service of process.

[*Treble Damage Action*]

The action in this district in which Cluesmann was served is for treble damages allegedly resulting from a conspiracy to violate the anti-trust laws (15 U. S. C. §§ 1 and 2) by the American Federation of Musicians and various of its officers. Cluesmann, alleged to be a participant in the conspiracy, is the executive secretary and a member of the Executive Committee of defendant American Federation of Musicians (A. F. M.). The action was originally brought in the United States District Court for the Southern District of California and was transferred to this district pursuant to 28 U. S. C. § 1404(a) by order entered on stipulation of the parties. Only three defendants, A. F. M. and two of its other officers, had been served prior to the transfer.

[*Service in Jurisdiction*]

On the day Cluesmann was served depositions were being taken in the California actions at the House of the Association of the Bar of the City of New York on West 44th Street, in the Borough of Manhattan, pursuant to order of the California court. The American Federation of Musicians, a defendant in the action in this district, was also a defendant in the California actions. The depositions of a number of the officers of A. F. M., including Cluesmann, had originally been ordered by the California court to be taken at their various places of residence. However, by stipulation of counsel for the parties the situs of all the depositions was changed to New York City and a commission to take the depositions was issued by the California court to a New York City notary.

[*Place of Business—Residence*]

Cluesmann states that on May 2, 1958, the date of service, he was present in New York for the "purpose of having my deposition taken" in the California actions against the A. F. M. "pursuant to an order of the California [court] and stipulation of counsel". He states that he had begun his testimony at 10:00 a. m., had then gone to lunch, and was served while he was returning from lunch to resume his testimony. He then testified for the remainder of the afternoon of May 2 and completed his testimony the following day when he "returned at once to the State of New Jersey". Cluesmann's own affidavit contains no statement as to his residence or place of business. However, the reply affidavit of his attorney, purporting to be made on personal knowledge, states as a fact that Cluesmann is a resident of New Jersey (presumably Newark), and that "he had come to New York on the day on which plaintiffs attempted to serve him for the sole purpose of having his deposition taken". This affidavit also states that Cluesmann's office as secretary of the A. F. M. is maintained in Newark and that Cluesmann conducts his business as secre-

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tary there. The addresses of Cluesmann's place of residence or of his office, and the details of his trip to New York, beyond those related above, are not given.

Counsel for the plaintiffs states by affidavit that the principal office and place of business of the A. F. M. is in New York County and that Cluesmann as secretary and a member of the Executive Board of A. F. M. "carries out his functions and conducts business in the City of New York". The latter is denied by Cluesmann's counsel.

I deem the lengthy discussions by counsel in their affidavits of the history and background of the New York and California litigation of little relevance on the motion before me.

[*Exemption of Non-Resident*]

The principles governing the exemption of a non-resident witness from service of process are well settled and of ancient origin. See *Stewart v. Ramsay,* 242 U. S. 128. Usually they are applied where a defendant has been served while within the jurisdiction as a party or witness in another case then pending in the courts of the same jurisdiction. In such a case the court before whom the motion to quash service is made is called upon to determine which of two competing interests is entitled to the more weight.

The first such interest is the encouragement of witnesses to come to the jurisdiction in aid of the administration of justice free from fear of vexation or harassment. The second is to allow a plaintiff to serve a defendant promptly so that he may be afforded the opportunity to have his cause heard and determined expeditiously.

[*Discretion of Court*]

Thus it has long been held that the exemption from service of process accorded a party or witness is a privilege which belongs to the court and it is "discretionary to grant it on some occasions and to refuse it on others." *Starret's* case, 1 Dal. 356; *Parker v. Hotchkiss,* C. C. E. D. Penn., Fed. Cases 10,739; *Lamb v. Schmitt,* 285 U. S. 222; *New England Industries, Inc. v. Margiotti,* 270 App. Div. 488.

[*Comity*]

The problem presented here, however, differs from the usual pattern. Here the proceedings for which defendant came to this jurisdiction to testify are not related to an action pending in this court or in the courts of this state but are in aid of actions in the California state courts. It is therefore necessary to ascertain what view the California courts would take of the claimed exemption since the motion must rest upon the premise that service should be quashed as a matter of comity in order to aid the administration of justice in the California state courts. There is no need to quash the subpoena for this reason if the California courts would see no necessity for so doing. *Crittenden v. Barkin,* D. C. S. D. N. Y., 276 F. 978.

California recognizes the exemption. See *Gerard v. Superior Court,* 191 Cal. App. 2d 549; *Hammons v. Superior Court,* 63 Cal. App. 700. Therefore, not because California law applies, but as a matter of comity, the question presented here should be decided in the light of what the California courts would do under the circumstances, and the extent to which the convenience of this court would be served by retaining jurisdiction over Cluesmann in the suit before it. *Crittenden v. Barkin, supra. Cf. Hardie v. Bryson,* D. C. E. D. Mo., 44 F. Supp. 66.

California follows the general view and is in accord with the federal rule that "the proper test is whether [allowance of] the privilege will promote justice" under the circumstances presented. *Russell v. Landau,* 127 Cal. App. 2d 685, citing with approval *United States v. Conley,* D. C. D. Mass., 80 F. Supp. 700, and *Stewart v. Ramsay,* 242 U. S. 128.[1]

[*Affirmative Showing*]

The exemption of which Cluesmann seeks to avail himself is based on no mere technical rule of law from which it would automatically follow that because the non-resident defendant was here testifying as a witness he is totally immune from service. Defendant must affirmatively show that it is in the court's own interest in furtherance of

[1] Under the liberal federal rule it is of no moment that Cluesmann came to this jurisdiction for the purpose of having his deposition taken and not for attendance at trial. *Plimpton v. Winslow,* C. C. S. D. N. Y., 9 F. 365; *Mississippi Wood Preserving Co. v. Rothschild,* 5 Cir., 201 F. 2d 233; *Durst v. Tautges,* 7 Cir., 44 F. 2d 507. See, also, *New England Industries, Inc. v. Margiotti, supra.* Although there appear to be no California cases directly on this point I will assume for the purposes of this motion that California holds the same view.

the administraion of justice, or in its interest as a matter of comity, to quash the service of this summons. The exemption should "not be enlarged * * * [and] should be extended or withheld only as judicial interests require". *Lamb v. Schmitt, supra.*

[*Presumption*]

The strong presumption is that service is regular and the burden is on a defendant who is contesting service to establish that it was not. Among other things, what the non-resident defendant does and the time he spends in the jurisdiction before service, and, to a lesser extent, his activities in the jurisdiction and how long he stays thereafter, are taken into account in determining what his intentions were in coming into the jurisdiction, and whether he was really there solely for the purpose of testifying or not. *Finucane v. Warner,* 194 N. Y. 160. And I see no reason why in that connection the defendant's general habits with respect to the frequency and regularity of his business in the jurisdiction are not of importance where, as here, his residence is only a short tube ride away from the place where his testimony is being taken and he has obvious strong business connections in New York City.[2]

[*Affidavits*]

In my view Cluesmann has not met his burden. On the question of the frequency, regularity and extent of his business activities in New York the affidavits in support of the motion are cryptic to a degree. They seem designed to conceal rather than to reveal the extent of Cluesmann's usual activities in New York. There is no statement as to when he arrived here to have his testimony taken or how frequently he comes to New York on the business of the Federation, which concededly has its principal offices in New York City, and of which he is the executive secretary. There is no description of what activities are carried on in the Executive Secretary's office in Newark. Indeed, neither the address of that office or of his Newark place of residence is given. There is no showing that he had any other business or occupation than as executive secretary of the Federation, and it is unlikely that he had. It is a fair inference from the circumstances which have been shown to exist, and the defendant's significant omissions, that he regularly comes in and out of New York to attend to the business of the Federation, and that had he not been testifying on that particular day he would have been in New York anyway.

Moreover, it is of some signifiance that the American Federation of Musicians, with which Cluesmann's interests were so closely allied, was a defendant both in the action in this district, and that counsel for the A. F. M. had stipulated that the depositions of its president and some eight of its other officers, including Cluesmann, should be taken in New York where its principal office and place of business was located. These facts, at the least, would place on Cluesmann a greater burden than he has met.

[*Purpose of Visit*]

Cluesmann leaves it to a third party to indicate that his controlling purpose in coming to New York was to attend the examination, and he himself does not even refer to that subject. The showing as to the purpose of the visit is in itself insufficient to sustain his burden. *Cf. McKinney v. Northwest Tractor & Equipment Corp.,* 41 Wash. 2d 372; *Finucane v. Warner, supra.*

Under all the circumstances presented here there is no basis on which to find that the administration of justice in this court would be aided by quashing the service. Nor is sufficient shown to indicate that this court should do so as a matter of comity in order to further the administration of California justice. To grant relief in this case would in no wise "emphasize the dignity and importance of attendance at court * * *". *United States v. Conley, supra,* p. 702.

[*Motion Denied*]

The motion to quash service is in all respects denied because of the failure of defendant to sustain his burden of proof that service was irregular and in the exercise of my discretion.

So ordered.

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[2] *Cf. Barbella v. Yale,* 4 Misc. 2d 825, (witness traveled 360 miles); *Plimpton v. Winslow, supra,* (225 miles); *Dwelle v. Allen,* D. C. S. D. N. Y., 193 F. 546, (Ohio to New York City); *Stewart v. Ramsay, supra,* (Colorado to Illinois); *Page v. Macdonald,* 261 U. S. 446, (Ontario to Boston); *New England Industries, Inc. v. Margiotti, supra,* (Pittsburgh to New York City); *Russell v. Landau, supra,* (South Africa to California).

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[¶ 69,280] **Harsam Distributors, Inc. and Harry Wagonfeld v. Federal Trade Commission.**

In the United States Court of Appeals for the Second Circuit. No. 167—October Term, 1958. Docket No. 25184. Argued November 5, 1958. Decided February 13, 1959.

Petition to review and set aside an order of the Federal Trade Commission. Petition denied and order affirmed.

Federal Trade Commission Act

Unfair Practices—Misrepresenting Prices—Fictitious Pricing of Perfume.—A Federal Trade Commission finding that perfume distributors violated the FTC Act by using and disseminating advertising materials which represented that their perfume regularly sold for "$18.50 the ounce at better shops," when in truth that was never the usual and customary retail price, was supported by substantial evidence.

See Unfair Practices, Vol. 2, ¶ 5095.30.

Unfair Practices—Misrepresenting Origin of Product—Foreign "Essence" of Perfume Combined With Domestic Alcohol—Selling as Imported Perfume.—Perfume distributors violated the Federal Trade Commission Act by selling as an imported perfume a foreign concentrate combined, in this country, with domestic alcohol. The Commission's determination that the distributors represented their product as an imported perfume was a reasonable one. Substantial evidence supported the Commission's findings that the distributors imported only the perfume concentrate to be mixed here with domestic alcohol, but that they used on their package labels the French tricolor, French words and phrases, and the English words "Perfume Essence—Compounded in France." Those words might disclose to those familiar with the manufacturing of perfume that only the "essence" of the packaged article was represented as being wholly compounded in France; however, such specialized knowledge cannot be imputed to the average purchaser. The Act was not made for the protection of experts but for the protection of the public.

See Unfair Practices, Vol. 2, ¶ 5091.600.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Power to Declare Practices Unfair—False Price Representations.—The Federal Trade Commission is empowered to prevent such unfair practices as perfume distributors' false representations that their perfume regularly sold for a price that was never, in truth, the usual and customary retail price of the product.

See Unfair Practices, Vol. 2, ¶ 5201.505.

For petitioners: Abraham B. Hertz, New York, N. Y.

For the respondent: Earl W. Kintner, General Counsel; James E. Corkey, Assistant General Counsel; and E. K. Elkins, Attorney, Federal Trade Commission, Washington, D. C.

Affirming a Federal Trade Commission cease and desist order in Dkt. 6687.

Before: Clark, Chief Judge, Waterman, Circuit Judge, and Galston, District Judge.

[*Price and Origin of Perfume*]

Per Curiam [*In full text*]: Petitioners seek to set aside an order of the Federal Trade Commission ordering them to cease and desist from engaging in unfair and deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1). The Commission found that petitioners had used and disseminated advertising materials which represented that their "White Christmas" perfume regularly sold for "$18.50 the ounce at better shops," when in truth that never was the usual and customary retail price. The Commission also found that although petitioners imported from France only the perfume concentrate to be mixed here with domestic alcohol, they used the French tricolor and French words and phrases on their package labels, together with the English words "Perfume Essence—Compounded in France." These findings

are supported by substantial evidence and therefore are binding upon us, 15 U. S. C. § 45(c); *Federal Trade Commission v. Sewell* [1957 TRADE CASES ¶ 68,720], 353 U. S. 969 (1957); *Federal Trade Commission v. Standard Education Society* [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112 (1937); *Federal Trade Commission v. Algoma Co.* [1932-1939 TRADE CASES ¶ 55,041], 291 U. S. 67 (1934).

[*Protection of Public*]

False price representations such as those found to have been made by petitioners are unfair practices that the Commission is empowered to prevent. *Federal Trade Commission v. Standard Education Society, supra; Thomas v. Federal Trade Commission,* 116 F. 2d 347 (10 Cir. 1940). And we have held on more than one occasion that one cannot, within the scope of the Federal Trade Commission Act, sell as an imported perfume a foreign concentrate combined in this country with domestic alcohol. *Houbigant, Inc. v. Federal Trade Commission,* 139 F. 2d 1019 (2 Cir. 1944), *cert. denied,* 323 U. S. 763 (1944); *Establissements Rigaud, Inc. v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,186], 125 F. 2d 590 (2 Cir. 1942); *Parfums Corday, Inc. v. Federal Trade Commission,* 120 F. 2d 808 (2 Cir. 1941); *Fioret Sales Co., Inc. v. Federal Trade Commission* [1932-1939 TRADE CASES ¶ 55,196], 100 F. 2d 358 (2 Cir. 1938). The Commission's determination that petitioners represented their product as an imported perfume is a reasonable one. "Perfume Essence—Compounded in France" might well disclose to those familiar with the manufacturing of perfume that only the "essence" of the packaged article offered for sale was represented as being wholly compounded in France; but such specialized knowledge of the difference between essences and perfumes cannot be imputed to the average purchaser, *C. Howard Hunt Pen Co. v. Federal Trade Commission* [1952 TRADE CASES ¶ 67,286], 197 F. 2d 273 (3 Cir. 1952), and the Act "was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous,' *Florence Mfg. Co. v. J. C. Dowd & Co.,* 2 Cir. 178 Fed. 73, 75," *Charles of the Ritz Dist. Corp. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 55,267], 143 F. 2d 676, 679 (2 Cir. 1944).

[*Petition Denied*]

The petition to set aside the order of the Commission is denied.

[¶ 69,281] Bernard Rosten, t.a. Bern Products Company v. Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. No. 63—October Term, 1958. Docket No. 25140. Argued January 7, 1959. Decided February 16, 1959.

Petition to review and set aside a cease and desist order of the Federal Trade Commission directed at the sale and distribution of merchandise by means of a lottery scheme in violation of the Federal Trade Commission Act, 15 U. S. C. A. 45. Petition to set aside order denied, and order affirmed.

Federal Trade Commission Act

Unfair Practices—Using or Selling Lottery Devices—Lotteries in Sale of Miscellaneous Merchandise—Lottery by Means of "Punch Card."—A Federal Trade Commission order prohibiting a distributor of "punch cards" from using lottery devices to sell electrical appliances, clocks, and other merchandise was affirmed. The cards contained a number of perforated disks bearing names which could be "punched out" by customers. The punched out paper indicated the amount to be paid. Persons who, by chance, punched out certain disks received prizes, while the majority of persons who "punched" the cards received nothing. The manner of merchandising resulted in the purchaser either receiving nothing for the amount paid or an article of substantially greater value than the price paid for the chance. The court rejected the contention that the mere mailing of punch board cards was not sufficient to establish an existing lottery and that there was thus no violation of law. There is a substantial difference between a criminal lottery proceeding and the type of situation the Commission is authorized to regulate.

See Unfair Practices, Vol. 2, ¶ 5173.50.

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Unfair Practices—Definitions Under Federal Trade Commission Act, Section 4—Interstate Commerce.—The distribution of "punch cards" throughout the United States from an office located first in Chicago and then in New York was conducted in interstate commerce. The Commission, by subpoena, obtained the distributor's testimony and that of three residents of the State of Indiana who had received the cards, sold them, remitted the proceeds to the distributor, and received the merchandise and the reward for selling. The proof definitely overcame the distributor's argument that the lottery, if any, was intrastate. The underlying purpose of the merchandise selling scheme was interstate in character.

See Unfair Practices, Vol. 2, ¶ 5005.83.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Functions of Commission—Alleged Legislative Character of FTC Order.—A Federal Trade Commission order prohibiting the use of lottery devices to sell merchandise was not legislative in character. That argument was passed upon and rejected in *National Candy Co. v. FTC*, 1932-1939 TRADE CASES ¶ 55,224.

See Unfair Practices, Vol. 2, ¶ 5201.311.

Federal Trade Commission Enforcement and Procedure—Access to Witnesses—Immunity of Witnesses under FTC Act, Section 9—Relief To Be Granted.—A distributor of lottery devices was not deprived of due process of law because of involuntary testimony given by him under compulsion of an FTC subpoena. Section 9 of the FTC Act has been construed as not immunizing a witness where the only relief to be granted was a cease and desist order which was prospective only and was purely remedial and preventative.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8701.62.

For the petitioner: Jerome M. Schwartz, New York, N. Y. (Horace J. Donnelly, Washington, D. C., on the brief).

For the Federal Trade Commission: Frederick H. Mayer, Attorney for the Federal Trade Commission, Washington, D. C. (Earl W. Kintner, General Counsel, and James E. Corkey, Assistant General Counsel, on the brief).

Affirming a Federal Trade Commission cease and desist order in Dkt. 6758.

Before: CLARK, Chief Judge, MOORE, Circuit Judge, and GIBSON, District Judge.

[*Lottery Scheme*]

MOORE, Circuit Judge [*In full text*]: Petitioner seeks to review a cease and desist order of the Federal Trade Commission issued after proceedings upon a complaint charging petitioner with unfair acts and practices arising out of the sale and distribution of merchandise in interstate commerce by means of games of chance, gift enterprises or lottery schemes in violation of section 5(a) of the Federal Trade Commission Act, as amended, 15 U. S. C. A. 45(a). The business was carried on by petitioner distributing in interstate commerce throughout the United States from petitioner's office, first in Chicago and then in New York, packages of advertising literature containing push cards. Accompanying the cards were instructions and circulars describing petitioner's plan of sale and distribution of merchandise. Briefly stated, a typical card contained a number of perforated disks (54 in number) bearing names which could be punched out by the customers. The punched out paper indicated the amount to be paid therefor, ranging in price from 1¢ to 39¢. Under a master seal was a name corresponding to one of the names on the disks. The person who by chance punched out this name became the prize winner. Certain other names received lesser prizes. Naturally the majority received nothing. The inducement to sell the push card was that the person selling the card and remitting its total value to petitioner would receive an article identical with that awarded as the first prize.

The Commission by subpoena obtained petitioner's testimony and that of three residents of the State of Indiana who had received the cards, sold them, remitted the proceeds to petitioner and received the merchandise and the reward for selling.

[*Interstate Commerce*]

The proof definitely overcomes petitioner's argument that the lottery, if any, was

intrastate. The underlying purpose of the merchandise selling scheme was interstate in character.

[*Existence of Lottery*]

Petitioner next argues that since it was held in a criminal case, *United States v. Halseth*, 342 U. S. 277 (1952), that the mere mailing of punch board cards was not sufficient to establish an existing lottery, there was no violation of law. There is a substantial difference between a criminal proceeding and the type of situation the Commission is authorized to regulate. This distinction is to be found in the same *Halseth* case where the Commission's cease and desist order[1] against him was affirmed by the Court of Appeals for the Seventh Circuit[2] [1954 TRADE CASES ¶ 67,870] and certiorari denied by the Supreme Court, 348 U. S. 928 (1955).

[*Due Process*]

Petitioner also claims that there was a denial of due process of law because of involuntary testimony given by him under compulsion of the Commission's subpoena. This point appears to have been passed upon directly in *Drath v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,557], C. A. D. C., 1956, 239 F. 2d 452, cert. den. 353 U. S. 917 (1957). The court there construed section 9 of the Federal Trade Commission Act as not immunizing a witness where the only relief to be granted was a cease and desist order "which is prospective only and has been aptly described as 'purely remedial and preventative.'"

[*Hearing*]

Petitioner next challenges the testimony of the three witnesses from Indiana and speaks of their testimony as hearsay. The testimony was not hearsay. Petitioner merely failed to appear personally or by counsel at the hearing of which he had notice.

[*Character of Order*]

Finally, petitioner's argument that the cease and desist order is legislative in character has been passed upon and rejected, *National Candy Co. v. Federal Trade Commission* [1932-1939 TRADE CASES ¶ 55,224], 7 Cir., 1939, 104 F. 2d 999, cert. den. 308 U. S. 610 (1939).

[*Cases Considered*]

The cases cited in support of petitioner's arguments are clearly distinguishable. *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284 (1954), involved a radio give-away program where no monetary consideration was involved. *United States v. Minker*, 350 U. S. 179 (1956) dealt with the power to obtain testimony by subpoena from persons against whom denaturalization proceedings were in contemplation.

The factual situation in *Seymour Sales Company v. Federal Trade Commission* [1954 TRADE CASES ¶ 67,880], C. A. D. C., 1954, 216 F. 2d 633, cert. den. 348 U. S. 928 (1955), presented an almost identical punch card problem. There, as here, the manner of merchandising resulted "in the purchaser either receiving an article or receiving nothing for the amount paid, the amount [being] determined wholly by lot or chance, and the article [having] a value substantially greater than the price paid for the chance" (p. 635). The cease and desist order was affirmed.

[*Order Affirmed*]

The petition to set aside the order is denied, and the order is affirmed.

[¶ 69,282] Webster Rosewood Corporation v. Schine Chain Theatres, Inc.; Schine Theatrical Co., Inc.; Schine Circuit, Inc.; Schine Lexington Corporation; J. Myer Schine; Louis W. Schine; and John A. May.

In the United States Court of Appeals for the Second Circuit. No. 139—October Term, 1958. Docket No. 25036. Argued January 14, 1959. Decided February 13, 1959.

This is an appeal from a judgment of the District Court for the Northern District of New York, dismissing after a trial to the court a complaint for violation of the anti-trust laws.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Practices—Clearance System in Motion Picture Industry—Conspiracy to Deny Exhibitor First Neighborhood Run—Sufficiency of Evidence.—A trial court's dismissal of a motion picture theatre owner's complaint charging

[1] 50 F. T. C. 242 (1953).

[2] Not officially reported.

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chain exhibitors with conspiring to monopolize motion pictures in Rochester, New York, was affirmed. The trial court had found that the evidence failed to disclose any conspiracy to monopolize films and deprive the owner of "first neighborhood runs" between 1942 and 1950, and that the evidence rebutted "any presumption or inference" of the continuance, during those years, of a conspiracy which the defendants had been found guilty of in a prior Government action. The trial court also found that the owner had made no demand upon distributors for any first neighborhood run of the films shown at a competing theatre operated by the exhibitors. Such a demand is a necessary condition of any claim for relief. The owner could not recover damages on account of a failure to obtain first run showings unless it had made demand for that which it claimed to have been deprived of by the conspiracy. Also, the distributors were justified in giving preference to the chain theatre since the testimony indicated that it was a better customer of the distributors, for location and revenue, than the owner's theatre.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.553.

Private Enforcement and Procedure—Suit for Civil Damages—Evidence—Decree in Prior Government Action—Evidential Effect—Limited Time Period.—In a motion picture theatre owner's action seeking treble damages for chain exhibitors' alleged antitrust violations between June, 1942, and May, 1950, the trial court properly interpreted Section 5(a) of the Clayton Antitrust Act in holding that the "*prima facie* estoppel" of a prior Government decree against the chain exhibitors was limited to a period before May 19, 1942. The prior Government decree provided that all findings, with respect to acts committed by the exhibitors which were found to have been in violation of the antitrust laws, were limited to acts committed prior to May 19, 1942. Therefore, the decree in the Government suit had no evidential effect beyond that date. Congress, by using the word "estoppel" in Section 5(a), indicated that it meant the judgment in the Government decree to have no greater effect than that effected by an "estoppel" under the ordinary doctrine of *res judicata*. It is settled that the effect of an estoppel is confined to the facts actually adjudicated.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.260, 9012.410.

Private Enforcement and Procedure—Suit for Civil Damages—Effect of Prior Government Decree—Inference of Continuation of Conspiracy—Sufficiency of Evidence.—The existence of a conspiracy by chain exhibitors to monopolize motion picture films in Rochester, New York, until May 19, 1942, was not a basis for assuming that the conspiracy continued after that time. A decree entered in a Government action against the exhibitors could not be the basis for such an inference. However, even if the continuation of the conspiracy was a permissible inference, it would not make "clearly erroneous" the trial court's finding that the plaintiff failed to show that the exhibitors made any "unlawful use of monopoly" after May 19, 1942.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.500.

For the appellant: Francis T. Anderson.

For the appellees: James O. Moore, Jr.

Affirming a judgment of the U. S. District Court for the Northern District of New York, 1957 Trade Cases ¶ 68,912.

Before: Hand, Lumbard and Burger, Circuit Judges.

[*Conspiracy Charged*]

Hand, Circuit Judge [*In full text*]: The plaintiff appeals from a judgment of Judge Foley, dismissing its complaint demanding treble damages for violation of the antitrust laws (§ 15, Title 15, U. S. C.). The action was tried to the judge who delivered an elaborate opinion reported in 157 Fed. Supp. 251 [1957 Trade Cases ¶ 68,912], to which we refer as the supplement to what we say. The claim in suit arose from an alleged injury to the plaintiff, the corporate owner of a moving picture house in the City of Rochester, called "The Webster," whose shares were held by one, Max Fogel. The gravamen of the claim was that the defend-

ants between June, 1942, and May, 1950, by virtue of their monopolistic control over moving picture "distributors," succeeded in preventing "The Webster" from receiving "first neighborhood run" of films; and that during this period another theatre, known as the "State" and controlled by the defendants, always got the "first neighborhood run," although "The Webster" was as good, and as well situated as the "State." After extended hearings consisting in large part of the testimony of Fogel himself, the judge made the following findings of fact at the close of his opinion: (1) that the evidence did not disclose any conspiracy to monopolize films between 1942 and 1950, and arbitrarily to deprive the plaintiff of "first neighborhood runs." (2) That the evidence rebutted "any presumption or inference" of the continuance during 1942 to 1950 of the conspiracy of which the defendants were found guilty by the Supreme Court in *Schine Chain Theatres, Inc. v. United States* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110. (3) That the plaintiff had made no demand upon distributors for any first neighborhood run of the films shown at the "State" theatre. (4) That the evidence did not show that "The Webster" "was clearly a better customer * * * than the State and that a different pattern of distribution would have been more to the interests of the distributors and thus allow an inference of conspiracy."

Judge Foley described at length the dealings between Fogel and the defendant J. Myer Schine, beginning shortly after Fogel built "The Webster" in 1927, a year after defendants' "State" theatre was built. The two theatres were six blocks apart and continued either in competition or cooperation until 1933 when Schine abandoned an interest that he had acquired in "The Webster." Fogel kept on alone until the autumn of 1940 when Schine took control and Fogel became his employee. In June, 1942, Fogel reacquired his interest in "The Webster" and the period of alleged injury began. Meanwhile, the United States had brought the action of which we have spoken under the antitrust laws which was finally determined by the Supreme Court on May 3, 1948, and in which the court held that a chain of about 148 motion-picture theatres located in 76 towns and in six states was controlled by the defendants, and had been operated in violation of the antitrust laws. This action had been brought in the District Court for the Western District of New York and in it Judge Knight made the following finding which was affirmed by the Supreme Court:

> "All findings made herein with respect to any acts committed by the defendants or any of them, or any course of conduct pursued by them which the Court holds to be in violation of the antitrust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer evidence beyond that date."

Judge Foley held that this finding limited the *"prima facie* estoppel" of the judgment of the Supreme Court under § 16 of Title 15, U. S. C. to the period before May 19, 1942, and therefore to a period before the beginning of that for which the plaintiff demanded damages. There can be no doubt that this was a proper interpretation of the statute (*Theatre Enterprises v. Paramount Film etc. Co.* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537, 541, 543). Congress by choosing the word, "estoppel," indicated that it meant the judgment to have no greater effect, even *prima facie,* between individuals than that effected by an "estoppel" under the ordinary doctrine of *res judicata;* and it is too well settled to require citation that the effect of an estoppel is confined to the facts actually adjudicated. Therefore, the decree in the Government suit had no evidential effect beyond Judge Knight's finding.

There remains the question whether the existence of such a conspiracy until May 19, 1942, might be the basis of an inference that it continued thereafter. We do not mean to suggest that, even if this be a permissible inference, it would make "clearly erroneous" Judge Foley's first finding that the plaintiff did not show that the defendants made any "unlawful use of monopoly" after May 19, 1942; but the situation is not even as favorable to the plaintiff as that. An order, *pendente lite,* was entered, apparently in May, 1942, by which the defendants were directed to dispose of the interest they then had in "The Webster," and this they did. It is of course conceivable that after surrendering control of that theatre in pursuance of this order they began to discriminate against it, though the surrender had been in compliance with an order in the Government suit; but in the face of both the surrender and the continued existence

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of the Government suit, we cannot agree that the decree in that suit served as a basis for supposing that the conspiracy found to have then existed continued, at least as to "The Webster." Be that as it may, the plaintiff had the burden of proving that the conspiracy in fact did continue and the judge's reasons for discrediting the plaintiff's testimony make impossible a reversal of his first and second findings.

Furthermore, he found that there was "no credible evidence to convince that the Webster was clearly a better customer from the distribution point of view than the State and that a different pattern of distribution would have been more to the interests of the distributors and thus allow an inference of conspiracy." Read strictly, it is true that this finding does not necessarily justify the uniform preference of the "State" theatre in the distribution of films; as it would have if the "State" theatre were the better customer of distributors, though we should have been tempted to read it as meaning that the "State" theatre was the "better customer," even if the finding stood alone. However, when we read it with the following passage from the opinion all doubt disappears.

> "The testimony of the top men in the distribution part of the movie industry was unhesitatingly to the effect that the State was a better theatre for location and revenue than the Webster and this testimony was also reliable and factual as was that of McKay, then general counsel for Schine, that there was never any agreement or meeting of the minds to deprive the Webster of first neighborhood run if it wanted it."

Finally, we can see no answer to the defendants' argument that there was no proof that Fogel ever demanded "first run" films on an equality with the "State" theatre; and in *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.* [1954 TRADE CASES ¶ 67,757], 212 Fed. (2) 840, we held (following the Seventh Circuit, *Milwaukee Towne Corp. v. Loew's, Inc.* [1950-1951 TRADE CASES ¶ 62,891], 190 Fed. (2) 561), that such a demand was a necessary condition of any claim for relief. We repeat what we said in that case, page 845: "The plaintiffs cannot recover damages on account of any failure to obtain future pictures for first run exhibition unless they made demand for that of which they now claim they were deprived by the conspiracy."

Judgment affirmed.

[¶ 69,283] Jack H. Kelly v. Vincent W. Kosuga.

In the Supreme Court of the United States. October Term, 1958. No. 267. Dated February 24, 1959.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Suit on Sales Contract—Scope of Defense of Illegality Under Sherman Act—Where Court's Judgment Would Not Enforce Antitrust Violations.—A purchaser of onions could not avoid paying for the goods by alleging that the sale was an indivisible part of an agreement which violated Section 1 of the Sherman Act. The challenged portion of the agreement was an alleged promise, mutually made by the parties, that they would not deliver onions on the futures market for the remainder of a season "for the purpose of creating a false and fictitious market condition." Assuming the illegality of that nondelivery agreement under the Sherman Act, it could not be enforced by a court. However, the courts would not be enforcing a violation of the Sherman Act by giving legal effect to a completed sale of onions at a fair price. The scope of the defense of illegality under the Sherman Act goes no further. Past the point where the judgment of the court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy of "preventing people from getting other people's property for nothing when they purport to be buying it." The purchaser argued that the cases in which the defense of illegality had been denied involved situations where a person not a party to any unlawful agreement sought to defend on the grounds of the seller's unlawful acts, whereas he was not liable for the purchase price because he was a party

to the unlawful agreement and the agreement bore some relation to the suit. The court rejected that principle of distinction, and held that the character of the parties was not itself determinative.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.760, 2205, 2339.15, 2407.15; Private Enforcement and Procedure, Vol. 2, ¶ 9042.650.

For the petitioner: Joseph W. Louisell and Ivan E. Barris, Detroit, Mich.

For the respondent: Lee A. Freeman and Anthony B. Eben (Brainerd Currie and Philip B. Kurland, of counsel), Chicago, Ill.

Affirming a judgment of the U. S. Court of Appeals for the Seventh Circuit, 1958 Trade Cases ¶ 69,062. For a prior opinion of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1957 Trade Cases ¶ 68,714.

[*Action on Contract—Antitrust Defense*]

Mr. Justice Brennan delivered the opinion of the Court [*In full text*].

The respondent sued the petitioner in the District Court for the Northern District of Illinois for failing to complete payment of the purchase price of 50 cars of onions which the respondent had sold to the petitioner in December 1955. Jurisdiction was based on diversity of citizenship. The petitioner interposed the defense that the sale was made pursuant to and as an indivisible part of an agreement which violated § 1 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. A motion was made to strike this defense and therefore the facts underlying it must be taken to be those set up in the petitioner's answer. Petitioner and respondent were both engaged in the marketing of onions. Petitioner, who was a grower of onions, admitted that he bought the onions from the respondent. But he alleged that the respondent and one Sam Siegel had represented to him and to other onion growers that they were the owners of substantial amounts of onions in storage, controlling 600 cars in the Chicago area and 400 more elsewhere throughout the country; that respondent and Siegel further informed the petitioner and other growers, at meetings called for the purpose in November and December 1955, that unless the growers purchased a large quantity of these onions, the respondent and Siegel would deliver them on the futures exchange for the purpose of depressing the futures price and the cash market price of onions. The petitioner and the other growers, who usually sold through trade channels, were fearful that this would cause them considerable loss. It was finally agreed by the petitioner and other growers that they would purchase 287 of the 600 cars of onions stored in the Chicago area, and the respondent and Siegel agreed not to deliver any onions on the futures market for the remainder of the current trading season. The petitioner and the other purchasers themselves agreed not to deliver any of the onions purchased from respondent and Siegel on the futures market for the remainder of the season; this was "for the purpose of creating a false and fictitious market condition," and "to fix the price of onions and limit the amount of onions sold in the State of Illinois." The District Court granted respondent's motion and struck the defense as insufficient in law.[1]

[*Illegality Under Sherman Act*]

The District Court then found, on the undisputed facts, that petitioner had in fact purchased the 50 cars of onions from the respondent, at an agreed price of $960 per car, plus storage charges incurred after sale; that petitioner had withdrawn 13 cars of the onions from the designated storage places after the sale, but had not withdrawn the remainder; that while petitioner had made some payments on account of the sale, he had come into default on them;

[1] Petitioner also interposed defenses of illegality under the Commodity Exchange Act, § 9, 42 Stat. 1003, as amended, 7 U. S. C. § 13, and the Illinois Antitrust Act, Smith-Hurd Illinois Ann. Stat., c. 38, §§ 569, 573, 574, and a counterclaim alleging respondent's breach of the nondelivery agreement. These issues were decided adversely to the petitioner below and are not preserved by him here.

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and that, when the onions began to show signs of deterioration, the respondent properly, after repudiation of the purchase by the petitioner, withdrew the remaining cars from storage and sold them for petitioner's account. The District Court entered summary judgment for the unpaid purchase price and storage charges, less the amounts obtained on the sale by respondent, the market price having declined in the interim. The Court of Appeals for the Seventh Circuit affirmed. 257 F. 2d 48 [1957 TRADE CASES ¶ 69,062]. We granted certiorari to consider the availability of the petitioner's pleaded defense of illegality under the Sherman Act to this action to enforce the terms of a sale made under state law. 358 U. S. 811.

[*Cases Considered*]

As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act[2] has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold. In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, one who had purchased merchandise from a firm allegedly a combination in restraint of trade was not allowed to set up that fact as a defense to an action for the purchase price. In *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, Corn Products sold merchandise to Wilder with a standing offer, of which the latter apparently had sought to take some advantage, to give Wilder a rebate if it bought exclusively from it. Again, in an action by the seller, Corn Products, to recover the agreed price, the purchaser, Wilder, was denied any defense of illegality based on the Sherman Act. The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction. *Id.*, at 174-175. Cf. *Bruce's Juices, Inc., v. American Can Co.* [1946-1947 TRADE CASES ¶ 57,553], 330 U. S. 743, 755. See *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248, 252, generally to the same effect. Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law, *Sola Electric Co. v. Jefferson Electric Co.* [1940-1943 TRADE CASES ¶ 56,245], 317 U. S. 173, 176-177, even in diversity actions in the federal courts after *Erie R. Co. v. Tompkins*, 304 U. S. 64, still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act.

[*Asserted Distinction*]

The petitioner recognizes the import of the holdings in *Connolly, Wilder* and *Small*, but he argues that they involve situations where a person not party to any unlawful agreement sought to defend against the action on the grounds of the seller's unlawful acts; where the purchaser is party to the unlawful agreement and the agreement bears some relation to the suit, the petitioner claims he is not to be held to the purchase price. The distinction asserted is, to say the least, on its face paradoxical; and the petitioner quotes from this Court's opinion in *McMullen v. Hoffman*, 174 U. S. 639, 669, which dealt with the plea of illegality in another context: "It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions." Petitioner evidently is willing to take the bitter as well as the sweet from this passage. If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general.

[*Scope of Illegality Defense*]

In any event, an analysis of the narrow scope in which the defense is allowed in respect of the Sherman Act indicates that the principle of distinction is not what the petitioner claims it to be. The leading case here in which the defense was allowed is *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, much relied on by petitioner. There the Voight company had made purchases from Continental, a corpora-

[2] Without deciding the point, we shall assume that the petitioner's allegations duly charged a violation of the Sherman Act.

tion which existed only as a selling agent for numerous wall paper companies doing business as a pool and selling at prices, alleged to be excessive and unreasonable, fixed through the pool agreement. The Court was of opinion that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act. 212 U. S., at 261. Any thought that the Court might have been proceeding on broader grounds was shortly afterwards laid to rest by the unanimous opinion of the Court in the *Wilder* case. 236 U. S., at 177. The scope of the defense of illegality under the Sherman Act goes no further. While enforcement of a contract between wrongdoers may more frequently present such a situation, cf. *Lyons v. Westinghouse Electric Corp.* [1955 TRADE CASES ¶ 68,008], 222 F. 2d 184, 188, the character of the parties is not in itself determinative. Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." *Continental Wall Paper Co. v. Louis Voight & Sons Co., supra,* at 271 (dissenting opinion). Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, cf. *Bruce's Juices, Inc., v. American Can Co., supra,* at 753-754, is avoided by treating the defense as so confined.

[*Lawful Sale*]

Accordingly, while the nondelivery agreement between the parties could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of "divisibility" or some other verbal formula may well be circular, see 6 Corbin, *Contracts,* § 1520, in any event, where as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question. Cf. *Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Bay,* 200 U. S. 179, 185. Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

[¶ 69,284] **United States v. Radio Corporation of America and National Broadcasting Company, Inc.**

In the Supreme Court of the United States. October Term, 1958. No. 54. Dated February 24, 1959.

On Appeal from the United States District Court for the Eastern District of Pennsylvania. KIRKPATRICK, Chief Judge.

Case No. 1311 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Scope of Sherman Act—Applicability to Regulated Industry (Television Broadcasting)—Jurisdiction of Regulatory Agency and Federal Court—Primary Jurisdiction—Effect of Federal Communications Commission Order Approving Station Exchange Attacked as Illegal Under Antitrust Laws.—The approval by the Federal Communications Commission of an agreement to exchange television stations did not bar an independent action by the Government which attacked the exchange as being in furtherance of a conspiracy in violation of the Sherman Antitrust Act. The legislative history of the Communications Act of 1934 revealed that the Federal Communications Commission was not given the power to decide antitrust issues as such, and that FCC action was not intended to prevent enforcement of the antitrust laws in Federal courts, that is, such courts retained jurisdiction to pass on alleged antitrust violations irrespective of FCC action. The repeal of a sentence of Section 311 of the Communications Act, which provided that the granting of a license should not estop the United

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States from proceeding against licensees for violations of the antitrust laws, was not intended as a curtailment of the power of the United States to proceed under the antitrust laws.

Despite the legislative history of the Communications Act, the over-all regulatory scheme of the Act did not require the invocation of the primary jurisdiction doctrine. The doctrine has been held applicable to transactions allegedly violative of the antitrust laws, particularly involving fully regulated industries whose members were forced to charge only reasonable rates approved by the appropriate regulatory agency. It has been consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by Federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance. While the television industry is a regulated industry, it is regulated in a very different way. That difference is controlling. Under the Communications Act, television broadcasters are not included in the definition of common carriers. Thus extensive controls, including rate regulation, do not apply. Therefore, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by Federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears. In every sense, the question faced by the parties to the station exchange was solely one of business judgment (as opposed to regulatory coercion), save only that the FCC had to find that the public interest would be served by their decision to make the exchange. However, this is not to imply that Federal antitrust policy may not be considered in determining whether the public interest would be served.

See Combinations and Conspiracies, Vol. 1, ¶ 2039.25; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221.125, 8229.625.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Defenses—Prior Adjudication by Administrative Agency—Laches—Estoppel.—The approval by the Federal Communications Commission of an agreement to exchange television stations did not bar an independent action by the Government which attacked the exchange as being in violation of the Sherman Antitrust Act. Insofar as this ruling was based on the finding that the Federal Communications Commission had no power to decide antitrust questions, other objections to the maintenance of the action by the Government fell of their own weight. Before it could be found that the Government was collaterally estopped by the FCC approval of the exchange, it had to be determined whether or not in the FCC proceeding the Government had authority to represent its antitrust interests in a final adjudication of the issue in controversy. However, the issue in controversy before the FCC was whether the exchange would serve the public interest and not whether the exchange violated the antitrust laws. Consequently, there could be no estoppel. *Res judicata* principles were even more inapposite. Similarly, the suit could not be barred on the theory of laches. There could be no laches unless the Government was under a duty to go forward in the FCC proceeding. Since the FCC had no power to decide the antitrust issues, the Government had no duty either to enter the FCC proceeding or to seek review of the FCC approval. It had been contended that the delay between the approval and the filing of the antirust suit barred the suit.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229, 8229.525, 8229.575.

For the appellant: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; Daniel M. Friedman, Bernard M. Hollander, and Raymond M. Carlson, Attorneys, Department of Justice, Washington, D. C.

For the appellees: Bernard G. Segal, Edward W. Mullinix, and Josephine H. Klein, Philadelphia, Pa. (Lawrence J. McKay and Denis G. McInerney, New York, N. Y., of counsel).

Reversing a decision of the U. S. District Court, Eastern District of Pennsylvania, 1958 Trade Cases ¶ 68,913; for a prior decision of the District Court, see 1957 Trade Cases ¶ 68,788.

[*Issue*]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court [*In full text*].

Appellees, Radio Corporation of America and National Broadcasting Company, are defendants in this civil antitrust action brought by the Government under § 4 of the Sherman Act, 15 U. S. C. § 4. After holding a preliminary hearing on three of appellees' affirmative defenses to that action, the federal district judge dismissed the complaint, 158 F. Supp. 333. The Government appealed directly to this Court under the Expediting Act, 15 U. S. C. § 29. The principal question presented is whether approval by the Federal Communications Commission of appellees' agreement to exchange their Cleveland television station for one in Philadelphia bars this independent action by the Government which attacks the exchange as being in furtherance of a conspiracy to violate the federal antitrust laws.

[*Government's Complaint*]

The Government's complaint generally alleged the following facts. In 1954, National Broadcasting Company (NBC), a wholly owned subsidiary of Radio Corporation of America (RCA), owned five very high frequency (VHF) television stations. The stations were located in the following market areas: New York, which is the country's largest market; Chicago, second; Los Angeles, third; Cleveland, tenth; and Washington, D. C., eleventh. According to the Government's allegations, in March 1954, NBC and RCA originated a continuing conspiracy to acquire stations in five of the eight largest market areas in the country. Since Philadelphia is the country's fourth largest market area, acquisition of a Philadelphia station in exchange for appellees' Cleveland or Washington station would achieve one goal of the conspiracy.[1]

One Philadelphia station, WPTZ, was owned by Westinghouse Broadcasting Company. This station and a Westinghouse-owned station in Boston were affiliated with the NBC network. In addition, Westinghouse desired NBC affiliation for a station to be acquired in Pittsburgh. In order to force Westinghouse to exchange its Philadelphia station for NBC's Cleveland station, it is alleged that NBC threatened Westinghouse with loss of the network affiliation of its Boston and Philadelphia stations, and threatened to withhold affiliation from its Pittsburgh station to be acquired. NBC also threatened to withhold network affiliation from any new VHF or UHF (ultra high frequency) stations which Westinghouse might acquire. By thus using its leverage as a network, NBC is alleged to have forced Westinghouse to agree to the exchange contract under consideration. Under the terms of that contract NBC was to acquire the Philadelphia station, while Westinghouse was to acquire NBC's Cleveland station plus three million dollars.

The Government asked that the conspiracy be declared violative of § 1 of the Sherman Act, 15 U. S. C. § 1, that the appellees be divested of such assets as the District Court deemed appropriate, that "such other and additional relief as may be proper" be awarded, and that the Government recover costs of the suit.

[*Defenses—FCC Action*]

Appellees' affirmative defenses arose out of the fact that the exchange had been approved by the Federal Communications Commission.[2] FCC approval was required under § 310(b) of the Communications Act of 1934, 48 Stat. 1086, as amended, 66 Stat. 716, 47 U. S. C. § 310(b). Under that Section, appellees filed applications setting forth the terms of the transaction and the reasons for requesting the exchange. The Commission instituted proceedings to determine whether the exchange met the statutory requirements of § 310, that the "public interest, convenience and necessity" would be served. They were not adversary proceedings. After extensive investigation of the transaction, the Commission was still not satisfied that the exchange would meet the statutory standards, and over three dissents, issued letters seeking additional information on various subjects, including antitrust problems, under § 309(b) of the

[1] Under present FCC regulations, NBC can own no more than five stations, 47 CFR, 1958, § 3.636, so that acquisition of a new station would require that an existing one be relinquished.

[2] Federal Communications Commission Report No. 2793, Public Notice 27067, December 28, 1955.

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Act. After receiving answers to the letters, the Commission, without holding a hearing, on December 21, 1955, granted the application to exchange stations.[3]

It was stipulated below that in passing upon the application, the Commission had all the information before it which has now been made the basis of the Government's complaint. It further appears that during the FCC proceedings the Justice Department was informed as to the evidence in the FCC's possession. It was further stipulated, and we assume, that the FCC decided all issues relative to the antitrust laws that were before it, and that the Justice Department had the right to request a hearing under § 309(b), to file a protest under § 309(c), to seek a rehearing under § 405, and to seek judicial review of the decision under § 402 (b). See *Far East Conference v. United States* [1952 Trade Cases ¶ 67,241, 342 U. S. 570, 576; *U. S. ex rel. Chapman v. Federal Power Comm'n,* 345 U. S. 153, 155, 156. The Department of Justice took none of these actions. Accordingly, on January 22, 1956, after the period in which the Department could have sought review had expired, NBC and Westinghouse consummated the exchange transaction according to their contract. The Department did not file the present complaint until December 4, 1956, over ten months later.

Against this background, appellees assert that the FCC had authority to pass on the antitrust questions presented, and, in any case, that the regulatory scheme of the Communications Act has so displaced that of the Sherman Act that the FCC had primary jurisdiction to license the exchange transaction, with the result that any attack for antitrust reasons on the exchange transaction must have been by direct review of the license grant. Relying on this premise, they then contend that the only method available to the Government for redressing its antitrust grievances was to intervene in the FCC proceedings; that since it did not, the antitrust issues were determined adversely to it when the exchange was approved, so that it is barred by principles of collateral estoppel and *res judicata;* and that in any case the long delay between approval of the exchange and filing of this suit bars the suit because of laches.

I.

[*Communications Act*]

Whether these contentions are to prevail depends substantially upon the extent to which Congress authorized the FCC to pass on antitrust questions, and this in turn requires examination of the relevant legislative history. Two sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.,* deal specifically with antitrust considerations, Sections 311 and 313:

> "Sec. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313.
>
> . . . . . .
>
> "Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by

[3] Commissioner Bartley dissented from the action, urging that hearings should have been held because the facts theretofore revealed by the investigation had raised "serious questions as to the desirability and possible legality of the competitive practices followed by the network in obtaining dominance of major broadcast markets." He suggested that there was "a substantial question whether, once the Commission grants its approval to these transfers, certain provisions of the Clayton Act (viz. 15 U. S. C. Section 18) might prevent Federal Trade Commission and Justice Department from taking any *effective* action in the event they concluded that possible violations of the antitrust laws were involved." (Emphasis by the Commissioner.) Commissioner Doerfer, joined by Commissioner Mack, responded that it was unnecessary to hold a hearing because the investigation had fully revealed the facts. He concluded, however: "It is difficult to see how approval of this exchange may effectively preclude other governmental agencies from examining into this or any other transaction of the network companies."

law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

[*Legislative History*]

These provisions were taken from the Radio Act of 1927.[4] They appear to have originated in a bill drafted by Congressman White of Maine, H. R. 5589, 69th Cong., 1st Sess. What is now § 311 appeared as the third paragraph of § 2(C)[5] of that bill, while what is now § 313 appeared as § 2(G).[6] In the hearings on the bill before the House Committee, Congressman Reid of Illinois asked Judge Davis, Department of Commerce representative, whether the Secretary of Commerce[7] had any discretion to refuse a license under § 2(C) (now § 311) to a party which the Secretary believed to be violating the antitrust laws. The following colloquy ensued:[8]

Judge Davis. "He has no discretion under this act."

Congressman Reid. "They have to be found guilty first; is that the idea?"

Congressman White. "Yes. In other words, I tried to get away from placing upon the secretary the determination of a judicial question of that character. That involves, of course, a determination as to the facts; it requires a knowledge of the law and it requires an application of the law to the facts, and then it requires the exercise of judicial powers, if you leave that in his discretion, and I tried to lift it away from the secretary."

Later on, the question arose as to what grounds were available to the Secretary to revoke licenses under § 2(F) (now § 312). After Congressman White enumerated one statutory ground, Congressman Reid observed:[9]

"Yes; but you do not include unlawful combinations and monopolies and contracts or agreements in restraint of trade. That is not covered."

Congressman White. "No; not in that section."

Congressman Davis of Tennessee. "Those are covered in 'G' [now § 313]."

Congressman White. "That is a judicial question and we have left it to the courts to pass on that."

This failure to include a provision permitting refusal of a license for antitrust violations in the absence of a judicial determination caused Congressman Davis to insert a lengthy Minority Report on H. R.

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[4] 44 Stat. 1162. See H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47, 49.

[5] "The Secretary of Commerce is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been found guilty by any Federal court of unlawfully monopolizing or attempting to unlawfully monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means. The granting of a license shall not estop the United States or any person aggrieved from prosecuting such person, firm, company, or corporation for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade."

[6] "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

[7] As then phrased, the Act was to be administered primarily by the Secretary of Commerce.

[8] Hearings before the House Committee on the Merchant Marine and Fisheries on H. R. 5589, 69th Cong., 1st Sess. 27.

[9] *Id.*, at 29.

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9108, which was old H. R. 5589 reintroduced by Congressman White.[10] Consequently, when the bill (then numbered H. R. 9971) reached the floor of the House, Congressman Davis attempted to insert a number of amendments which would have strengthened the antitrust aspects of the bill. See 67 Cong. Rec. 5484, 5485. All were defeated, including an amendment to § 2(C) (now § 311) which would have required refusal of a license to any company "found by any Federal court *or the commission* to have been unlawfully monopolizing" radio communication. (Italics supplied.) See 67 Cong. Rec. 5501-5504, 5555.

Thus, in the Senate consideration of a version of the bill, when asked whether there was "anything in the bill providing in case the applicant for a permit is found to be acting in violation of the Sherman antitrust law or controls a monopoly that the commission may pass upon the question," Senator Dill of Washington, who was in charge of the bill in the Senate, replied:[11]

> "The bill provides that in case anybody has been convicted under the Sherman antitrust law or any other law relating to monopoly he shall be denied a license; but the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court."

Congress adjourned before any action could be taken on the bill at that session. At the next session, a Conference Committee reported out the version of the bills which became the Radio Act of 1927, with now § 311 being § 13 of the Act and now § 313 being § 15 of the Act, despite the vigorous but unsuccessful opposition of Congressman Davis in the House, see, *e. g.*, 68 Cong. Rec. 2577, and Senator Pittman of Nevada in the Senate. See, *e. g.*, 68 Cong. Rec. 3032, 3034.

Only one change was made in those two Sections when they were incorporated into the Communications Act. Section 311 was modified merely to authorize rather than to require the revocation of a license by the Commission after a court had found a radio broadcaster in violation of the antitrust laws, but had not ordered its license revoked, 48 Stat. 1086. In all other respects §§ 13 and 15 of the Radio Act were identical with, and had the same purpose as, §§ 311 and 313 of the Communications Act.[12]

While this history compels the conclusion that the FCC was not intended to have any authority to pass on antitrust violations as such, it is equally clear that courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action. Thus § 311, as originally enacted in 1934, 48 Stat. 1086, read as follows:

> "The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. *The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.*" (Emphasis supplied.)

[*Contentions*]

Appellees attempt to avoid the force of the italicized sentence in two ways. First, they point to its repeal in the 1952 amendments to the Act, 66 Stat. 716. That repeal was occasioned by objections from the industry that it was unfair for radio broadcasters who had been found in violation of the antitrust laws to be subject to license refusals by the Commission, even when the court as a part of its decree did not see fit to order the license revoked under § 313. See S. Rep. No. 142, 82d Cong., 1st Sess. 9. Congress accordingly repealed all of the Section following the first comma, including

[10] See H. R. Rep. No. 404, 69th Cong., 1st Sess. 6, 16, 23.
[11] 67 Cong. Rec. 12507.
[12] H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47, 49.

the italicized sentence. It apparently considered that inherent in the scheme of the Act was the right to challenge under the antitrust laws even transactions approved by the Commission, for the Conference Committee carefully noted that repeal of the italicized sentence would not curtail such a right:[13]

> "To the extent that this section of the conference substitute will eliminate from section 311 of the present law the last sentence, which is quoted above, the committee of conference does not feel that this is of any legal significance. It is the view of the members of the conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law the power of the United States or of any private person to proceed under the antitrust laws would not be curtailed or affected in any way."

Thus, appellees' reliance on repeal of the last sentence of § 311 is clearly misplaced.

Second, appellees urge that the italicized sentence as originally enacted had a very narrow scope; that it was intended to insure only that the granting of a license would not estop the Government from prosecuting antitrust violations subsequent to the transaction giving rise to the license proceeding, or of which the transaction was merely a small part. They argue that the sentence was intended to permit only actions such as in *Packaged Programs v. Westinghouse Broadcasting Co.*, 255 F. 2d 708. But the language of the sentence cannot be naturally read in such a narrow manner, and it would take persuasive legislative history so to restrict its application. Appellees point to no such history, nor to any cases so holding.

[*FCC Power*]

Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.

II.

[*Primary Jurisdiction*]

We now reach the question whether, despite the legislative history, the over-all regulatory scheme of the Act requires invocation of a primary jurisdiction doctrine. The doctrine originated with Mr. Justice (later Chief Justice) White in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. It was grounded on the necessity for administrative uniformity, and, in that particular case, for maintenance of uniform rates to all shippers.[14] A second reason for the doctrine was suggested by Mr. Justice Brandeis in *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291, where he pointed to the need for administrative skill "commonly to be found only in a body of experts" in handling the "intricate facts" of, in that case, the transportation industry.

[*Applicability of Doctrine*]

Thus, when questions arose as to the applicability of the doctrine to transactions allegedly violative of the antitrust laws, particularly involving fully regulated industries whose members were forced to charge only reasonable rates approved by the appropriate commission, this Court found the doctrine applicable.[15] *United States v. Pacific & Arctic R. Co.*, 228 U. S. 87; *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156; *United States Navigation Co. v. Cunard S. S.*

[13] H. R. Conf. Rep. No. 2426, 82d Cong., 2d Sess. 19.

[14] We recently explained the nature of the doctrine in *United States v. Western Pacific R. Co.*, 352 U. S. 59, 63-64:

"The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

[15] See, generally, 3 Davis, Administrative Law Treatise, §§ 19.05, 19.06; Jaffe, Primary Jurisdiction Reconsidered. The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436; von Mehren, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929.

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Co., 284 U. S. 474; *Georgia v. Pennsylvania R. Co.*, [1944-1945 Trade Cases ¶ 57,344], 324 U. S. 439; *Far East Conference v. United States* [1952 Trade Cases ¶ 67,241], 342 U. S. 570. At the same time, this Court carefully noted that the doctrine did not apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures or a regulatory scheme.[16] *United States v. Pacific & Arctic R. Co., supra; Georgia v. Pennsylvania R. Co., supra.* The decisions sometimes emphasized the need for administrative uniformity and uniform rates, *Keogh v. Chicago & N. W. R. Co., supra,* while at other times, they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. *United States Navigation Co. v. Cunard S. S. Co., supra,* and *Far East Conference v. United States, supra,* as explained in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481, 497-499.

The cases all involved, however, common carriers by rail and water. These carriers could charge only the published tariff, and that tariff must have been found by the appropriate agency to have been reasonable. Free rate competition was modified by federal controls. The Court's concern was that the agency which was expert in, and responsible for, administering those controls should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive whole. That some resolution is necessary when the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious. Cf. *McLean Trucking Co. v. United States* [1944-1945 Trade Cases ¶ 57,203], 321 U. S. 67. Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance.

[*Television Industry*]

While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. Radio broadcasters, including television broadcasters, see *Allen B. Dumont Laboratories v. Carroll,* 184 F. 2d 153, are not included in the definition of common carriers in § 3(h) of the Communications Act, 47 U. S. C. § 153(h) as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communciations Act, 47 U. S. C. §§ 201-222, do not apply.[17] Television broadcasters remain free to set their own advertising rates. As this Court said in *Federal Communications Comm'n v. Sanders Bros. Radio Station,* 309 U. S. 470, 474:

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate

[16] This followed because, in the words of Mr. Justice Brandeis in *Keogh v. Chicago & N. W. R. Co., supra,* 161, ". . . a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal." This Court in *Georgia v. Pennsylvania R. Co., supra,* took the position that shippers were entitled to have rates filed by carriers who were not parties to a conspiracy, even though the rates filed were the lowest which would be found to be reasonable. The risk that future filings would be at the uppermost limits of the zone of reasonableness was too great, and damage from the conspiratorial filings was presumed to flow. Of course, when the agency is permitted to exempt from antitrust coverage rates filed cooperatively, the doctrine equally applies to an attack on the alleged conspiracy. *United States Navigation Co. v. Cunard S. S. Co., supra; Far East Conference v. United States, supra.*

[17] Under Title II, common carriers are required to furnish communications service on reasonable request and may charge only just and reasonable rates, § 201. Such carriers must file rates with the FCC, and can charge only the rates as filed, § 203. The Commission may hold hearings on the lawfulness of filed rates, § 204, and after hearings may itself set the applicable rate, § 205. Cf. 49 U. S. C. § 15 et seq., 46 U. S. C. § 817. In view of this extensive regulation, Congress has provided that certain actions of telephone and telegraph companies may be exempted from the antitrust laws by the Commission, § 221(a) and § 222(c)(1). Cf. 49 U. S. C. §§ 5(11), 5b(9) and 46 U. S. C. § 814. Such exemptions are, however, subject to review, see *Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481.

> Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads. . . ."

Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears.[18]

[*Nature of Exchange*]

The facts of this case illustrate that analysis. Appellees, like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an unregulated concern only in that they also had to obtain the approval of a federal agency. But scope of that approval in the case of the FCC was limited to the statutory standard, "public interest, convenience, and necessity." See, generally, *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266; *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U. S. 134; *Federal Communications Comm'n v. Sanders Bros. Radio Station, supra; Federal Communications Comm'n v. RCA Communications*, 346 U. S. 86. The monetary terms of the exchange were set by the parties, and were of concern to the Commission only as they might have affected the ability of the parties to serve the public. Even after approval, the parties were free to complete or not to complete the exchange as their sound business judgment dictated. In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion), save only that the Commission must have found that the "public interest" would be served by their decision to make the exchange. No pervasive regulatory scheme was involved.

[*FCC—Antitrust Considerations*]

This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served by proposed action of a broadcaster, for this Court has held the contrary.[19] *National Broadcasting Co. v. United States*, 319 U. S. 190, 222-224. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. See 98 Cong. Rec. 7399; *Mansfield Journal Co. v. Federal Communications Comm'n* [1950-1951 TRADE CASES ¶ 62,555], 86 U. S. App. D. C. 102, 107, 108, 180 F. 2d 28, 33, 34.

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[18] This conclusion is re-enforced by the Commission's disavowal of either the power or the desire to foreclose the Government from antitrust actions aimed at transactions which the Commission has licensed. This position was taken both before the district judge below, and in a Supplemental Memorandum filed in this Court, page 8:

"Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall the United States from subsequently bringing an antitrust suit challenging those transactions."

Nor was this position taken merely for the purposes of this litigation, for it has been the view of the Commission over a period of years. See *Report on Uniform Policy as to Violation by Applicants of Laws of United States*, FCC Docket No. 9572 (1950), 1 Pike and Fischer, Radio Regulation, Part III, 91:495; *National Broadcasting Co. v. United States*, 319 U. S. 190. Since, as Mr. Justice Brandeis observed, the doctrine of primary jurisdiction rests in part upon the need for the skill of a "body of experts," it would be odd to impose the doctrine when the experts deny the relevance of their skill.

[19] See also *Report on Uniform Policy as to Violation by Applicants of Laws of United States*, FCC Docket No. 9572, 1 Pike and Fischer, Radio Regulation, Part III, 91:495.

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III.

[*Estoppel—Laches*]

The other contentions of appellees fall of their own weight if the FCC has no power to decide antitrust questions. Thus, before we can find the Government collaterally estopped by the FCC licensing, we must find "whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication *of the issue in controversy.*" *Sunshine Anthracite Coal Co. v. Adkins* [1940-1943 TRADE CASES ¶ 56,037], 310 U. S. 381, 403. (Emphasis supplied.) But the issue in controversy before the Commission was whether the exchange would serve the public interest, not whether § 1 of the Sherman Act had been violated. Consequently, there could be no estoppel. *Res judicata* principles are even more inapposite.

Similarly, there could be no laches unless the Government was under some sort of a duty to go forward in the FCC proceedings. But unless the FCC had power to decide the antitrust issues, and we have held that it did not, the Government had no duty either to enter the FCC proceedings or to seek review of the license grant.[20]

[*Reversed*]

Accordingly, the judgment of the District Court dismissing the action is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[Concurring Opinion]

MR. JUSTICE HARLAN concurs in the result, believing, as he understands part "I" of the Court's opinion to hold, that a Commission determination of "public interest, convenience, and necessity" cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, and that these considerations alone are dispositive of this appeal.

[*Justices Not Participating*]

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

[¶ 69,285] The Fishermen and Allied Workers, an Affiliate of National Maritime Union, AFL-CIO, et al. v. The Quaker Oats Company.

In the Supreme Court of Mississippi. No. 40,954. Decided February 23, 1959.

Mississippi Antitrust Law

Combinations and Conspiracies—Application of State Antitrust Laws to Labor Unions—Jurisdiction of State Courts and National Labor Relations Board—Existence of Labor Dispute Affecting Interstate Commerce.—A Mississippi trial court had no jurisdiction to enjoin a fishermen's labor union from picketing the plant of a company which used fish caught by the union's members in producing cat food. A labor dispute was involved which affected interstate commerce, and jurisdiction was therefore vested in the National Labor Relations Board. The company charged that the union was picketing the plant for the unlawful purpose of restraining trade and monopolizing the production of fish in violation of the Mississippi law regulating trusts, combines, and labor. The union claimed that it sought to have the company's employees join the union so that an agreement might be reached with the company obligating it to buy fish only from union members. There was no dispute between the company and its employees, and no pressure was brought to bear upon the employees with reference to their joining or not joining the union. However, a "labor dispute," as defined in the Labor Management Relations Act, includes not only a controversy concerning the terms or conditions of employment but also a controversy "concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

[20] It is relevant to note that the Commission is not expressly required to give the Government notice that antitrust issues have been raised in a § 310(b) proceeding. Compare § 222(c)(1) of the Act relating to common carriers, which expressly makes consolidations and mergers exempt from antitrust coverage if approved by the Commission, but which also expressly requires that notice be given to the Attorney General of the United States prior to approval.

conditions of employment, regardless of whether the disputants stand in the proximate relationship of employer or employee." Also, the company was engaged in interstate commerce since it received raw materials from the Gulf of Mexico, Tennessee, and Louisiana and shipped its finished product into the various states.

See Combinations and Conspiracies, Vol. 1, ¶ 2441, 2445, 2453.

For the plaintiffs: Morse & Morse, Poplarville, Miss.

For the defendant: Morse & Morse, Gulfport, Miss.

[*Parties*]

HOLMES, Justice [*In full text*]: The litigation involves a controversy between The Quaker Oats Company and the Fishermen and Allied Workers, an affiliate of National Maritime Union, AFL-CIO.

The Quaker Oats Company is a New Jersey corporation qualified to do business, and doing business, in Pascagoula, Jackson County, Mississippi.

The Fishermen and Allied Workers, an affiliate of National Maritime Union, AFL-CIO, is a labor union having its principal place of business in Biloxi, Harrison County, Mississippi, and doing business in Jackson County, Mississippi.

[*Action to Enjoin Picketing*]

The Quaker Oats Company, as complainant, instituted this action in the Chancery Court of Jackson County, Mississippi, against the said labor union and its president and secretary as defendants, seeking the issuance of an injunction to enjoin the defendants from picketing the complainant's place of business in Pascagoula, Mississippi.

[*Mississippi Antitrust Laws*]

The original and amended bills of complaint alleged that on November 16, 1957, the complainant was engaged in the manufacture of Puss'n Boots Cat Food from trash fish as one of its ingredients; that at said time the complainant's employees were members of the International Chemical Workers Union, Local No. 504, with which union the complainant had a contract; that the complainant never had a contract with the defendant union and has never had a controversy with the defendant union; that on the morning of November 16, 1957, the defendants caused to be placed pickets on the premises of the complainant bearing placards or signs inscribed as follows: "Quaker Oats Company unfair to organized labor. AFL-CIO, Fishermen and Allied Workers"; that the said defendants were continuing to so picket the premises of the complainant; that said picketing was being done for the following unlawful purposes: (1) To damage or destroy the complainant's business in Pascagoula, Mississippi, pursuant to an unlawful conspiracy; (2) to intimidate the complainant's employees and persons supplying complainant with trash fish by using placards or other writing, or verbally attempting by threats, direct or implied, to induce the employees of the complainant to abandon their employment; (3) and the defendants, in carrying out said picketing, were wrongfully trespassing upon the property of the complainant; that the picketing was, in addition, for the following unlawful purposes: (a) To restrain trade and commerce, (b) to limit or increase the price of complainant's product, (c) to limit or reduce the production of complainant's product, (d) to hinder competition in the production or output of complainant's product, (e) to restrain or attempt to restrain the freedom of trade or production of complainant, (f) to monopolize, or attempt to monopolize, the production of raw materials used by complainant in the manufacture of its product and otherwise conspiring to violate the laws of the State of Mississippi regulating trusts, combine and labor; that the complainant's product was transported to and from the complainant's premises by the L. & N. Railroad Company, which had a service track into the complainant's place of business, and by trucks, and that the picketing was having the effect of interfering with the transportation of merchandise or products to and from the complainant's place of business, and that if the picketing is permitted to continue, it will seriously and injuriously affect the business of the complainant for the reason that the train crews and truck drivers have refused to cross the picket line; that the controversy between the complainant and the defendants is not a labor dispute affecting interstate commerce, and that the State court is vested with jurisdiction to decide the same; that

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the complainant is entitled to an injunction to restrain the defendants from picketing the place of business of the complainant, and that unless the said defendants are so restrained, the complainant will suffer irreparable injury to its business, and that it is without an adequate remedy at law.

[*Prior Proceedings*]

The chancellor issued the temporary injunction as prayed for. The defendants answered the original and amended bills of complaint and denied the material allegations thereof, and moved the court to dissolve the temporary injunction and further filed a plea to the jurisdiction of the court, alleging that the controversy in question constituted a labor dispute affecting interstate commerce, and that the exclusive jurisdiction of such controversy was vested in the Labor Management Relations Act of 1947 (29 U. S. C. A., Sec. 151, *et seq.*).

After a hearing, the chancellor overruled the plea to the jurisdiction of the court and the motion to dissolve the temporary injunction and entered a decree making the injunction permanent, and it is from this decree that this appeal is prosecuted.

[*Jurisdiction—Existence of Labor Dispute*]

The appellant contends on this appeal that the controversy involved is a labor dispute affecting interstate commerce within the purview of the Labor Management Relations Act of 1947, and that in the absence of violence, threats or coercion, the state court was without jurisdiction to adjudge the controversy, and that such jurisdiction was vested exclusively in the National Labor Relations Board. The appellee does not controvert this contention, or the authorities cited in support thereof, if it be conceded that the controversy involved is a labor dispute affecting interstate commerce. We need not, therefore, review the several cases cited by the appellant in support of its contention. But the appellee says that the controversy is not a labor dispute affecting interstate commerce within the purview of the Labor Management Relations Act (29 U. S. C. A., Sec. 151, *et seq.*), and that, therefore, the doctrine of federal pre-emption does not apply, and the state court was not without jurisdiction to hear and determine the controversy.

[*Issues*]

The position of the parties, therefore, simplifies the issues presented to this Court for decision. We concern ourselves only with the questions whether or not the complainant was engaged in interstate commerce, and whether or not the controversy between the parties was a labor dispute affecting interstate commerce within the purview of the Labor Management Relations Act. It becomes pertinent in the consideration of these questions to consider the facts as disclosed by the record before us.

[*Facts*]

The appellee, The Quaker Oats Company, had its plant and principal place of business at Pascagoula, Mississippi. It employed approximately 103 employees who were inside workers at the plant. The company was engaged in the processing, production and distribution for sale of Puss'n Boots Cat Food. The product was processed and produced at the company's plant in Pascagoula, Mississippi, and was shipped out to different states by rail and truck for sale to customers. The ingredients used in the product were scrap fish and cereals. The product was put up in cans. The cereals came from The Quaker Oats Company in Memphis, Tennessee. The cans were obtained from the Continental Can Company of Harvey, Louisiana. The trash fish were bought by The Quaker Oats Company from George Castigliola, who with Vincent Castigliola was doing business as Castigliola Shrimp Company in Pascagoula, Mississippi. Under the terms of the agreement which The Quaker Oats Company had with George Castigliola, the fish, which were caught by fishermen who were members of the boat crews plying waters in the Gulf of Mexico, were delivered at the plant of The Quaker Oats Company and there unloaded by employees of the said company. They were unloaded by means of a suction hose and taken from the wharf to the scales where they were weighed and the weight tickets were taken to George Castigliola, who paid the boat owners for the fish. The fishermen who caught the fish were members of the defendant union. The owners of the boats were not. The Quaker Oats Company bought the fish from George Castigliola and had no contact or dealings with the boat owners or the fisher-

men insofar as concerned its purchase of the fish.

Under date of November 13, 1957, W. J. Higginbotham, Secretary of the defendant union, addressed the following letter to Mr. Leonard Davis, Manager of The Quaker Oats Company:

"Mr. Leonard Davis, Manager,
"Coast Fisheries,
"Pascagoula, Miss.

"Dear Sir:

"The Fishermen and Allied Workers Union, an Autonomous Union within the National Maritime Union are the successors of the Old Gulf Coast Shrimper's and Oysterman's Association. As you probably know, all of the Fishermen who fished for you when you first started operations in Pascagoula in 1952 were members of this Union. You also know that the Business Agent, Mr. Walter McVeay, scheduled the boats for your Agent. That when your production was limited, the Union, with the consent of your Agent, restricted each boat to five tons per boat per trip, etc. And relations between your company, your agent, and the Union were very cordial and we all prospered and grew larger. It has now been brought to our attention that an ever increasing number of outside boats have been brought in, thereby crowding out some of our local boats. Also that these outside boats are selling from three to five times more fish than the local boats. That our local fishermen are being replaced by Negro fishermen from other states. It is this discrimination by your agent that the Union is gravely concerned. Your agent has used and abused our local fishermen to the point that the Union must take immediate action, we therefore ask that you meet with us November 15, 1957 in your office to discuss the necessary steps to eliminate these unjust conditions and to draw up an agreement whereby the fishermen of Pascagoula may claim their seniority rights, working conditions, and other benefits to which they are entitled.

"Sincerely yours,
"s/s W. J. Higginbotham,
Secretary"

[*Picketing*]

On the next day, November 14, 1957, Mr. Davis replied to said letter, acknowledging the receipt thereof and stating that such letter would be answered in due course. On November 15, Higginbotham and two others representing the defendant union called at Mr. Davis' office for the purpose of discussing the complaints set forth in Higginbotham's letter of November 13, but were told by Mr. Davis' secretary that he was busy. The next day, the defendant union placed pickets at the place of business of The Quaker Oats Company. The record is unsatisfactory as to whether or not the pickets actually trespassed upon the property of the Quaker Oats Company, but it is deducible from the evidence that if they did so trespass, it was of a minor nature. The picketing was otherwise peaceable. The record is clear that there was no dispute between The Quaker Oats Company and its employees, and no pressure was brought to bear by Quaker Oats Company upon the employees of said company with reference to joining or not joining the defendant union. It is undisputed from the evidence, however, that the presence of the pickets had the effect of preventing the train crews and the truck drivers from entering and leaving the premises of The Quaker Oats Company, and, therefore, had the effect of interfering with shipments moving in interstate commerce to and from the place of business of The Quaker Oats Company. This necessarily, if it had been permitted to continue, would have resulted in seriously injuring the business of The Quaker Oats Company and would have brought about a stoppage of or serious interference with the free flow of shipments to and from the place of business of The Quaker Oats Company.

[*Definitions*]

Considering the facts of the case before us and the questions here presented, it is important at this point to consider the definition of the terms "commerce," "affecting commerce," and "labor dispute in commerce" as set forth in the Labor Management Relations Act of 1947 (29 U. S. C. A., Sec. 152, subsections (6), (7), and (9). These definitions are as follows:

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia or any territory of the United States and any state or other territory, or between any foreign country and any state, territory, or the District of Columbia, or within the District of Columbia or any territory, or between points in the same state but through any other state or any terri-

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tory or the District of Columbia or any foreign country."

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relationship of employer and employee."

[*Interstate Shipments*]

We think it cannot be successfully maintained that the appellee was not engaged in interstate commerce, and that such commerce would not be affected by the dispute. The cat food which the appellee was engaged in processing and producing had for its ingredients scrap fish and cereals. The product was put up in cans. The cans were obtained from Louisiana; the cereals were obtained from Memphis, Tennessee, and the trash fish which were caught by the members of the defendant union in the waters of the Gulf of Mexico, were bought by George Castigliola and in turn sold by him to The Quaker Oats Company. The product when processed was shipped out to various states by rail and trucks to customers in different states. That The Quaker Oats Company was engaged in interstate commerce is well supported by the authorities.

In the case of *N. L. R. B. v. Richter's Bakery,* (C. C. A. 5th, 1944), 140 F. 2d 870, certiorari denied, 64 S. Ct. 1267, 322 U. S. 754, 88 L. Ed. 1584, it was held that a bakery whose products were sold and consumed locally but which purchased from sources outside the state raw materials valued at more than $60,000 which constituted twenty-five percent of the value of all raw materials used was engaged in "commerce", and subject to the Labor Management Relations Act.

In the case of *N. L. R. B. v. Schmidt Baking Company,* (C. C. A. 1941) 122 F. 2d 162, a baking company purchasing most of its materials and supplies in other states than that wherein two of its three plants were located, making large interplant shipments of materials and supplies and delivering a substantial part of its products to customers outside the state was engaged in interstate commerce.

In the case of *Wilson & Company v. N. L. R. B.* (C. C. A. 1939), 103 F. 2d 243, it was held that a meat packer purchasing in the state most of the livestock slaughtered, but shipping most of the finished products outside the state, was engaged in interstate commerce so as to be amenable to the jurisdiction of the National Labor Relations Board.

[*Interference with Interstate Shipments*]

The evidence is undisputed that the train crews and truck drivers engaged in transporting merchandise to and from The Quaker Oats Company's place of business were observing the picket lines, and thus it is apparent that the existence of the pickets affected injuriously shipments of merchandise to and from The Quaker Oats Company's place of business, and, therefore, resulted in a serious interference with the free flow of interstate commerce.

[*Labor Objective*]

The further question is presented, however, as to whether or not the controversy between The Quaker Oats Company and the defendant union was a labor dispute within the purview of the Labor Management Relations Act. We think that it was. The letter which Higginbotham first addressed to The Quaker Oats Company's manager complained that "an ever increasing number of outside boats have been brought in, thereby crowding out some of our local boats." It was further set forth in this letter that "these outside boats are selling from three to five times more fish than the local boats." The letter concluded by requesting a meeting on November 15, 1957, to "discuss the necessary steps to eliminate these unjust conditions and to draw up an agreement whereby the fishermen of Pascagoula may claim their seniority rights, working conditions and other benefits to which they are entitled." Higginbotham testified that one of the purposes of the union was to get the employees of Quaker Oats Company to join the Fishermen's union to the end that an agreement might be reached with The Quaker Oats Company obligating it to buy trash fish only from union members. Higginbotham further testified that there were

legitimate complaints to be adjusted with reference to equal working hours, safety factors at the plant where the fish were unloaded, inaccurate scales on which the fish were weighed, deductions from the fishermen's pay for insurance and radio facilities. This evidence of Higginbotham shows that the dispute between the parties concerned terms or conditions of employment.

[*Cases Considered*]

The definition of the term "labor dispute" in the Labor Management Relations Act of 1947 includes not only a controversy concerning the terms or conditions of employment but includes also a controversy "concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relationship of employer or employee." We think that the facts of this case bring the controversy here involved within the definition of a labor dispute as set forth in the act. Pertinent to this question and the facts of this case is the case of *Wisconsin Employment Relations Board, Respondent, v. Chauffeurs, Teamsters and Helpers Local 200 of I. B. of T. C. W. & H. of A., A. F. L. and Another, Appellants: National Warehouse Corporation, Intervenor,* 267 Wis. 356. We quote from the statement of the case as set forth in 267 Wis. pages 357-358, as follows:

"The complainant, National Warehouse Corporation, the intervenor here, is a Wisconsin corporation engaged in the general storage and warehousing business in Milwaukee, Wisconsin. It maintains terminal and platform facilities on a railroad siding and also receives shipments by over-the-road trucks. Its out-of-state supply of goods amounts to substantially in excess of $1,000,000 annually. The company employs 12 warehousemen, one of whom was a member of Local 200 of the Teamsters Union at the time of the organizational campaign here concerned. The employees of the company had been members of the union from 1937 until April 1948, when the contract expired. In 1948, a union authorization election was held by the National Labor Relations Board among the employees of the company, and the employees voted down the union by a vote of nine to two. In 1949, in the course of a general strike in the warehouse industry in Milwaukee, pickets appeared at the company premises. However, all of its employees continued to work, and upon the filing of charges of unfair labor practices against the union before the Wisconsin Employment Relations Board, the union immediately stopped picketing the National Warehouse. As a result of the continuance of nonunion workers at their jobs during the strike, it is alleged that the bargaining effect of the representatives of the union was lessened. Therefore, in 1952, organizational activities were commenced at nonunion warehouses. Their employees were notified of meetings for the purpose of talking to them about the benefits of belonging to the union. The employees at National Warehouse did not attend the meeting of which they had been notified, and refused to listen to personal appeals. Thereupon the president of the union gave the order to picket the National Warehousing Corporation."

Further stating the facts in the Wisconsin case, the Court said:

"They (the pickets) remained in cars parked outside the premises and waited until trucks doing business with the warehouse approached, at which time they approached the truck drivers with their signs. The picketing was peaceful at all times. All of the warehouse employees continued working and passed back and forth through the picket line. There was no dispute between the employer and its employees, and no pressure was put upon its employees by the employer with regard to joining or not joining the union. However, the drivers of the trucks are practically all members of the union, and the effect of the picket line was that the movement of trucks in and out of the warehouse was entirely choked off, thus seriously injuring the business of complainant."

The Court citing the case of *Garner v. Teamsters Union* (1953), 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228, held that the National Labor Relations Board had exclusive jurisdiction of the controversy involved. In so holding, the Court further said:

"Picketing is one of the traditional labor techniques incidental to the achievement of collective bargaining, and therefore, if lawful, is protected by the act. *It makes no difference that, as in the instant case, the picketing takes the form of 'stranger picketing,' i. e., picketing of a primary employer by a union which represents other units in the same industry than the unit being picketed. In the course of development of labor law, the area of a labor*

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dispute has been extended from that of employer and employee in a single unit of an industry or craft to the entire industry or craft." (Italics ours)

Continuing, the Court said:

"It will be seen, then, that there existed a bona fide 'labor dispute' in the instant case arising from 'stranger picketing' of the primary employer; and the definition of 'labor dispute' in the act itself makes this fact clear when it says that a 'labor dispute' includes 'any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms of conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.'"

A leading case which is analogous in its facts to the case at bar and which supports the conclusion which we have reached is the case of *Garner v. Teamsters Union*, 346 U. S. 485. The facts as stated by the Court are as follows:

"Petitioners were engaged in the trucking business and had 24 employees, four of whom were members of respondent union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike was in progress, and at no time had petitioners objected to their employees joining the union. Respondents, however, placed rotating pickets, two at a time, at petitioners' loading platform. None were employees of petitioners. They carried signs reading: 'Local 776 Teamsters Union (A F of L) wants employees of Central Storage and Transfer Company to join them to gain union wages, hours, and working conditions.' Picketing was orderly and peaceful, but drivers for other carriers refused to cross the picket line and as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as ninety-five percent. The court below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union."

The Court held that the dispute there involved was a labor dispute affecting interstate commerce and fell within the jurisdiction of the National Labor Relations Board. The Court said:

"Congress has taken in hand this particular type of controversy where it affects interstate commerce. . . . It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us."

The appellee relies strongly upon the case of *Columbia River Company v. Hinton*, [1940-1943 TRADE CASES ¶ 56,185], 315 U. S. 143. We think, however, that the essential facts in the *Hinton* case are materially different from the facts of the case at bar. As the Court pointed out in the *Hinton* case, "the controversy here is altogether between fish sellers and fish buyers." Thus it is manifest that the controversy there involved was not a labor dispute affecting interstate commerce within the prohibition of the federal act.

[*Injunction Dissolved*]

In the light of the views hereinbefore expressed, it is our conclusion that the court below was without jurisdiction to determine the question involved and that the controversy here involved was a labor dispute affecting interstate commerce and that jurisdiction of the same was vested in the National Labor Relations Board. Accordingly, the decree of the court below is reversed and judgment entered here dissolving the injunction and dismissing the suit of the appellee, and the cause is remanded for determination by the court below of the question of attorneys' fees claimed by the appellant on the dissolution of the injunction. Reversed and Judgment Here and Cause Remanded.

McGEHEE, Chief Justice, and HALL, LEE and ETHRIDGE, Justices, concur.

[¶ 69,286] Sanitized, Inc. v. S. C. Johnson & Sons, Inc.

In the United States District Court for the Southern District of New York. Civ. No. 133-285. Filed February 18, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Violation as Defense to Trade-Mark Infringement Action—Misuse of Trade-Mark—Sufficiency—Motion to Strike.—In a

trade-mark infringement action, a motion to strike an affirmative defense alleging that the trade-mark was being used "to violate the antitrust laws of the United States" was denied. The insufficiency of that defense was not clearly apparent and could better be determined at the trial. The owner of the trade-mark contended that the allegation, even if it were true, did not constitute a defense to an infringement action. While the law on the subject had not yet entirely crystallized, it appeared that the use of a trade-mark to violate the antitrust laws may constitute "unclean hands" and disentitle the trade-mark owner to relief.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.600.

For the plaintiff: Deane Ramey, New York, N. Y.

For the defendant: Watson, Leavenworth, Kelton & Taggart, New York, N. Y.

[*Patent Infringement Action*]

BICKS, District Judge [*In full text except for omissions indicated by asterisks*]: Plaintiff seeks injunctive relief and damages contending that defendant has infringed its registered trade-mark "Sanitized"[1] and has engaged in unfair competition. The defendant has denied the material allegations of the complaint and has interposed seven affirmative defenses and three counterclaims. *Sub judice* are three motions—one by defendant for summary judgment and two by plaintiff addressed to the form and sufficiency of the responsive pleading.

* * *

Plaintiff's Motion to Strike Third Affirmative Defense:

The third affirmative defense alleges that plaintiff's trade-mark "has been and/or is being used by plaintiff, its licensees and customers to violate the antitrust laws of the United States." Plaintiff contends that, assuming *arguendo* the truth of such allegation, it does not constitute a defense to the infringement action. Accordingly, plaintiff moves that said defense be stricken pursuant to Fed. R. Civ. P. 12(f). While the law on this subject has not yet entirely crystallized, it appears that use of a trade-mark to violate the antitrust laws may constitute "unclean hands" and disentitle the trade-mark owner to relief. See *G. D. Searle & Co. v. Institutional Drug Distributors, Inc.* [1957 TRADE CASES ¶ 68,724], 151 F. Supp. 715 (S. D. Cal. 1957); *Forstmann Woolen Co. v. Murray Sices Corp.* [1950-1951 TRADE CASES ¶ 62,716], 10 F. R. D. 367 (S. D. N. Y. 1950); 4 Callmann, *Unfair Competition and Trade-Marks* § 97.3(c)(4) at pp. 2083-2084 (2d ed. 1950); 2 Nims, *Unfair Competition and Trade-Marks* § 418 (4th ed. 1947). Cf. *Timken Roller Bearing Co. v. United States* [1950-1951 TRADE CASES ¶ 62,837], 341 U. S. 593, 598-99 (1951). But see Comment, 32 N. Y. U. L. Rev. 1002 (1957). The insufficiency of the defense sought to be stricken here is not clearly apparent and may better be determined at trial. See *Maschmeijer v. Ingram* [1950-1951 TRADE CASES ¶ 62,845], 97 F. Supp. 639 (S. D. N. Y. 1951); 1 Barron and Holtzoff, *Federal Practice and Procedure* § 368 at p. 750 (1950).[2]

* * *

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[1] On August 13, 1935, and pursuant to the Act of February 20, 1905, the United States Patent Office issued to plaintiff for a term of twenty years Registration No. 326,972 for plaintiff's trade-mark "Sanitized." Thereafter, and on August 13, 1955, plaintiff caused the said registration to be renewed in accordance with Section 9 of the Trade-Mark Act of 1946, 15 U. S. C. A. § 1059.

[2] As to the reluctance to resort to Rule 12(f) for the purpose of pre-trial determination of substantial questions of law, see *Lopez v. Resort Airlines, Inc.*, 18 F. R. D. 37, 41 & n. 12 (S. D. N. Y. 1955); 2 Moore, *Federal Practice* Para. 12.21[3] (2d Ed. 1948); 1 Barron and Holtzoff, op. cit. § 369 at p. 755 and cases there cited.

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[¶ 69,287] Anderson v. Sonbac Sales Corporation.

In the New York Supreme Court, Kings County, Special Term, Part I. 141 N. Y. L. J., No. 28, page 15. Dated February 10, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Price Violation by Enforcing Party.—A retailer was denied a temporary injunction to restrain violations of fair trade agreements where answering affidavits denied the so-called "bargain-price" sales and alleged affirmatively that the retailer's pharmacy itself sold the merchandise below fair trade prices. Confronted with conflicting affidavits, the court could not say that the retailer was entitled to the drastic relief of a restraining order. To grant such relief would give the retailer, prior to trial, all the relief it would be entitled to if it were successful at the trial.

See Fair Trade, Vol. 1, ¶ 3452.34.

[*Fair Trade Action*]

FRIEDMAN, Justice [*In full text*]: In an action to enjoin the defendant from violating a fair trade agreement with respect to the prices of certain drug commodities, plaintiffs move before this court for a temporary injunction, restraining and enjoining the defendant from selling or offering to sell any of the products at a price below those established in said contracts. The relief in the action is sought under the provisions of section 369a of the General Business Law. The moving papers assert that defendant has consistently sold various items of merchandise, described in said papers, at prices substantially below those set forth in the fair trade agreements. Affidavits substantiating these claims are made part of the moving papers. The answering affidavits deny the claimed sales at so-called bargain prices and allege affirmatively that the plaintiffs herein may not be heard to complain since plaintiffs' pharmacy itself sells the said merchandise below the so-called fair trade prices. An affidavit to that effect indicating such a purchase from plaintiffs' pharmacy and from others is part of the answering affidavits. Confronted with these conflicting affidavits, the court may not say that plaintiffs are entitled at this time to the drastic relief of a restraining order. To grant such relief at this time would give to the plaintiffs, prior to the trial, all of the relief to which it would be entitled if it was successful upon trial, and our courts have consistently held that such may not be done. In *Weinberg v. Bennett* (122 N. Y. S. 2d 383) the Appellate Division in this department affirmed an order which denied plaintiff's motion for a temporary injunction under section 369a of the General Business Law. There seems to be nothing in the papers before the court which indicates that these plaintiffs are entitled to any different disposition. Accordingly, the motion is in all respects denied.

[¶ 69,288] Center Lane Pharmacy, Inc. v. Stein.

In the New York Supreme Court, Nassau County. 141 N. Y. L. J., No. 35, page 15. Dated February 20, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Price Violation by Enforcing Party.—A retailer was denied a temporary injunction to restrain sales below fair trade prices where the defendant denied such sales and also averred (1) that the action had not been brought in good faith, and (2) that the retailer had not complied with the fair trade law as to the sale of similar items. It would be an abuse of discretion to grant the retailer injunctive relief before trial if it, in turn, had violated the same statute.

See Fair Trade, Vol. 1, ¶ 3452.34.

[*Fair Trade Action*]

MEYER, Justice [*In full text*]: In an action for an injunction for alleged violations of section 369(a) of the General Business Law (Fair Trade Law) the plaintiffs move for a temporary injunction restraining the

defendants from selling certain patent medicines, cosmetics and other items below the retail prices fixed by the manufacturers, wholesalers and distributors of said items. The defendants not only deny the advertising or the sale below the minimum price of the items specified in the plaintiffs' papers, but they aver (1) that the action has not been brought in good faith and (2) that the plaintiffs have not complied with the Fair Trade Law as to the sale of similar items. Upon the papers submitted, the court finds that the plaintiffs have not shown a clear right to injunctive relief before trial. Moreover, if the plaintiffs in turn have violated the same statute it would be an abuse of discretion to grant such relief (*Frasca v. Wilson,* 2 App. Div. 2d 762). Motion denied.

[¶ 69,289] United States v. American Greetings Corporation.

In the United States District Court for the Northern District of Ohio, Eastern Division. Civil Action No. 32986. Filed January 21, 1959.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Civil Penalties for Violation of FTC Order—Motions for New Trial—Additional Findings of Fact—Stay of Execution.—A manufacturer of greeting cards was denied a motion for a new trial after a judgment had been rendered against it for $10,600 for violating a Federal Trade Commission order. The motion was ostensibly on the ground that the judgment was contrary to the weight of the evidence, but the manufacturer's brief disclosed that it was not so much the weight of the evidence that was questioned, but rather the court's interpretation of the scope of the Federal Trade Commission order. The findings of fact were supported by substantial evidence. Also, the manufacturer's motions for additional findings of fact and for a stay of execution pending determination of the motions were denied. The requested additional findings of fact were not material to the court's decision, and the stay of execution was not necessary since the time for appeal did not begin to run until the determination of the motions.

See Unfair Practices, Vol. 2, ¶ 5075.12, 5201.481; FTC Enforcement and Procedure, Vol. 2, ¶ 8661, 8661.50.

For the plaintiff: Sumner Canary, U. S. Attorney, Cleveland, Ohio; and P. B. Morehouse, Berry W. Stanley, and Frank C. McAleer, Federal Trade Commission, Washington, D. C.

For the defendant: Robert W. Poore and James T. Lynn, of Jones, Day, Cockley & Reavis, Cleveland, Ohio.

For a prior judgment of the U. S. District Court, Northern District of Ohio, Eastern Division, imposing civil penalties for violation of a Federal Trade Commission cease and desist order in Dkt. 5982, see 1959 Trade Cases ¶ 69,258.

Memorandum Re: Motion for a New Trial, Additional Findings of Fact and for a Stay of Execution Pending the Disposition of This Motion

[*Motions*]

Weick, Judge [*In full text*]: Defendant has filed a motion for a new trial (Rule 59(a) Federal Rules of Civil Procedure) and for additional findings of fact (Rule 52(b) Federal Rules of Civil Procedure) and for a stay of execution pending the disposition of this motion.

A judgment for $10,600 was rendered against defendant in an action to enforce penalties for violation of a Federal Trade Commission order.

[*Motion for New Trial*]

Defendant's motion for a new trial is ostensibly on the ground that the judgment is contrary to the weight of the evidence.

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However, the brief clearly discloses that it is not so much the weight of the evidence, but rather the Court's interpretation of the scope of the Federal Trade Commission's order, that is questioned.

There is one point that should be made clear.

Defendant appears to be under the impression that it is free to remount competitor's cards taken from a retailer's stock, even though a specimen card had been mounted on a competitor's identifying mount. It is defendant's belief that so long as the display card itself is not disturbed there is no violation of the Order.

This view is entirely misconceived. If such a course of conduct were to be condoned it would allow defendant to circumvent the Order in a manner almost childlike in its simplicity. Stated classically, this would achieve by indirection that which cannot be done directly.

The Commission's Order gives defendant the right to remount competitor's cards on blank mounts only when the competitor's cards had previously been displayed on blank mounts or on no mounts at all.

The only real question of fact which defendant poses goes to the transaction under Count 4 relating to the destruction of competitor's cards. Defendant presents a good argument in support of its position, but not good enough to convince the Court that its findings of fact are clearly erroneous. The findings of fact are supported by substantial evidence.

The motion under Rule 59(a) is denied.

[*Findings of Fact*]

The requested additional findings of fact are not material to the Court's decision. Many of them stand uncontroverted on the record, and may be presented on appeal in that manner. If a Court were to adopt as findings of fact the many minute details not germane to a decision, its opinion would be unduly lengthy. Findings of fact should be concise and relevant to the issues.

The motion under Rule 52(b) is denied.

[*Penalties*]

Defendant also complains of the amount of the penalties assessed on Counts 3, 4 and 5. Count 4 involved violations of Paragraphs A, B and F and the penalty was fixed accordingly. Counts 3 and 5 were founded on violations of Paragraph F. The $2,500 penalty on each of these counts was assessed after weighing the various factors involved. Defendant should bear in mind that had its acts been flagrant violations of the Order it would have been fined $5,000 on each of these counts. The Court felt that $2,500 was a reasonable fine in view of all the facts and circumstances in the case.

[*Stay of Execution*]

Finally, a motion was presented for stay of execution under Rule 62(b) of the Federal Rules. Defendant states that this is necessary to preserve its right of appeal.

Under the provisions of Rule 73(a) defendant's time for appeal does not begin to run until the determination of these very motions. Therefore, there is no necessity for this relief to be granted, on the ground that it is requested, and the motion is, therefore, denied.

[*Motions Overruled*]

Defendant's motion for a new trial, for additional findings of fact and for a stay of execution is overruled.

[¶ 69,290] William Greene v. Lam Amusement Co., et al.

In the United States District Court for the Northern District of Georgia, Atlanta Division. Civil Action No. 5287. Dated January 29, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Production of Evidence—Interrogatories.—A motion picture exhibitor, suing for damages to his business by reason of an alleged conspiracy, was directed to answer interrogatories requiring him to state (1) the theory to be used in arriving at his damages and (2) the method by which his damages were computed. The exhibitor had contended that the action was assigned for trial within a short period and that the interrogatories came too

late. However, the exhibitor's objection to a third interrogatory requesting the exact amount of damages claimed to have been suffered by him for each calendar year during the period 1951 through 1954 was sustained. His counsel stated that due to the press of business there was no time to prepare the calculation which the interrogatory would require.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiff: Ryan and Ryan, Boston, Mass.; and Swift Tyler and John Tyler, Atlanta, Ga.

For the defendants: M. Neil Andrews and Clinton J. Morgan, Atlanta, Ga., for Lam Amusement Co., Newnan Theatres Co., and Oscar C. Lam; Sutherland, Asbill & Brennan, Atlanta, Ga., for East Point Amusement Co.; Troutman, Sams, Schroder & Lockerman, Atlanta, Ga., and Stanley Godofsky, New York, N. Y., for Paramount Film Distributing Corp., Loew's Inc., Twentieth Century-Fox Film Corp., Warner Bros. Pictures Distributing Corp., RKO Radio Pictures, Inc., United Artists Corp., and Universal Film Exchanges, Inc.

For prior opinions of the U. S. District Court, Northern District of Georgia, Atlanta Division, see 1956 Trade Cases ¶ 68,309, 68,310.

[*Interrogatories*]

Boyd Sloan, District Judge [*In full text*]: The distributor defendants propound to plaintiff the following interrogatories:

"1. State the theory to be used by plaintiff in arriving at his damages.

"2. State the method by which such damages are computed.

"3. State the exact amount of damages claimed to have been suffered by the plaintiff for each calendar year during the period 1951 through 1954."

[*Objections*]

The plaintiff objects thereto on the ground that the action has been assigned for trial on February 16, 1959, and that these interrogatories come too late and would not be of any particular value to the defendants since they do not ask for facts but for theory and method.

Plaintiff's counsel states that due to press of business he would not have time to prepare a calculation which Interrogatory No. 3 would require.

These objections are now before the Court for determination.

[*Ruling*]

The objections to Interrogatories Nos. 1 and 2 are overruled and plaintiff is directed to answer same. The objection to Interrogatory No. 3 is sustained and the plaintiff is relieved from responding thereto.

[¶ 69.291] The Evening News Publishing Company v. Allied Newspaper Carriers of New Jersey, et al.

In the United States Court of Appeals for the Third Circuit. No. 12,647. Argued November 20, 1958. Filed February 20, 1959.

Appeal from the United States District Court for the District of New Jersey. Wortendyke, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Trade Association Activities—Group Boycotts—Effect on Competition—*Per Se* Illegality.—A trial court's ruling that an association of home delivery news dealers and its members illegally combined to refuse to purchase and distribute a local daily and Sunday newspaper for the purpose of eliminating the competition presented by independent newsboys in the "home delivery market" of the newspaper was affirmed. The association demanded that the newspaper discontinue its use of newsboys in the home delivery of its papers. When the newspaper rejected that ultimatum, the dealers refused to accept and deliver the papers. Group boycotts are among the practices which the courts have deemed to be unlawful in and of themselves; they are unreasonable *per se* wherever there is sufficient economic power to appreciably restrain free competition and a "not insubstantial" amount of interstate commerce is involved. The boycott in the

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instant case stopped the home delivery of about 15,000 daily papers in 1956 and some 32,000 daily and Sunday papers in 1957. That number of newspapers constituted "an appreciable amount of commerce under any standard." Since the boycott appreciably restrained free competition and involved a "not insubstantial" amount of interstate commerce, the conduct of the dealers was unreasonable *per se*.

See Combinations and Conspiracies, Vol. 1, ¶ 2005, 2005.533, 2017.121.

Combinations and Conspiracies—Interstate Commerce—Affecting Interstate Commerce.—Home delivery news dealers and their association affected and restrained interstate commerce by refusing to distribute a daily and Sunday newspaper in New Jersey. The dealers conceded that their actions resulted from an agreement and combination of the independent dealers; they asserted, however, that the proof failed to show a conspiracy to restrain interstate commerce. They emphasized that it was not shown that any of their members delivered newspapers outside of New Jersey. Although the newspaper was published in New Jersey, and by far the major portion of its sales were made in that state, one of the paper's essential elements was the obtaining, disseminating, and interpreting of national and world-wide news. Further, interstate advertising appreciably affected the paper and its readers. To place news and advertising in the hands of New Jersey people required a continuous interstate transmission of materials and payments, to say nothing of the interstate commerce involved in the sale and delivery of the products sold. The record supported the trial court's finding that the restraint on interstate commerce was undue and substantial.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153.

Monopolies—Monopolization—Combinations to Monopolize—Refusal to Deal—Group Boycott.—A trial court's ruling that an association of home delivery news dealers did not violate Section 2 of the Sherman Act by combining to refuse to purchase and distribute a local daily and Sunday newspaper for the purpose of eliminating the competition presented by independent newsboys was affirmed. The evidence unquestionably demonstrated the effort of the dealers to acquire a monopoly of the newspaper's home delivery business; however, the evidence failed to establish that they possessed the power to actually accomplish that objective.

See Monopolies, Vol. 1, ¶ 2510, 2520, 2540, 2610.720.

For the appellants: Jerome C. Eisenberg, Newark, N. J.

For the appellee: Edward J. Gilhooly, Newark, N. J.

Affirming a prior decision of the U. S. District Court, District of New Jersey, 1958 Trade Cases ¶ 69,006. For a prior opinion of the U. S. District Court, District of New Jersey, see 1957 Trade Cases ¶ 68,745.

Before Biggs, Chief Judge, and Maris and McLaughlin, Circuit Judges.

Opinion of the Court

[*Nature of Action*]

By McLaughlin, Circuit Judge [*In full text*]: This anti-trust litigation arises from defendants' efforts to force plaintiff to eliminate newsboy home delivery of plaintiff's newspapers, The Newark, New Jersey Evening and Sunday News.

The defendants consist of 19 home delivery dealers and a New Jersey non-profit corporation, Allied Newspaper Carriers of New Jersey, formed by the individual defendants in August, 1956. The corporation acted as bargaining agent for its members. By June, 1957 its membership had increased to 133 home delivery dealers.

[*Facts*]

The facts found by the district court were mostly conceded, though there seems some misunderstanding as to this by appellants' present counsel. In any event there is substantial support in the record for the court's fact findings which are set out in great detail in the opinion below, — F. Supp. — (1958) [1958 Trade Cases ¶ 69,006]. Only those necessary for present purposes will be noted.

[*Group Boycott*]

Allied on February 15, 1956, was an unincorporated association of Home Delivery Dealers of which James L. Hutchings was president. On that date he, with 17 other members, complained to the News Circulation Director about late deliveries of the paper to the dealers. They threatened to discontinue handling the News unless this was remedied. Plaintiff agreed to improve its service. After that and prior to July 13, 1956, Hutchings demanded of the Circulation Director that all newsboys delivering the News in any territory of the Dealers should be forced out of business by plaintiff refusing to sell its newspapers to them. Plaintiff refused and was again threatened by the Dealers' spokesman with a refusal to handle the News by the Dealers. Within the same period, the Dealer representatives demanded that plaintiff "shut out" any distributor other than the newspaper man or Dealer in the particular area allocated to him by the Dealers themselves. On July 13, 1956, Hutchings and an attorney, who later represented the defendants at the trial, gave the News Circulation Director the ultimatum that unless plaintiff discontinued the use of newsboys in the distribution of its newspaper, the Dealers would no longer handle it. This was refused and that same day the Dealers refused to accept copies of the News from plaintiff. The latter tried to fill the gap with substitute carriers, selling its papers to them on the same terms as had existed between plaintiff and its other newsboys and the Dealers.

The number of newspapers affected daily was about 15,000 on Sunday the amount was somewhat less. The Dealers' action continued for about two weeks with 16 of the individual defendants participating. Just prior to its start, the Dealers gave written notices to their customers accusing the News of unethical practices, explaining that they would be unable to deliver the paper temporarily and suggesting that the Dealer be notified if the customer wished to substitute another paper. Certain of the Dealers gave their customers a notice which accused the News of trying to eliminate them and confectionary stores from the newspaper business and thus control circulation, etc. This notice warned that plaintiff would tempt little children into becoming newsboys by giving them the idea they would become little merchants handling their own routes. Some of the notices conveyed the idea that children acting as newsboys were forced to make their deliveries in bad weather and when they were ill. Other notices charged that the low rates insisted on by the News made it impossible for the Dealer to earn a living. Another form of notice said plaintiff sought men's services at boys' wages.

[*Injunctive Relief Sought*]

At the expiration of the two weeks the Dealers resumed taking and distributing the News but sought to persuade plaintiff to induce the substitute newsboys in the Dealers areas to withdraw. Business relations continued between the Dealers and the News until January, 1957, when at a meeting between Hutchings with some other Dealers and News Circulation Department personnel, demand was made that the substitute boys be eliminated. This was refused and Hutchings for the Dealers renewed the strike threat. As a result plaintiff brought this suit charging violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2) and seeking interlocutory and permanent injunctive relief.

[*Answer*]

An answer was filed admitting the jurisdiction of the court and all of the allegations of the complaint regarding the intrastate and interstate elements of plaintiff's business. It denied plaintiff was entitled to relief and alleged various affirmative defenses.

[*Prior Proceedings*]

On or about May 20, 1957, the date originally fixed for trial of this matter, the Allied members renewed their boycott of the News. This was stopped on June 18, 1957, solely by the interlocutory injunction. During the boycott period, the Dealers refused to handle approximately 32,000 daily and Sunday copies of the papers. By expensive substitute service, the News succeeded in having approximately 16,000 papers delivered to the readers affected.

The trial of the suit started May 23, 1957 and continued intermittently until June 17, 1957. On June 18, 1957 an interlocutory injunction was allowed plaintiff. Prior to final decision the district judge who heard the matter, died and the case was reassigned. Thereafter briefs were filed and oral argu-

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ment had. At that time counsel for the defendants adopted the factual summary set out in plaintiff's main brief and withdrew the affirmative defenses of the answer. He, for the defense, continued to assert that no relief was justified under the circumstances and questioned the sufficiency of the complaint. It was conceded on behalf of the defendants that their actions complained of resulted from an agreement and combination of the individual defendants through their membership in the corporate defendant.

The district court held that there had been a restraint of trade in violation of Section 1 of the Sherman Act but that the evidence failed to sustain the charged violations of Section 2 as to monopolizing. The injunction was made permanent and the final decree was entered April 9, 1958.

[*Interstate Commerce*]

Appellants on this appeal assert that the proofs fail to show a conspiracy to restrain interstate commerce. They stress that such was not their intention; they make no attempt to divide plaintiff's business into intrastate and interstate but seek to emphasize that it was not shown that any Allied member delivers outside of New Jersey; they would excuse their action as protection against discriminatory practices and unfair competition, saying that "The 'restraint' was not intended to achieve a restraint upon interstate commerce."

The truncated argument advanced would have us forget completely that interstate commerce is an inseparable, indispensable part of this plaintiff newspaper. The News does furnish neighborhood, city, county and state news to its readers. And by far the major portion of its sales are in New Jersey. But an essential element of its being, (perhaps considering its territory and the present state of this world of ours its most essential element) is the obtaining, dissemination and interpretation of national and world-wide news. Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in *Lorain Journal v. United States of America* [1950-1951 Trade Cases ¶ 62,957], 342 U. S. 143, 151 (1951), "* * * continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved in the sale and delivery of products sold". The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in *Lorain* (p. 152), "* * * an inseparable part of the flow of the interstate commerce involved." That Court said further (p. 152), "Without the protection of competition at the *outlets* of the flow of interstate commerce, the protection of its earlier stages is of little worth." (Emphasis supplied). It should be noted that in *Lorain*, as here, the contention was that merely a local issue was in dispute. See also *Greenspun v. McCarren* [1953 Trade Cases ¶ 67,439], 105 F. Supp. 662 (D. C. Nev. 1952); *Hearst Publications v. N. L. R. B.*, 136 F. 2d 608, 610 (9 Cir. 1943), rev. other grounds, *N. L. R. B. v. Hearst Publications*, 322 U. S. 11 (1944). See generally *Times-Picayune Pub. Co. v. United States* [1953 Trade Cases ¶ 67,494], 345 U. S. 594, 602-603, 604-605, 610 (1953).

[*Effect on Interstate Commerce*]

Whatever may have been its purpose, plainly the restraint imposed by defendants did affect interstate commerce. But, suggest the appellants, plaintiff must go further than that, it must prove that the activities of the defendants directly affected interstate commerce and that there has been undue restriction thereon harmful to the general public. Again they stress what they call "the purely local activities of these defendants".[1]

The district court concluded from the evidence that the restraint on interstate commerce was undue and substantial. Our examination reveals that the record supports these findings. The *Lorain* opinion governs the situation before us. *United States v. Yellow Cab Co., et al.* [1946-1947 Trade Cases ¶ 57,576], 332 U. S. 218 (1947) is hardly in point but, as far as it goes, supports the proposition that the home delivery of the

[1] They urge, as they did below, that it is the plaintiff who is really fixing the prices of the home delivery of its papers. The district judge found no support in the evidence for that assertion; to the contrary ample basis for its negation. The record entitled him to those conclusions and we have no right to disturb them.

News is an integral part of the interstate operation. The other two early decisions relied on do not represent what we think is the present law.[2]

[*Restraint of Competition*]

Finally, appellants assert that their concerted refusal to accept the News for home delivery did not restrain competition. They "maintain" their concession that their actions and refusal to deal with plaintiff which resulted from an agreement among themselves went no further than to relieve plaintiff of the burden of showing that a "combination" existed; that it did not relieve plaintiff of proving that the combination was one which unreasonably restrained competition.

[*Per Se Illegality*]

The Supreme Court in *Northern Pacific R. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1 (March 10, 1958) left no doubt what the true rule is in a group boycott case like the one before us. Mr. Justice Black for the Court said at page 5:

> "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, aff'd, 175 U. S. 211; *group boycotts, Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U. S. 392." (Emphasis supplied).

The Northern Pacific litigation dealt with tying arrangements, one of the same category as group boycotts. Justice Black, speaking of these said at page 6:

> "Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States*, 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co. v. United States*, 354 U. S. 594, 606. *They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected.*" (Emphasis supplied).

[*Competition Restrained*]

There was no incredibly complicated and prolonged economic investigation in this suit such as the Supreme Court, in *Northern Pacific*, holds unnecessary in a group boycott. Nevertheless the district court did sit for at least eleven days hearing testimony and argument. From the record it was held that the evidence established that the restraint resulting from the Dealers refusal to handle deliveries of the News for the home delivery market had made itself felt to a substantial degree. This was based on the uncontradicted testimony that the 1956 boycott had stopped the home delivery of about 15,000 daily papers and a somewhat lesser number on Sunday; that the restraint was enhanced by the written notices the Dealers circulated among their customers; that the 1957 boycott had prevented delivery of some 32,000 papers, daily and Sunday; that the plaintiff's extraordinary costly effort to keep its home delivery readers supplied in the latter crisis only took care of about half of those cut off by the strike.

[2] *Anderson v. United States*, 171 U. S. 604 (1898); *Hopkins v. United States*, 171 U. S. 578 (1898).

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Appellee claims that the 1957 boycott affected 20% of the total circulation of the News. This is disputed by the Dealers, as complicated mathematics. Even if the percentage figure were to be considerably reduced the number of papers eliminated by the boycotts is before us. These constituted "an appreciable amount of commerce under any standard". *United States v. Yellow Cab* [1946-1947 TRADE CASES ¶ 57,576], 332 U. S. 218, 225-226 (1947).

[*Monopoly Charge*]

It seems to us therefore from the record, that it was solidly established in the course of the trial that the boycotts had appreciably restrained free competition in the home delivery of the newspapers involved and that a not insubstantial amount of interstate commerce was affected. The evidence also unquestionably demonstrates the effort of the defendants to acquire a monopoly of plaintiff's home delivery business, though we agree with the district court that it fails to establish that defendants possessed the power to actually accomplish this particular objective. Appellee strongly contends that the presence of intent to suppress competition removes the obligation of proving that a substantial amount of interstate commerce is affected. Because, as we have already stated, the record firmly supports the Supreme Court test as laid down in *Northern Pacific*, there is no need for us to pass upon that question at this time.

[*Judgment Affirmed*]

The judgment of the district court will be affirmed.

[¶ 69,292] Duchen v. Milliken Woolens, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 141 N. Y. L. J.; No. 41, page 11. Dated March 3, 1959.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies Under State Antitrust Laws—Practices—Refusal to Deal—Legality.—A garment manufacturer's complaint charging that a yarn manufacturer conspired with other garment manufacturers to prevent it from purchasing yarn was dismissed for failure to state a cause of action. Refusal of the single manufacturer to sell its product to the garment manufacturer did not constitute a violation of the Donnelly Act. The other unnamed persons alleged to have conspired with the yarn manufacturer were not manufacturers of yarn, the subject product, but were manufacturers of garments made from that product. The court noted that the claimed destruction of the garment manufacturer's business by reason of the conspiracy was wholly conclusory.

See Combinations and Conspiracies, Vol. 1, ¶ 2337.34.

[*Conspiracy Charged*]

LEVEY, Justice [*In full text except for omissions indicated by asterisks*]: Defendants move for dismissal of each cause of action for insufficiency and for further relief pursuant to Rules 103, 102(1) and 90. Plaintiff insists that its purchases were made from the defendant Deering, Milliken & Co., Inc. The documents submitted on the motion do not conclusively establish that the defendant does not sell and the allegations relating to the defendants as manufacturer and seller are not sham.

* * *

The third cause rests on claimed violation of the Donnelly Act. In effect plaintiff complains that defendants, manufacturing and selling a particular yarn, have refused to sell to plaintiff. To render the refusal wrongful it is alleged that defendants conspired and agreed with other manufacturers of garments made from yarn, the subject product, to prevent plaintiff from purchasing the yarn and manufacturing garments made therefrom. The claimed destruction of plaintiff's business by reason thereof is wholly conclusory.

There are several other conclusory allegations contained in the complaint but apart therefrom the restraint on the part of the single manufacturer of the subject product to sell that product to plaintiff does not constitute a violation of the Donnelly Act. The other unnamed persons alleged to have conspired along with the defendants are not the manufacturers or sellers of the subject

product but are manufacturers of garments made therefrom.

[*Conspiracy Charge Dismissed*]

The motion is granted to the extent of dismissing the first and third causes of action for insufficiency and it is denied in all other respects, with leave to plaintiff to serve an amended complaint within twenty days from service of a copy of this order, with notice of entry.

[¶ 69,293] **Loew's Incorporated v. Somerville Drive-In Theatre Corporation; and seven other consolidated actions: Paramount Film Distributing Corporation; Warner Bros. Pictures Distributing Corporation; Twentieth Century-Fox Film Corporation; United Artists Corporation; Columbia Pictures Corporation; Universal Film Exchanges, Inc.; and RKO Teleradio Pictures, Inc. v. Somerville Drive-In Theatre Corporation.**

In the Superior Court of New Jersey, Appellate Division. No. A-700-57. Decided February 18, 1959.

Appeal from the Superior Court of New Jersey, Law Division, Somerset County. JOSEPH HALPERN, Judge.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Suit on Motion Picture Licensing Agreements Alleged to Be Part of Conspiracy—Where Court's Judgment Would Not Enforce Antitrust Violations.—A motion picture exhibitor, when sued by distributors for fees allegedly due under licensing agreements, could not defeat the action by alleging that "clearance" and "run" provisions in the agreements were imposed upon it by a conspiracy among the distributors in violation of the Sherman Act. The exhibitor argued that the unlawfully fixed clearances influenced the license fees and were inherent in the contracts. The court held, however, that the alleged illegality was collateral to the agreements in suit, citing *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. In that case the defense of illegality was rejected, although unlawfully fixed prices not only influenced the contracts in suit but were the actual provisions sued upon. It could not be said that a judgment for the distributors would further an illegal scheme; in order to do so, the court would have to say that any judgment in favor of one who is a party to a conspiracy to restrain trade, in a suit on a contract whose terms partly resulted from his unlawfully dominant position, "furthers the illegal scheme." There was merit in the distributors' contention that the *Connolly* case was distinguishable from *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, in which the defense of illegality was sustained, by the fact that the defendant in the latter case was a participant in the conspiracy. The distinction might be better stated by saying that, in the *Continental* case, the contract sued upon called for some further unlawful act, namely, maintenance of fixed resale prices by the defendant; therefore, a judgment by the court for the plaintiff would have furthered an illegal scheme by validating a contract requiring further activity.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.575, 9048.225.

Combinations and Conspiracies—Practices—"Clearances" and "Runs" in Motion Picture Industry—Unreasonableness as Basis for Illegality—Absence of Conspiracy—Refusal to Deal.—"Clearance" and "run" provisions in film licensing agreements between distributors and a motion picture exhibitor were not illegal under Section 1 of the Sherman Act in the absence of a conspiracy among the distributors. The exhibitor, as an affirmative defense to an action to recover license fees, asserted that the "clearance" and "run" provisions were unreasonable, arbitrary, and therefore illegal, even in the absence of a conspiracy. An exhibitor has no right *per se* to a priority of run enforceable against an individual distributor under the antitrust laws. Section 1 of the Sherman Act, which condemns every contract, combination, or conspiracy in restraint of trade, requires a plurality of actors. If each distributor, through sheer perversity, and acting independently, refused to grant runs to the exhibitor except following an unreasonable clearance, there would be no ground for relief under the Sherman Act. The exhibitor must show,

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as an essential part of its case, that the clearances were imposed as the result of an agreement or some kind of joint action among the distributors, or between a distributor and a prior-run exhibitor. The Sherman Act comes into operation only where a distributor conspires with others to impose a subsequent run upon an unwilling exhibitor under conditions deemed to be unreasonable as a matter of law.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.553, 2005.785.

Private Enforcement and Procedure—Antitrust Law Violations as Defenses to Contract Actions in State Court—Governing Law.—The New Jersey Superior Court, Appellate Division, held that whether or not an alleged violation of the Federal antitrust laws constituted a defense to a state cause of action in contract was a Federal question. Also, a determination of the conditions under which a violation constitutes a defense would be a Federal question, since otherwise the additional remedy under the Federal statute might be distorted beyond what the interpreting authority, the United States Supreme Court, deemed that Congress intended.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.

For the appellant: Monroe E. Stein, Elizabeth, N. J.

For the respondents: Willard G. Woelper of Toner, Crowley, Woelper & Vanderbilt, Newark, N. J. (Edward A. Sargoy and John F. Whicher of Sargoy & Stein, New York, N. Y., of counsel).

Affirming a judgment of the Superior Court of New Jersey, Law Division, Somerset County, 1958 Trade Cases ¶ 69,117.

Before Judges GOLDMANN, FREUND and HANEMAN.

The opinion of the court was delivered by GOLDMANN, Judge [*In full text*]: This is an appeal, taken by leave granted pursuant to R. R. 2:2-3, from an order of the Superior Court, Law Division, striking as insufficient in law (R. R. 4:12-6) the affirmative defense interposed in each of eight consolidated actions. Four were commenced in the district court and the rest in the Law Division; all eight were consolidated in the Superior Court. The cases present identical questions of law and fact.

I

[*Action on Contract*]

Plaintiff in each case is a distributor of motion pictures and is suing defendant, which operates a drive-in motion picture theatre in Somerville, N. J., for the balance of license fees allegedly due under license agreements for the exhibition of plaintiff's films. The complaints are identical except for plaintiff's name and the amount of damages sought. We may therefore treat one complaint as typical of the others and, for the moment, refer to the respective plaintiffs as "plaintiff."

[*Antitrust Violation Alleged as Defense*]

The complaint, as amplified by the pretrial order, alleges that plaintiff, by means of license agreements, granted defendant the right to exhibit at its theatre and at certain fixed times various copyrighted motion pictures distributed by it. Defendant was to pay a license fee, known as a percentage rental, in an amount determinable by a percentage of the gross box office receipts. Defendant's original admission charge was 70¢ for each patron over 12 years of age. Beginning with the fall of 1954 defendant concededly charged 80¢, except for certain brief periods. In accounting to plaintiff for gross box office receipts for the purpose of computing and paying percentage rentals, defendant reported its receipts at only 70¢ per patron. Plaintiff claims the unpaid percentage balance due on the remaining 10¢. Defendant alleges that the unreported 10¢ represented a charge to patrons for the use of car heaters supplied during cold weather, or for the privilege of their children's use during the summer months of a small playground located on the theatre premises. It contends that such charges should not be considered part of the admission fee. Defendant concedes that if this contention is not upheld, the eight plaintiffs will be entitled to claims aggregating $9,020.57. However, in addition to denying liability, defendant raises the affirmative defense that plaintiff cannot recover because the license agreements sued upon are illegal

and unenforceable, in that they violate the Sherman Anti-Trust Act, 15 U. S. C. A., §§ 1 to 7, inclusive.

[*"Runs" and "Clearances"—Legality*]

Plaintiffs distribute over 90% of the films available for exhibition at defendant's theatre. The business of distributing and licensing motion pictures is conceded to be in interstate commerce. The defense alleges that the "run" and "clearance" provisions in the license agreements "set the time when a theatre operator may exhibit a certain picture in relation to the time when said picture is exhibited in other theatres"; that these provisions are integral parts of the agreements and substantially affect the license fee terms; and that "clearance" is legal only when reasonable. Defendant further alleges that it requested, but was refused, "a run free and clear of clearance over defendant's theatre from any other theatre"; that any run in its theatre which was based on clearance in favor of any other theatre, or which conditioned the time when defendant could exhibit a picture upon the time when any other theatre exhibited, or upon any fact other than the general release of the picture in New Jersey, is unreasonable, arbitrary and illegal. Defendant also claims that the refusal of the several plaintiffs to agree to license their pictures on the terms defendant had requested, was the result of a conspiracy among them (in which certain unnamed exhibitors also participated) to impose upon defendant a uniform system of runs and clearances which it was obliged to accept in order to obtain films. All these actions, it is alleged, effected an unreasonable restraint on interstate commerce, and hence violated the Sherman Act. Defendant demanded judgment dismissing the several complaints.

[*Prior Proceedings*]

In granting plaintiffs' motion to strike the defense as insufficient, the trial judge held it to be settled law that

> "* * * the contracts of an unlawful combination or its members, which are collateral to and independent of the unlawful contract by which the conspiracy was created, and which are not in furtherance of its unlawful purpose, are valid and enforceable. It is generally agreed that the mere fact that the plaintiff is a member of an unlawful conspiracy or combination, created with the intent and purpose of restraining trade or establishing a monopoly, will not disable or prevent it in law from selling goods or services within or affected by the provisions of such trust or combination, and recovering their price or value, either at common law or under statutes making unlawful contracts in restraint of trade or commerce."

He concluded that the alleged illegality pleaded by defendant was collateral to the contracts in suit.

II

[*Economic Necessity*]

Plaintiffs argue, and defendant readily concedes, that the system of staggered releases of motion pictures, whereby certain theatres exhibit a particular picture ahead of others, *i. e.*, on an earlier "run," is an economic necessity in the motion picture business and has judicially been sanctioned when reasonably employed. *Fanchon & Marco v. Paramount Pictures* [1950-1951 Trade Cases ¶ 62,909], 100 F. Supp. 84, 89 *et seq.* (S. D. Cal. 1951), affirmed 215 F. 2d 167 [1954 Trade Cases ¶ 67,843] (9 Cir. 1954), certiorari denied 348 U. S. 912, 75 S. Ct. 293, 99 L. Ed. 715 (1955). It is also well settled that no exhibitor has a right, as a matter of law, to a priority of run. *Paramount Pictures Theatres Corp. v. Partmar Corp.*, 97 F. Supp. 552, 559 (S. D. Cal. 1951), affirmed on opinion below 200 F. 2d 561 (9 Cir. 1952), affirmed 347 U. S. 89, 74 S. Ct. 414 [1954 Trade Cases ¶ 67,674], 98 L. Ed. 532 (1954), rehearing denied 347 U. S. 931, 74 S. Ct. 527, 98 L. Ed. 1083 (1954); *Orbo Theatre Corp. v. Loew's, Inc.* [1957 Trade Cases ¶ 68,869], 156 F. Supp. 770, 779 (D. D. C. 1957). Defendant, however, insists that the clearance and run provisions inserted in the licenses in suit are unreasonable and arbitrary, and therefore illegal.

[*Definition of "Clearance"*]

Clearance and run provisions in a film license contract fix the time when a theatre may exhibit the licensed picture. The meaning of "clearance" was set out in the leading case of *United States v. Paramount Pictures, Inc.* [1946-1947 Trade Cases ¶ 57,470], 66 F. Supp. 323 (statutory court S. D. N. Y. 1946); findings, conclusions and decree published in 70 F. Supp. 53 [1946-1947 Trade Cases ¶ 57,526] (S. D. N. Y. 1947); affirmed in part and reversed in part, 334

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U. S. 131 [1948-1949 TRADE CASES ¶ 62,244], 68 S. Ct. 915, 92 L. Ed. 1260 (1948). The lower court there said (66 F. Supp., at page 341):

> "Among provisions common to the licensing contracts of all the distributor-defendants are those by which the licensor agrees not to exhibit or grant a license to exhibit a certain motion picture before a specified number of days after the last date of the exhibition therein licensed."

The United States Supreme Court in the same case (334 U. S., at page 144) said that "Clearances are designed to protect a particular run of a film against a subsequent run." In the findings of fact of the statutory court, reported in 70 F. Supp. 53 [1946-1947 TRADE CASES ¶ 57,526], at page 54, clearance is defined as "the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres."

[*"Clearance" Not Illegal Per Se*]

We note, in passing, that a clearance is not illegal *per se,* even though it may restrict trade to some extent. As was squarely held by the statutory court in *United States v. Paramount Pictures, Inc.,* above, 66 F. Supp., at page 341 *et seq.*:

> "* * * a grant of a clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the licensee without unreasonably interfering with the interests of the public. * * * [L]icenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area." (The court was here referring to its comment that at common law "a vendor of income-producing property may validly covenant with his purchaser not to compete for a given time or within a given area so long as the restrictions are reasonable necessary to protect the value of the property purchased.")

This holding was left undisturbed on appeal, 334 U. S., at page 145. And see *Fanchon & Marco v. Paramount Pictures,* above, 100 F. Supp. at page 89. The rule accords with our law relating to negative restrictive covenants of a similar character. *Voices, Inc. v. Metal Tone Mfg. Co.,* 119 N. J. Eq. 324 (Ch. 1936), affirmed 120 N. J. Eq. 618 (E. & A. 1936), certiorari denied 300 U. S. 656, 57 S. Ct. 433 (1937).

[*Definition of "Runs"*]

"Runs" are defined as "the successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on." 70 F. Supp., at page 55. In short, the "run" determines the sequence in which a theatre may exhibit a particular picture with reference to the sequence of exhibition in other theatres which enjoy a prior run, and "clearance" sets the time which must elapse between the showing of the picture at different theatres.

III

[*Reasonableness of Agreements*]

In elaboration of its affirmative defense, defendant contends that plaintiffs have violated the Sherman Anti-Trust Act in two separate and independent particulars: (1) the clearance and run provisions of the license agreements in suit are unreasonable and arbitrary, and hence illegal, even in the absence of a conspiracy between and among the several plaintiffs; and (2) the uniform clearance and run provisions inserted in license agreements were determined and imposed upon defendant as a result of a conspiracy and agreement to which all the plaintiffs were parties.

[*Contracts with "Prior-Run" Exhibitors*]

To meet the first branch of defendant's argument, plaintiffs use as their point of departure the definition of "clearance" given in the *Paramount Pictures* case, above, and argue that defendant mischaracterizes as "clearances" the contract provisions in suit. Clearances, they contend, are negative covenants in the exhibition contracts made by a distributor with *prior-run* exhibitors, to protect for limited times and within a certain area the exclusivity of the prior-run exhibition right therein granted. But the issue raised by the defense, they say, is actually directed toward the delivery date or availability of the film print, and not to the

legal validity of any clearances granted in contracts with third parties for prior-run protection. Plaintiffs point out that defendant pleads no such clearance clauses in the contracts in suit; it does not claim that it agreed, conspiratorially or otherwise, with any plaintiff unreasonably to withhold any picture from any theatre, or that it made any negative covenants in its contracts to obtain exclusive and unreasonable protection by way of clearance for itself over later-run theatres. What it is claiming is that it was held back to a later delivery date or run than it desired, because of unreasonable protective clearance granted to prior-run theatres. Plaintiffs state that such clearances, by definition, could only be found in the agreements between plaintiffs and such *prior-run* exhibitors.

Plaintiffs' argument, on first impression, carries a measure of persuasion. Since no exhibitor has a right, as a matter of law, to a priority of run, there could be no inherent illegality in a license agreement which fixes the availability or time for delivery of the film print licensed for exhibition. The contract and any breach thereof, say plaintiffs, can be established on its own account; one need not go outside the contract into other and collateral contracts and transactions. It is only when one finds a "clearance" provision as defined and described in the *Paramount Pictures* case, that one encounters anything in the nature of a restraint of trade.

There is language in the *Paramount Pictures* case (see 66 F. Supp., at page 341 and 334 U. S., at page 144, quoted above) that would appear to lend support to plaintiffs' argument that a true clearance provision can be found only in the license agreements of a prior-run theatre which grant that theatre clearance or protection over a subsequent-run theatre. In most anti-trust actions, the emphasis would probably be on agreements with prior exhibitors, in an effort to show that the protection granted thereby was unreasonable because unduly extended as to area or duration. However, our examination of the cases, particularly the *Paramount Pictures* case, nowhere reveals a statement by the court that clearance *must* be stipulated in the contracts of the prior-run theatre for whose benefit the clearance was granted. In considering clearances, the objectionable feature is the fact that there is an arrangement to give an unreasonably broad protection. The fact that the clearance appears in one document rather than another cannot reasonably or logically be considered material.

The definitions of "clearance" given in the briefs, all taken from *Paramount,* do not compel the narrow interpretation advanced by plaintiffs. In that case the courts were concerned with clearance provisions that already appeared in contracts with preferred exhibitors, and references would naturally be to those contracts. In logic and in practice, clearance provisions may be expressed in license agreements with prior-run theatres which have the benefit of the clearance, or in those with later-run theatres on which the clearance is imposed. They might more informally be included in letter agreements, or even effected by verbal arrangements, with the understanding that the terms would subsequently be incorporated in the executed license agreements of a prior-run theatre, later-run theatre, or both. The search always is for evidence of clearance, no matter how or in what form expressed.

[*Refusal to Deal*]

We pass to another aspect of the first branch of defendant's argument. Defendant rests its case for holding the so-called clearance and run provisions of the license agreements in suit illegal on the flat assertion that these provisions are in violation of section 1 of the Sherman Anti-Trust Act, even in the absence of a conspiracy between and among the several plaintiffs. This contention vitiates defendant's entire argument.

The question posed is simply this: whether an individual distributor's refusal to agree to license a particular theatre on any but a subsequent run can ever be illegal for any purpose, in the absence of conspiratorial or joint wrongful action with third parties underlying such refusal, under conditions which render that refusal unreasonable as a matter of law. The firmly established rule, as has already been indicated, is that an exhibitor has no right *per se* to a priority of run enforceable against an individual distributor under the anti-trust laws, *Paramount Pictures Theatre Corp. v. Partmar Corp.* and *Orbo Theatres Corp. v. Loew's, Inc.,* above.

[*Joint Action Required*]

Section 1 of the Sherman Anti-Trust Act condemns "Every contract, combination * * * or conspiracy, in restraint of trade

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or commerce among the several States, * * *." 15 U. S. C. A., § 1. A plurality of actors is required. *Orbo Theatre Corp. v. Loew's, Inc.*, above, 156 F. Supp., at page 779; *Fanchon & Marco v. Paramount Pictures*, above, 100 F. Supp., at page 89; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951), rehearing denied 340 U. S. 939, 71 S. Ct. 487, 95 L. Ed. 678 (1951). If each plaintiff, through sheer perversity, and acting independently, refused to grant runs to defendant except following an unreasonable clearance, there would be no ground for relief under the Sherman Act. In claiming the protection of the anti-trust laws against the imposition of allegedly unreasonable clearances upon its theatre, defendant must show as an essential part of its case that the clearances were imposed as the result of an agreement or some kind of joint action among the distributors, or between a distributor and a prior-run exhibitor or exhibitors. *United States v. Paramount Pictures, Inc.*, above, did not, as defendant contends, hold to the contrary, for the illegality relating to runs and clearances which the decree in that case struck down was squarely rested upon findings of joint wrongful action. 70 F. Supp., at pages 62 and 71-72 (Findings of Fact Nos. 79-82, and Conclusions of Law Nos. 7(b), 8(c) and (e), and 9(c) and (d)). In our review of the cases cited by both parties we have found none where the court has undertaken to restrict a distributor's freedom individually to determine what run it will grant to an exhibitor. Only where the distributor conspires or acts jointly, either with other distributors or with one or more exhibitors, to impose a subsequent run upon an unwilling exhibitor under conditions deemed to be unreasonable as a matter of law, does the Sherman Act come into operation.

Although defendant has attempted to present its affirmative defense under two headings, the first fails for the reasons stated. The only legitimate claim defendant raises is its second one—that plaintiffs conspired to set unreasonable runs and clearances, to its detriment. We proceed to a consideration of that basic issue.

IV

[*Conspiracy—"Collateral" and "Inherent" Illegality*]

It will be recalled that defendant claims that the Sherman Act has been violated in that the so-called uniform clearance and run provisions inserted in the various license agreements it had with the several plaintiffs were determined and imposed upon it as a result of a conspiracy and agreement to which all the plaintiffs were parties. The allegations of its affirmative defense so summarized were taken almost verbatim from the findings of fact and conclusions of law by the statutory court in the *Paramount Pictures* case, where the court held that it was a violation of the Sherman Act when distributors acted in concert in the formation of a uniform system of clearances for the theatres to which they licensed their films. 66 F. Supp., at page 343, and see the case on appeal, 334 U. S., at pages 146, 147.

Defendant concedes that

> "* * * if the contract sued upon was collateral to the illegal conspiracy, the violation of the Sherman Act is not available as a defense to an action on that contract, but that if the contract upon which the pending action is based is inherently a part of the conspiracy, or to put it conversely, the illegality is inherent in the contract itself, then a violation of the Sherman Act is available as a defense to an action on the said contract."

It also concedes that the distinction between what is "inherent" and what is "collateral" illegality in this connection depends upon an analytical comparison of the two leading decisions in point, both written by the late Mr. Justice Harlan: *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed 679 (1902), dealing with collateral illegality, and *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 29 S. Ct. 280, 53 L. Ed. 486 (1909), dealing with inherent illegality. The trial court, after a consideration of these cases and the citation of others in support of its conclusion, held that defendant's affirmative defense was legally insufficient because the claimed illegality was collateral to the contracts in suit, under the *Connolly* rule. On appeal defendant argues, as it did below, that the defense should be sustained because the illegality claimed was inherent to the contracts, under the *Continental Wall Paper* case.

[*Federal Law Applicable*]

We note, parenthetically, that neither party to this appeal has considered whether state or federal law is determinative of the question before us, namely, under what

conditions does a breach of a federal statute, which breach influenced the amounts allegedly due under state law, constitute a defense to the state law claim for the balance of license fees due? Both parties assume that federal law governs. We consider that the question of whether a violation of the federal anti-trust laws may constitute a defense to a state cause of action in contract is a federal question. Cf. *Bruce's Juices v. American Can Co.* [1946-1947 TRADE CASES ¶ 57,553], 330 U. S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219 (1947). The determination of under what conditions the violation constitutes a defense would also be a federal question, since otherwise the additional remedy under the federal statute might be distorted beyond what the interpreting authority (*i. e.*, the United States Supreme Court) deemed that Congress intended. The cases seem so to hold, although the issue has never been discussed. We turn to a consideration of the *Connolly* and *Continental Wall Paper* cases.

[*Cases Considered*]

Plaintiff in *Connolly* sued upon notes which defendant had given it in purchase of a quantity of sewer pipe. Defendant pleaded, among other things, that plaintiff, by agreement of various persons, firms and corporations engaged in the sewer pipe trade, had been incorporated to act, and did act, as their agency in effectuating an illegal trust, combination or conspiracy to monopolize the sewer pipe trade and fix prices at which pipe could be sold. Further, that plaintiff's sales to defendant were made at prices so unlawfully fixed, and were therefore illegal and void under the Sherman Act. The court held the defense invalid, stating:

> "* * * plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination * * * The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe." (184 U. S., at page 549)

In *Continental Wall Paper* plaintiff sued for a balance due on account of wallpaper sold and delivered to defendant jobber. As in *Connolly,* defendant pleaded that plaintiff had been organized and incorporated by various wallpaper manufacturers as a common selling agency, in order to restrain trade and fix wallpaper prices at all levels of distribution. Defendant further alleged that plaintiff, in pursuance of the objects of the conspiracy, compelled defendant to become a party to the conspiracy by entering into a written agreement to buy all of its wallpaper requirements exclusively from plaintiff, at prices illegally fixed by the conspiracy, and compelled defendant to agree illegally to maintain the seller's list prices and not to resell the wallpaper so purchased at prices lower than a fixed schedule of minimum prices. Defendant claimed that plaintiff should be denied recovery of the unpaid purchase price because the purchase orders were inherently unlawful in that they were made in furtherance of the illegal price-fixing scheme to which it had been made a party. The court sustained defendant's contention by a narrow majority, Justices Holmes, Brewer, White and Peckham dissenting.

Speaking for the majority in *Continental Wall Paper,* Mr. Justice Harlan pointed out that

> "The present case is plainly distinguishable from *Connolly* case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. * * * *His* contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned.* * * *" (212 U. S., at page 260; italics the court's)

He went on to say:

> "The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, *it is admitted by the demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* * * *
>
> The present suit is * * * based upon * * * agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had

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for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the *Connolly* case. * * *" (212 U. S., at page 261; italics the court's)

The fact that defendant received a windfall was held not material—it is the public welfare that is uppermost—and following the long established rule the court refused to give its aid in any measure whatsoever to a party seeking to realize the fruits of an agreement tainted with illegality.

[*Distinction—Purchaser's "Participation"*]

The parties on this appeal propose various rationales for distinguishing *Connolly* and *Continental Wall Paper*. Plaintiffs contend that the cases turn on whether defendant was a participant, however unwillingly, in the conspiracy pursuant to which the contracts in suit were made (as in *Continental Wall Paper*), or not (as in *Connolly*). Pursuing this ground of distinction, plaintiffs logically argue that for a purchaser simply to agree to buy what the seller has every right to sell, but at prices illegally fixed by a sellers' conspiracy, as in *Connolly,* is not to become an active party to the wrong, even though such a contract may serve the unilateral purpose of the seller to carry out the objects and purposes of the conspiracy. *Connolly* squarely held such an agreement not to be inherently illegal. On the other hand, a would-be purchaser's agreement, made as part of the consideration for all future sales, not to resell the purchased goods at less than the prices fixed by a conspiracy, and thus to make himself a party to the illegal conspiracy to maintain resale prices, and himself to agree to further the wrongful objects and purposes of that price-fixing conspiracy, as in the *Continental Wall Paper* case, *is* a direct participation by the purchaser in such wrongful objects and purposes, and makes all purchase contracts entered in any pursuance of such an unlawful arrangement inherently illegal. The courts deny enforcement to such purchase agreements on public policy grounds, and accordingly leave the parties where it finds them. *Volk v. Paramount Pictures* [1950-1951 Trade Cases ¶ 62,673], 91 F. Supp. 902, 905-906 (D. Minn. 1950).

[*True Ground of Distinction*]

The United States Supreme Court has, in later cases, apparently recognized this as the true ground of distinction between the two cases. See, *e. g., Bruce's Juices v. American Can Co.,* above, 330 U. S., at page 755. *Cf. Bell v. Lamborn,* 2 F. 2d 205 (4 Cir. 1924); *Turner Glass Corp. v. Hartford Empire Co.* [1948-1949 Trade Cases ¶ 62,379], 173 F. 2d 49, 52-53 (7 Cir. 1949).

[*Character of Parties*]

Defendant resists this basis for distinguishing the *Connolly* and *Continental Wall Paper* cases, claiming that it would be "an anomolous situation if the courts were to grant relief to a party who was both a participant in and the victim of an illegal conspiracy and in another situation were to deny relief to a party who was a non-participant in but a victim of an illegal conspiracy because of such non-participation." This ignores two considerations. The first is that the defense of illegality is not allowed as a "relief" to a defendant. This was pointed out in *McMullen v. Hoffman,* 174 U. S. 639, 669, 19 S. Ct. 839, 43 L. Ed. 1117 (1899):

> "The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. * * *"

And see the *Continental Wall Paper* case, above, 212 U. S., at pages 262-263, where McMullen is quoted with approval. In short, whether defendant is the victim of a wrong is of no moment in granting or denying the defense; indeed, the defense is not allowed out of any sympathy for either party's position.

[*Relief for Alleged Wrong*]

Another answer to defendant's claim of "anomoly" is that the Sherman Act provides relief for the alleged wrong it has pleaded by way of affirmative defense. Defendant may sue for treble damages in the federal jurisdiction. 15 U. S. C. A., §§ 15 and 26.

[*Face of Contract*]

Plaintiffs also suggest that the two leading cases may be distinguished on the basis of whether illegality appears on the face of the contract. Although that rationale has some support in the cases, see *Gasoline Products Co. v. Champlin Refining Co.*, 46 F. 2d 511 (D. C. S. D. Me. 1931), and would minimize excursions into side issues, it would appear to be somewhat unrealistic. Such a criterion might well make the issue of enforceability depend upon the artfulness of the draftsman of the contract, or upon whether the illegality was apparent or disguised. It would invite conceptualistic distinctions as to whether illegality did or did not appear on the face of the document, and how much (if any) interpolation could be made in the writing.

[*Impact of Conspiracy*]

Defendant offers its own rationale for distinguishing between the two cases, namely, that the alleged conspiracy in *Connolly* had no impact upon the contracts there involved. The distinction disregards the facts in both cases. The impact of the conspiracy on the contracts in suit was just as direct in *Connolly* as in *Continental Wall Paper*—disregarding for the moment defendant's direct participation in the illegal conduct complained of in the latter case by his agreement to maintain resale prices to his customers at levels fixed by the conspiracy.

We find that defendant's contention that the instant case be regarded as within the rule of *Continental Wall Paper* because the clearance provisions of the contracts substantially affected the schedule of license fees, proves too much. In *Connolly* the defense was that the prices imposed upon defendant, although lawful on their face, were unlawful because they were the result of concerted action. Certainly in that case the unlawfully fixed prices were as vital a part of the contract as are the unlawfully fixed clearances here. The cases are not materially different in this respect. And the argument that the unlawfully fixed clearances influenced the license fees can only mean that *Connolly*, where the unlawfully fixed prices not only influenced the contracts in suit but were the actual provisions sued upon, was wrongly decided.

[*Judgment Furthering Illegal Scheme*]

Although there is merit in, as well as support for, plaintiffs' contention that *Connolly* and *Continental Wall Paper* turn on whether or not defendant was a participant in the conspiracy, the basis for distinguishing the two cases might better be stated in this way: that in the latter the contract sued upon called for some further unlawful act. The contract in *Continental Wall Paper* required defendant to charge fixed resale prices. This, of course, was illegal. In *Connolly* no such restriction appears; once the defendant had the sewer pipe he could do with it as he wished. This distinction is meaningful when related to the theory of the court in *Continental Wall Paper*—that the court would not further an illegal scheme by granting a judgment that validated a contract requiring some further activity.

We cannot say, as defendant would have us hold, that a judgment for plaintiffs in the instant case would further an illegal scheme, unless we expand this concept beyond the meaning of *Continental Wall Paper* to include the scheme in *Connolly*. That is, to support the proposition just stated we would have to say that any judgment in favor of one who is a party to a conspiracy to restrain trade, in a suit on a contract whose terms partly resulted from his unlawfully dominant position, "furthers the illegal scheme." This the *Connolly* court refused to do, as did the court in all the cases set out in the opinion of the court below and in the briefs. We find no case cited to us which supports the broad proposition for which defendant contends, and none is so similar to this case as to compel a particular result.

[*Alleged Illegality "Collateral" to Contract*]

We hold, as in *Connolly*, that the alleged illegality pleaded by defendant was collateral to the contracts in suit. Although we decide this matter as a question of applicable federal law, we find three New Jersey cases which, although not precisely in point, tend to support the conclusion that the illegality here alleged does not render the contracts unenforceable. See *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 520-525 (E. & A. 1899); *Voices, Inc. v. Metal Tone Mfg. Co.*, above, 119 N. J. Eq., at pages 335-337; *cf. Brennan v. United Hatters*, 73 N. J. L. 729, 739 (E. & A. 1906). There is no reason why, even if state law were to govern, the distinction between *Connolly* and *Continental Wall Paper*, as discussed above, should not be held applicable. Affirmed.

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[¶ 69,294] Sam Temperato v. Walter Horstman, Constance Horstman, Emil M. Ehrlacher, and Theresa Ehrlacher.

In the Supreme Court of Missouri, Division Number Two. January Session, 1959. No. 46,651. Filed March 9, 1959.

Appeal from the Circuit Court of the City of St. Louis. ROBERT L. ARONSON, Judge.

Missouri Antitrust Laws

Combinations and Conspiracies Under State Antitrust Laws—Practices—Price Fixing Provisions in Patent Licensing Agreements—Legality—"Limited Monopoly" Under Patent.—Licensing agreements which gave the licensor of an ice cream freezer patent and an ice cream trade-name the right to set the retail price of ice cream sold by his licensees were illegal and void under the Missouri antitrust laws. It was contended that the price fixing clause was valid because of the "limited monopoly" afforded to the holder of the freezer patent, and that no state could detract from those rights by the antitrust laws or otherwise. A patentee, however, is not permitted to fix the price of the products made by a patented machine in the hands of a licensee. Therefore, even assuming the existence and validity of the patent, the price fixing provisions were not justified. The type of price-control provision found in the contracts might be described as "vertical price-fixing." The Missouri antitrust statutes are not aimed solely at combinations of competitors, or "horizontal" price fixing; they declare "void" all contracts between two or more persons which tend to lessen full and free competition in the sale of any product or tend to increase the market price of any product. Any person who agrees with any other person to regulate, control, or fix the price of any article is also declared guilty of a conspiracy in restraint of trade. The Missouri statutes are so explicit and all-inclusive that there is no room left for construction by the courts.

See Combinations and Conspiracies, Vol. 1, ¶ 2329, 2335.27.

Combinations and Conspiracies Under State Antitrust Laws—Practices—Supply Control Provisions in Trade-Mark Licensing Agreements—Legality—Conflicts in State and Federal Laws.—Licensing agreements providing that (1) licensees selling ice cream under a trade-name could purchase supplies only from "sources approved in writing" by the licensor, and (2) that the licensor reserved "the right to change the list of approved sources of supply as it deems best" constituted an unlawful restraint of trade and competition in violation of the Missouri antitrust laws. It was contended that the agreements were justified as "quality-control" provisions in connection with the licensing of a trade-mark or trade-name. In that field, the court did not concede that federal authorities were controlling, if they were in conflict with Missouri statutes. The right to the use of a trade-name or mark, though it be subject to federal registration, does not arise from that registration or from federal law, but from a prior, exclusive appropriation and user under the common law. The registration is merely *prima facie* evidence of that right. However, the court found no authorities, federal or otherwise, which upheld provisions giving a licensor full power to designate and change the actual sources for any and all supplies used by a trade-name licensee.

See Combinations and Conspiracies, Vol. 1, ¶ 2325.27, 2329, 2401.27.

Combinations and Conspiracies Under State Antitrust Laws—Action to Recover Royalties Under Franchise Agreements—Illegality of Agreements Under Missouri Antitrust Laws as Defense.—A licensor of an ice cream trade-name and ice cream freezer patent was not permitted to collect royalty payments under franchise agreements which gave him the power to (1) set retail prices for the ice cream sold by his licensees, and (2) designate and change the sources from which the licensees could get their supplies. Both of those provisions were illegal and void under the Missouri antitrust laws. There was no need to delve into the technical aspects of the severability of those provisions; Missouri statutes declare all such contracts void. Those statutes contain no exceptions or qualifications; therefore, total illegality is the price of inserting such provisions in contracts in violation

of the Missouri statutory public policy. The court also found that the record did not support the licensor's contention that the illegal provisions had been "abandoned."

See Combinations and Conspiracies, Vol. 1, ¶ 2407.

Combinations and Conspiracies Under State Antitrust Laws—Action on Contract—Counter-Claim for Treble Damages Under State Antitrust Laws—Antitrust Violations as Defense—"Pari Delicto."—In an action by a licensor of a patent and a trade-name to recover royalties under a franchise agreement which had been held illegal under the Missouri antitrust laws, the licensee's counterclaim for treble damages, based upon sums paid under the agreement, was dismissed on the ground that the licensees were active parties to the illegality of the agreement. Active participants in a forbidden contract cannot recover damages, treble or otherwise, against the other party on account of the very act of illegality in which they themselves have engaged. The agreement had been executed insofar as the licensees had made payments on it and actually operated under it; therefore, neither party was entitled to any relief. An alternative counterclaim by which the licensees asserted a breach of the agreement by the licensor's installation of a competing business in the licensees' territory was also rejected because of the agreement's illegality.

See Combinations and Conspiracies, Vol. 1, ¶ 2407.

For the appellants: Aubrey B. Hamilton and Richard A. Hetlage, St. Louis, Mo.

For the respondent: Blumenfeld and Abrams, St. Louis, Mo.

[*Antitrust Violations as Defenses*]

HENRY I. EAGER, Judge [*In full text*]: In this suit plaintiff sought damages for the breach of a contract which may initially be described as a "Dairy Queen" franchise for a territory in the City of St. Louis; he also sought certain injunctive relief. He recovered damages of $29,843.60 and was given a permanent injunction. Defendants had filed counterclaims, which were ruled adversely and which will be referred to later. The case was tried to the court. After an unsuccessful motion for a new trial, defendants appealed. We would merely encumber this opinion by reciting the pleadings; they fully cover the claims and defenses, pro and con. We note at the outset, however, that one of the defenses was and is that the contract was void because in violation of the Missouri and federal anti-trust statutes. The judge who heard the evidence retired before deciding the case, and it was thereafter submitted by stipulation to the present trial judge on the transcript, briefs, and oral arguments.

[*Patent—Trade-Mark Registration*]

We may assume that the record shows, though in part by inference and hearsay, that a patent had been issued for a type of freezer which froze and delivered so-called "soft-cream" through a special faucet; the final product, it is said, emerged in a distinctive shape with a "curl on top,"—at least where the frozen cream was visible in a cone or sundae. These freezers were used rather widely, in nearly all the states, under the name "Dairy Queen." The product was sold in cones, sundaes, shakes, pints, quarts, and possibly in other forms. The purported owners of the patent had applied for a trade-mark registration on the name, but this had been declined, expressly or by failure to issue, because of the prior registration of a trade-mark on that name to International Milk Company; that company eventually gave the holder of the Dairy Queen freezer patent a letter of nonobjection to its use of the name under certain conditions, but that agreement was made long after the controlling breach of contract involved here.

[*Franchise Operations*]

A complicated system of franchise operations had grown up in licensing the use of these freezers and of the name "Dairy Queen"; there were state franchises, district franchises and "sub-franchises," the latter being for the operation of local stores. The freezers were generally leased to the store operators, who apparently owned or leased the stores, paid all their own expenses, and

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paid a royalty on all the "mix" which was purchased and used in the freezers, in addition to any lump sum paid for the original contract or the territory . The "mix" was the basic dairy product used, and it was purchased from outside sources. We shall not attempt to unravel the tangled system of royalties which the witnesses tried to describe, except to say that the defendants, as other store owners, paid a royalty to their immediate contracting party or parties. There were various competing companies or systems processing and selling soft-cream products, also sometimes referred to as "soft-milk" products; these, of course, were operated under other names, such as Tasti-Freez, Zesto and Dairy Delight.

[*Contract*]

The contract now in question was executed on Sept. 2, 1948. We shall digest briefly its essential parts. William and Irene Bollini as owners "of the exclusive right to the use of the Dairy Queen Freezers manufactured under Patent No. 2080971, and the exclusive right to the use of the trade-name 'Dairy Queen' in St. Louis, Missouri, and St. Louis County, Missouri; * * *" thereby sold to defendants such rights for a certain defined area in the City of St. Louis for a period of ten years, with an option of renewal; they also agreed to furnish two freezers for each store, which were to remain the property of one Harry Axene and his wife and which should also continue to be personal property. Defendants agreed: to pay $3,600 for the use of the freezers, and a royalty of 54 cents per gallon on all "mix" used; that no royalty should be cancelled or abated by reason of the expiration of the patent; that defendants would keep complete records which should be open to inspection by the Bollinis or their agents or by Axene; to make written reports and payment of royalties monthly; to erect at their own expense, a suitable building according to plans to be furnished and on an approved site; to pay all employees and all costs of operation; to maintain the "standards and cleanliness" set up by Bollini, to comply with all health and sanitation laws, and to operate for at least six months of each calendar year. We quote, in part, the following additional provisions. which were also agreed to: "that all mix and supplies, including cones, cups, containers, toppings, flavoring, coloring and like supplies and materials, shall meet the standards of quality and specifications therefor as may now or hereafter be set up by the Party of the First Part and shall be purchased only from sources approved in writing by the Party of the First Part and W. J. Lanaghan, Belleville, Ill., and these Parties reserve the right to change the list of approved sources of supply as it deems best. * * * that no product, other than Dairy Queen may or will be sold on the premises above described without the written approval of the Party of the First Part and W. J. Lanaghan, Belleville, Ill., first had and obtained. * * * Party of the Second Part agrees that the selling price of all Dairy Queen Products may be set from time to time by the Party of the First Part, and the Party of the Second Part agrees that it will not deviate from the prices so set." Defendants did construct a building within the prescribed territory and began the operation in or about October, 1948. Under date of March 1, 1951, Bollini and his wife, Axene and his wife, and one William J. Lanaghan and his wife entered into a contract with plaintiff, Sam Temperato, by which they transferred to plaintiff all franchise rights in St. Louis City and County and in certain other territory, and their interest in the existing contracts, including that of these defendants.

[*Testimony*]

Defendants operated under Bollini from the fall of 1948 until sometime in March, 1951, and under plaintiff from March, 1951, to July 14, 1951, when they repudiated the contract and so notified plaintiff. Bollini testified: that the form of contract involved here was one given to him by Axene and Lanaghan (his contracting parties and superior franchise holders) for use in his "subfranchise" arrangements; that defendants continually complained about the amount of the royalty and that he reduced it from 54 cents to 49 cents per gallon, but they still complained; that he made no demands that defendants purchase their supplies from stated sources, but at first had to tell them "where they could buy their supplies," because they did not know; that on certain items few sources were available; that to a large extent the different stores bought from different sources; he "encouraged" a uniform paper source; that he got no 'kick backs." Bollini's testimony concerning the retail prices of the products was somewhat conflicting, but, in essence, it was as follows: that there was a "suggested selling price" at all times; that he made no demands on de-

fendants, but that a new operator might put out either too much or too little material for his own good at a certain price, "so we have to instruct what price to charge," and that he arranged to have price lists painted in the stores "at the beginning"; that he got directives from the Dairy Queen Trade Association on prices to be charged and set; that it was his policy to have uniformity of weights and prices in that area, and he wanted the stores to be as identical as possible; that, at the outset, defendants sold malts for 25 cents and shakes for 20 cents, and he called to their attention the fact that this "was not correct as to the policy in the City of St. Louis" and that all stores, including drug stores, were charging the same prices; that they then "corrected" it; that the "policy" included Dairy Queen and "all soft cream stores"; that on one occasion he called to defendants' attention a divergence in prices on ice cream sodas; that at a regional meeting at the Lennox Hotel in St. Louis in the spring of 1950, attended by most of the Dairy Queen operators, it was mutually agreed that the cost of supplies had gone up and that in order to make a profit "you would have to get more money for your quart or pint containers," or for these products generally; that thereafter most of the St. Louis stores raised their prices. Another witness was permitted to testify that: "Mr. Bollini had told us the standard price that Dairy Queen had for their merchandise and all their stores we served had that same price * * *."

Plaintiff Temperato had some connection with "Dairy Queen" in another territory before he took over Bollini's franchise. He also held a "Tasti-Freez" franchise from and after Sept., 1950. He testified: that after he took over he promptly reduced the St. Louis Dairy Queen royalties from 49 cents to 34 cents; that he made no demands concerning the purchase of supplies or the maintenance of retail prices; that he did discuss and tried to promote a method of volume purchasing of mix from the Pet Milk Company whereby a saving of 7 cents a gallon would have been accomplished; under this plan all purchases would be billed to him or his nominee, 1 cent of the saving would go to his office for bookkeeping, and the other 6 cents would be split between himself and the store operators; that he held a joint meeting of Dairy Queen and Tasti-Freez operators on this proposal in April, 1951; that he discussed this with defendants almost as soon as he notified them that he had taken over; in other words, he urged them to change their source of supply on the mix, whatever may have been the reason. Defendants did not make the change, but other stores did and supposedly saved 3 cents per gallon. He further testified: that he did "look at" the prices, and that the prices were "about uniform" in Missouri; that he also suggested that defendants purchase all their paper produts from "Royal Paper" because, first, these products were printed to advertise Dairy Queen, and, secondly, he could check up through that source on the volume of defendants' sales, as he could also have done through Pet Milk. One of the officials of Southern Products Company, from which defendants purchased mix, testified that Temperato asked them if they were "big enough" to handle the Dairy Queen business for Missouri, to which they (he and other officers) replied in the affirmative, and that plaintiff (and the witness) then said: "'Well, what terms—if I would give you this business what terms can we come together on?' I says, 'What do you mean?' He says, 'I expect a kickback to the Company that I turn the business over to,' * * *" but that the witness refused to deal on that basis, and that thereafter his Dairy Queen business "started fading out." Plaintiff denied this conversation. Eventually, the plaintiff got into a violent argument with the defendants upon his insistence that they were cheating on their royalty payments. We may note at this point that there was substantial evidence that defendants had consistently purchased mix at Southern Products Company by two methods,—one on a regular charge account, and another by purchasing for "wholesale cash," upon tickets paid at the time of delivery and without further identification. There is a fair inference that this was done to decrease the royalty payments to be made under the contract and to conceal the actual volume. On July 14, 1951, defendants discontinued the use of the Dairy Queen Freezers and notified plaintiff that he should pick up the freezers; this notice was confirmed by letter, and in turn plaintiff's counsel replied that defendants would be held liable for all royalties and for all damages due to the breach. Defendants' check for accrued royalties was returned. This suit followed nearly a year later. There was evidence that after July 14, 1951, defendants continued to use signs and advertising in and about their place of busi-

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ness which tended to mislead the public into believing that "Dairy Queen" products were being sold there.

[*Judgment of Lower Court*]

This case was decided on the transcript and exhibits by a judge who heard no testimony. In such instances the appellate court does not accord to the trial court's findings the same deference which it would accord had that court personally heard the evidence. (*Pitts v. Garner*, Mo., decided Feb. 9, 1959, — S. W. 2d —.) In a memorandum opinion the court noted the plan of defendants to defraud plaintiff on royalties, the admitted breach of the contract, the fact that defendants did not testify, and it generally disallowed the defense of the invalidity of the contract as "technical and legalistic" and as unsupported by proof; it also stated that the supposed proof of illegal activity rested upon the speculation and skepticism of counsel; that the price fixing and source of supply clauses were abandoned, and that there was no possibility of a monopoly; also, that the contract was severable, and that it was unnecessary to rule specifically upon the legality of the parts attacked; however, the court apparently found the contract not to be "invalid." Other matters were discussed in detail, which we need not note. Damages were assessed for all unpaid royalties, past and future, over a ten year period, as computed on the average gallonage of mix shown by charges and by "wholesale cash" purchases. These damages covered a period of more than seven years after the breach; approximately one year of this period had not expired at the time of the entry of judgment; this portion of the damages was commuted. Judgment was entered in favor of plaintiff for $29,843.60 as damages for the breach; the judgment entry contained extensive findings, generally in line with the memorandum opinion. Therein the court apparently avoided a specific finding that the contract was valid, but found that there were no illegal activities or conspiracies and no enforcement of price fixing or of the provisions concerning the sources of supplies. The findings and judgment were also against the defendants on their counterclaim and alternative counterclaim. Defendants were enjoined from using any confusingly similar name or names or advertising matter and, generally, from "unfair competition."

[*Issues*]

It will be impractical to discuss, or even to mention, all the points argued here, pro and con. These have all been considered and many cases read, some of which led largely down byroads. The basic question here is whether this contract is illegal and void because in violation of the Missouri or federal anti-trust statutes. The applicable Missouri statutes are §§ 416.010-416.050, RSMo 1949, V. A. M. S. (to which revision all statutory references will be hereafter made), and the primary federal law is the Sherman Act, Title 15 U. S. C. A. §§ 1, 2; see, also, the Clayton Act, Title 15 U. S. C. A. § 14. Plaintiff's essential position, as briefed here, is that the entire contract is valid as a lawful exercise of patent rights which a state may not infringe, and that in any event the good and the bad (if any) in the contract were severable, and that the bad had been wholly abandoned, so that enforcement of the contract should not be denied. We take no further note of the evidence or the arguments concerning the legality or illegality of the Dairy Queen National Trade Association; its existence and activities certainly added no luster to the legal status of this contract but, in view of our conclusions, that issue would merely encumber an already burdened opinion.

[*"Vertical Price-Fixing"*]

We have concluded that this contract is illegal and void as in direct violation of the Missouri statutes, *supra*. It was substantially conceded at the oral argument here that the contract was, on its face, violative of those statutes, but counsel contended, as we understood, that the broad, protective wings of the patent monopoly and the alleged abandonment of any possible illegality, saved plaintiff's position. There can be no doubt here that the Bollinis on the one hand, and defendants on the other, agreed specifically and in writing that all retail selling prices might be set by the first parties and that defendants would not deviate from those prices. This form of contract was given to Bollini by Axene and Lanaghan for his use with his sub-franchise operators; the record fairly shows that these men were the ones from whom Bollini acquired his rights. Plaintiff took over Bollini's contract with defendants, with all its infirmities and inequities; and we think that this contract remained burdened with the acts of plain-

tiff's predecessor in the enforcement of such provisions, at least in the absence of a clear and unequivocal renunciation (or better, a contract amendment) which is wholly lacking here. The evidence shows that Bollini sought enforcement of the pricing provisions and the attainment of a scheme of uniform prices. Plaintiff denied all enforcement of the price-fixing provisions on his own part, but his evidence falls far short of establishing any affirmative "abandonment," if such there may be. This type of price-control provision may be described as "vertical price fixing," discussed and condemned in *State ex inf. Dalton v. Miles Laboratories et al.* [1955 TRADE CASES ¶ 68,155], Banc, 365 Mo. 350, 282 S. W. 2d 564. In our case the contract itself bespoke price fixing; in the *Miles* case the practice was deduced from the evidence of activities. As the court there said, our statutes are so explicit and all-inclusive that there is no room left for construction by the courts; the court said further, loc. cit. 573: "* * * Sections 416.010 and 416.020 denounce and condemn *any person* entering into *any* combination, agreement or understanding with *any other person or persons* (note the use in the disjunctive of both singular and plural) in restraint of trade or competition or to regulate, control, fix or maintain the price of any article; and, Section 416.040 is directed against *all* arrangements, contracts, agreements, combinations or understandings between *any two or more persons* designed or tending to lessen full and free competition in, or to increase the market price of, any product. * * *" It was specifically held that our statutes are not aimed solely at combinations of competitors or "horizontal" price fixing. Section 416.040 specifically declares void "all * contracts * * * between any two or more persons * which tend to lessen * full and free competition in the * * sale * of any product * * and all contracts * * made with a view to increase, or which tend to increase the market price of any product * * *." Section 416.020 declares that any person who agrees with any other person to "regulate, control or fix the price of any article * commodity * bought or sold * * *" is guilty of a conspiracy in restraint of trade and shall be punished therefor. These, together with §§ 416.010 and 416.110, must be construed together as a declaration of policy. The last cited section specifically declares that all contracts made in violation of any of the provisions of Chapter 416 are void. And see, generally, *State ex rel. Taylor v. Anderson* [1952 TRADE CASES ¶ 67,205], 363 Mo. 884, 254 S. W. 2d 609; *State ex inf. Attorney General v. Arkansas Lumber Co. et al.*, 260 Mo. 212, 169 S. W. 145; and *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213 (involving an attempt to recover under an illegal contract). The test is not whether the agreement unreasonably lessens competition or increases prices. *State ex rel. Barrett, Attorney General, v. Boeckeler Lumber Co.*, 301 Mo. 445, 256 S. W. 175; and these statutes would seem to permit of no exception by reason of the amount of degree of restraint or the volume of business affected. *State ex rel. Kimbrell, Pros. Atty., v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S. W. 101. It is not necessary to find a monopoly or a possibility of monopoly in order to find a violation; the statutes do not so require. We do not mean to say that a mere incidental uniformity of prices establishes, in itself, an unlawful agreement or understanding, *State ex rel. Taylor v. Anderson* [1952 TRADE CASES ¶ 67,205], 363 Mo. 884, 254 S. W. 2d 609. But here we have an express agreement in writing for the control of retail prices, plus at least some active steps in enforcement. The evidence also disclosed that Bollini had issued, and plaintiff had taken over, at least two other subfranchise agreements (Rissane—April 1, 1950; Schaefering, July 18, 1950) containing identical price-fixing provisions.

[*Sherman Act*]

Under the circumstances we need not consider whether the Sherman Anti-Trust Act (Title 15 U. S. C. A. §§ 1, 2) was violated, or whether there was a sufficient showing of interference with interstate commerce to bring that act into operation. The latter project, in itself, sometimes leads into a labyrinth of confusion and perplexity.

[*Price-Fixing Under "Patent Monopoly"*]

Plaintiff urges that the price-fixing clause of this contract is valid because of the limited monopoly afforded to the holder of the freezer patent, and that no state may detract from these rights by anti-trust laws or otherwise, citing *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (CC 7), 154 Fed. 358. Actually, proof of the existence and validity of the patent here is woefully

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absent; we have assumed these elements because the defendants accepted a license under the patent, and we think they are in no position to question either their original licensing agreement from Bollini or his assignment to plaintiff. Among many cases cited by plaintiff we note the following as perhaps the principal ones: *United States v. General Electric Co.*, 272 U. S. 476, 47 S. Ct. 192; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 S. Ct. 747; 46 L. Ed. 1058, and *Straight Side Basket Corp. v. Webster Basket Co., Inc.* [1932-1939 Trade Cases ¶ 55,113], (CC 2), 82 Fed. 2d 245. In the *General Electric* case, which has since been seriously questioned (*United States v. Line Material Co.* [1948-1949 Trade Cases ¶ 62,225], 333 U. S. 287) it was held that the owner of a patented process for manufacturing lamps with tungsten filaments might license another to use the process in making lamps and control the original sale price of the patented article so produced. In other words, it had merely done through another what it might legally have done itself. We note, however, that the contract involved only sales of the patented article itself, and not the unpatented product of a patented article. The court was also careful to note that a patentee might not dispose of a patented article so as to control its resale price. The prior *Bement* case was substantially to the same effect. In the *Straight Side Basket Corp.* case, *supra,* the Court of Appeals for the Second Circuit did hold that where one licensed patented attachments for making baskets, a condition in the license giving the licensor the power to determine the sale prices of the baskets was lawful as a valid exercise of the patent rights. However, so far as we can find, the case stands wholly alone and is out of harmony with the principles announced in other federal cases. See, specifically: *Barber-Colman Co. v. National Tool Co.* [1940-1943 Trade Cases ¶ 56,279], (CC 6), 136 F. 2d 339, 344; *Cummer-Graham Co. v. Straightside Basket Corp.* (CC 5) [1944-1945 Trade Cases ¶ 57,241], 142 F. 2d 646, 647, certiorari denied 323 U. S. 726, 65 S. Ct. 60 (involving the same patent); *United States v. General Electric Co.* [1948-1949 Trade Cases ¶ 62,318], DC N. Y., 80 F. Supp. 989, 1005; *United States v. General Electric Co.* [1948-1949 Trade Cases ¶ 62,352], DC N. J., 82 F. Supp. 753, 814. The courts in the *Barber-Colman, Cummer-Graham* and *General Electric* (82 F. Supp. 753, 814) cases expressly disapproved the *Webster* decision. And the court which rendered that decision stated later, in *United States v. Aluminum Co. of America* (CC 2) [1944-1945 Trade Cases ¶ 57,342], 148 F. 2d 416, 438, that the subject was "in flux." The holdings of such cases as *Mercoid Corp. v. Mid-Continent Inv. Co. et al.* [1944-1945 Trade Cases ¶ 57,201], 320 U. S. 661, 64 S. Ct. 268; *Morton Salt Co. v. G. S. Suppiger Co.* [1940-1943 Trade Cases ¶ 56,176], 314 U. S. 488; *United States v. United States Gypsum Co.* [1948-1949 Trade Cases ¶ 62,226], 333 U. S. 364, 68 S. Ct. 525, and *International Salt Co. v. United States* [1946-1947 Trade Cases ¶ 57,635], 332 U. S. 392, 68 S. Ct. 12, clearly proscribe all right to control and regulate, or to require the use of, unpatented materials in connection with patent-licensing agreements. And it is our conclusion that the federal decisions do not permit a patentee to control or fix the sale prices of the products of a patented machine in the hands of a licensee. So, assuming here the existence of a patent and its validity, we hold that the so-called patent monopoly did not justify or validate the price-fixing provisions of this contract.

[*Supply Control*]

We consider now certain other provisions of this contract. The provision that all materials used should "meet the standards of quality and specifications" set up by party of the first part was, in itself, valid, and the first party might and should have provided such standards and specifications as he deemed necessary. The remainder of the provision, to the effect that all supplies should be "purchased only from sources approved in writing by the party of the First Part and W. J. Lanaghan, Belleville, Illinois, and these parties reserve the right to change the list of approved sources of supply as it deems best" goes entirely too far; obviously, this has implications beyond a mere quality control and we hold that it constituted an unlawful restraint of trade and of competition under the Missouri statutes; specifically, it certainly would "tend to lessen * full and free competition *" in violation of § 416.040. We have read many authorities cited by plaintiff as justifying "quality control" provisions in connection with the licensing of a trade-mark or trade-name. See, for instance: *E. I. DuPont De Nemours & Co. v. Celanese Corp. of*

America, Ct. of Customs and Pat. Apps., 167 F. 2d 484; *Green v. Electric Vacuum Cleaner Co., Inc.* (CC 6) [1940-1943 TRADE CASES ¶ 56,265], 132 F. 2d 312; *Coca-Cola Co. et al. v. State of Texas,* Civ. App., 225 S. W. 791; Grismore, *Assignment of Trade Marks,* 30 Mich. Law Review 489; Callmann, *Unfair Competition and Trade-Marks* (1950), Vol. 3, §§ 65.1, 65.2; *Morse-Starrett Products Co. v. Steccone,* DC (Calif.), 86 F. Supp. 796, 805. In this field we do not concede that federal authorities are controlling, if in conflict with our statutes. The right to the use of a trade-name or mark, though it be subject to federal registration, does not arise from that registration or from federal law, but from a prior, exclusive appropriation and user under the common law. *E. F. Prichard Co. et al. v. Consumers Brewing Co.* (CC 6), 136 F. 2d 512. And the registration is merely "*prima facie* evidence" of the right. *Prichard, supra.* But, even so, we find no authorities, federal or otherwise, which uphold provisions so broad as those present here, which gave to the licensor and a third person full power to *designate* and to *change* the actual sources for any and all supplies used. It is not necessary to consider the discussion of "tying" agreements as used in connection with licenses issued under patents, though the point is covered pro and con in the briefs; some of those authorities are referred to above in our discussion of the price-fixing clause. We find that the last quoted provision of this contract is illegal and void under the Missouri statutes. The provision that "no product, other than Dairy Queen may or will be sold on the premises * without written approval*" has been seriously questioned in the briefs. We shall not burden this opinion with a discussion of it.

[*Abandonment*]

Counsel for plaintiff urge that the questioned provisions, if illegal, are severable from the remaining parts of the contract, that they were abandoned, and that plaintiff is entitled to relief, particularly in view of defendants' fraud in the payment of royalties. This record does not support a finding of "abandonment." Plaintiff took over this contract tainted with its inherent illegality and with what had been done by his predecessor to enforce it; he did nothing to change or amend it affirmatively, and some of his actions at least bordered upon the enforcement of the "sources of supply" provisions. The doctrine of abandonment, as urged here, sometimes called "purging," seems to be confined to patent infringement cases where the patent owner is found, in equity, to have fully abandoned a prior illegal restraint and to have dissipated its results, he then being permitted to proceed. *Sylvania Industrial Corp. v. Visking Corp.* [1940-1943 TRADE CASES ¶ 52,890], 132 F. 2d 947; *Campbell et al. v. Mueller et al.* [1946-1947 TRADE CASES ¶ 57,540], 159 F. 2d 803; *Westinghouse Electric Corp. v. Bulldog Electric Co.* (CC 4), 179 F. 2d 139. The facts of those cases and the general application of the doctrine render it inapplicable here. In those cases the courts had a continuing jurisdiction to maintain the state of "purge"; in our case plaintiff sought and obtained substantial damages for a breach of contract, not for an infringement, and his position must stand or fall on the *status quo* as of July 14, 1951.

[*Public Policy*]

Our statutes, as indicated (see particularly § 416.110) declare to be *void* "all contracts or agreements made in violation of any of the provisions of this chapter * * *." We have held that this contract did violate those statutes in at least two respects. The statutes contain no exceptions or qualifications. We need not delve into the technical aspects of severability or non-severability, or into the legality of the consideration; such might be necessary in the absence of a declared public policy and public interest. We hold that a total illegality is the price here of inserting such provisions in violation of our statutory public policy. We note by way of analogy the case of *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,524], 329 U. S. 394, involving the federal anti-trust statutes; there one party had granted a patent license for the manufacture of baking pans by means of the patented process and on a royalty basis; the agreement contained pricing provisions which were held to be illegal. It was also held that the whole contract was illegal since the agreement to pay royalties and the agreement to sell at prices fixed by the other party were not severable. And see also: *McGregor v. Westinghouse Elec. & Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,525], 329 U. S. 402; *Park-in Theatres v. Paramount-Richards Theatres,* DC Del., 90 F. Supp. 730; *Hazelton v. Sheckells,* 202 U. S. 71.

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We entertain no illusions here concerning the conduct of the defendants. We find that there was substantial evidence of cheating in the royalty payments by purchasing mix for "wholesale cash" with no charge entries, and by false reports. We wholly fail to see, however, how this fact can eliminate the basic illegality of the contract itself, and we hold that it does not. In so holding, we are not giving aid to the defendants, as plaintiff's counsel would seem to imply; we are merely refusing to enforce the contract on the grounds of public policy, and not as an aid to the defendants, or as a matter of private right. See *United States v. The Bayer Co.* [1955 TRADE CASES ¶ 68,164], DC N. Y., 135 F. Supp. 65.

[*Injunction Affirmed*]

The trial court enjoined defendants from using the name "Dairy Queen," or any name confusingly similar thereto, and from using any advertising, signs or paraphernalia which were the same as, or confusingly similar to, those of plaintiff. We find that the evidence justified the injunctive relief, regardless of the illegality of the contract; the conduct of the defendants which gave rise to the injunction occurred after they repudiated the contract. That part of the judgment will be affirmed.

[*"Pari Delicto"*]

The only matters remaining to be considered are the counterclaim and alternative counterclaim of the defendants. In the counterclaim they seek treble damages, computed upon all sums paid by them pursuant to the contract, both to plaintiff and his predecessors. In the view we take, defendants were active parties to the illegality of this contract, in *"pari delicto"* so to speak, and they are entitled to no relief upon their complaint of its illegality. Such is not the intention of § 416.090 providing for treble damages; we shall not permit the active participants in a forbidden contract to recover damages, treble or otherwise, against the other party on account of the very act of illegality in which they themselves have engaged. *Bersch v. Fire Underwriters' Ass'n of St. Louis,* Banc, Mo., 241 S. W. 428. Generally, the parties to an illegal contract will be left in the position where they put themselves, and the law will not afford affirmative relief to either. *Gilbert v. Edwards,* Mo. App., 276 S. W. 2d 611, 620, and cases cited; *Donovan v. Kansas City,* 352 Mo. 430, 175 S. W. 2d 874, 175 S. W. 2d 874, 878. A distinction is sometimes made between executed and unexecuted contracts. *Murray v. Murray,* Mo., 293 S. W. 2d 436; *Pearl v. Interstate Securities Co.,* 357 Mo. 160, 206 S. W. 2d 975. This contract had been executed in so far as defendants had made payments thereon and actually operated thereunder, and neither party is entitled to any relief. The alternative counterclaim asserted a breach of the contract by the installation of a competing business in defendants' territory and by other interference with their business and rights under the contract. Of course, defendants will not be permitted to recover damages based upon the contract which we have already held to be wholly illegal.

[*Judgment*]

The judgment for damages in favor of plaintiff and against defendants is reversed; the judgment awarding a permanent injunction against defendants, and the judgment against defendants on their counterclaim and alternative counterclaim are affirmed. It is so ordered.

All concur.

[¶ 69,295] William J. Ludwig v. American Greetings Corporation.

In the United States Court of Appeals for the Sixth Circuit. No. 13,549. Filed March 11, 1959.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Robinson-Patman Price Discrimination Act

Price Discrimination—Practices Constituting Unlawful Discrimination—Placing Competitor's Customers on "Consignment" Basis—Furnishing Display Cabinets—Payment of Cash Bonus.—An allegation that a manufacturer of greeting cards injured the business of a competing wholesaler by placing the wholesaler's former customers on a consign-

ment basis in order to induce them to transfer their business to the manufacturer stated a *prima facie* case of indirect price discrimination under section 2(a) of the Clayton Act. Also, the wholesaler's allegation that the manufacturer furnished display cabinets and paid cash bonuses to induce certain retailers to purchase from it rather than from the wholesaler charged violations of sections 2(c), 2(d), and 2(e) of the Clayton Act.

See Price Discrimination, Vol. 1, ¶ 3505.470, 3508, 3520, 3522, 3524.

Clayton Antitrust Act

Private Enforcement and Procedure—Civil Damages for Violations of the Antitrust Laws Under Clayton Act, Section 4—Who May Bring Suit—Price Discrimination—Action on Behalf of Alleged Discriminator's Competitor.—A wholesaler of greeting cards who competed with a manufacturer of a substantially competitive product was entitled to maintain a treble damage action charging the manufacturer with discriminating between retailers in violation of section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The trial court, in dismissing the action, indicated that his principal reason for that ruling was the fact that the action was on behalf of a competitor of the alleged discriminator, rather than on behalf of a customer claiming discrimination between himself and another customer. The Clayton Act has been construed as giving a right of action to a competitor who is injured in his business as well as to a customer who has been discriminated against.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.

For the appellant: Argued by Harry N. Kandel, Canton, Ohio (Harry N. Kandel and Ian Bruce Hart, Canton, Ohio, on the brief).

For the appellee: Argued by Robert W. Poore, Cleveland, Ohio (Robert W. Poore and James T. Lynn, of counsel, both of Jones, Day, Cockley & Reavis, Cleveland, Ohio).

Before SIMONS, MARTIN and MILLER, Circuit Judges.

[*Treble Damage Action*]

MILLER, Circuit Judge [*In full text*]: Appellant brought this action in the District Court to recover treble damages for alleged violation by the appellee of Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act. *Sections 13 and 15, Title 15, U. S. Code.* Reliance was also placed upon Section 3 of the Robinson-Patman Act, Section 13a, Title 15, U. S. Code, but subsequent to the decision of the District Court the Supreme Court decided *Nashville Milk Co. v. Carnation Co.* [1958 TRADE CASES ¶ 68,915], 355 U. S. 373, and in view of the ruling in that case reliance upon Section 3 of the Robinson-Patman Act has been properly abandoned on this appeal.

[*Complaint*]

The complaint alleges that the appellee was engaged in the business of manufacturing at its plant in Cleveland, Ohio, greeting cards together with related products, such as paper and ribbons, and selling and distributing its products in interstate commerce to more than 40,000 retail customers or purchasers throughout the United States; that the appellant, as an individual, had been engaged in the business of purchasing from manufacturers and reselling at wholesale to various retail customers and purchasers in the state of Ohio greeting cards which constituted a substantial competitive product to the greeting cards manufactured and sold by the appellee in the same territory; that the appellee in the course of its business had done certain acts, hereinafter set out more in detail, with the effect of interfering with the resale of merchandise of the appellant as a competitor, which acts had and continued to have a tendency unduly to restrain, hinder, suppress and eliminate competition between the appellee and the appellant in the sale and distribution of greeting cards in commerce; and that appellant had been injured in his business in the amount of $15,158.00 by reason of said acts which were forbidden by the antitrust laws of the United States.

[*Acts Charged*]

Several specific acts on the part of the appellee are set out in the complaint, including the allegations that (1) appellee bought and took over stocks of greeting cards sold by the appellant to retail sellers and arranged with retail customer sellers

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of the appellant to junk and destroy stocks of greeting cards distributed to such retail sellers by the appellant, (2) that appellee furnished new greeting card display cabinets free of charge to retail sellers formerly serviced by the appellant, provided said retail sellers would transfer their business from the appellant to the appellee, (3) that appellee offered to repurchase greeting card display cabinets from retail sellers, and to pay a cash bonus to such retail sellers as an inducement to drop the line of greeting cards supplied by the appellant and to take on cards supplied by the appellee, and (4) that appellee agreed to place former retail customers of the appellant on a consignment basis in order to induce such customers to transfer their business from appellant to appellee.

[*Prior Proceedings*]

The material allegations of the complaint were denied by the appellee. After hearing evidence, the District Judge sustained the motion of appellee for judgment and entered an order dismissing the complaint, from which this appeal was taken.

[*Issues*]

In making his ruling, the District Judge referred to the fact that diversity of citizenship did not exist, and stated that although the acts complained of might properly be the subject of an unfair competition suit in the state court, in his opinion, they were not such as to confer under the statute a right on the part of the plaintiff to maintain a private action in the District Court, and that he was without jurisdiction to consider it. He made no findings of fact with respect to whether the appellee had or had not engaged in the practices complained of, or what practices the appellee had engaged in in its competition with the appellant. Accordingly, we have no findings of fact to review in the light of the evidence or to use as a basis for deciding whether they support the District Judge's conclusion of law. On the contrary, the District Judge stated in his opinion that "under the *complaint* in this case the charges *alleged* are not such as to confer under the statute the right of private litigation on the part of the plaintiff" (italics added). In view of that statement and in the absence of findings, we will only consider on this review whether the charges alleged in the complaint constitute a violation by the appellee of the anti-trust laws of the United States, and, if so, whether the appellant is a person within the meaning of Section 15, Title 15, U. S. Code, who has been injured in his business or property by reason thereof. If we decide those questions in the affirmative, the judgment must be reversed. *Section 15, Title 15, U. S. Code.*

[*Indirect Price Discrimination*]

The answer to this question is found by a consideration of Section 2, subsections (a) through (e) of the Clayton Act as amended by the Robinson-Patman Act, Section 13(a)-(e), Title 15, U. S. Code. *Nashville Milk Co. v. Carnation Co., supra* [1958 Trade Cases ¶ 68,915], 355 U. S. 373, 378-379, 382.

Appellee contends that the complaint does not allege any discrimination in price by it between different purchasers of its greeting cards, which is a requirement under Section 2(a) of the Act. *Section 13(a), Title 15, U. S. Code.* The statute makes unlawful price discrimination which is either direct or indirect. Various trade practices have been held to constitute indirect price discrimination. Examples are the inclusion of improper freight rates, the granting to favored customers of purchase options at existing prices in a rising market, special discounts, and special rebates. *Corn Products Refining Co. v. Federal Trade Commission* [1944-1945 Trade Cases ¶ 57,363], 324 U. S. 726, 740; *Federal Trade Commission v. Morton Salt Co.* [1948-1949 Trade Cases ¶ 62,247], 334 U. S. 37, 42-44; *Moog Industries, Inc. v. Federal Trade Commission* [1956 Trade Cases ¶ 68,527], 238 F. (2) 43, 50, C. A. 8th, affirmed 355 U. S. 411 [1958 Trade Cases ¶ 68,918], rehearing denied, 356 U. S. 905. We are of the opinion that placing former retail customers of the appellant on a consignment basis in order to induce such customers to transfer their business to the appellee, as charged in the complaint, constitutes in substance a *prima facie* case of indirect price discrimination. It is true that such a *prima facie* case may be rebutted, but the burden of doing so is upon the person charged with the violation. *Section 2(b) of the Act, Section 13(b), Title 15, U. S. Code.* The District Judge did not reach or pass upon such an issue.

Other types of discrimination are made unlawful under subsections (c)(d) and (e) of the Act, Sections 13(c)(d) and (e), Title

15, U. S. Code. Subsection (c) makes it unlawful to pay or grant a commission or compensation, except for services rendered, in connection with the sale of goods, wares or merchandise. Subsection (d) makes it unlawful to pay anything of value in consideration for any services or facilities furnished by a customer in connection with the handling or offering for sale of any products sold to him, unless such consideration is available on proportionally equal terms to all other customers competing in the distribution of such products. Subsection (e) makes it unlawful to discriminate in favor of one purchaser against another purchaser of a commodity bought for resale by furnishing any services or facilities connected with the handling of such commodity so purchased, upon terms not accorded to all purchasers on proportionally equal terms. We believe that the furnishing by appellee of new greeting card display cabinets free of charge to retail sellers formerly serviced by the appellant and the payment of a cash bonus to certain retail customers of the appellant as an inducement to purchase appellee's cards instead of appellant's, as charged in the complaint, constitute a violation of these sections of the statute. *Elizabeth Arden Sales Corp. v. Gus Blass Co.* [1944-1945 TRADE CASES ¶ 57,400], 150 F. (2) 988, C .A. 8th, cert. denied, 326 U. S. 773; *Elizabeth Arden, Inc. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,467], 156 F. (2) 132, C. A. 2nd; *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.* [1948-1949 TRADE CASES ¶ 62,521], 178 F. (2) 150, C. A. 2nd; *United Cigar-Whelan Stores Corp. v. H. Weinreich Co.* [1952 TRADE CASES ¶ 67,322], 107 F. Supp. 89, 91, S. D. N. Y.; *National Nut Co. v. Kelling Nut Co.* [1944-1945 TRADE CASES ¶ 57,405], 61 F. Supp. 76, 83, N. D. Ill.

[*Injury to Competitor*]

The opinion of the District Judge indicates that the principal reason for his ruling was because this action was on behalf of a competitor of the appellant rather than by a customer claiming discrimination between himself and another customer. The present action by a competitor appeared to him to be more in the nature of unfair competition than a violation of the antitrust laws. It may be that appellant might have a cause of action for unfair competition, but such remedy is not an exclusive one. The Act has been construed as giving a right of action to a competitor who is injured in his business as well as to a customer who has been discriminated against. *Moore v. Mead's Fine Bread Co.* [1954 TRADE CASES ¶ 67,906], 348 U. S. 115, 118; *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,251], 334 U. S. 219, 236; *Central Ice Cream Co. v. Golden Rod Ice Cream Co.* [1958 TRADE CASES ¶ 69,017], 257 F. (2) 417, 418, C. A. 7th; *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728, 735, W. D. Ky., affirmed, 136 F. (2) 12, C. A. 6th; *Streiffer v. Seafarers Sea Chest Corp.* [1958 TRADE CASES ¶ 69,074], 162 F. Supp. 602, 607, E. D. La.

[*Affirmative Defenses*]

Certain affirmative defenses pleaded by the appellee were not involved in the District Court's ruling and have not been considered on this review. They remain open for a ruling by the District Judge in the further proceedings in this case.

[*Judgment Reversed*]

The judgment is reversed and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

[¶ 69,296] Mandell v. Lowerre's Pharmacy, Inc.

In the New York Supreme Court, Queens County, Special Term, Part I. 141 N. Y. L. J., No. 45, page 15. Dated March 9, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Temporary Injunctive Relief—Defenses—Retailer's Delay in Bringing Suit.—A retailer's motion for a temporary injunction restraining alleged fair trade violations by a competitor was denied where the retailer had knowledge of the alleged violations for almost two years before it commenced suit.

See Fair Trade, Vol. 1, ¶ 3440.34.

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[*Temporary Injunction Denied*]

RABIN, Justice [*In full text*]: Plaintiff, a retail phamacist in Flushing, Queens County, N. Y., moves for a temporary injunction restraining the defendant, a competitor, from the alleged violation, as far back as March, 1957, of fair trade contracts entered into by manufacturers and retailers of certain pharmaceutical products. The plaintiff had knowledge of the claimed violations which are the basis of this action for almost two years but took no steps to restrain them until the commencement of this action in January, 1959, and the making of this motion for a temporary injunction by an order to show cause dated February 10, 1959. The long delay is unexplained. Accordingly, the drastic relief herein sought is denied (*Flamm v. Noble*, 43 N. Y. S. 2d 922, aff'd 266 App. Div. 1001, 45 N. Y. S. 2d 413; *Vilardi v. Sinclair Refining Co.*, 147 N. Y. S. 2d 269; *Giordano v. Dellwood Dairy Co.*, 153 Misc. 54, 275 N. Y. S. 193). However, the Special Term, Part III, calendar of this court is virtually up to date, since January, 1959, issues have already been reached for trial. Plaintiff can thus obtain an early trial by placing the cause on the calendar for the April, 1959, term. Submit order.

[¶ 69,297] Court Degraw Theatre, Inc. v. Loew's Inc.; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; RKO Radio Pictures, Inc.; Columbia Pictures Corporation; Universal Pictures Company, Inc.; and United Artists Corporation.

In the United States District Court for the Eastern District of New York. Civil No. 12921. Dated February 19, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Defenses—Statute of Limitations—Tolling Period of Limitation—Applicability of Tolling Provision to Subsidiaries, Agents, or Successor Corporations Not Named in Government Action.—The tolling provision of the Clayton Act applies only to named parties in the Government suit, and the statute of limitations is not tolled as to unnamed subsidiaries of a named parent corporation. Since the defendant corporation in the instant action was not a named defendant in the Government suit and was not even in existence until after a decree in that suit was entered, the statute did not toll as to the defendant. No authority was cited in support of the position that unnamed subsidiaries, agents, or successor corporations are subject to the tolling provision.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275.

For the plaintiff: Sperry, Weinberg & Ruskay (Joseph A. Ruskay, of counsel).

For the moving defendant: Louis Phillips (E. Compton Timberlake, Bernard E. Kalman, and Marvin Ginsky, of counsel) for Paramount Pictures Corporation.

For prior decisions of the U. S. District Court, Eastern District of New York, see 1958 Trade Cases ¶ 69,014 and 1957 Trade Cases ¶ 68,634.

[*Statute of Limitations—Tolling*]

BRUCHHAUSEN, District Judge [*In full text*]: Plaintiff brought this action for treble damages pursuant to the Sherman Anti-Trust Act, 15 U. S. C. A. Sections 1 to 7, inclusive, and the Clayton Act, 15 U. S. C. A. Sections 12 to 27, inclusive, alleging acts of conspiracy in restraint and monopolization of the distribution, licensing and exhibition of motion pictures. Defendant Paramount Pictures Corporation now brings this motion pursuant to Rule 56(b) of the Federal Rules of Civil Procedure to dismiss all claims asserted against it which accrued prior to September 22, 1946, alleging that the six year statute of limitations as to it expired on that date.

Plaintiff alleges that 15 U. S. C. A. 16 provides for the tolling of the statute of limitations during a suit brought by the Government against the defendant in a civil anti-trust suit; that such a Government suit was brought against Paramount Pictures, Inc. and was pending from July 1938 until March 1949; that since Paramount Pictures Corporation was the successor and alter ego of

Paramount Pictures, Inc. that the statute of limitations was tolled at least until March 1949 and that therefore defendant's motion should be denied. In the alternative, plaintiff moves for an order compelling defendant Paramount to answer certain interrogatories before an adjudication of defendant's motion.

[*Defendant—Government Suit*]

The facts are undisputed. Paramount Pictures, Inc. was a holding company engaged in the production, distribution and exhibition of motion pictures, including the ownership and operation of theatres directly and through subsidiaries. One of its wholly-owned subsidiaries was Paramount Film Distributing Corporation which licensed and distributed films.

The Government brought suit against Paramount Pictures Inc., Equity No. 87-273, U. S. D. C., SDNY, and that suit was pending from July 1938 until March 1949. Pursuant to the decree entered therein Paramount Pictures, Inc. was dissolved and its theatre and exhibition assets were transferred to Paramount Pictures Corporation. One of the assets so transferred was Paramount Film Distributing Corporation which became a wholly owned subsidiary of Paramount Pictures Corporation. Paramount Pictures Corporation was formed in late 1949 and commmenced doing business on January 1, 1950.

[*Tolling Provision*]

The tolling provision of 15 U. S. C. A. 16 provides as follows:

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

[*Contention*]

Plaintiff alleges that Paramount Film Distributing Corporation is an alter ego of Paramount Pictures Corporation, is completely controlled and dominated by it and is a mere agent or department of Paramount Pictures Corporation. This, plaintiff alleges, tolls the statute of limitations as to Paramount Pictures Corporation, pursuant to 15 U. S. C. A. 16.

[*Scope of Tolling Provision*]

The tolling provisions of the statute apply only to named parties in the Government suit and the statute of limitations is not tolled as to unnamed subsidiaries of a named parent corporation. *Sun Theatre Corp. v. RKO Radio Pictures* [1954 TRADE CASES ¶ 67,722], 213 F. 2d 284; *Leonia Amusement Corp. v. Loew's Inc.* [1953 TRADE CASES ¶ 67,592], 117 F. Supp. 747; *Christensen v. Paramount Pictures, Inc.* [1950-1951 TRADE CASES ¶ 62,751], 95 F. Supp. 446; *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.* [1953 TRADE CASES ¶ 67,560], 113 F. Supp. 937. Since Paramount Pictures Corporation was not a named defendant in *United States v. Paramount Pictures, Inc.* and was not even in existence until after the decree in that case was issued, the statute does not toll as to it.

[*Interrogatories*]

Plaintiff cites no authority to maintain its position that unnamed subsidiaries, agents or successor corporations are subject to the tolling statute, therefore the answers to the interrogatories propounded by plaintiff are immaterial to this motion.

[*Motion Granted*]

The motion of the defendant, Paramount Pictures Corporation is granted. The plaintiff's cross motion is denied.

[¶ 69,298] Standard Newspapers, Inc. v. J. W. Woods.

In the Supreme Court of Florida. January Term, A. D. 1959. Case No. 29,586. Filed March 6, 1959.

An Appeal from the Circuit Court for Marion County, CARROLL W. FUSSELL, Judge.

Florida Antitrust Law

Contracts in Restraint of Trade Under State Antitrust Laws—Contract Under Which Persons Are Restrained from Pursuing A Lawful Profession or Trade—Constitutionality of Florida Law Declaring Such Contracts Void.—The constitutionality of a Florida

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statute declaring void, with certain exceptions, every contract by which anyone is restrained from exercising a lawful profession, trade, or business was upheld over the contention that the statute was unconstitutional because it so impaired the right to contract as to amount to the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution. "We cannot agree that an act is unconstitutional that denounces in the main agreements designed to prevent a person from following his lawful 'profession, trade or business' when such agreements in the cases cited and others like them have for so long been rejected by the courts for fundamental reasons."

See Combinations and Conspiracies, Vol. 1, ¶ 2303.11.

Contracts in Restraint of Trade Under State Antitrust Laws—Contract Under Which Persons Are Restrained from Pursuing A Lawful Profession or Trade—Legality of Contract—Exceptions to Statute Declaring Such Contracts Void—Right To Repudiate Contract.—An individual who was a director-officer-stockholder of a newspaper corporation, which sold all of its assets (including good will) to another company, could not repudiate his agreement, for which he was paid $1,000, not to re-enter the newspaper field in a specified county as an owner, a stockholder, or a partner for a period of five years. The individual had contended that the agreement, to which his associates also were parties, was void under a Florida law declaring contracts under which persons are restrained from pursuing a lawful profession or trade void, and that the agreement did not come within the exemptions to the law as to the sale of the good will of a business and to a stockholder selling his shares in a corporation. The agreement not to compete was an indispensable part of the sale of the corporation's assets and therefore could not be considered by itself. In reality, the individual and his associates sold a newspaper and all of its assets, including good will, for a price, and as a part of the deal, they represented that they would secure the buyer against competition from them. While it was true that the agreement was not excepted from the prohibition of the law as an agreement made in conjunction with the sale of stock by a shareholder, the agreement was excepted from the prohibition of the law as an agreement made in conjunction with the sale of the good will of a business. On equitable principles, the individual, having presumably got his share of the purchase price and having surely received $1,000 for his promise not to compete, should not be allowed to repudiate his obligation. The individual was not prohibited as an employee from securing a livelihood but was only precluded from entering the field as a proprietor.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.

For the appellant: James M. Smith, Jr.

For the appellee: Greene, Ayres & Greene.

[*Agreement Not To Compete*]

THOMAS, Justice [*In full text*]: The appellee sought in the Circuit Court of the Fifth Judicial Circuit a declaratory decree construing and declaring his rights and status under a certain agreement between appellant and himself, declaring the agreement void, and holding him to be free to engage in the newspaper and printing business in Marion County.

From the allegations of his complaint it seems that the appellee, and Clyde Hooker, R. F. Brown and Marion Publishing Company, as parties of the first part, entered into the contract with appellant, as party of the second part, by which they agreed that they would not re-enter the newspaper field in the county, directly or indirectly, as owner, stockholder or partner for a period of five years and would not abet such competition.

The appellee alleged that he was untrained in any other business and could not, therefore, earn a livelihood for his family in the county. He claimed that under Sec. 542.12, Florida Statutes 1957, and F. S. A., the agreement was not binding on him inasmuch as he had not sold the good will of any business, and had not executed it as a stockholder selling his shares in a corporation.

[*Florida Statute*]

By the law are condemned contracts under which persons are restrained from

pursuing a lawful profession, trade or business, with two paragraphs of exceptions. One relates to partners and is not involved here. Sec. 542.12(3), *supra.* The other appears to exclude from the operation of the law persons in three categories: those who sell the good will of businesses, shareholders who sell all their stock in corporations, and employees or agents. Persons in the first two classes may agree with the buyers to desist from engaging in a similar business for a reasonable time in a reasonable area, while those in the third class, agents and employees, may assume the same obligations and may further agree not to solicit old customers of the former employer. Sec. 542.12(2).

[*Sale of Newspaper*]

The appellee devoted the allegations in his complaint to the one contract dealing with promises not to compete with the appellant for a stated period in a specified area but it is not possible to decide this controversy on the agreement isolated by him. A few days before it was executed, Marion Publishing Company, as party of the first part had executed a memorandum of agreement with appellant as party of the second part for the sale, by the former to the latter, of The Marion Sun, a weekly newspaper, and all the equipment, circulation lists and good will of the paper.

The appellee, who owned about 25% of the stock of Marion Publishing Company and held the positions of director and secretary in the corporation, was reluctant to sign the ancillary agreement securing the purchaser against competition from the signatories. His associates fearing that the sale, then evidently being negotiated pursuant to the memorandum, might not be consummated unless the agreement not to compete was signed paid him $1,000 consideration for his signature.

[*Constitutionality of Statute*]

In its answer the appellant took the position that the appellee was restrained only from re-entering the newspaper or printing business in the capacity of owner, stockholder or partner and from aiding someone else in the establishment of a competing business. The appellant asserted that Sec. 542.12, *supra,* had no application to the present situation. Furthermore, appellant charged that the statute was unconstitutional because it so impaired the right to contract as to amount to taking its property without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The circuit judge held that the assault upon the statute should fail and the ruling gave this court jurisdiction of the controversy. *Leafer v. State,* Fla., 104 So. 2d 350.

In the appellant's brief there is a dearth of citations to buttress its contention that the primary inhibition in the law unduly restricts the right to contract by condemning agreements designed to prevent a person from following a lawful trade, business or profession.

Originally, under the common law of England, contracts restricting a man's right to follow his calling were considered void as against public policy. This view developed from the requirement that a man could not pursue a trade to which he had not become apprenticed, and that one so committed was subject to penalty if he did not exercise that trade. Consequently an agreement to restrain him from following his trade would result either in his violation of the law or the deprivation of his right to earn a livelihood.

Before the passage of time and the change of conditions brought refinements of the rule there had been reluctance on the part of courts to enforce contracts likely to stifle competition, *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502, or to interfere with a person's right to make a living, *Love et al. v. Miami Laundry Co.,* 118 Fla., 137, 160 So. 32.

In *Arond v. Grossman et al.,* Fla., 75 So. 2d 593, we said that contracts "not to compete or work for a competitor" were unenforceable in the absence of *"some special equity."* We have furnished italics.

We have referred briefly to the history of such contracts and their fate in the courts because the appellant, in effect, asks us to hold invalid an act that, following the principles announced, generally condemns them with, of course, noteworthy exceptions. We cannot agree that an act is unconstitutional that denounces in the main agreements designed to prevent a person from following his lawful "profession, trade or business" when such agreements in the cases cited and others like them have

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for so long been rejected by the courts for fundamental reasons.

Moreover, the appellant's challenge is not impressive for under the exceptions may be done what appellant attempted to accomplish, namely, the preclusion of competition by those from whom it had bought the business including the good will. This seems to have been long recognized as an exception to the general rule, *Massari v. Salciccia,* 102 Fla. 847, 136 So. 522; *Wilson v. Pigue,* 151 Fla. 734, 10 So. 2d 561, and the appellant in undertaking to operate under it was afforded abundant opportunity to protect itself from the competition of the sellers in a reasonable territory for a reasonable time.

We come, then, to the conclusion that the chancellor ruled correctly when he held the act constitutional. As for the appellee, as appellant concedes, he is not prohibited as an employee from securing a livelihood for his family but is only precluded from entering the field as a proprietor.

This view does not, however, mean that we agree with the ultimate decision of the chancellor.

[*Right to Relief*]

Appellee entered a court of equity and when he did so he became amenable to equitable principles. We take now a close look at the facts to see whether or not he should have been rewarded with a decree declaring him "free to engage in the newspaper business and * * * the printing business in Marion County" without interference from the appellant.

When negotiations to sell the property were under way appellee displayed antagonism to the deal and this opposition became so strong that his associates finally paid him $1,000 to sign the "non-competition" agreement. Although the attack in the complaint was directed at but one agreement, it would be impractical and illogical to decide the point of law now involved without considering the two. They were so closely related that they should be examined *in pari materia* to ascertain the facts essential to proper disposition of this litigation. Plainly, execution of the agreement assuring noncompetition was so necessary to consummation of the sale that the appellee thought his signature should fetch him a sizeable amount of money, which it did, and his associates thought his signing was worth their disgorging that amount. Doubtless the appellant, too, regarded it an indispensable part of the transaction.

Now the appellee, with the $1,000 in his pocket, attempts to escape the effect of his bargain upon grounds that are tenuous indeed. While claiming the protection of the first part of the act declaring invalid contracts in restraint of the exercise of a lawful business and so on, he disclaims any applicability of the exceptions, because he says he did not sell the good will of a business and did not as a shareholder of a corporation sell all his stock in the corporation.

The second of these statements is literally true because it was the assets of the corporation, and not the stock that was sold. The first is very difficult to understand. To accept the appellee's literal interpretation of the part of the statute referring to transfer of good will would amount to keeping the latter without regard for the spirit by holding he was not "[o]ne who [sold] the good will of a business." But if we focus on the entire transaction, it is plain that in reality he and his colleagues for a price sold a newspaper and all its assets including the good will. As a part of the deal he and they represented that they would secure the buyer against competition from them. The importance of this assurance was fully realized by appellee, else why did he put the value of $1,000 on his signature and why did he think his associates met his demand. Having, presumably, got his share of the purchase price, and having, surely, received his "bonus" he should not in a court of equity be upheld in his attempt to repudiate his obligation.

[*Dismissal of Complaint*]

The decree is reversed with directions to dismiss the complaint at the cost of the appellee.

Affirmed in part; reversed in part.

TERRELL, C. J., ROBERTS, DREW and THORNAL, JJ., concur.

[¶ 69,299] United Banana Company, Inc., et al. v. United Fruit Company, et al.

In the United States District Court for the District of Connecticut. Civil No. 7141. Filed February 19, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Federal Statute of Limitations—Claims Barred Under State Law Prior to Federal Statute's Effective Date—Effect of State Tolling Provision as to Defendant's Absence from State.—Where it had been held that the Federal four-year statute of limitations was tolled by the pendency of a Government antitrust action and that the plaintiffs could go back to July 3, 1950 for the recovery of damages, the defendants asserted that the application of the Federal tolling statute left enforceable plaintiffs' rights which existed on the date of the bringing of the Government action on July 2, 1954 and that the Connecticut limitation statute of three years, then applicable (the Federal statute not having been enacted until January 7, 1956), had left alive at that time (July 2, 1954) rights which had accrued during the three years prior thereto, that is, the period back to July 2, 1951. They argued that the cut-off date could not go back to July 2, 1950 because of Section 4B of the Clayton Act, which provides that no cause of action barred under existing law on the effective date of this section shall be revived.

The court, noting that the assertion did not take into consideration the Connecticut statute tolling the limitation period during the absence of the defendant from the state, ruled that since the defendant could not deny its absence from Connecticut from 1947 to 1953 (by reason of a prior adjudication), the operation of the state three-year statute of limitations was tolled during that period, and causes of action accruing between July 3, 1950 and July 3, 1951 were still alive on the effective date of the Federal statute. Although the effect of the Connecticut tolling statute on such rights goes back to 1947, it does not follow that rights accruing between 1947 and 1950 remained alive for remedial claims. It was the Federal statute of limitations and the Federal tolling statute which fixed July 3, 1950 as the date to which the plaintiffs could go back, and Connecticut statutes were only referred to to determine which of the plaintiffs' claimed accrued rights were dead at the hand of the state limitations statutes and were incapable of being revived when the Federal statute took effect.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100, 9010.275.

For the plaintiff: Robert E. Nickerson and Ernest Leff, Greenwich, Conn.

For the defendant: Frank E. Callahan of Wiggin & Dana, New Haven, Conn.

Amending and supplementing a decision of the U. S. District Court, District of Connecticut, 1959 Trade Cases ¶ 69,277.

Supplemental Memorandum of Decision

[*Contention*]

ANDERSON, District Judge [*In full text*]: The defendants have asked the court to amend that part of the first full paragraph at the top of page 8 in the Memorandum of February 10, 1959, which reads as follows, ". . . the plaintiffs may go back to July 3, 1950 with respect to this part of the action" so that the date July 3, 1950 will be changed to July 3rd, 1951. They claim that application of the federal tolling statute left enforceable plaintiff's rights which existed on the date of the bringing of the Louisiana action on July 2, 1954 and that the state limitation statute of 3 years, then applicable (the federal statute not having been enacted until January 7, 1956), had left alive at that time (July 2, 1954) rights which had accrued during the 3 years prior thereto, that is, the period back to July 2, 1951.

The defendants argue that the cut-off date cannot go back to July 2, 1950 because of Section 4B of the Clayton Act (15 U. S. C. Sec. 15b) which provides:

> "No cause of action barred under existing law on the effective date of this section and section 15a and 16 of this title shall be revived by said sections."

However, these assertions by the defendants do not take into consideration the tolling of the Connecticut statute because of the provision of Sec. 8330 of the General Statutes of the State of Conn. (Rev. Ed.

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1949) and the absence of United Fruit from the State of Connecticut between 1947 and 1953. The defendants may have been misled by the statement in the first full paragraph on page 6 of the memorandum of decision which reads ". . . the possible absence of the defendants from Connecticut for purposes of tolling the Connecticut Statutes under Conn. Gen. Stat. Sec. 8330 (Rev. Ed. 1949) is not an issue in this case." This quoted portion should be amended by adding thereto the words "except as hereinafter noted." While the defendants absence from the state and the Connecticut tolling statute were not in issue with respect to the questions as they were discussed in the memorandum, they do need to be considered in dealing with the point now raised by the defendants and discussed in this memorandum.

[*Connecticut Tolling Statute*]

The Connecticut tolling statute reads as follows:

> "Sec. 8330. Defendant's absence from the state to be excluded, when. In computing the time limited in the several cases aforesaid, the time during which the party, against whom there may be any such cause of action, shall be without the state, shall be excluded from the computation."

The issue of United Fruit Company's absence from Connecticut, for the purposes of Section 8330, has already been litigated in the New York case, *Banana Distributors, Inc. v. United Fruit Co.* [1957 Trade Cases ¶ 68,876], 158 F. Supp. 153 (S. D. N. Y. 1957). In that case the jury rendered a special verdict finding United Fruit to be "without the state" of Connecticut from 1947 to 1953, and that verdict is binding on United Fruit here. It does not matter that these plaintiffs were not parties to the former suit, for United Fruit, against whom the decision is applied, was a party there and actively litigated the merits of the case. The res judicata effect of that determination is not undercut by the slowly dying theory of mutuality of estoppel. See *United States v. Willard Tablet Co.*, 141 F. 2d 141 (7th Cir. 1944). All that due process requires is that the party who is now being bound was a party to the earlier judgment. *Bernhard v. Bank of America National Trust & Savings Ass'n.*, 19 Cal. 2d 807, 812, 122 P. 2d 892, 894 (1942). See also *Gart v. Cole*, Docket #25358, U. S. Court of Appeals, 2d Cir. 1959; *Israel v. Wood Dolson*, 1 N. Y. 2d 116, 134 N. E. 2d 97 (1956); *Good Health Dairy Products Corp. v. Emery*, 275 N. Y. 14, 9 N. E. 2d 758 (1937); *U. S. v. Wexler*, 8 F. 2d 880 (E. D. N. Y. 1925); *Coca Cola Co. v. Pepsi Cola Co.*, 36 Del. 124, 172 A. 260 (1934); *Jenkins v. Atlantic Coast Line R. Co.*, 89 S. C. 408, 71 S. E. 1010 (1911); *Atkinson v. White*, 60 Me. 396 (1872); cf. *Kessler v. Eldred*, 206 U. S. 285 (1907); 35 Yale L. J. 607; 18 N. Y. U. L. Q. Rev. 565; 12 Corn. L. Q. 92; 29 Ill. L. Rev. 93; 9 Va. L. Reg. (N. S.) 241; Freeman, Judgments, 932-935 (5th Ed. 1925).

[*Ruling*]

Since United Fruit may not deny its absence from Connecticut from 1947 to 1953, the operation of Section 8316 is tolled during that period, and causes of action accruing between July 3, 1950 and July 3, 1951 were still alive on the effective date of the federal statute.

It should be understood that although the effect of the Connecticut tolling statute on the rights mentioned goes back to 1947 it does not follow that rights accruing between 1947 and 1950 remained alive for remedial claims in the present action. As stated in the memorandum and now reaffirmed by this supplemental memorandum, it is the *federal* statute of limitations and the *federal* tolling statute which fix July 3, 1950 as the date to which the plaintiffs may go back and Connecticut statutes are only referred to, to determine what of the plaintiffs' claimed accrued rights were dead at the hand of the state limitations statutes and were incapable of being revived when the federal statute of limitations took hold. It is found that the state statutes had killed only those which accrued before 1947, but the federal statutes limit all those which accrued before July 3, 1950.

[¶ 69,300] United States v. Pan American World Airways, Inc.; W. R. Grace and Company; and Pan American-Grace Airways, Inc.

In the United States District Court for the Southern District of New York. Civ. 90-259. Filed January 30, 1959.

Case No. 1181 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure — Consent Decree — Refusal of Court to Approve Proposed Consent Decree.—A Federal District Court refused to approve a proposed consent decree and ordered the parties to trial. The court was of the opinion that it would be wiser not to express its reasons for withholding its approval of the proposed decree until the outcome of the trial of the case on its merits.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241.

For the plaintiff: Special Assistant to Attorney General.

For the defendants: Cahill, Gordon, Reindel & Ohl; White & Case; and Cleary, Gottlieb, Friendly & Hamilton, all of New York, N. Y.

Memorandum

[*Consent Decree—Approval Denied*]

MURPHY, District Judge [*In full text*]: The court will not approve the proposed consent decree and hereby orders the parties to trial on May 4, 1959.

We have given serious consideration to arguments of counsel for and against the proposed decree and we have written several draft memoranda expressing our reasons for the withholding of our approval. After continued reflection we have concluded it to be a wiser course not to express any opinion but await the outcome of the trial on the merits.

This is an order. No settlement is necessary.

[¶ 69,301] United States v. Erie County Malt Beverage Distributors Association; Erie County I. D. Malt Beverage Association, also known as Erie County Importing Malt Beverage Distributors Association; Kahkwa Beer Company; George B. Barber; Robert E. Carney; Ralph A. Deck; Anthony D. Marinelli; Harold J. Mulvihill; and Louis Sawicki.

In the United States Court of Appeals for the Third Circuit. No. 12,627. Argued December 15, 1958. Filed March 18, 1959.

Appeal from the United States District Court for the Western District of Pennsylvania. HERBERT P. SORG, District Judge.

Case No. 1272 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Scope of Sherman Act—Applicability to Commerce in Malt Beverages—Pennsylvania Liquor Code—Twenty-First Amendment to United States Constitution.—The Twenty-first Amendment to the United States Constitution did not deprive the United States of jurisdiction to prosecute, under the Sherman Act, a conspiracy to suppress and eliminate competition in the sale of malt beverages to home consumers in Erie County, Pennsylvania, by fixing case lot prices, mark-ups, and delivery charges and enforcing such acts by boycott. Under the Amendment, the power to regulate intoxicating liquors as articles of commerce is distributed between the state and federal governments. The Amendment does not give to the states complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause; some power to regulate and control that commerce remains in Congress. The Amendment does not bar a Sherman Act prosecution when the Act is not being enforced in such a way as to conflict with state law. In the instant case, the Pennsylvania Liquor Code,

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regardless of its effect with respect to the sale and distribution of spiritous liquors, permits the functioning of a private entrepreneurial system in the sale and distribution of malt and brewed beverages, and there is nothing in the Pennsylvania law, decisional or otherwise, which authorizes the practices charged and proven in the instant case.

See Combinations and Conspiracies, Vol. 1, ¶ 2039.

For the appellant: Thomas W. Barber, Erie, Pa.

For the appellee: William L. Maher, Chief, Middle Atlantic Office, Antitrust Division, Department of Justice, Philadelphia, Pa.

Affirming a judgment of the U. S. District Court, Western District of Pennsylvania, 1958 Trade Cases ¶ 68,973; for a prior opinion of the District Court, see 1957 Trade Cases ¶ 68,590.

Before Biggs, Chief Judge, and McLaughlin and Hastie, Circuit Judges.

Opinion of the Court

[*Prior Proceedings*]

By Biggs, Chief Judge [*In full text*]: George B. Barber, the defendant-appellant, together with others as named in the caption, was indicted on March 19, 1956 for a violation of Section 1 of the Sherman Act, 15 U. S. C. A. § 1. The United States asserts that the defendants have engaged in a conspiracy to suppress and eliminate competition in the sale of malt beverages to home consumers in Erie County, Pennsylvania, by fixing case lot prices, mark-ups, and delivery charges, and enforcing the foregoing by boycott. All the defendants, including Barber, were found guilty. A motion for arrest of judgment was made and denied. Barber has appealed.[1] The appeal raises but one question substantially as incorporated in the motion in arrest of judgment.[2]

[*Twenty-first Amendment—Jurisdiction*]

In brief Barber asserts that the Twenty-first Amendment to the Constitution of the United States[3] ousts the United States of jurisdiction to prosecute restraints of interstate trade or commerce in malt beverages. Intoxicating liquors have acquired special status as articles of commerce because of a very long legal history dealing with numerous phases of their regulation by state police power as well as by the federal government. Since the effective date of the Twenty-first Amendment, December 5, 1933, the power to regulate intoxicating liquors as articles of commerce has been distributed between the state and federal governments and has depended to some degree upon the complementary effects of state and federal laws. But soon after the Amendment became effective the Supreme Court held that the Amendment did not give to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the Commerce Clause and that some power to regulate and control that commerce remained in Congress. *Jameson & Co. v. Morgenthau,* 307 U. S. 171 (1939).[4] The quantum of power remaining in Congress to legislate in respect to commerce in intoxicating liquors following the amendment has never been precisely defined but has remained to be marked out by judicial decision. *Carter v. Virginia,* 321 U. S. 131, 138 (1944), concurring opinion of Mr. Justice Black.

This residuum of power remaining in the federal government was dealt with by the Supreme Court in *United States v. Frankfort*

[1] [1958 TRADE CASES ¶ 68,973] — F. Supp. — (W. D. Pa. 1957).

[2] In pertinent part as follows:

"The defendants and each of them move the Court to arrest the judgment for the following reasons:

* * *

"5. When the malt beverages brewed outside Pennsylvania arrived at the warehouse of the respective defendants in the County of Erie, Pennsylvania, the Interstate transactions in relation to said beverages ended, and the activities of the defendants or any of them thereafter were not a subject of Congressional regulations."

The defendants had previously filed a motion to quash the indictment based on similar grounds. This motion was denied.

[3] The Amendment provides: "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[4] In the cited case the commerce involved was foreign commerce; *viz.,* the importation of Irish whiskey.

Distilleries [1944-1945 TRADE CASES ¶ 57,338], 324 U. S. 293, 299-300 (1945). In this case liquor wholesalers in Colorado who controlled 75% of spiritous liquors and wines annually shipped into Colorado were indicted under Section 1 of the Sherman Act, 15 U. S. C. A. Section 1, and it was contended by them, relying on the Miller-Tydings Amendment to the Sherman Act, 50 Stat. 693, and on the Colorado "Fair Trade" Act, Session Laws of Colorado, 1937, chapter 146, as defenses, that the Twenty-first Amendment prohibited the prosecution. The Supreme Court concluded that the Sherman Act was not being enforced under the circumstances of the cited case in such a way as to conflict with the law of Colorado and reversed the Court of Appeals for the Tenth Circuit. The Supreme Court, by Mr. Justice Black, said, "We . . . do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented."

In a concurring opinion Mr. Justice Frankfurter laid emphasis on the fact that the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment and that the Sherman Act, since it derives its authority from the Commerce Clause can have no greater potency than the Commerce Clause itself. "And so," said Mr. Justice Frankfurter, *supra,* at p. 301, "[T]he validity of a charge under the Sherman law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment." The appellant in the case at bar contends that we are faced with circumstances which compel the conclusion that the Sherman Act does interfere with the purposes of the Pennsylvania law relating to intoxicating liquors and that the entire field has been preempted by Commonwealth legislation. We cannot agree.

Immediately following the adoption of the Twenty-first Amendment to the Constitution of the United States the Legislature of the Commonwealth of Pennsylvania enacted statutes which covered many facets of the traffic in Pennsylvania in spiritous liquors and in malt and brewed beverages. These are set out in some detail in the brief of the defendant Barber but need not be recounted here for the Pennsylvania Liquor Code, P. L. 90, 47 P. S. Pa. § 1 *et seq.,* is now in force. Whatever may be the force of the Liquor Code in respect to spiritous liquors, it is clear that the Code permits the functioning of a private entrepreneurial system in the sale and distribution of malt and brewed beverages by the authorization of the issuance of licensing to private persons for engaging in the business of purchasing and distributing such beverages. See *Melrose Distilleries, Inc. v. United States* [1958 TRADE CASES ¶ 69,129], 258 F. 2d 726, 729 (4 Cir. 1958), cert. granted on another issue, 358 U. S. 878 (1958). No decision of the Pennsylvania Court looks in an opposite direction. There is nothing in the law of Pennsylvania, decisional or otherwise, which authorizes the fixing of prices, uniform closing hours, save for week-end closings, 47 P. S. Pa. § 4-492(4), or the enforcement of group action by boycott as charged and proved here.

[*Affirmed*]

The judgment of the court below will be affirmed.

[¶ 69,302] Anna Bedno et al., co-partners d/b/a King Optical Co. v. Dan B. Fast et al., as the Wisconsin Board of Examiners in Optometry, et al.

In the Supreme Court of the State of Wisconsin. August Term, 1958. No. 173. Filed March 3, 1959.

Appeal from a judgment of the Circuit Court for Milwaukee County: MYRON L. GORDON, Circuit Judge. Affirmed.

Federal Trade Commission Act

False Advertising Under Federal Trade Commission Act—Scope of Federal Regulation—Effect on State Regulation of Truthful Advertising of Optometric Services.—Congress, by enacting Section 12 of the Federal Trade Commission Act (declaring unlawful the false advertising of food, drugs, devices, or cosmetics), did not preempt the field of interstate advertising in the optical industry so as to deprive the State of Wisconsin of

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jurisdiction to regulate in this field. Section 12 of the Act only prohibits false advertising; the Wisconsin statute in question related to truthful advertising of prescription eyeglasses or optometric services. Congress had not seen fit to include within the scope of federal legislation the dissemination of truthful advertising; therefore, the federal act did not cover the subject matter of the Wisconsin statute and did not by preemption preclude the state from so exercising its police power. There was nothing in the state statute which was repugnant to or incompatible with the federal act.

See Unfair Practices, Vol. 2, ¶ 5201.361; False Advertising, Vol. 2, ¶ 6005.

For the appellants: Padway, Goldberg & Previant (A. G. Goldberg and Saul Cooper, of counsel).

For the respondents: Stewart G. Honeck, Attorney General; Warren H. Resh and John H. Bowers, Assistant Attorneys General; William J. McCauley, District Attorney; and Hugh O'Connell, Special Assistant District Attorney, Milwaukee, Wis.

[*Nature of Action*]

Action commenced by plaintiffs Anna Bedno, Jacob Bedno, Samuel J. Ritholz, Sylvia Ritholz, Morris I. Ritholz, Fanny Ritholz, Benjamin D. Ritholz, Sophie Ritholz, co-partners doing business as King Optical Company, against defendants Dan B. Fast, Augustus N. Abbott, Fred N. Harris, Edward D. La Course, Newton E. W. Lenz, as the Wisconsin Board of Examiners in Optometry, and William J. McCauley, District Attorney for Milwaukee county, for declaratory judgment and injunction declaring secs. 153.10 and 153.11, Stats. inapplicable to plaintiffs, or unconstitutional, and enjoining defendants from enforcing the same. On motions for summary judgment on the pleadings by both parties, the trial court found that the statutes were applicable to plaintiffs and that they were constitutional, denied the injunction and granted judgment on defendants' motion. From that judgment plaintiffs appeal.

The facts will be stated in the opinion.

[*Statutes*]

MARTIN, Chief Justice [*In full text except for omissions indicated by asterisks*]: The statutes involved are:

Sec. 153.10 "It shall be unlawful for any person to advertise, either directly or indirectly, by any means whatsoever, any definite or indefinite price or credit terms on lenses, frames, complete glasses or any optometric services; to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess superior qualifications or are best trained to perform the service; or to render any optometric service pursuant to such advertising."

Sec. 153.11 "Any person not lawfully authorized to practice optometry, who shall practice optometry, or shall hold himself out as a practitioner thereof, or who shall impersonate another practitioner, or who shall violate any provisions of this chapter, or any rule or regulation made under authority thereof, shall be punished for the first offense by a fine not less than $50 nor more than $200, or by imprisonment for not more than 3 months, or both. And for a subsequent offense by a fine not less than $200 nor more than $500, or by imprisonment for not less than 3 nor more than 6 months, or both such fine and imprisonment."

[*Evidence*]

None of the facts are in dispute, it being stipulated by the parties that the allegations contained in the complaint and answer, together with the exhibits attached thereto, constitute all the evidence in the case.

[*Plaintiffs' Business*]

Plaintiffs are manufacturers and merchants of optical goods. They engage in the practice of optical dispensing, which consists of taking facial measurements, processing, fitting and adjusting mountings, frames and lenses in the filling of prescriptions. They duplicate, replace and reproduce such devices without prescription where no optometrical service is required. Plaintiffs own and operate a factory at Chicago for the manufacturing and processing of optical goods, as well as branches in numerous cities of the United States and Canada for the dispensing of such goods. The orders taken from customers at these branches, including the Milwaukee office, are sent to the Chicago factory to be filled according to the prescriptions. The eyeglasses or lenses are returned to the branch office where the frames are fitted to the customer's face.

All advertising contracts are made in Chicago and advertisements are placed in

newspapers from the Chicago office. All accounting and banking activities incidental to the operation of the branch offices are carried on in Chicago. Annual sales of the business, between the Chicago office and the various branches, exceed two and one-half million dollars.

A one-price policy is maintained by the plaintiffs. Single-vision eyeglasses are $9.98; bifocal glasses are $4.98 additional. These prices include any correction, size, style, shape or color of lenses or frames.

On opening their branch in Milwaukee on September 16, 1957, plaintiffs placed advertisements in the local newspapers containing statements such as, "All single-vision glasses at one low price including frames and lenses. Bifocals, if desired, at small additional charge." They have also published and circulated matter which advertises that glasses may be obtained for $9.98 complete with frames and lenses. There is no allegation in the pleadings that any of the statements contained in said advertisements are false, misleading, fraudulent, deceiving, or for the purpose of causing misunderstanding. It is admitted that such statements are full, fair, complete and truthful, and all articles so advertised are actually of the type, kind, quality and description as set forth in the advertisements.

[*Issues*]

Three questions are presented on appeal, the first of which is:

Are secs. 153.10 and 153.11, Stats., which prohibit the advertising of prices of complete glasses, applicable to plaintiffs, who do not practice optometry, or to their price advertising?

* * *

The second question is:

If secs. 153.10 and 153.11 are applicable to plaintiffs' activities, are they constitutional?

* * *

The last question is:

Has Congress preempted the field of interstate advertising in the optical industry so as to deprive the state of jurisdiction to regulate in this field?

[*Federal Regulation—FTC Act*]

The rule has been stated in *Metropolitan Finance Corp. v. Matthews* (1953), 265 Wis. 275, 278, 61 N. W. (2d) 502, as follows:

> "If plaintiff's business, although in interstate commerce, has incidents and requires activities within the state intimately related to local welfare, then those incidents and activities are subject to state regulation under the police power, unless Congress has, by appropriate legislation, preempted the field with reference thereto."

Plaintiffs base their argument on the provisions contained in 15 U. S. C. sec. 52 which they contend is a comprehensive regulatory plan controlling price advertising in interstate commerce. A reading of the statute will show that it prohibits only *false* advertising as an unfair or deceptive act in commerce. Congress has not seen fit to include within the scope of federal legislation the dissemination of truthful advertising. Thus, the federal act does not cover the subject matter of sec. 153.10, Stats. and does not by preemption preclude the state from so exercising its police power. As stated in *Kelly v. Washington* (1937), 302 U. S. 1, 10, 58 Sup. Ct. 87, 82 L. Ed. 3:

> "There is no occupational rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

All of the authorities relied upon by plaintiffs deal with *false* representations in advertising relating to optical goods. None of them involve truthful advertising of prescription eyeglasses. Since the prohibition of such truthful advertising is a proper exercise of the state's police power, as pointed out above, and the federal government has clearly limited its control to the field of false advertising, sec. 153.10, Stats., is constitutional. There is nothing in the statute which is repugnant to or incompatible with the federal act.

[*Affirmed*]

Our opinion in this case would be incomplete without a word of appreciation for the exhaustive decision prepared by the trial court. The thorough study and consideration of the questions which it put into the decision have been of substantial assistance to this court on appeal.

By the Court.—Judgment affirmed.

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[¶ 69,303] The American Securit Company v. Hamilton Glass Company, Inc. et al.

In the United States District Court for the Southern District of Indiana, Terre Haute Division. Civil Action No. TH 55-C-37. Filed February 13, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Patents—Package Licensing—Violation of Government Consent Decree—Settlement of Litigation.—Pursuant to a settlement agreement, a judgment was entered declaring that the plaintiff was not guilty of a violation of the antitrust laws, a violation of a Government consent decree entered against the plaintiff, or a misuse of its patents. The parties stipulated that the facts set forth in the findings of fact tendered to the court were true. The misuse charge appeared to be based largely upon a situation in which prospective licensees asked for quotations of royalties on different groups or packages of patents, and the plaintiff offered any individual patent or any group or package of patents for two cents per square foot. According to the conclusions of law, (1) if any applicant had the right to ask about prices for package licenses under the terms of the consent decree, the plaintiff had the right to offer them, (2) the consent decree compelled the plaintiff to grant licenses under any, some, or all of its patents, (3) the plaintiff did make such offers, but no applicant adopted the remedy of appealing to the consent decree court for a license on other terms, (4) the plaintiff's offers completed its obligations under the decree and left the inquirers to their remedies of making a counter-offer or of appealing to the consent decree court, (5) the defendant made no application for a license, (6) the plaintiff did not issue licenses with price fixing provisions contrary to case law, and (7) the opinion of the consent decree court that the plaintiff did not violate its decree was adopted.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500; Monopolies, Vol. 1, ¶ 2610.550; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241.341, 8421; Private Enforcement and Procedure, Vol. 2, ¶ 9041.

For the plaintiff: Ralph Hamill, of Hollowell & Hamill, Indianapolis, Ind.; John L. Seymour, of Bauer & Seymour, New York, N. Y.; and Joseph W. Burns, of Austin, Burns, Appell & Smith, New York, N. Y. (John L. Seymour and Joseph W. Burns, of counsel.)

For the defendants: David I. Day, of Marshall, Batman & Day, Terre Haute, Ind.; Howard W. Koven, of Koven, Koven, Salzman & Homer, Chicago, Ill.; and Howard W. Hodgkins, of Wilkinson, Huxley, Byron & Hume, Chicago, Ill.

For a prior opinion of the U. S. Court of Appeals, Seventh Circuit, see 1958 Trade Cases ¶ 69,018.

Stipulation of Parties and Findings of Fact Pursuant Thereto

Cale J. Holder, District Judge [*In full text except for omissions indicated by asterisks*]: The parties stipulate that the facts set forth in the findings of fact tendered to the Court for signature are true. It is noted that the findings of fact relating to Shatterproof, Permaglass, Libbey-Owens-Ford, are summaries of factual matters contained in depositions of said companies taken under oath. Many facts jointly agreed to and found by the parties in preparation for trial have been omitted from this finding of fact without prejudice.

It is stipulated that any finding of fact which is actually a conclusion of law shall be considered to be a conclusion of law, and any conclusion of law which is actually a finding of fact shall be considered to be a finding of fact.

Findings of Fact

From the Stipulation of the parties, the Court finds as follows:

I

Facts Concerned With But Not Limited to Infringement and Validity

1. The Court has jurisdiction of the parties and of the subject matter herein.

1(a). The plaintiff, The American Securit Company, is a corporation organized and existing under and by virtue of the laws of Delaware. Its fundamental business is to acquire and license patents.

Its officers are: Eugene Gentil, President, a French citizen, residing at 23 Rue

Simon Dereure, Paris, France; Robert Ingouf, Vice President and Treasurer, an American citizen, residing at No. 6 Brooklands, Bronxville, New York; Alain du Breil, Vice President, an American citizen, residing at 45 East 85th Street, New York, New York; and David M. Tappen, Secretary, an American citizen, residing at 460 Park Avenue, New York, New York.

Its directors are: Eugene Gentil, Robert Ingouf, Alain du Breil, Germain Delattre, Andre Delloye, Daniel de Gorter, and Gerard de Piolene.

Its place of business is at 927 Market Street, Wilmington, Delaware, c/o Corporation Guarantee & Trust Company.

2. The defendant, Hamilton Glass Company, is a corporation of Illinois, having a factory and place of business at Chicago, Illinois; another factory and place of business at Vincennes, Indiana; and another factory and place of business at West Pittsburgh, Pennsylvania.

The defendant Edith Building Corporation is a corporation of Indiana having a place of business at Vincennes, Indiana.

4. Hamilton and Edith have been and are under the same control.

6. The manufacture by Hamilton of tempered glass began about 1950; at that time Michael Schapiro was President of Hamilton and Edith, and David S. Levin was Vice President of Hamilton and Edith.

8. The Directors of Hamilton and Edith were Michael Schapiro and David S. Levin and, in each case, a third person who was a nominee of no status, to fulfil the Illinois requirement that there be three directors.

9. The decision of the defendants (Hamilton and Edith) to enter the manufacture of tempered glass was made by Schapiro and Levin about 1950.

10. Under date of January 24, 1951 the defendant Hamilton was notified by plaintiff's counsel of plaintiff's patents.

11. When television came in, a tremendous market for tempered glass was established, mainly as implosion plates to protect the viewers from the implosion of television tubes. Among companies that went into the manufacture of tempered glass for this use were Chicago Dial, Permaglass, Dearborn, Bienenfeld (possibly also called Century), Pittsburgh Plate Glass, Libbey-Owens-Ford, Corning, Shatterproof, and Croname.

12. Defendant, by the decision of Schapiro and Levin, decided to enter the field of making and selling tempered glass. The decision was made under the belief that, to get themselves on an even footing with their competitors and to hold their position in the industry, they were forced to go into tempering. At the time they made the decision, they knew about the antitrust suit involving the plaintiff and other glass manufacturers before Judge Kloeb in the United States District Court for the Northern District of Ohio, Western Division, Civil Action 5239, which had been terminated by a Consent Decree on October 30, 1948 [1948-1949 TRADE CASES ¶ 62,323].

13. Chicago Dial undertook tempering before Hamilton. Its tempering apparatus was constructed under the direction of John Busch. When Hamilton undertook tempering, they employed John Busch to construct their apparatus.

14. Under date of December 21, 1953 Hamilton was notified that it was infringing some of plaintiff's patents. Thereafter, until the filing of the Complaint in this case (on or about July 13, 1955), defendant was repeatedly accused by plaintiff of infringement.

15. Plaintiff offered defendant a standard license before bringing suit.

18. The defendant proceeded, to construct two complete apparatuses for tempering glass at its plant in Vincennes, Indiana.

19. One of plaintiff's licensees was West-Penn Mirror Company at West Pittsburgh, Pennsylvania. It manufactured tempered glass, particularly for the television industry, but suffered business reverses. Its plant at West Pittsburgh was acquired by defendant, which thus became possessed of three complete apparatuses for manufacturing tempered glass.

20. The tempering plant at West Pittsburgh was operated, at first, by Hamilton in substantially the same condition in which it was received from West-Penn Mirror Company.

22. For a time, defendant operated the West Pittsburgh plant without substantial change in its construction.

23. Thereafter, defendant made changes in the construction of the West Pittsburgh plant, but continued to manufacture tempered glass.

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Tempered Glass

* * *

30. The price of tempered glass of a particular size and quality is not determined by the number of plaintiff's patents which are used.

* * *

II

Facts Concerned With But Not Limited to Matters Involving Antitrust and the Consent Decree

202. The plaintiff entered into a Consent Decree on October 30, 1948 in the nature of a contract between plaintiff and the United States of America before the United States District Court for the Northern District of Ohio, Western Division, hereafter called the Ohio Court.

203. The Ohio Court has held that plaintiff has not violated the Consent Decree.

204. The plaintiff gave notice of its patents to Hamilton in January 1951 (letter dated January 24, 1951).

205. The plaintiff gave Hamilton notice of infringement on December 21, 1953.

206. Additional notice, also including West-Penn, September 9, 1954.

207. Plaintiff's letter, asserting undue delay in reply, October 29, 1954.

210. Since the Consent Decree, the plaintiff has not attempted to fix prices.

211. Since the Consent Decree, the plaintiff has not attempted to restrain commerce in unpatented articles.

212. Since the Consent Decree, the plaintiff has not attempted to eliminate jobbers.

213. Since the Consent Decree, the plaintiff has not attempted to standardize trade practices throughout the industry.

214. Since the Consent Decree, the plaintiff has not issued price-fixing licenses.

215. Since 1948, the plaintiff has been bound by the Consent Decree to issue a license at a reasonable and a non-discriminatory royalty to anyone who applies therefor in writing.

216. Since 1948, any applicant dissatisfied with the terms of a license offered by plaintiff has had the right to apply to the Ohio Court for relief.

217. The defendant has not applied in writing to plaintiff for a license and has not applied to the Ohio Court for relief.

218. After the Consent Decree, the first applicants for license were PPG and LOF. Separate negotiations were carried on with them by plaintiff between November 1948 and March 1949, resulting in the grant of licenses on similar terms; the outstanding terms of each license provided a royalty of 2¢ per square foot of glass tempered, regardless of the number of patents actually used by the licensees. The licenses also provided for a minimum annual royalty, required the licensee to furnish a written statement of the number of square feet of glass sold under the agreement, required licensee to furnish such information as was necessary to enable licensor to determine the amount of royalties due, required licensee to give notice of any suit for infringement, and provided for termination by the licensor for failure of the licensee to perform and by the licensee on thirty-days notice, for arbitration, and that New York law should govern.

219. In July 1950, upon a written application, plaintiff issued to Croname, Inc. a license at the same 2¢ royalty on 37 patents, being all the patents then owned by plaintiff. This license was then printed, designated "Standard License Contract", and offered generally to the trade. This Standard License differed from the PPG and LOF licenses in that it contained some changes which were made at the request of the Department of Justice, and a lesser minimum royalty.

220. In 1952, Permaglass, Inc. requested a license under two patents. Plaintiff offered such a license, but at the same royalty of 2¢ per square foot. Permaglass then executed the Standard License including all the patents.

221. In 1954, Eagle Convex Glass Specialty Company requested a license under only one patent at the royalty of 2¢. Plaintiff requested Eagle Convex to accept the Standard License contract, advising that it could cancel after the expiration of the requested patent on September 27, 1955. Eagle Convex accepted the standard form license and did cancel after the patent expired.

222. Between 1949 and 1955 approximately twenty companies discussed with plaintiff its Standard License or a similar license, and seven companies executed package licenses at the 2¢ royalty.

225. From 1951 to 1955 there was considerable correspondence between plaintiff and Hamilton Glass Company about infringement.

227. Plaintiff's royalty was the result of negotiations with applicants Libbey-Owens-Ford and Pittsburgh Plate Glass, who agreed on 2¢ per square foot as the reasonable value for the use of any, some or all of plaintiff's patents to a person desiring to enter the glass tempering field. Plaintiff's licensees have not been required to use any of plaintiff's patents, they have been free to use any, some or all of plaintiff's patents, and they have been free to cancel their licenses at any time, for any reason or no reason, on thirty-days notice. To those licensees who used one patent (Eagle Convex) the royalty was 2¢ per square foot, to those who used two or a few patents (Croname) the royalty was 2¢ per square foot, and to those who used several patents (PPG and LOF), the royalty was 2¢ per square foot.

228. The nature of plaintiff's patents made it impossible for any licensee to use all patents. For example, patents 1,916,174, 1,944,625 and 1,971,268 describe different cooling machinery; 2,052,254 and 2,093,040 describe different methods for tempering the glass; and 2,151,266 and 2,062,567 describe different machinery for supporting the glass. The possibility that anyone would use all patents was not contemplated because of the varied nature of the patents.

229. At no time was a licensee limited to the use of any specified patent or number of plaintiff's patents.

230. Glass that has been tempered by the use of any one or several of plaintiff's patents has been improved, so that it commands a higher price.

231. The higher price of tempered glass depends on the fact that it is tempered, not on the number of patents used in the tempering.

232. At no time was a license granted charging 2¢ per square foot for the use of a specified number of patents. In every instance, the number of patents to be used was left up to the licensee.

233. The plaintiff has not issued licenses fixing the resale prices of tempered glass.

234. Plaintiff's licenses have been limited to those who asked for them in writing and accepted them when offered, constituting only seven companies out of twenty who applied, and only a small percentage of the companies in the glass industry.

235. Plaintiff has not tried to raise the prices of tempered glass.

236. Plaintiff has not tried to fix the prices of tempered glass.

237. Plaintiff has not tried to limit the manufacture of tempered glass or to stabilize the prices of related products.

238. Plaintiff has not tried to control the distribution of tempered glass.

239. Plaintiff has not concerted with manufacturers and distributors to control the price of tempered glass.

240. Plaintiff has not sought control over the prices and distribution of tempered glass.

241. Plaintiff has not organized the industry under patent licenses.

242. Plaintiff has issued no license containing a price-fixing clause.

243. Plaintiff has issued no license requiring payment of royalty on unpatented products such as window glass.

244. All plaintiff's licenses require a royalty only on glass which has been improved in value by the use of plaintiff's patents.

245. The terms of plaintiff's licenses do not require the industry or any manufacturer to fix prices on tempered glass.

247. Plaintiff has not attempted to systematize sales of glass.

248. Plaintiff has made no special provision for special classes of customers.

* * *

IV

604. * * *

The depositions of Messrs. MacNichol and Wall, President and General Counsel of Libbey-Owens-Ford, state that Shatterproof Glass Co. directed to Libbey-Owens-Ford, another party to the Consent Decree (see paragraph 12 hereof), a demand for package licenses couched in terms like those addressed to plaintiff; that L-O-F made a counter-offer of licenses under individual patents; that prices were set on individual patents at 3¢ per square foot, at 2½¢ per square foot, at 2¢ per square foot and at lesser prices differing by ½¢ per square foot; that Shatterproof demanded a package license and that the

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license finally issued was a package license permitting the use of substantial numbers of L-O-F patents; that the maximum price was 2% of the net sales price of the product; and that Shatterproof used only from four to one patents.

These facts do not raise any question concerning the relations of plaintiff and defendant, nor any question of patent misuse by plaintiff.

Conclusions of Law

1. The *United States Gypsum Company* cases (53 F. S. 889, 59 P. Q. 318 [1946-1947 Trade Cases ¶ 57,473]; 67 F. S. 397, 70 P. Q. 48 [1948-1949 Trade Cases ¶ 62,226]; 333 U. S. 364, 76 P. Q. 430; 180 Fed. 2nd 753, 85 P. Q. 32 [1950-1951 Trade Cases ¶ 62,729]; 340 U. S. 76, 87 P. Q. 276 [1957 Trade Cases ¶ 68,627]; 352 U. S. 457, 112 P. Q. 340) constitute an intricate series of actions in which the Federal Government took part and in which the crux of the government's charges was the alleged illegality of Gypsum's system of industry-wide uniform patent licensing agreements containing clauses giving Gypsum the right to fix resale prices on gypsum board and products. (112 P. Q. 341).

The course of decisions in the anti-trust litigation clearly shows that the only misuse ever adjudicated was that arising from the uniform price fixing provisions of the license agreements. (112 P. Q. 345).

The plaintiff Securit, did not issue licenses with price fixing provisions and is not guilty of any misuse comprehended by the *Gypsum* cases.

2. The Consent Decree in *U. S. A. v. Libbey, Owens-Ford Glass Co.* and others, C. A. 5239 Northern District of Ohio Western Division [1948-1949 Trade Cases ¶ 62,323], to which this plaintiff was a party, effective Oct. 30, 1948, provided for the grant of licenses under plaintiff patents to any applicant who applied in writing. The plaintiff and defendant have entered into extensive stipulations of fact in which no written application by defendant for a license is found.

3. In a proceeding between the U. S. Government and this plaintiff before the court which issued the said Consent Decree, brought in 1958 by plaintiff for a construction of that Decree, of which this defendant had notice, plaintiff was held guiltless of any violation of the Decree.

Under the rule of full faith and credit, it would require a very substantial showing of facts that were not before that court to induce this court to take an opposite position. Such a showing of fact is lacking here. The opinion of the Consent Decree court, that this plaintiff has not violated its decree, is adopted by this court.

4. The defense of patent misuse appears to be based largely upon a situation that arose between certain prospective licensees and plaintiff, in which quotations of royalties on different groups or packages of plaintiff's patents were asked, and plaintiff offered any individual patent or any group or package of patents for 2¢ per square foot.

If any applicant had the right to ask about prices for package licenses under the "any, some or all" phrase of Sec. XIV of the Consent Decree, the plaintiff had the right to offer them. Indeed, under the Consent Decree, plaintiff was compelled to grant licenses under any, some or all of its patents to applicants in writing. It appears that plaintiff did make offers, as aforesaid, and that no applicant adopted the remedy that was open to it of appealing to the Consent Decree court for a license on other terms.

This situation does not constitute a question of patent misuse or of anti-trust law.

5. The patents pleaded by plaintiff are valid.

The Mosmieri patent is not invalid in the light of the references listed against it.

The Clitherow patent is not invalid in the light of the references listed against it.

The Forbes patent is not invalid in the light of the references listed against it.

The Long patent is not invalid in the light of the references listed against it.

There is no evidence to support the defense which asserts that the inventions of plaintiff's pleaded patents are within the skill of a mechanic working in the art or that they represent mere mechanical skill.

The patents are not invalid for indefiniteness, lack of sufficient description, or inoperativeness.

There is no evidence of prior publication, knowledge, use, or sale which would invalidate any of plaintiff's pleaded patents.

6. The depositions of Messrs. MacNichol, Wall, and Chase relating to dealings be-

tween Shatterproof and Libbey-Owens-Ford relate circumstances parallel to the dealings of Shatterproof with plaintiff and show that in this patent field royalties up to 3¢ per square foot may be reasonable for an individual patent. Plaintiff's offer completed its obligations under the Consent Decree and left the inquirer to its remedies of making a counter-offer or of appealing to the Consent Decree court. Any applicant that failed to take the remedies offered by the Consent Decree to the Consent Decree court may not now assert wrongdoing on the part of plaintiff. Having made one offer, the plaintiff was not thereafter required to make other or lesser offers.

7. The evidence before the Court shows no patent misuse by the plaintiff. It was required by the Consent Decree to offer its patents at a reasonable royalty but the remedy of a dissatisfied applicant was an appeal to the Consent Decree court, and outside of that remedy the law provided none other. There is no evidence that plaintiff failed to make an offer, or that any applicant was so dissatisfied with the offer made as, within a reasonable time, to apply for relief to the Consent Decree court.

8. The evidence before the Court shows compliance by the plaintiff, and a willingness to comply, with the terms of the Consent Decree.

9. The facts before the Court show no violation of the anti-trust laws by the plaintiff.

10. The plaintiff's policy as set forth in the evidence now before the court is not a violation of any statute, rule of law, or canon of public policy.

11. The Court has jurisdiction of the parties and of the subject matter herein.

Judgment

The parties having entered into a certain settlement agreement, dated February 13, 1959, whereby the parties have settled and compromised all their differences concerning the subject matter of this action, the said agreement is now approved by the Court.

Pursuant thereto, it is ordered, adjudged and decreed:

1. The Defendant shall disclose to Plaintiff and assign to Plaintiff the entire right, title, and interest in and to the following developments and inventions:

(a) A development for suspending glass vertically.

(b) A development for after-cooling glass during tempering.

(c) A mirror development called "Sparkletone."

In each said development Defendant shall have a royalty-free shop right; and Defendant shall have the right to license others in the United States upon payment by Defendant to Plaintiff of one cent (1¢) per square foot of glass, any part of which has undergone the process of the development. Applications on said developments shall be filed in the United States Patent Office by Defendant and the cases as filed shall then be turned over to Plaintiff for prosecution at its own expense. Filing in foreign countries shall be at Plaintiff's will and expense, except that Defendant shall do all that is needful to make possible the filing.

2. The judgment of this Court related to patent use is that which is set forth in the findings of fact and the settlement agreement.

3. The patent identified as Mosmieri, No. 2,131,406, September 27, 1938, is valid.

4. The patent identified as Clitherow, No. 2,151,266, March 21, 1939, is valid.

5. The patent identified as Forbes, No. 2,198,622, April 30, 1940, is valid.

6. The defenses, affirmative defenses, and counter claims of the Defendant are dismissed, with prejudice.

7. The Plaintiff is not guilty of a violation of the antitrust laws or any of them.

8. The Plaintiff is not guilty of a violation of the Consent Decree issued in *U. S. A. v. Libbey-Owens-Ford,* U. S. District Court for the Northern District of Ohio, Western Division, on or about October 30, 1948.

9. The Plaintiff is not guilty of a misuse of its patents.

10. Each party shall pay its own costs and attorneys' fees.

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[¶ 69,304] **Francis Bragen v. Hudson County News Company.**

In the United States District Court for the District of New Jersey. Civil Action, File 296-58. Filed December 19, 1958.

Sherman Antitrust Act

Monopolies—Practices—Refusal to Deal—Distributor's Refusal to Supply Newspapers and Periodicals to Retailer—Publishers' Refusal to "By-Pass" Exclusive Distributor—Legality.—A wholesale distributor of newspapers and periodicals did not violate Section 2 of the Sherman Act by ceasing to supply a retailer with such merchandise. The wholesaler had suspended its service to the retailer as a result of a dispute over money which the wholesaler claimed was owing and had indicated that it would resume supplying the retailer upon payment of the alleged indebtedness. Section 2 of the Sherman Act does not restrict the general right of a trader engaged in an entirely private business activity to freely exercise his own discretion as to the parties with whom he will deal, although that right is not absolute nor exempt from regulation if accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control. The distributor could, without running afoul of the Sherman Act, refuse to deal with a customer who had proved unsatisfactory. Its refusal to sell to the retailer was not grounded in any attempt to monopolize since it was undisputed that its dealing with the retailer would be resumed upon the settlement of the claim for money allegedly due from the retailer. In the absence of any scheme to fix prices or to eliminate competition, such a refusal to deal was not offensive to the Sherman Act. Also, the publishers' refusal to sell directly to the retailer, when he had a dispute with their exclusive distributor, was not evidence of a conspiracy having for its object a monopolistic practice; it was, instead, a good business practice.

See Monopolies, Vol. 1, ¶ 2610.720.

Monopolies—Practices—Tying Arrangements—Alleged Tying of Unwanted Publications to Sale of Other Publications—Legality Under Sherman Act, Section 2.—A retailer of newspapers and periodicals who alleged that a wholesale distributor compelled him to accept unwanted magazines as a condition to supplying him with other publications failed to show a violation of Section 2 of the Sherman Act. Tying arrangements are illegal under the Sherman Act when (1) the supplier of the "tying" product enjoys a monopolistic position in the market, and (2) a substantial volume of commerce in the "tied" product is restrained. The facts set forth failed to establish the second of those two conditions and further failed to specify an intention on the part of the wholesaler to destroy competition or build a monopoly. Nothing was alleged which would justify the conclusion that the public suffered any injury since it could exercise its prerogative of buying or not buying the questionable magazines. Also, the wholesaler's competitors had no reasonable grounds for complaint. The retailer was free to, and did, sell merchandise supplied by others than the wholesaler. In addition, there was nothing to show that the wholesaler exercised any restraint over the distribution of publications other than those which it distributed. Lastly, any inference that the wholesaler's alleged "tie-in" sales were a monopolistic practice was negatived by the fact that the wholesaler's delivery to the retailer of unwanted magazines cost the retailer nothing; he received full credit for unsold merchandise which he returned to the wholesaler.

See Monopolies, Vol. 1, ¶ 2610.850.

Monopolies—Combinations and Conspiracies to Monopolize—Alleged Conspiracy to "Tie" Sale of Unwanted Publications to Other Publications and Prevent Retailer from Obtaining Supplies—Legality.—A retailer of newspapers and periodicals had no cause of action under the Sherman Act against a wholesale distributor who allegedly conspired with publishers to (1) "tie" the sale of unwanted publications to other publications, and (2) prevent the retailer from obtaining supplies directly from the publishers after the wholesaler ceased dealing with him. In essence, the publishers told the retailer they would not supply him if he had any outstanding bills owing to their wholesaler. The retailer conceded that he spoke to only one magazine publisher and one newspaper publisher concerning direct delivery, and that he made no attempts to purchase

such merchandise from wholesale distributors in other counties. It was admitted by the retailer that the alleged delivery of unwanted magazines cost him nothing since he could return unsold publications. There was no allegation in the complaint that the charged conspiracy had as its object the control of prices of the merchandise distributed by the wholesaler. Also, the publishers' refusal to sell directly to the retailer during his dispute with their distributor was not evidence of a conspiracy having for its object a monopolistic practice but was, instead, a good business practice.

See Monopolies, Vol. 1, ¶ 2520.

Private Enforcement and Procedure—Suit for Civil Damages—Monopolization—Necessary Averments to State Cause of Action—Undue Restriction Upon Interstate Commerce.—A retailer of newspapers and periodicals who sought treble damages for a wholesale distributor's alleged monopolization of the distribution of such merchandise failed to plead facts which would show that the free flow of interstate commerce was unduly restricted or that there was any appreciable monopolistic effect upon interstate commerce. It was conceded that the wholesaler's distribution of newspapers and periodicals formed a part of interstate commerce insofar as it was a link in the chain of distribution from an out-of-state publisher to a consumer-reader within the state. However, there was nothing to show that the wholesaler exercised any restraint over the distribution of publications other than those which it distributed itself. Its refusal to sell to the retailer, in the absence of a scheme to fix prices or eliminate competition, was not offensive to the Sherman Act. As to an alleged "tying" of unwanted publications to the sale of other publications, no facts were set forth which would establish that a substantial volume of commerce in the "tied" product was restrained.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

Private Enforcement and Procedure—Suit for Civil Damages—Monopolization—Necessary Averments to State Cause of Action—Injury to Public.—A retailer of newspapers and periodicals who claimed that a wholesale distributor monopolized the distribution of such merchandise in violation of Section 2 of the Sherman Act was not entitled to treble damages since he alleged nothing which justified the conclusion that the public suffered any injury. There was no allegation in the complaint that an alleged conspiracy between the wholesaler and the publishers of the merchandise had as its object the control of prices, and there was no showing that the wholesaler's refusal to sell to the retailer caused any harm to the general public. Further, the public was not injured by the alleged "tying" of unwanted publications to the sale of other publications to the retailer, since the public could exercise its prerogative of buying or not buying the magazines which the retailer found objectionable. Also, nothing was alleged which showed that the wholesaler's competitors had any reasonable grounds for complaint.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

For the plaintiff: Rothbard, Harris & Oxfeld, by Doane Regan.

For the defendant: Abraham H. Gottlieb, by Julius Kass.

Opinion

[*Monopoly Charged*]

WORTENDYKE, District Judge [*In full text*]: The following views are evoked by defendant's motion for summary judgment, Fed. R. Civ. P. 56(b).

Plaintiff Bragen is seeking threefold damages alleged to have resulted from defendant's violation of Section 2 of the Sherman Anti-Trust Act, 26 Stat. 209 (1890) and 38 Stat. 731 (1914), 15 U. S. C. §§ 2 and 15 (1952). There being no diversity of citizenship between the parties jurisdiction depends upon the cited Federal statute.

Defendant's right to summary judgment depends upon the absence of any genuine issue as to any material fact as determined by the pleadings, depositions and affidavits on file upon the pending motion. Fed. R. Civ. P. 56(c).

[*Distribution of Newspapers and Magazines*]

The complaint alleges the following: Bragen operates a store in Jersey City, New Jersey at which he sells at retail "newspapers, magazines, books and other publications, as well as confectionery, tobacco

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and other merchandise." He asserts that his retail sale of newspapers and periodicals is a department or phase of the publishing business which constitutes a part of interstate commerce. Defendant Hudson County News Company (Hudson) is the sole wholesale distributor, within most of Hudson County, in which Bragen's store is located, of "practically all of the newspapers, magazines, paper covered books and certain other publications" which Bragen handles. As a consequence, Hudson has monopolized the distribution of this merchandise and "by means of agreements, contracts, understandings and conspiracies with [the] publishers" of such merchandise is enabled to determine "by whom, in what manner, and under what conditions" the ultimate consumers within Hudson County may obtain access to this merchandise. Further, the alleged monopoly enables Hudson to compel retail newsdealers to accept for resale publications which such retailers have not ordered, cannot or do not wish to sell and which are "obscene, lascivious, and offensive to morality and good taste," as a condition of defendant's continued supply to such retailers of other publications. Since June 1957, Bragen alleges, Hudson has refused to supply him with merchandise and that he has been unable to secure such supply either from the publishers or from other wholesaler distributors because they have refused to supply him without the consent of the defendant.

[*Alleged Indebtedness*]

Hudson has denied the existence of the alleged monopoly and further denies the pleaded unavailability to the plaintiff of supplies of the merchandise which he handles as well as the alleged compulsion to accept offensive and unordered merchandise. It also denies its alleged refusal and that of others to supply Bragen with merchandise which he desired. Hudson has conceded that Bragen had at times received unordered deliveries of merchandise, together with his regular deliveries, but that this practice was not unknown in the general custom of the trade. Moreover, if such "volunteered" merchandise did not sell, it was later picked up by Hudson and the charges against the retailer for such deliveries were credited accordingly. Hudson contends that the sole issue between the parties is an indebtedness Hudson claims Bragen owes it in the amount of $126.19, for a service charge and billing for certain magazines delivered to Bragen, which has not been paid by him. Hudson states that upon payment of this amount, it will resume doing business with Bragen.

[*Conspiracy Charged*]

The "conspiracy" which Bragen charges in his complaint is mainly related to the objectionable periodicals which he stated Hudson supplied to him together with the other standard magazines and periodicals. On deposition he stated:

> "Well, the thing that makes me say there is a conspiracy is the way the smut hits the stands, and the quantities that it hits the stands. There is something deeper in this business than Hudson County News. There are some people in my mind who have made agreements with probably every local or every reasonable [sic.—responsible?] distributor in the country."

Thus the conspiracy charged between Hudson and the publishers is "to flood the market with dirty books * * * because there is a greater profit in handling that trash than there is in the *Saturday Evening Post* or *Good Housekeeping*."

The second aspect of the conspiracy charged is that upon termination of Hudson's service for the reason of Bragen's non-payment of the amount claimed by Hudson, Bragen was unable to obtain directly from the publishers the newspapers and periodicals which had previously been supplied to him by Hudson. In essence, Bragen was told that if he had any outstanding bills owing to Hudson they would not supply him. He concedes, however, that he spoke to only one magazine publisher and one newspaper publisher concerning direct delivery. He further admits that he made no attempts to purchase such merchandise from wholesale distributors outside of Hudson County.

[*Market Area*]

From the affidavit of the president of Hudson it appears that when Hudson ceased serving Bragen it was delivering hundreds of different publications to approximately seven hundred retail dealers in Hudson County. Within a radius of two blocks of Bragen's store Hudson served four other similar retailers. Hudson does not deliver two of the seven New York City newspapers and one of the two Jersey City newspapers, of which the combined circulation within Hudson

County exceeds the combined circulation of all of the newspapers which Hudson does distribute. Hudson does not make deliveries in certain portions of Hudson County, but concedes that in the area thereof in which it does make deliveries it is the sole wholesale distributor of magazines and paper-backed books. Hudson's former sole competitor, the American News Company, discontinued its business in 1957. It is denied that Hudson has any agreement which could or does prevent any publisher from shipping directly to a retailer or from utilizing any other wholesale distributing agency. With respect to Bragen's charge that Hudson had delivered publications to him which he had not ordered and did not wish to receive, it is stated that such occasional instances resulted from mistake and nothing more. Such deliveries are at no cost to Bragen, since it has always been defendant's policy to give full credit to all retail dealers for all magazines and paper-backed books returned whether ordered or unordered, wanted or unwanted, displayed or not displayed. This is admitted by Bragen.

[*Jurisdiction*]

Upon a motion for summary judgment the Court is not called upon to decide any issues of fact but merely to determine whether any material issues of fact exist. It appears beyond contradiction, from the material before me, that a dispute arose between Hudson and Bragen concerning certain charges made by Hudson to Bragen's account. In consequence of this disagreement Hudson suspended its service to Bragen, but indicated that such service would be resumed upon payment of his alleged indebtedness. It appears without question that Bragen's sole cause of action, if any, is one sounding in contract. There being no diversity of citizenship here, this Court would be without jurisdiction to entertain such an action.

[*Refusal to Deal—No Public Injury*]

Assuming as true all well-pleaded facts, as distinguished from conclusory allegations, set forth in the complaint, as they are qualified or elaborated by Bragen's own testimony on deposition, there appears no issue of fact which, if resolved in his favor, could support an inference that Hudson had committed such a violation of Section 2 of the Sherman Act as would give rise to a cause of action in Bragen for threefold damages under Section 15. It is conceded that Hudson's wholesale distribution of newspapers and periodicals formed a part of interstate commerce insofar as it was a link in the chain of distribution from an out of the State publisher to a consumer-reader within the State. Cf. *Mandeville Farms v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,251], 1948, 334 U. S. 219. Section 2 of the Sherman Act relied on by Bragen forbids monopolization, attempts to monopolize and combinations or conspiracies to monopolize any part of commerce among the several States. Monopoly power which offends against this section has been said by the Supreme Court to exist when there is control of price or competition in the competitive market for the particular product in question. *United States v. DuPont & Co.* [1956 TRADE CASES ¶ 68,369], 1956, 351 U. S. 377. There is no allegation in Bragen's complaint that the charged conspiracy in any way has as its object the control of prices of the merchandise Hudson distributes. Neither does Bragen complain of Hudson's exclusive territorial franchise with the publishers with whom it does business as being a monopoly or conspiracy to monopolize interstate commerce. That of which Bragen does complain is the cutting off by Hudson of his service, and his subsequent inability to obtain from the publishers the merchandise which he had previously secured from Hudson. However, in this action to recover treble damages for Hudson's alleged violations of the Sherman Act, it must be shown that Hudson's acts were harmful to the general public as well as to Bragen. Injury to Bragen alone by Hudson is not enough, but Hudson's acts must unduly restrict the free flow of interstate commerce. *Feddersen Motors v. Ward* [1950-1951 TRADE CASES ¶ 62,579], 10 Cir. 1950, 180 F. 2d 519. Moreover, the monopolistic effect upon interstate commerce must be appreciable. *Shotkin v. General Electric Co.* [1948-1949 TRADE CASES ¶ 62,341], 10 Cir. 1948, 171 F. 2d 236; see *Times-Picayune v. United States* [1953 TRADE CASES ¶ 67,494], 1953, 345 U. S. 594, 611. The complaint herein does not contain the familiar allegations in a charged monopoly that there is a conspiracy to fix prices, divide marketing territories, apportion customers, restrict production or otherwise suppress competition. Cf. *Apex Hosiery v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 1940, 310 U. S. 469, 494-98. The pleadings and proof before

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me simply show a personal grievance between Bragen and Hudson arising upon the refusal of the latter to continue doing business with Bragen. Cf. *Shotkin v. General Electric Co., supra; Klor's Inc. v. Broadway-Hales Stores* [1958 Trade Cases ¶ 69,007], 9 Cir. 1958, 255 F. 2d 214, cert. granted, 27 Law Week 3110 (No. 76, 1958).

Section 2 of the Sherman Act does not restrict the general right of a trader engaged in an entirely private business activity freely to exercise his own discretion as to parties with whom he will deal, *United States v. Colgate & Co.*, 1919, 250 U. S. 300, although such right is not absolute nor exempt from regulation if accompanied by unlawful conduct or agreement or conceived in monopolistic purpose or market control. *Lorain Journal v. United States* [1950-1951 Trade Cases ¶ 62,957], 1951, 342 U. S. 143. The publishers' refusal to sell to Bragen directly when Bragen had a dispute with the publishers' exclusive distributor is not evidence of a conspiracy having for its object a monopolistic practice. *Brosious v. Pepsi-Cola Co.* [1946-1947 Trade Cases ¶ 57,459], 3 Cir. 1946, 155 F. 2d 99. Indeed it is a good business practice. Certainly Hudson can refuse to deal with a customer who has proved unsatisfactory to it without running afoul of the Sherman Act. *Hoffman v. Riverside & Dan River Cotton Mills* [1944-1945 Trade Cases ¶ 57,219], D. C. S. D. N. Y. 1944, 55 F. Supp. 13. Clearly, Hudson's refusal to sell is not grounded in any attempt to monopolize since it is undisputed that service would be resumed upon the settlement of the claim for money owing. In the absence of any scheme to fix prices or eliminate competition such action is not offensive to the Sherman Act. *Interborough News Co. v. Curtis Publishing Co.* [1955 Trade Cases ¶ 68,129], 2 Cir. 1955, 225 F. 2d 289.

[*"Tie-In" Sales*]

Bragen further claims violation of the Sherman Act by reason of the "tie-in" sales to him of magazines offensive to him with such suggestive titles as *Titter, Wink, Eyefull, Whisper, Frolic* and *Figure,* which Hudson compels him to accept as a condition of a continuing supply of the more "morally wholesome" publications such as the *Saturday Evening Post* and *Good Housekeeping.* The Supreme Court in *Times-Picayune v. United States, supra,* set forth the standard of illegality under the Sherman Act of trying arrangements to be when the supplier of the "tying" product, in this case the acceptable (to Bragen) magazines and periodicals, enjoys a monopolistic position in the market *AND* if a substantial volume of commerce in the "tied" product, in this case the magazines of questionable taste, is restrained. *Id.* at 608-609. Nowhere in the pleadings or depositions before me are there any facts set forth which would establish the second of these two conditions necessary to bring Hudson's activities within Section 1 of the Sherman Act. However, Bragen is not proceeding under Section 1 but under the monopolization offense of Section 2. But here again the facts as set forth fail to specify an intention on the part of Hudson to destroy competition or to build a monopoly. *Times-Picayune v. United States, supra,* p. 626. Nothing is alleged which would justify the conclusion that the public suffered any injury (since it could exercise its prerogative by buying or not buying the questionable magazines) or that competitors had any reasonable grounds for complaint. Cf. *Federal Trade Commission v. Gratz,* 1920, 253 U. S. 421. Further Bragen is free to sell magazines, periodicals and newspapers supplied by others than Hudson and indeed does so. See *Federal Trade Commission v. Sinclair Co.,* 1923, 261 U. S. 463. There is nothing to show that Hudson exercises any restraint over the distribution of magazines and publications other than those which it distributes. *Journal of Commerce Pub. Co. v. Tribune Co.,* 7 Cir. 1922, 286 F. 111. Lastly, any inference that this is a monopolistic practice is negatived by the fact that Hudson gives full credit to the retailer for any magazines and paper-backed books it supplied which were unsold by the retailers.

[*Summary Judgment Granted*]

This Court, therefore, has no jurisdiction in this case because the plaintiff has not brought himself within the provisions of 15 U. S .C. § 15, and there is no diversity of citizenship between the parties. The defendant's motion for summary judgment will be granted and an appropriate order may be presented in accordance with the views hereinabove expressed.

[¶ 69,305] The A. L. B. Theatre Corporation v. Loew's Incorporated, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56 C 727. Filed February 27, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion to Strike Matter Relating to History of Alleged Conspiracy—Relevance.—Motion picture distributors were denied a motion to strike from an exhibitor's complaint allegations addressed to a conspiracy existing prior to 1935 and continuing during the period when the exhibitor operated its theatre, November 1, 1955, to January 31, 1957. Trial matters need not always be limited to the precise time when a particular plaintiff was adversely affected by a segment of an overall conspiracy. The allegations of the existence of the conspiracy, from its inception, would be permitted to stand, it being understood that it was that particular conspiracy which affected the exhibitor at a later time. However, the floodgates of discovery and evidence were not to be opened to all aspects of the time and territory involved, but merely insofar as such matters were relevant to show the history of the overall conspiracy so that the setting of the instant case might be understood. The court also rejected the distributors' contention that allegations of a conspiracy prior to 1947 should be stricken. In that year, they re-divided the district which they had earlier zoned for the distribution of the same run of film. The court was of the opinion, however, that the mere physical subdividing of a territory which was a part of an overall existing conspiracy was not tantamount to the creation of an entirely new and disassociated scheme, apart from the prior conspiracy.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.595.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion to Strike Allegations Relating to Prior Government Decree—Relevance.—Motion picture distributors were denied a motion to strike from an exhibitor's complaint allegations relating to decrees entered and proceedings had in a prior government action. Determination of the relevance of that matter should await its use, if any, during the trial.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012, 9013.595.

For the plaintiff: Seymour F. Simon, Chicago, Ill.

For the defendants: Robert W. Bergstrom, John F. Caskey, Francis E. Matthews, and Mayer, Friedlich, Spiess, Tierney, Brown & Platt, all of Chicago, Ill.

For a prior opinion of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1957 Trade Cases ¶ 68,911.

Memorandum

On Motion of Defendants to strike Paragraphs 13, 14, 15, 16, 29 and portions of Paragraphs 12 and 17 of the Amended and Supplemental Complaint.

[*Motion to Strike*]

Edwin A. Robson, District Judge [*In full text*]: Defendants have moved to strike Paragraphs 13, 14, 15, 16, 29 and portions of Paragraphs 12 and 17 of the Amended and Supplemental Complaint for the reason that these allegations address themselves to a conspiracy existing prior to 1935 and continuing during the period of November 1, 1955 to January 31, 1957, when plaintiff operated its Belmont Theatre. Furthermore, defendants contend that allegations of conspiracy prior to 1947 should in any event be stricken.

[*Conspiracy Charged*]

This is a civil anti-trust suit wherein plaintiff contends that the conspiracy of defendants foreclosed its procuring of film which its competitors, the Covent and Century Theatres, were able to procure. The City had been zoned by defendants for the distribution of the same run of film, and in 1947 defendants redivided the district in which these theatres were located. It is on the basis of this further subdivision of districts that the defendants claim there must be deemed to have occurred the formation of a new and different conspiracy from the one theretofore existing,

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if any, and therefore allegations of a conspiracy prior thereto must be stricken. The Court is of the opinion that the mere physical subdividing of a territory, which is part of an over-all existing conspiracy, is not tantamount to the creation of an entirely new and disassociated scheme, apart from the prior conspiracy.

[*Relevancy*]

The inherent and inescapable complexities of an anti-trust suit demand the rejection of all unnecessary and extraneous allegations, and evidentiary matters in support thereof. Therefore, a critical examination must be made to limit the allegations, discovery procedures and admissible evidence as far as possible to the actual issues presented. However, that strictness does not always require a limitation of these trial matters to the precise time when this particular plaintiff was adversely affected by a segment of an over-all conspiracy of antecedent duration. The history of the over-all conspiracy, having some pertinency, is entitled to be very briefly established so the setting of the particular case may be better understood.

The disparity in holdings on this matter probably does not represent a true conflict in the law, but rather in the application of the rule of "relevancy" to the particular facts of the case involved.

In *Alamo Theatre Co. Inc. v. Loew's Incorporated,* [1956 Trade Cases ¶ 68,391] 143 F. Supp. 419 (D. C. Ill. 1956), it was held that certain paragraphs of the complaint should be stricken "for the reason that they relate to historical matter not pertinent to the matters here complained of by the plaintiff." Yet, the same court in *United States v. E. I. DuPont deNemours and Co.,* [1954 Trade Cases ¶ 67,898] 126 F. Supp. 27, held that

> "* * * in anti-trust cases, if full effect is to be given the anti-trust laws, it is necessary to develop fully the background of facts out of which the alleged conspiracy arose and in which it operated, and that broad discretion and great latitude toward the reception of evidence should be exercised."

In *Maple Drive-In Theatre Corp. v. Radio-Keith-Orpheum Corp.* [1955 Trade Cases ¶ 67,972], 17 F. R. D. 226 (D. C., N. Y.), the complaint was stated to allege all the wrong-doing of the motion picture industry in the United States for the last 30 years, and the court ordered it stricken but went on to say:

> "While technically, perhaps, the pleader has indicated a causal connection between these misdeeds and the specific injury he complains of, nevertheless the connection lacks genuine relevancy, and this shotgun type of pleading could be employed to raise innumerable issues utterly foreign to the gravamen of the complaint. . . . Therefore, so much of the complaint as is devoted to the historical recitation of the defendants' malefactions will be stricken. . . . However, I am also in accord with Judge Dawson's suggestion that if some of these practices which were condemned . . . continued and were continuing at the time of plaintiff's claimed injury, it is permissible to assert that fact. . . .
>
> "Although the line is one which cannot be drawn without difficulty, I am unwilling in other respects to strike references to a national conspiracy from which the plaintiff claims to have suffered damages. . . . The plaintiff will be permitted to plead a national conspiracy without, however, employing the type and technique of allegations which have been stricken."

It was similarly held in *New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp.* [1954 Trade Cases ¶ 67,853], 16 F. R. D. 203 (D. C., N. Y.).

In *Metropolitan Theatre Co. v. Warner Bros. Pictures* [1952 Trade Cases ¶ 67,304], 12 F. R. D. 516, 518 (D. C., N. Y.), the court held that the ". . . plaintiff is not prevented from pleading a nation-wide conspiracy if such it is claimed to be, provided, of course, plaintiff alleges damages therefrom."

In *Milgram v. Loew's, Inc.* [1950-1951 Trade Cases ¶ 62,938], 192 F. 2d 579, 584 (C. A. 3), the court said, "We think that the past proclivity of these defendants to unlawful conduct may be of some significance here, where the conspiracy alleged by plaintiff is identical in scope and nature to one of the conspiracies found in the *Paramount* case. . . ."

[*Motions Denied*]

The allegations of the existence of the conspiracy from its inception will be permitted to stand, it being understood that it was this particular conspiracy which at a

later time affected plaintiff, who was located in one small segment of the territory involved. The floodgates of discovery and evidence, however, are not to be opened to all aspects of time and territory involved but merely in so far as such matters are relevant to show the history of the over-all conspiracy so that the setting of this particular case may be understood.

[*Prior Decrees*]

The motion also seeks to strike the part of Paragraph 29 relating to decrees entered and proceedings had in other litigation, i. e., the *"Paramount"* decree. This aspect of the motion is denied, and as Judge LaBuy stated in the *Alamo Theatre Co.* case, *supra*, the relevance of that matter should await its use, if any, during the trial.

[¶ 69,306] Arlington Glass Co., Inc., et al. v. Pittsburgh Plate Glass Company, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 57 C 967. Filed March 4, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Production of Evidence—Deposition—Businessmen's Club as "Real Party in Interest"—Secrecy of Grand Jury Testimony.—A plaintiff was not required to answer, at an oral examination on deposition, questions pertaining to the activities of a "club," which was allegedly sponsoring and paying for a treble damage action. The defendants claimed that they were entitled to know the activities of the club and its members in initiating and supporting the suit, as the "real party in interest," in order to have the judgment operate as a judgment by estoppel, and to avoid multiplicity of suits. However, the plaintiffs were the actual parties assertedly injured by the activities complained of; therefore, even conceding the interest of the club in the litigation, the defendants could not interrogate the plaintiff as to the club's connection with the litigation because the club was not and could not be, absent injury to it, a "real party in interest."

Also, the plaintiff was not required to answer questions concerning the nature and substance of his testimony before a grand jury which investigated possible antitrust violations in the defendants' industry. There was no "compelling necessity" for the disclosure of that testimony. Although Rule 6(e) of the Federal Rules of Criminal Procedure does not impose any obligation of secrecy on witnesses, the defendants had no right to make him disclose that which transpired before the grand jury unless he voluntarily wished to do so.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.250; Private Enforcement and Procedure, Vol. 2, ¶ 9013.775.

For the plaintiffs: Thomas C. McConnell and W. Donald MacSweeney, both of Chicago, Ill.

For the defendants: Max Weinberg; J. L. Olschan; Henry H. Koven; Howard R. Koven; Paul Homer; Theodore P. Nebel; Lord, Bissell & Brook; Snyder, Chadwell, Fagerburg & Keck; Bell, Boyd, Marshall & Lloyd; and Thompson, Raymond, Mayer, Jenner & Bloomstein, all of Chicago, Ill.

On Defendants' Motion to Compel Answers to Questions Propounded at Deposition of Irwin Shaffer

Memorandum

Edwin A. Robson, District Judge [*In full text*]: This is a civil antitrust suit brought by several independent glazing contractors, who install glass in offices and stores, against several large manufacturers and distributors, some of whom are alleged to be glazing contractors, for treble damages for violation of the Antitrust Acts.

[*Conspiracy Charged*]

The Complaint alleges a conspiracy by the defendants in discriminating as to prices between defendants and plaintiffs, charging the latter higher prices and thus preventing plaintiffs from obtaining bids for glazing contracts. The Complaint also charges refusal of defendants to furnish plaintiffs with certain types of glass, such as Thermopane, with which to do certain jobs; and finally, it charges that defendants prevent the influx of lower priced foreign glass, except when defendants' own supply is low.

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[*Deposition*]

There is said by defendants to be a "Businessmen's Club" composed of independent glaziers, of whom plaintiffs are some of the members, and defendants claim this Club is really sponsoring this litigation and paying for it, and defendants set forth several letters as indicative of the fact.

The defendants' motion to compel plaintiff Shaffer to answer questions which were propounded of him at the oral examination on deposition on February 4, 1958, and February 11, 1958, which questions he refused to answer on advice of his counsel, pertains to two matters:

(a) the activities of the Club and its members in initiating and supporting this suit as real parties in interest, and

(b) the nature and substance of the testimony of plaintiff Shaffer before the Special Federal Grand Jury of this district, investigating possible antitrust violations in the flat glass industry in the Chicago area during the years 1955 and 1956.

[*"Real Parties in Interest"*]

(a) Defendants maintain they are entitled to know the activities and relationship of the Glazing Contractors Businessmen's Club, and its members, in initiating and supporting this suit, as the "real parties in interest," for these reasons: Judge LaBuy has previously denied a motion to quash the portion of the subpoena pertaining to documents concerning that Club and he has therefore impliedly ruled on the matter; and, furthermore, because defendants are entitled to know the "real party in interest," which is the party required by Rule 17 of the Rules of Civil Procedure to bring the suit, and also it needs to know the real party in interest in order to have the judgment operate as judgment by estoppel, and to avoid multiplicity of suits.

Conceding, for the purposes of this motion, the inference of a fostering interest of the Club in this litigation, the Court is nevertheless of the opinion that inasmuch as the plaintiffs are the actual parties assertedly injured by the defendants' alleged activities, the defendants may not interrogate as to the Club's connection with the litigation because they are not and could not be, absent injury to the Club, a "real party in interest." Thus, in *Northern California M. D. Ass'n v. Interment Association of California* [1954 Trade Cases ¶ 67,715], 120 F. Supp. 93 (D. C., Cal., 1954), the Monument Dealers Association suit for treble damages for alleged violations of the Sherman and Clayton Acts was dismissed because (p. 94)

> "As a trade association whose members have allegedly been damaged by violations of the antitrust laws, plaintiff does not itself have any right to relief or cause of action, since *the association is not the 'real party in interest.'*" (Emphasis ours.)

It is, therefore, apparent that the information sought relative to the Club is not predicable on that basis. Also, the ruling of Judge LaBuy on the overruling of the motion to quash the subpoena was not a ruling on the admissibility or relevancy of all possible evidence which might be adduced.

[*Grand Jury Testimony*]

(b) The second matter raised is the right of the defendants to interrogate plaintiff Shaffer concerning his testimony before the Special Federal Grand Jury, impaneled on January 3, 1955, for the purpose of investigating possible antitrust violations, which investigation continued during 1955 and 1956 when the Grand Jury was dismissed without having taken any action to indict anyone.

[*"Interest of Justice"*]

The test most generally used in determining the need for lifting the cloak of secrecy accorded grand jury proceedings is whether the "interests of justice" require such revelation. This test of "interest of justice" has been applied in *U. S. v. Socony-Vacuum Oil Co.* [1940-1943 Trade Cases ¶ 56,031], 310 U. S. 150, 234; *U. S. v. Alper,* 156 F. 2d 222 (C. A. 2, 1946); *In re Grand Jury Proceedings,* 4 F. Supp. 283 (D. C., Penn., 1933); *U. S. v. Skurla,* 126 F. Supp. 711 (D. C. Penn., 1954); and *Wigmore on Evidence,* Vol. VIII, Sec. 2362, p. 724 (3rd Ed.). Furthermore, a "strong and positive showing is required of persons seeking to break the seal of secrecy," (*U. S. v. Brennan,* 134 F. Supp. 42, 52 (D. C., Minn., 1955)), and the safeguard of secrecy continues even after the grand jury has completed its efforts. (*In the Matter of the April 1956 Term Grand Jury,* 239 F. 2d 263 (C. A. 7, 1956.) The "inviolable necessity" for secrecy of grand jury proceedings was pointed out in *U. S. v. Smyth,* 104 F. Supp. 283 (D. C. Cal., 1952). The Court concludes that the circumstances of this case do not require a revelation by plaintiff Shaffer of his testi-

mony theretofore given before the grand jury.

[*Witnesses*]

The Court is cognizant of the fact that Rule 6(e) of the Federal Rules of Criminal Procedure imposes an oath of secrecy only on specific persons and does not include witnesses in the list, and furthermore, the Advisory Committee's Note to this Rule states "The rules does not impose any *obligation* of secrecy on witnesses." (Emphasis ours.) It was similarly so held in the case of *In the Matter of Hearings Before the Committee on Banking & Currency of the U. S. Senate,* 19 F. R. D. 410 (D. C., Ill., 1956). (Contra, see *U. S. v. Central Supply Assn.,* 34 F. Supp. 241 (D. C., Ohio 1940).) The Court is also aware that here the defendants are not seeking to discover as to the *entire* transcript of proceedings before the grand jury, which fact was repeatedly stressed in the Supreme Court decision in *United States v. Procter & Gamble* [1958 TRADE CASES ¶ 69,046], 356 U. S. 677. On the other hand, both that decision and many others, cite the need for secrecy of grand jury proceedings, even on behalf of witnesses, and even after the grand jury probe has terminated. As the Supreme Court said in the *Procter & Gamble* case, *supra,* (p. 682): "This 'indispensable secrecy of grand jury proceedings,' . . . must not be broken except where there is a compelling necessity." (To the same effect, see *U. S. v. Schack,* 165 F. Supp. 371, (D. C., N. Y. 1958).)

The Court sees no "compelling necessity" in the disclosure by plaintiff Shaffer of the testimony he gave before the grand jury. Defendants may interrogate plaintiff Shaffer on deposition on all revelant matters raised by the issues of this suit's pleadings, but have no right to make him disclose that which transpired before the grand jury, unless he voluntarily wishes to disclose the same. The *Procter & Gamble* case, *supra,* acknowledges the fact that broad as the public policy is for wide discovery, the public policy against disclosure of grand jury proceedings is even stronger.

[*Motion Denied*]

The motion of defendants to compel answers to questions propounded at deposition of Irwin Shaffer is denied.

[¶ 69,307] Loew's Incorporated v. Don George, Inc.

In the Supreme Court of Louisiana. No. 43,617. Dated March 23, 1959.

On Appeal from the First Judicial District Court for the Parish of Caddo, State of Louisiana. HON. HENRY F. TURNER, Judge.

Louisiana Antitrust Laws

Combinations and Conspiracies Under State Laws—Procedure—Statute of Limitations—Tolling of Statute During Pendency of Government Action.—A motion picture exhibitor's counterclaim for treble damages under the Louisiana antitrust laws was governed by a one-year statute of limitations covering tort actions. The counterclaim alleged a tortious injury rather than a breach of contract and was therefore controlled by the one-year statute. There was no merit to the contention that the action was contractual. The counterclaimant did not sue on a contract nor did it rely on any alleged specific breach of the terms of a contract. It was untenable to argue that prohibitory antitrust laws could reform a written agreement between the parties. Furthermore, the counterclaim was not based on a quasi-contractual relationship.

Also, the running of the one-year statute was not suspended by the pendency of a United States antitrust action against the counter-defendant. The counterclaimant had contended that under the Louisiana statute its claim had not prescribed, because of a consent decree entered after a contradictory trial and appeal, and final judgment in the Government action. The Louisiana statute does not apply to consent decrees. At the time the counterclaim was filed, more than a year had elapsed since the occurrence of the acts charged and the rendition of the final judgment in the Government action.

See Combinations and Conspiracies, Vol. 1, ¶ 2431.

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Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction of State Court to Entertain Damage Action Under Federal Antitrust Laws.—A state court did not have jurisdiction to entertain a damage action brought under the Federal antitrust laws. Section 4 of the Clayton Act vests the Federal district courts with exclusive jurisdiction of Federal antitrust actions.

See Private Enforcement and Procedure, Vol. 2, ¶ 9007.

For the defendant-appellant: Smallenberger & Eatman, Shreveport, La.; John E. Jackson and Baldwin J. Allen, New Orleans, La.; and Jackson, Smith, Mayer & Kennedy, Shreveport, La.

For the plaintiff-appellee: Wilkinson, Lewis, Wilkinson & Madison, Shreveport, La.; and Chaffe, McCall, Phillips, Burke & Hopkins, New Orleans, La.

[*Licensing Agreements*]

HAMLIN, Justice [*In full text*]: By written agreements, Loew's, Inc., a distributor of motion pictures in interstate commerce and a licensor of the right to exhibit motion pictures distributed by it, granted to Don George, Inc., the alleged owner of seven theatres, the right to exhibit various motion pictures. The agreements provided for payment of either a fixed sum (known as a flat rental) or an amount determinable by a fixed or varying percentage of the gross receipts obtained from admissions to such exhibitions (known as a percentage rental), with or without a guaranty of a minimum amount; and further provided that Don George, Inc. submit to Loew's, Inc. a correct itemized statement of gross receipts for each day of exhibition of a picture at a designated theatre.[1]

[*Nature of Action*]

On February 17, 1953, Loew's, Inc. instituted suit against Don George, Inc. for $2,500.00 and other unaccounted-for amounts to be determined by the trial court, alleging that these sums represented unreported and unaccounted-for percentages on gross admission receipts.

[*Antitrust Counterclaim*]

In answer to plaintiff's petition, defendant denied liability and reconvened for the sum of $1,201,585.90, treble damages for loss of earnings, alleged to have been suffered as a result of an unlawful conspiracy against reconvenor's business. As plaintiff in reconvention, defendant further prayed for the sum of $50,000.00 for false and libelous statements alleged to have been made by Loew's, Inc. in a petition filed in the United States District Court for the Western District of Louisiana on April 11, 1952 (Suit No. 3693, entitled *"Loew's, Incorporated v. Don George, Inc., and Don & Darrell George"*).[2]

In charging that "as a direct and proximate cause of the operation of said unlawful agreements and conspiracy against the Re-

[1] From the allegations of Articles 6 and 7 of plaintiff's petition.

[2] "That the defendants, Don and Darrell George, placed in operation prior to the period in controversy, at some date unknown to the plaintiff, and thereafter kept in operation during the period in controversy, a plan, design and conspiracy in which the corporate defendant joined in or about June, 1946, to defraud the plaintiff by making or causing to be made regularly to the plaintiff during the period in controversy, false and inaccurate statements of the gross admission receipts received from the exhibition of said theaters of various of the pictures distributed by the plaintiff, with the intent and purpose upon the part of the defendants of concealing from plaintiff a portion of such admission receipts derived from the exhibition of such pictures, of inducing the plaintiff to believe, accept, and rely upon such statements as true and accurate in further dealings of the plaintiff with repsect to said theatres.

"In or about August .., 1951, plaintiff discovered the existence of the aforesaid plan, design and conspiracy. The exact total amount of gross box office receipts actually derived from the exhibition of each of said pictures is at this time not known to the plaintiff and is peculiarly within the knowledge of defendants. Plaintiff is therefore unable at this time to state the exact amount of damages which it sustained as alleged in subdivision (a) and (b) of this paragraph.

"Plaintiff is informed, believes and therefore avers that said acts of the defendant in underreporting and misrepresenting to the plaintiff the gross admission receipts actually derived from plaintiff's pictures as aforesaid, were wilfully, deliberately and fraudulently committed with the knowledge, purpose and intent that the plaintiff would believe and rely thereon to its loss and damage in its transactions with the defendants in connection with the exhibition of its pictures at said theaters, and with gross disregard of the rights and interests of the plaintiff, for which plaintiff is entitled to an award of exemplary or punitive damages."

convenor's business, Reconvenor has been subjected to a net loss of earnings in excess of * * * $400,528.63,"[3] Don George, Inc. relied on the findings in the case of *United States v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 92 L. Ed. 1261, 68 S. Ct. 915, wherein Loew's, Inc. and other motion picture distributors were charged with a violation of the Sherman Act, 15 USCA, Sec. 1 *et seq.* There, the defendants were found guilty of having committed unlawful conspiratorial restraints of trade in unreasonable clearances, pooling agreements, joint ownerships, formula deals, block-bookings, and discriminations.

Loew's, Inc., defendant in reconvention, filed exceptions to the jurisdiction *ratione materiae* and no cause or right of action to the reconventional demand.

[*Trial Court Ruling*]

The trial court sustained the exception to the jurisdiction, holding that the cause of action asserted by plaintiff in reconvention was purely statutory (Sherman Anti-Trust and Clayton Acts, 15 USCA, Sec. 1 et seq.) and could only be brought in courts of the United States. In sustaining the exception of no cause or right of action, it held that the demand for libel would have to await the termination of the action, *supra,* in the federal court.

The demand in reconvention was amended so as to include the State Monopoly Act (LSA-R. S. 51:121-152). Loew's, Inc. filed a plea of prescription, on the ground that the reconventional demand was founded in tort and therefore prescribed in one year. The then trial judge, the late Honorable James U. Galloway, sustained the plea of prescription and dismissed the reconventional demand, stating in part:

"* * * It is our opinion first, that the action asserted by defendant in its reconventional demand is not *ex contractu.* As we read the reconventional demand of defendant there is no claim that Loew's, Inc. breached any provision of any contract existing between the parties. As we appreciate defendant's position his claim is based solely on his allegations that he has suffered damages as the result of a nationwide conspiracy and combination between Loew's, Inc. and other named parties, which combinations were in restraint of trade and in violation of the Anti-trust Laws of the United States and likewise in violation of the Anti-trust Law of Louisiana in so far as said combinations and conspiracies entered into the realm of intrastate commerce. We agree with the proposition contained in Article 2315 of the Louisiana Civil Code, that every act of man that causes damage to another obliges him by whose fault it happened to repair it. We do not consider that said statutes created a new right or cause of torts. The fact that said statutes authorized the recovery of treble the amount of damages proved does not affect the basic right or cause of action.

"The Supreme Court of Louisiana, in the case of *Lagrone v. K. C. S. Railway Company,* 157 La. 559, 102 So. 669, has succinctly stated what we think is the law. The Court said:

'It has never been held that the mere fact of the law imposing upon a person some duty towards the public operates to create a quasi contract between such person and each individual member of the public. And it is of the essence of a contractual obligation (contract or quasi contract) that it be due to some particular person as distinguished from the public in general.'

"Certainly defendant's reconventional demand is not based upon any alleged breach of a specific contract between these parties and the mere fact that plaintiff has violated the Anti-trust Laws and breached an obligation imposed upon it by such laws to refrain from a certain type of conduct creates no quasi contractual obligation between them. It is our opinion that the one year's prescription applies to the reconventional demand, unless the operation of the prescription has been suspended."

Don George, Inc., plaintiff in reconvention, then appealed to this Court from the above judgment. We reversed said judgment and remanded the case for trial on the merits (227 La. 127, 78 So. 2d 534), holding that the law did not favor the trial of cases in piecemeal, Succession of Dancie, 187 La. 628, 175 So. 418; and that where the reconventional demand is incidental to and grows out of the main demand, the two demands should be tried together, *First Nat. Bank Bldg. Co., Limited, v. Dickson & Denny,* 202 La. 970, 13 So. 2d 283.

After the filing of numerous incidental pleas, the case was tried by a jury on its merits. The trial court[4] sustained the plea

[3] Article 78, Reconventional Demand.

[4] The case was at this time heard and tried before the Honorable Henry F. Turner.

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of prescription of one year as to both the main demand and the demand in reconvention. Plaintiff, Loew's, Inc., offered no further evidence and the trial judge excluded the evidence offered by defendant, Don George, Inc., in support of its reconventional demand. The jury was then discharged since there was no evidence before it for consideration. Final judgment by the court rejected both the main demand and the demand in reconvention.

[*Appeal*]

Don George, Inc., plaintiff in reconvention, appealed to this Court, assigning the following errors:

"(1) The Court erred in excluding all defendants' evidence supporting its reconventional demand.

"(2) The Court erred in sustaining plaintiff's 'exception of prescription' of one year to defendant's demand in reconvention for damages under the Federal and State Antimonopoly Statutes.

"(3) The Court erred in dismissing defendant's demand for damages in reconvention for libelous statements plaintiff caused to be published in the local press and contained in its suit filed in the United States District Court, Western District of Louisiana.

"(4) The Court erred in sustaining the plea to the jurisdiction ratione materiae of the State Court to try a reconventional demand for damages under the Federal Antimonopoly Statutes."

The instant matter involves only the receipts of the Glenwood Theatre, a suburban theatre owned by the defendant, Don George, Inc., in Shreveport, Louisiana; no issue is taken with the finding of the trial court that the last alleged damages encompassed by the reconvenor occurred in the year 1946 —the reconventional demand being filed on March 5, 1953.

[*Antitrust Charges*]

In its demand in reconvention, Don George, Inc. alleged that Loew's, Inc., together with other film producing distributing corporations "engaged in a national conspiracy to restrain and monpolize, and have unreasonably restrained and monopolized, Interstate Trade and Commerce by the following means:

"1. Price Fixing.

"A. Vertical

"B. Horizontal

"2. Discriminatory and Unreasonable Clearance and Runs.

"3. Pooling Agreements and Joint Ownership.

"4. Formula Deals, Master Agreements and Franchises.

"5. Block-Booking.

"6. Discrimination on Contract Provisions.

"That this conspiracy was continued on and is presently being carried on on a national scale, and your reconvenor was adversely affected and damaged in its business and property by this conspiracy,

* * *

"That from 1939 to 1946 Reconvenor alleges that it could and should have profited to the extent of $61,976.00 per year had it received suitable pictures, or pictures with reasonable clearance, from all conspirators."

[*Nature of Counterclaim—Statute of Limitations*]

Initially, we shall determine whether the reconventional demand filed herein alleged a tortious injury or a breach of contract. If it alleged a tort, the prescription of one year applies;[5] whereas, an assertion of breach of contract is governed by the prescription of ten years.[6]

The character of the action given by reconvenor in its petition determines the prescription. *Sims v. New Orleans Ry. & Light Co.*, 134 La. 897, 64 So. 823. An examination of the pleadings, stated in part, *supra*, reflects that in the instant case, reconvenor did not sue on a written contract nor did it rely on the terms of the written agreements which form the basis of plaintiff's action. It alleged that the operation of such agreements caused it to suffer damages.

[5] "The following actions are also prescribed by one year:

"That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses." R. C. C., Art. 3536.

"The prescription mentioned in the preceding article runs:

"* * * from that (day) on which the injurious words, disturbance or damage were sustained." R. C. C., Art. 3537.

[6] "In general, all personal actions, except those before enumerated, are prescribed by ten years." R. C. C., Art. 3544.

In *Lagrone v. Kansas City Southern Ry. Co.,* 157 La. 559, 102 So. 669, we said:

"* * * it has been held that where one has bound himself by special contract, *i.e., has given bond,* for the performance of duties imposed upon him by law, the party injured may sue upon *the contract,* instead of on the *tort,* and, if he does so, his action is not prescribed except by the prescription of 10 years. * * *

"On the other hand, it has been held that where the action for damages was not the bond or *contract,* but merely upon the breach of duty *as imposed by law,* the damages arose ex delicto, and were extinguished by the prescription of *one* year. * * *"

Sims v. New Orleans Ry. & Light Co., supra, held:

"The decisions of this court, interpreting article 3536 of the Civil Code, hold that there must have been some infringement by the defendant either to the person or the property of the plaintiff in order to make the prescription therein provided for effective.

"The injuries from which damages spring are generally those from injuries to persons, property, or reputation, from deceit, slander and libel, malicious prosecution, conspiracy, assault and battery, false imprisonment, seduction, trespass, conversion, infringement of patents and trade-marks, damage by animals, negligence, and offenses."

In *Sizeler v. Employers' Liability Assurance Corporation,* 102 So. 2d 326, Writ of Certiorari denied, the able judge of the Court of Appeal stated:

"There are, in certain relationships, duties imposed by law, and a failure to perform these obligations is considered as a tort though the relationships themselves may be created by contract encompassing the same subject. The case of the common carrier furnishes us with a classic illustration. The law requires it to carry with impartiality and safety those who offer themselves as passengers. If it fails to do so, it is chargeable with a tort, which action is prescribed one year after the occurrence of the accident. Generally when merchandise is delivered to it for carriage, there is also a contract expressed or by operation of law that it will carry with impartiality and safety, and if it fails in this duty, there is a breach of contract which is prescribed ten years after the occurrence. [Now reduced to two years by statute, LSA-R. S. 45:1100] * * *

"Thus, for the breach of the general duty imposed by law because of the relationship, one type of action is initiated, and for the breach of a contract another form of action is indicated. As we have seen, the Revised Civil Code limits the time in which these two forms of actions may be instituted. * * *" *Cf. Parro v. Fifteen Oil Co.,* 26 So. 2d 30; *Oliver & Sons v. Board of Com'rs of Lake Charles,* 181 La. 802, 160 So. 419.

[*Louisiana Antitrust Law*]

Our Anti-Trust law, LSA-R. S. 51:121-152, is similar to the federal law, and a review of the Louisiana cases arising thereunder, in which the court considered the nature of the cause of action and the application of prescription, is as follows:

"The general rule is not disputed by plaintiffs, but they contend a cause of action based on the Sherman Law is sui generis and does not sound in tort. With this I cannot agree. In my opinion this case is identical in principle with other cases based on fraud and deceit, which have always been held to come under the general rule. * * *" *Caillouet v. American Sugar Refining Co.,* 250 Fed. 639.

"In response to defendants' motion to strike, plaintiff suggests, first that Article 3536, Louisiana Civil Code, relating to the prescription of 'offenses and quasi offenses' in one year, does not apply to a treble damage antitrust suit since such an action is sui generis and therefore falls within Article 3544, the ten-year omnibus provision covering prescription of all personal actions not otherwise provided for in the Code. It is true that the antitrust suit is a statutory action with no exact equivalent in the common law. Consequently, the courts have experienced some difficulty in applying to it statutes of limitation which list specific types of common law actions. But the Louisiana Civil Code term, 'offenses and quasi offenses,' is, not a specific and exclusive, but a general term which embraces all 'tort' actions, including the action for 'injury to business.' (R. C. C., Article 2315) In federal decisions antitrust damage suits are usually described as 'tort' actions.

"In this state of the law it would be arbitrary and unreasonable now to exclude this 'tort' action from the general category of 'offenses and quasi offenses.' Moreover, the courts of this district and this circuit have regularly applied Article 3536 to treble damage suits under the anti-trust laws. Although the point may never have been strongly urged in these

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prior cases, this Court can see no reason for changing the rule, and therefore the one year limit applies." *Delta Theaters, Inc. v. Paramount Pictures, Inc.* [1958 TRADE CASES ¶ 68,924], 158 Fed. Supp. 644, (U. S. District Court, E. D. Louisiana) [1958 TRADE CASES ¶ 69,134, 69,178] 259 F. 2d 563. See, also, *Streiffer v. Seafarers Sea Chest Corporation* [1958 TRADE CASES ¶ 69,074], 162 Fed. Supp. 602. *Cf. Don George, Inc. v. Paramount Pictures, Inc.* [1956 TRADE CASES ¶ 68,578], 145 F. Supp. 523.

[*Tort Claim*]

An application of the above jurisprudence to the allegations of the reconventional demand leads to the conclusion that the demand of plaintiff in reconvention is one for damages resulting from a tort. Reconvenor, however, contends that the written agreements into which it entered with plaintiff must be introduced in evidence to prove the facts alleged in the reconventional demand, and that these agreements have been reformed by the monopoly statutes and decisions thereunder.[1] Reconvenor argues that,

> "To go further, Don George, Inc., in order to establish its damage as shown by Article 78, must necessarily take each separate contract for pictures and see what it grossed, then take a contract that was legal and see what it grossed. The difference in what the illegal contract grossed as compared to [what] the legal contract grossed is our measure of damages. In other words, we are suing on the illegal contract as corrected and reformed by law. When we do this, we are suing in 'quasi contracts.'"

In arguing that the damages sustained by it grew out of a contractual relationship—the Anti-Trust Act forming a part of the contract—reconvenor cites the cases of *McKane v. New Amsterdam Casualty Co.,* 199 So. 175, Certiorari Denied, and *Johnson v. Anderson-Dunham Concrete Co., Inc.,* 212 La. 276, 31 So. 797, wherein it was held that the Workmen's Compensation Act (Act 20 of 1914, as amended) and the Fair Labor Standards Act (29 U. S. C. A., Secs. 201 to 219) formed a part of the contract of employment.

Reconvenor still further contends that despite the fact that the federal courts have held that an action for damages under the Sherman Anti-Trust and Clayton Acts is founded in tort, such is not the case in Louisiana, the rights enforced depending upon the law of the origin and not of the forum.

After raising the above ingenious arguments, plaintiff in reconvention contends that if its action is not based on breach of contract, it stems from a quasi-contractual relationship, i.e., defendant in reconvention cannot unjustly enrich itself at the expense of reconvenor, Article 3544, *supra,* applying.

We find no merit in reconvenor's contention that its action is contractual. As stated *supra,* plaintiff in reconvention did not sue on a contract, nor did it rely on any alleged specific breach of the terms of a contract. Reconvenor was neither an employee nor a workman. Defendant in reconvention allegedly violated prohibitory laws, and it is untenable to argue that such a law could reform the written agreements executed between plaintiff and defendant.

We now go on to a discussion as to whether or not a quasi contract is involved in this cause.

Article 2293 of the Revised Civil Code provides:

> "Quasi contracts are the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties."

Article 2294 of the Revised Civil Code further states:

> "All acts, from which there results an obligation without any agreement, in the manner expressed in the preceding article, form quasi contracts. But there are two principal kinds which give rise to them, to wit: The transaction of another's business, and the payment of a thing not due."

In *City of New Orleans v. Southern Bank,* 31 La. Ann. 560, 567, we held:

> "The distinction between damages ex delicto and ex contractu is, that the latter ensue from the breach of a special obligation, and the former from the violation of a general duty. * * *"

In *Knoop v. Blaffer,* 39 La. Ann. 23, 6 So. 9, the above case was construed in the following language:

> "* * * In *City of New Orleans v. Bank,* 31 La. Ann. 566, the court said: 'The marked distinction between a *quasi* con-

[1] "That both the Federal Antimonopoly Statute and the State Antimonopoly Statute created a special duty of an exhibitor having contract relations with the producer and imposed special obligations cannot be gainsaid." Appellant's Brief, p. 37.

tract and an offense or *quasi* offense is that the act which gives rise to a *quasi* contract is a lawful act, and therefore is permitted; while the act which gives rise to an offense or *quasi* offense is unlawful, and therefore is forbidden. * * *"

See, also, 12 Am. Jur., "Contracts," Sec. 6, p. 502.

This Court distinctly stated, in *Kramer v. Freeman,* 198 La. 244, 3 So. 2d 609, that:

"It is the well settled jurisprudence of this State that the character which a plaintiff gives his pleadings and the form of his action govern the prescription applicable. See *Antoine v. Franichevich,* 184 La. 612, 167 So. 98, and *Shepard Realty Co. v. United Shoe Stores Co.,* 193 La. 211, 190 So. 383. In the case at bar, the plaintiff alleges in his petition that the defendants have stolen and otherwise illegally obtained certain jewelry and cash from him and that on one occasion he was assaulted and struck by one of them. He does not, however, ask for damages in redress for the wrongs committed by the defendants (which would include the personal injuries he sustained) but, on the contrary, he prays that they be ordered to return the specific property which they abstracted from him or, in the alternative, in the event they cannot return it, that he be given judgment against them for its value. This prayer clearly indicates an election on his part to waive his right to recover for the defendants' unlawful acts and limit his demand to a suit in quasi contract for the restitution of his property." *Cf. Succession of Fields,* 222 La. 310, 62 So. 2d 495; *Masera v. Rosedale Inn,* 1 So. 2d 160; *Succession of Savant,* 132 So. 263; *Burney's Heirs v. Ludeling,* 47 La. Ann. 73, 16 So. 507; *Roussel v. Railways Realty Co.,* 165 La. 536, 115 So. 742; *Greenfield Box Co. v. Independence Veneer & Box Mfg. Co.,* 163 La. 86, 111 So. 608; *Don George, Inc. v. Paramount Pictures, Inc.* [1956 TRADE CASES ¶ 68,578], 145 F. Supp. 523.

[*One-Year Statute Applicable*]

Plaintiff in reconvention has not alleged that Loew's, Inc. owed it a special obligation, nor has it prayed for the return of anything unjustly held by the defendant in reconvention. In no way or manner does the character of its petition state or allege a quasi contract; it simply charges that the alleged conspiracy and monopoly accompanied by price fixing damaged appellant and constituted the violation of a general duty. Reconvenor's action is founded in tort and governed by the prescription of one year, and the judgment of the trial court sustained the plea of prescription of one year was, therefore, correct.

Having found that the reconventional demand was controlled by the prescription of one year, we conclude that the trial judge was correct in excluding all evidence which occurred at or referred to a time prior to one year before the filing of said reconventional demand.

[*State Tolling Provision*]

LSA-R. S. 51:132 provides:

"* * * This Section does not apply to consent judgments. Whenever any proceeding, civil or criminal, is instituted by the United States, or by this state, to restrain or punish violations of its antitrust laws, the running of prescription of a private right of action arising under these laws and based in whole or in part on any matter complained of in the proceeding shall be suspended during the pendency of the proceeding."

Reconvenor contends that under the above section the present action has not prescribed, because of a consent decree entered after a contradictory trial and appeal, and final judgment in the case of *United States of America v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 92 L. Ed. 1260, 68 S. Ct. 915, October Term, 1947, decided May 3, 1948. There is no merit to this contention; the above section does not apply to consent decrees. At the time the reconventional demand was filed on March 5, 1953, more than a year had elapsed since the occurrence of the alleged conspiratorial acts charged, and the rendition of said final judgment on May 3, 1948.

[*Libel Claim*]

We find no merit in reconvenor's contention that the trial judge was in error in rejecting its demand for damages alleged to have resulted from alleged libelous statements made by Loew's, Inc. in a proceeding it filed in the federal court, *supra,* against Don George, Inc. and others. We are not favored with proof of the alleged untruthfulness of the statements, nor do we have before us the final disposition of the matter.

In *Manuel v. Deshotels,* 160 La. 652, 107 So. 478, we held:

"The contention of the appellees is that when a suit for damages for libel is based

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upon allegations contained in another suit, the second suit must await the termination of the action wherein the defamatory averments are made. We think this is correct. *Wolf v. Ins. Co.*, 58 So. 507, 130 La. 679, and authorities cited therein." See, also, *Howard v. Coyle*, 163 La. 257, 111 So. 697.

Robinson Mercantile Co. v. Freeman, 172 So. 797, correctly stated:

"It is also well settled in the jurisprudence of this state that an action for libelous statements made by a party litigant cannot be maintained until the proceeding in which such allegations are made has terminated, as the cause of action does not arise until the party making the allegations has had the opportunity of proving the truth of the allegations in the proceedings in which they are made. See *Manuel v. Deshotels et al.*, 160 La. 652, 107 So. 478. And it is also well settled in our jurisprudence that an action for defamatory allegations cannot be made the basis for damages by a reconventional demand until the final termination of the main demand, and that such claim for damages are premature; that the claim for damages comes in esse only after the litigant making the charges has been given an opportunity to prove them in the suit in which they are made and has failed to make such proof. See *Howard v. Coyle et al.*, 163 La. 257, 111 So. 697; *Thompson & Co. v. Gosserand*, 128 La. 1029, 55 So. 663."

[*Federal Antitrust Claim*]

In 15 USCA, Sec. 15, it is provided:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

In *United Artists Corp. v. Ancore Amusement Corp.* [1950-1951 Trade Cases ¶ 62,550], 91 F. Supp. 132, and *Caraway v. Ford Motor Company* [1956 Trade Cases ¶ 68,536], 144 F. Supp. 295, the courts held that the above section vests the federal district courts with exclusive jurisdiction of federal anti-trust actions.

"Section 15 of Title 15 U. S. C. A., vests District Courts with exclusive jurisdiction of federal antitrust actions. It was intended to provide broader and more effective relief, both substantially and procedurally, for persons and corporations injured by violations of the antitrust laws, by enlarging the remedies provided under those laws and enabling persons and corporations to maintain suits for damages sustained as a result of violations. This right to sue granted under Section 15 is to be exercised only in a 'district court of the United States.' * * *" *Caraway v. Ford Motor Company* [1956 Trade Cases ¶ 68,536], 144 F. Supp. 295.

The trial court was correct in holding that it did not have jurisdiction to entertain a proceeding brought under the federal antitrust laws.

[*Affirmed*]

For the reasons assigned, the judgment of the trial court is affirmed.

[¶ 69,308] United States v. Loew's, Incorporated; United States v. C & C Super Corp.; United States v. Screen Gems, Inc.; United States v. Associated Artists Productions, Inc.; United States v. National Telefilm Associates, Inc.; and United States v. United Artists Corporation.

In the United States District Court for the Southern District of New York. Civil Actions Nos. 119-24, 119-284, 119-285, 119-286, 119-287, and 119-288, respectively. Filed February 16, 1959.

Cases Nos. 1331, 1333, 1334, 1335, 1336, and 1337, respectively, in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief—Interrogatories—Demand for Documents by Interrogatories—Names of Persons "Having Knowledge" of Challenged Contracts.—In a civil antitrust action charging motion picture distributors with "block booking" films to the motion picture industry, the Government was required to answer interrogatories asking for a description, and the names and

addresses of the custodians, of each "block booking contract." However, a further demand in the interrogatories for copies of those contracts was stricken. The production of documents could be secured under Rule 34 of the Federal Rules of Civil Procedure, but not by interrogatories under Rule 33. Other interrogatories which sought the names and addresses of persons "having knowledge" of any facts or documents tending to prove the existence of oral "block booking" contracts were also stricken. They would require the names of such persons as the Government's lawyers, investigators, informants, and stenographers. As drawn, the interrogatories sought what was, in fact, the work product of the Government's lawyers. The Government could be required, however, by properly drawn interrogatories, to state any oral contracts on which it intended to rely and to give information as to the witnesses it intended to call to prove the existence of those contracts.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.260.

For the plaintiff: Arthur H. Christy, United States Attorney, Southern District of New York (Leonard R. Posner, Raymond M. Carlson, and J. E. Waters, Attorneys, Department of Justice, of counsel).

For the defendants: Mervin C. Pollak, New York, N. Y., for C & C Super Corp.; Schwartz and Frohlich, New York, N. Y. (Arthur H. Schwartz, of counsel), for Screen Gems, Inc.; Simpson, Thacher & Bartlett, New York, N. Y. (Cyrus R. Vance, of counsel), for Associated Artists Productions, Inc.; Goldstein, Golenbock & Barell, New York, N. Y. (Justin M. Golenbock, of counsel), for National Telefilm Associates, Inc.; and Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y. (Paul Martinson and Gerald F. Phillips, Attorney, United Artists Corporation, of counsel), for United Artists Corporation.

[*Interrogatories*]

DAWSON, District Judge [*In full text*]: This matter involves the objections made by the plaintiff, the United States Government, to interrogatories served by the defendants. The objections are made under the provisions of Rule 33 of the Federal Rules of Civil Procedure.

Each of the actions is an anti-trust action brought by the Government under the Sherman Act. The actions have been consolidated to a limited extent, part of which is that all applications for discovery, interrogatories and depositions and motions relating to them shall be made before or referred to the judge to whom the cases have been assigned for all purposes.

This proceeding relates to interrogatories served by the defendants upon the Government. The Government has objected to certain interrogatories of certain of the defendants, which defendants are C & C Super Corp., Screen Gems, Inc., Associated Artists Productions, Inc., National Telefilm Associates, Inc. and United Artists Corporation. The interrogatories are numerous and searching and since the objections of the Government relate to certain categories of interrogatories this opinion will deal with the interrogatories in those categories.

[*List of Contracts*]

The interrogatories ask the Government to list each contract of certain defendants which the Government claims is a "block booking contract" and to describe such contracts sufficiently for identification, stating its date, the parties thereto, the persons who negotiated and who executed the contract and the name and address of the person in whose custody and control that contract may be found. The objections to such interrogatories are overruled.

[*Demand for Copies*]

The interrogatories then go on to demand that a copy of each written contract described in the interrogatory be furnished. Insofar as the interrogatories seek to require the production of written contracts or documents the objection to the interrogatory is sustained. The production of documents may be secured under Rule 34 of the Rules of Civil Procedure upon good cause being shown therefor. The production of documents may not be required by interrogatories under Rule 33. *Castro v. A. H. Bull & Co.*, 9 F. R. D. 84 (S. D. N. Y. 1949).

[*"Work Product"*]

A number of other interrogatories ask the Government to describe any contract for block booking which is oral, giving cer-

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tain facts with reference thereto, which facts may properly be inquired into by interrogatories. But they then continue with a demand that the Government furnish the names and addresses of each person known to plaintiff to have knowledge of any facts or documents tending to prove the existence or circumstances of such oral contracts and specifically requesting, with respect to each such person, certain information, included among which interrogaties are questions as to (A) whether such person was an employee of a television station at the time of the incident and if so the identification by name and the address of such television station, (B) whether such person is an employee of the United States and if so in what capacity, and (C) and (D) whether such person gave any written or oral statements to any officer or agent of the United States in connection with any investigation leading or related to this litigation. To the extent that the interrogatories seek that information they go beyond the reasonable limits of the Rules. The Government can certainly be required to state any oral contracts upon which they intend to rely, and the names of any persons entering into such contracts, and the substance of the terms of the oral contracts. To ask the Government to state the names and addresses of every person known to "have knowledge" of any fact tending to prove the existence or circumstances of such oral contract would impose an impossible burden upon the Government. It would require, for example, that the names of every person who worked upon the case in the anti-trust division, including the lawyers, stenographers, investigators, etc., would have to be furnished, because they all might have received some information about the evidence. It would call for the revealing of what in fact is the work product of the lawyers. See *Hickman v. Taylor,* 329 U. S. 495 (1947).

[*Witnesses*]

If the defendants seek to get information as to the witnesses whom the Government intends to call to prove the existence of oral contracts or the circumstances of the oral contracts, such information can be obtained by properly drawn interrogatories. See, *Kingsway Press v. Farrell Pub. Co.,* 30 F. Supp. 775 (S. D. N. Y. 1939). However, in a case of this nature it is obvious that the Government must employ attorneys and investigators to ascertain facts, most of whom they will not call as witnesses at the trial because their information will to a substantial extent be hearsay. To require by a "shotgun" interrogatory that the Government provide the names and addresses of all investigators and informants is improper.

[*Harassment*]

Properly drawn interrogatories may secure all the information that defendants need, which will disclose the basis of the Government's charge, the type of evidence that it will rely upon and any facts which may lead to the discovery of other evidence which might be helpful to the defendants. However, a consideration of the interrogatories in the present case, which seek the type of information hereinabove described, must lead the Court to conclude that the interrogatories are served more for the purpose of harassing the Government and putting it to an impossible task than that they are designed to secure information. Under the circumstances, so much of the interrogatories as seek the foregoing information are stricken.

[*Order*]

Numerous of the interrogatories to which objections have been made are perfectly proper interrogatories. However, certain of the interrogatories will have to be stricken as objectionable on the bases which are set forth hereinabove. The type of objectionable interrogatory is sufficiently defined in this opinion so that the parties may know to which interrogatories reference is made.

Let the parties submit an order in accordance with the foregoing opinion within ten (10) days from the date of entry herein. So ordered.

[¶ 69,309] **Radiant Burners, Inc. v. American Gas Association, Inc., et al.**

In the United States District Court for the Northern District of Illinois, Eastern Division. 57 C 1167. Filed May 9, 1958.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction over Parties—Service of Process on Director of Corporation.—Personal service of process on an Illinois resident who was a member of the Board of Directors of a non-resident corporation did not constitute service on the corporation. Rule 4(b)(3) of the Federal Rules of Civil Procedure provides for service of process on officers, managing or general agents, or any other agents authorized by appointment or by law to receive service of process for a corporation. The individual served was not a managing or general agent, and he was not authorized by appointment or by law to receive service of process for the corporation. Further, the director was not an "officer" of the corporation. Under the Illinois Business Corporation Act, the officers of a corporation consist of "a president, one or more vice-presidents . . . a secretary and a treasurer."

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.350.

For the plaintiff: Joseph Keig, Sr., John O'C. FitzGerald, Victor Neumark, Charles Frank Mann, and Charles Frank Marino, all of Chicago, Ill.

For the defendants: James W. Good, Jr.; Charles K. Bobinette; Justin A. Stanley; Edwin W. Jackson; Robert E. Crown; Winston, Strawn, Smith & Patterson; Robert Cronin; Isham, Lincoln & Beale; Ross & O'Keefe; Haft, Shapiro & Davis; Jesse Holland; Gregory A. Gelderman; Paul A. F. Warnholtz; James J. Gaughan; Lederer, Livingston, Kahn & Adsit; Robert W. Murphy; and Charles W. Houchins, all of Chicago, Ill. Stanton E. Hyer and Hyer, Gill & Brown, Rockford, Ill.

For prior opinions of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1957 Trade Cases ¶ 68,909 and 1958 Trade Cases ¶ 69,173.

Memorandum

[*Service of Process*]

SULLIVAN, District Judge [*In full text*]: This is a motion to quash service of summons on a nonresident non-profit corporation. The service was made personally on a member of the Board of Directors of the corporation who is a resident of Illinois. Affidavits as to the facts have been filed by both sides.

Rule 4(b)(3), F. R. C. P., provides for service of process on a foreign corporation "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive the service of process".

The affidavits of the plaintiff as to the activities of Mr. Hendrick, the director upon whom service was made, are very vague. Giving them all the weight possible, it is apparent that he was not a "managing or general agent" of the defendant. There is no suggestion that he was authorized by appointment or by law to receive service of process. This leaves as the only possibility to sustain service that he was served as an "officer".

[*"Officer" of Corporation*]

A director is not an "officer" of a corporation in the ordinary or the legal sense of that word. Thus the Illinois Business Corporation Act (Ch. 32, Smith-Hurd Statutes Ann. Sec. 157.43) provides that "the officers of a corporation shall consist of a president, one or more vice-presidents * * * a secretary and a treasurer, each of whom shall be elected by the board of directors". The statute illustrates the distinction commonly made between "officers" and the board of directors of a corporation. And in Illinois, it has been flatly held that a director is not an officer for service of process (*Sarelas v. Fagerburg*, 316 Ill. App. 606 (1952).

[*Service Set Aside*]

Service on the director, Mr. Hendrick, was not service on the defendant American Gas Association, and defendant's motion to set aside that service and the return thereon will be allowed.

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[¶ 69,310] Radiant Burners, Inc. v. American Gas Association, Inc., et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 57 C 1167. Filed March 11, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Place Where Suit May Be Brought—Proper Judicial District—"Transacting Business"—Sending "Inspectors" into District.—A corporation was properly sued in the Northern District of Illinois since its practice of sending "inspectors" into that District to "inspect" and approve appliances manufactured there was sufficient to show that it "transacted business" there.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210.

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction Over Parties—Service of Process on Corporation—Validity of "Out-of-State" Service Where Supporting Antitrust Action Held Invalid.—In an antitrust action in the Northern District of Illinois, service of process in New York against a corporation would not be quashed if a second amended complaint should be dismissed for failure to state a cause of action. The corporation argued that, in such an event, there would be no valid antitrust action to support the out-of-state service made under Section 12 of the Clayton Act. Under that section, however, service may be made wherever the defendant may be found when "any" antitrust action "may be brought." The validity of the service is tested by the bringing of the action; it cannot await a ruling on a motion to dismiss.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.350.

For the plaintiff: Joseph Keig, Sr., John O'C. FitzGerald, Victor Neumark, Charles Frank Mann, and Charles Frank Marino, all of Chicago, Ill.

For the defendants: James W. Good, Jr.; Charles K. Bobinette; Justin A. Stanley; Edwin W. Jackson; Robert E. Crown; Winston, Strawn, Smith & Patterson; Robert Cronin; Isham, Lincoln & Beale; Ross & O'Keefe; Haft, Shapiro & Davis; Jesse Holland; Gregory A. Gelderman; Paul A. F. Warnholtz; James J. Gaughan; Lederer, Livingston, Kahn & Adsit; Robert W. Murphy; and Charles W. Houchins, all of Chicago, Ill. Stanton E. Hyer and Hyer, Gill & Brown, Rockford, Ill.

For prior opinions of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1957 Trade Cases ¶ 68,909, 1958 Trade Cases ¶ 69,173 and 1959 Trade Cases ¶ 69,309.

Memorandum

[*Motion to Quash Service*]

SULLIVAN, District Judge [*In full text*]: In this anti-trust action, the American Gas Association (A. G. A.) has made a motion to quash service of summons as to it.

[*Corporation "Doing Business"*]

Service was made in New York under Title 15 U. S. C. § 22. A. G. A. first contended that it was a foreign corporation and not "doing business" in this District as required by that section. Affidavits and counter-affidavits were filed on this point. From them, it must be concluded that A. G. A.'s activities in this District were sufficient to show that it "transacts business" here. In particular, it has a regular practice of sending "inspectors" here to "inspect" gas appliances, and approves appliances manufactured here. (*Dairy Industries Supply Assn. v. La Buy* [1953 TRADE CASES ¶ 67,599], 207 F. (2d) 554 (7th Cir. 1953).)

[*Validity of Antitrust Action*]

A. G. A. also argues that if the second amended complaint should be dismissed for failure to state a cause of action, the service should be quashed since in that event there would be no valid antitrust action to support the out-of-state service (Title 15 U. S. C. § 22). The circuity of the argument is apparent. Under that section, service may be made wherever the defendant may be found when "any" anti-trust action "may be brought". The validity of the service is tested by the

bringing of the action, not at some subsequent time. Determination of whether or not a defendant is properly served cannot await a ruling on a motion to dismiss.

[*Motion Denied*]

The motion of A. G. A. to quash service of summons is denied.

[¶ 69,311] Radiant Burners, Inc. v. American Gas Assn., Inc., et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 57 C 1167. Filed March 11, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Restraint of Interstate Commerce—Public Injury.—In a private action seeking treble damages under the Sherman Act, a second amended complaint was dismissed for failure to state a cause of action. That complaint failed to cure the defects in the original and amended complaints which were noted by the court in prior opinions. The prior complaints were dismissed because they failed to allege any restraint on interstate commerce and any injury to the public.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.600.

For the plaintiff: Joseph Keig, Sr., John O'C. FitzGerald, Victor Neumark, Charles Frank Mann, and Charles Frank Marino, all of Chicago, Ill.

For the defendants: James W. Good, Jr.; Charles K. Bobinette; Justin A. Stanley; Edwin W. Jackson; Robert E. Crown; Winston, Strawn, Smith & Patterson; Robert Cronin; Ishan, Lincoln & Beale; Ross & O'Keefe; Haft, Shapiro & Davis; Jesse Holland; Gregory A. Gelderman; Paul A. F. Warnholtz; James J. Gaughan; Lederer, Livingston, Kahn & Adsit; Robert W. Murphy; and Charles W. Houchins, all of Chicago, Ill. Stanton E. Hyer and Hyer, Gill & Brown, Rockford, Ill.

For prior opinions of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1957 Trade Cases ¶ 68,909, 1958 Trade Cases ¶ 69,173, and 1959 Trade Cases ¶ 69,309 and 69,310.

Memorandum

[*Motion to Dismiss*]

SULLIVAN, District Judge [*In full text*]: This is a private anti-trust action to recover triple damages under the Sherman Act (Title 15 U. S. C. Secs. 1, 15, and 26). The original complaint and an amended complaint have been dismissed for failure to state a cause of action. A "second amended complaint" has been filed, and motions to dismiss have again been made.

[*Complaint Dismissed*]

The facts and the law have been stated in previous memoranda of this court and there is no need to re-state them here. The second amended complaint has failed to cure the defects previously noted.

The second amended complaint will be dismissed for failure to state a cause of action.

[¶ 69,312] United States v. Fur Shearers Guild, Inc.; Philip Amster; Louis Ferrari; Samuel Weinstein; Peter Del Bianco; William Bet; and Milton Husack.

In the United States District Court for the Southern District of New York. Civil No. 141-41. Filed March 18, 1959.

Case No. 1428 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Trade Associations—Association Membership as a Means of Trade Restraint—Price Fixing—Exclusive Dealing—Exclusion from Trade.—An association of persons engaged in the business of shearing furs and the association's

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individual members were prohibited by a consent decree from agreeing to fix prices for the sale of fur shearing services and to restrict or eliminate price competition between fur shearing concerns. The decree also enjoined the association and its members from (1) inducing manufacturers of sheared fur garments to discontinue business relations with any fur shearer, (2) preventing manufacturers from obtaining the services of any fur shearer, or (3) preventing the manufacturers from performing fur shearing services on their own garments. In addition, the decree ordered the association and its members to cancel all contracts with manufacturers which limited those manufacturers to the employment of fur shearers who were members of the association. Further, the decree prohibited participation or membership in any association or organization whose activities are inconsistent with the provisions of the judgment.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.815, 2011.181, 2017.121.

Combinations and Conspiracies—Trade Associations—Circulating Price Lists.—An association of persons engaged in the business of shearing furs and the association's individual members were prohibited by a consent decree from circulating or exchanging any price list for the shearing of furs which was established by an agreement between two or more fur shearers. In addition, the individual members of the association were ordered to cause their own fur shearing firms to withdraw their current price lists for fur shearing services and independently issue new lists on the basis of individual cost figures and other lawful considerations.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.208.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Dissolution—Cancellation of Contracts—Withdrawal of Price Lists.—An association of fur shearers and its individual members were ordered by consent decree to institute proceedings for the dissolution of the association and to cancel all contracts with manufacturers of sheared fur garments whereby such manufacturers were limited to the employment of fur shearers who were members of the association. Also, the individual members of the association, after being prohibited from circulating price lists agreed upon between two or more fur shearers, were ordered to withdraw their current price lists and to independently prepare new ones.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10, 8301.60, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; and Richard B. O'Donnell, W. D. Kilgore, Jr., Augustus A. Marchetti, and Paul D. Sapienza, Attorneys, Department of Justice.

For the defendants: Arthur Cooperman, of counsel, for the defendant association; and Philip Amster, Louis Ferrari, Samuel Weinstein, Peter Del Bianco, William Bet, and Milton Husack, for the individual defendants.

Final Judgment

[*Consent Decree*]

NOONAN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on December 16, 1958, and each of the said defendants having appeared herein and the plaintiff and the defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by any party in respect of any such issue;

Now, Therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of all the parties hereto, it is hereby

Ordered, Adjudged and Decreed as Follows:

I

[*Jurisdiction*]

The Court has jurisdiction of the subject matter hereof and all the parties hereto. The complaint states a claim upon which relief may be granted against the defendants and each of them under Section I of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm, association, corporation or other legal entity;

(B) "Defendant Association" shall mean the defendant Fur Shearers Guild, Inc.;

(C) "Fur shearing" shall mean the process whereby the hairs of selected animal furs are cut to a predetermined uniform length, and, if desired, various grooves are cut into the furs to highlight the natural color gradations that exist in certain furs;

(D) "Sheared fur garments" shall mean fur garments that have been subjected to fur shearing; including sheared fur coats, jackets, stoles, wraps, and other outer garments as well as sheared furs used as trimmings or adornments on outer garments; and

(E) "Fur shearer" shall mean any person whose primary business is the offering of his or its fur shearing services to any manufacturer of sheared fur garments on a fee or charge basis.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant and to his or its officers, agents, servants, employees, members, subsidiaries, successors and assigns, and to all other persons in active concert or participation with any defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Cancelldtion of Contracts—Dissolution*]

The defendants are ordered and directed:

(A) Forthwith to cause the Defendant Association in writing pursuant to this decree to terminate, cancel and declare of no effect all contracts, agreements and understandings between the Defendant Association and manufacturers of sheared fur garments limiting such manufacturers to the employment of fur shearers who are members of the Defendant Association;

(B) Forthwith to institute such action as may be necessary to dissolve the Defendant Association under the laws of the State of New York and to complete such dissolution within the minimum period of time permitted by the laws of the State of New York; and

(C) Upon completion of such dissolution of the Defendant Association, to file a report with this Court and with the plaintiff setting forth the fact of compliance with this Section IV.

V

[*Prohibited Agreements*]

The defendants are jointly and severally enjoined and restrained from, directly or indirectly, entering into, adhering to, enforcing, maintaining, or claiming any rights under any contract, agreement, understanding, plan or program with any manufacturer of sheared fur garments and any association or central agency of or for persons engaged in the fur shearing trade or industry:

(A) To limit, restrict, eliminate or reduce price competition between fur shearing concerns; and

(B) To hinder, restrict, limit or prevent any fur shearing concern from offering its services to manufacturers of sheared fur garments.

VI

[*Price Fixing—Exclusive Dealing*]

The defendants are jointly and severally enjoined and restrained from, directly or indirectly:

(A) Entering into, adhering to, or enforcing any contract, agreement, understanding, plan or program with any other person fixing, determining, establishing, maintaining or stabilizing prices, pricing methods, discounts, mark-ups, or other terms or conditions for the sale of shearing services to any third person;

(B) Advising, suggesting or inducing or attempting to advise, suggest or induce, any or all manufacturers of sheared fur garments to discontinue business relations with any fur shearer; provided however, that the defendants shall not be enjoined from individually soliciting the custom of any manufacturer of sheared fur garments;

(C) Hindering, restricting, limiting or preventing or attempting to hinder, restrict or prevent any manufacturer of sheared fur garments from obtaining the services of any fur shearer or from itself performing fur shearing services on its own sheared fur garments;

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(D) Circulating, exchanging or using in any manner, any price list or purported price list containing prices, terms or conditions for shearing of furs which have been agreed upon or established pursuant to agreement between two or more fur shearers; and

(E) Being a member of, contributing anything of value to, or participating in any of the activities of, any trade association or other organization, the activities of which are inconsistent in any manner with any of the provisions of this Final Judgment.

VII

[*Price Lists*]

Within thirty (30) days following the date of the entry of this Final Judgment, each of the individual defendants shall cause the fur shearing firm or business, which each owns in whole or in part, to:

(A) Withdraw its presently effective price list for fur shearing services originally issued between January 1, 1958 and February 28, 1958;

(B) Individually review the prices withdrawn in conformity with Section VII(A) herein on the basis of its individual cost figures and its individual judgment as to profits and other lawful considerations and issue a new price list on the basis of such independent review; and

(C) File with this Court, and with the plaintiff, a report setting forth the fact and manner of their compliance with this Section VII, together with a copy of the new price list issued by the fur shearing firm or business which each owns in whole or in part.

VIII

[*Notice*]

The Defendant Association is ordered and directed, within ten (10) days after the date of its entry, to furnish to each of its present members a conformed copy of this Final Judgment and to file with this Court, and with the plaintiff, a report setting forth the fact and manner of its compliance with this Section VIII, together with the names and addresses of each person to whom a copy of this Final Judgment shall have been furnished in compliance herewith.

IX

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall on written request of the Attorney General or the Assistant Attorney General in charge of the Anti-Trust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege, (A) reasonable access during office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and (B) subject to the reasonable convenience of such defendant and without restraint or interference to interview officers and employees of such defendant, who may have counsel present, regarding any such matters. Upon such written request, said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means provided in this Section "IX", shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and punishment of violations thereof.

[¶ 69,313] **Adolph Hohensee, et al. v. The Goon Squad, et al.**

In the United States District Court for the Middle District of Pennsylvania. Civil Action No. 6444. Filed March 19, 1959; amended March 24, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Interstate Commerce—Injury to Public.—A complaint in which a lecturer, writer, and seller of food products alleged that his business had been injured by a conspiracy stated no cause of action against a judge before whom he had appeared as a litigant, a newspaper which had reported his court appearances, and the officials of a penitentiary in which he had been incarcerated for the misbranding of drugs. The complaint set forth no interstate involvement; further, it failed to set forth that any of the defendants were in competition with the plaintiffs, or had any interest in any competing business. A complaint under the antitrust laws must describe with definiteness and certainty the conspiracy relied upon and the acts which allegedly resulted in damage to the plaintiff. The complaint was also defective in that it failed to charge any injury to the public. Facts must be alleged from which it can be determined as a matter of law that a conspiracy was entered into which brought about an increase in prices to the public, a lessening of the volume or quality of merchandise available, or other evil consequence in the free flow of interstate commerce.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.600.

Private Enforcement and Procedure—Suit for Civil Damages—Who May Be Liable—Parties Defendant—Liability of Judge, Penitentiary Officials, and Press.—A lecturer, writer, and seller of food products who claimed that his business was injured by a conspiracy stated no cause of action under the antitrust laws against a judge before whom he appeared as a litigant, a newspaper which reported his court appearances, and the officials of a federal penitentiary where he was incarcerated for the misbranding of drugs. A judge is not civilly liable to the parties in a law suit for his rulings in a case so long as he has jurisdiction. Also, the employees of the penitentiary were "so closely associated with the judicial process as to make necessary their protection from harassment in order to protect the judicial process." As to the newspaper, the freedom of the press guaranteed by the First Amendment to the United States Constitution precluded any claim against it under the antitrust laws of the United States.

See Private Enforcement and Procedure, Vol. 2, ¶ 9006.

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Transfer of Venue—Convenience of Parties.—A motion to transfer a treble damage action from the Middle to the Eastern District of Pennsylvania was denied since all of the defendants served were residents of the Middle District and a transfer would not be for their convenience.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.600.

For the plaintiffs: *Pro Se.*

For the defendants: Eugene F. Smith, Scranton, Pa., for John W. Murphy; Williamson & Cupp, Williamsport, Pa., for Leon Witkin; Warren, Hill, Henkelman & McMenamin, Scranton, Pa., for The Scranton Times and George Clark; Daniel H. Jenkins, United States Attorney, and Robert J. Hourigan, Assistant United States Attorney, Scranton, Pa., for Norman S. Hommel, Robert T. Zimmerman, John C. Taylor, and L. Troy Jacobs.

Opinion

[*Parties*]

FOLLMER, District Judge [*In full text*]: The plaintiffs in this action are Adolph Hohensee, Mildred Hohensee, Richard Roe #1, Richard Roe #2, Richard Roe #3, and Richard Roe #4. The defendants are listed as follows: The Goon Squad, its officers and members, John Doe #1 through #4; Norman S. Hommel; John W. Murphy;

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Robert T. Zimmerman; John C. Taylor; Herbert A. Cox; O. G. Blackwell; Max Barnhouse; John W. Wilson; Leon Witkin; Leonard Tunis; Jesse Woolfolk; L. Troy Jacobs; John Shields. Basil J. Carabelio; Harry J. Shaffer; Albert L. Watson; Stephen A. Teller; J. Julius Levy; George Clark; Robert Hourigan; Joseph J. Gercke; Scranton Times; J. A. Purcell; Marilyn Ferguson; J. Alex Zehner; Hearst Publications Co., Inc.; New York News Syndicate Co., Inc.; John J. Kane; John W. Walker; Howard B. Stewart; William N. Nicols; Nathaniel K. Beck; G. H. Rhorer; Gilbert Cloonan; Donald A. Surine; John M. Siemien; Ross Geise; S. Walker; James V. Bennett; American Medical Association, its officers and members, John Doe #5 through #8; Allegheny County Medical Society, its officers and members, John Doe #9 through #12; Affiliated Better Business Bureau, Inc., its officers and members, John Doe #13 through #16; Better Business Bureau of Pittsburgh, Inc., its officers and members, John Doe #17 through #20; Board of Managers of the Allegheny Soldiers and Sailors Memorial Hall of Pittsburgh, Pa., its officers and members, John Doe #21 through #24; John Doe #25 to John Doe #975. There is no indication in the complaint of the residence of any of the plaintiffs or any of the defendants.

[*Antitrust Laws*]

The complaint alleges that the action is brought under the antitrust laws of the United States and in it the plantiffs seek treble damages in the sum of Ten Million Dollars and injunctive relief.

[*Conspiracy Alleged*]

Plaintiffs allege that at all times mentioned in the complaint they were engaged in interstate commerce in the following businesses: lecturing; public relations; selling of food products; selling of other products; publishing, writing and distributing books, periodicals and other publications; other businesses. Plaintiffs further allege that during the period therein, to wit: beginning July 31, 1957 to and including June 14, 1958, defendants conducted a conspiracy against plaintiffs in restraint of trade and commerce between the several states, consisting of the following overt and unlawful acts:

a. Libel.
b. Slander.
c. Destruction of personal property.
d. Confiscation of personal property.
e. Unlawful search and seizure.
f. Ransacking of premises.
g. Assault and battery.
h. Abuse of process.
i. False arrest.
j. Obstruction of justice.
k. Impairment of credit.
l. Caused manufacturers to not supply items.
m. Caused the forced sale of real and personal property.
n. Other unlawful overt acts.
o. Destruction of businesses.

Plaintiffs claim that as the result of the alleged conspiracy they were injured in the destruction of lecture business, destruction of product sale business, destruction of health, loss of freedom and liberty, other losses and injuries.

[*Service of Process*]

The Marshal's return indicates that service of Summons and Complaint was made on the following: Norman S. Hommel, Custodial Force, Robert T. Zimmerman, Custodial Force, John C. Taylor, Warden United States Penitentiary at Lewisburg, Pa., Leon Witkin, Chief Medical Officer, and L. Troy Jacobs, Senior Technical Assistant, John W. Murphy and The Scranton Times.

[*Motions*]

There is presently before the Court

1. Motion of plaintiffs to transfer the case to the United States District Court for the Eastern District of Pennsylvania.

2. Motion of defendants, Norman S. Hommel, Robert T. Zimmerman, John C. Taylor, and L. Troy Jacobs, to dismiss on the grounds,

(a) lack of jurisdiction on the subject matter,

(b) lack of jurisdiction over the person,

(c) failure to state a claim on which relief can be granted,

and motion by the same defendants to strike for the reasons,

(a) complaint is impertinent and scandalous,

(b) allegations of the complaint are impertinent and scandalous,

(c) complaint is absurd and preposterous.

3. Motion of Leon Witkin to dismiss on the grounds,

(a) complaint fails to state a claim on which relief can be granted,

(b) complaint is scandalous.

4. Motion of John W. Murphy to dismiss on the grounds,

(a) failure to state a claim on which relief can be granted,

(b) lack of jurisdiction of the subject matter,

(c) Lack of jurisdiction over the person.

5. Motion of The Scranton Times and George Clark to dismiss on the grounds,

(a) lack of jurisdiction over the subject matter,

(b) lack of jurisdiction over the person,

(c) failure to state a claim on which relief can be granted,

and by the same defendants to strike for the reasons,

(a) complaint is impertinent and scandalous,

(b) failure to identify four of the plaintiffs who are identified in caption of complaint respectively as Richard Roe #1, #2, #3, and #4.

6. Motion of plaintiffs to strike motions of Norman S. Hommel, Robert T. Zimmerman, John C. Taylor, and L. Troy Jacobs to dismiss for the reason substantially that Daniel H. Jenkins, United States Attorney for the Middle District of Pennsylvania and attorney of record for said penitentiary official movants, has no authority under the law to so represent them as the movants are herein sued for their own tortious acts arising independently of their official duties.

7. Motion of plaintiffs to strike motion of John W. Murphy to dismiss substantially for the reason that Eugene F. Smith, law clerk for defendant John W. Murphy, Chief Judge of the United States District Court for the Middle District of Pennsylvania, and attorney of record for said John W. Murphy, is barred from practicing law in any court of the United States, and accordingly for that reason the said motion is defective from its inception.

[*Transfer of Venue*]

Plaintiffs' motion to transfer the case to the United States District Court for the Eastern District of Pennsylvania is denied. At the time of service all defendants served were residents of this district, so that a transfer certainly would not be for their convenience. Plaintiffs have set forth no facts to establish the contrary.

[*Right of Counsel to Appear*]

Motion of plaintiffs to strike motion of defendants, Norman S. Hommel, Robert T. Zimmerman, John C. Taylor, and L. Troy Jacobs is denied. This motion is predicated on the fact that the four defendants, all of whom were employees of the United States Penitentiary at Lewisburg, Pennsylvania, an agency of the United States, were represented without authority by the United States Attorney. This is completely without merit.

The *United States Attorneys' Manual,* Title 3, Civil Division, Page 3, under the caption "Representation of Government Officers and Employees," states, *inter alia,* as follows:

> "It is the general policy of the Department to afford counsel and representation to Government officers and employees when suits for injunction, mandamus, etc., are brought against them in connection with their performance of their official duties. * * *"

Motion of plaintiffs to strike motion of defendant, John W. Murphy, for the reason that Eugene F. Smith, law clerk for said defendant in his capacity as Chief Judge, United States District Court for the Middle District of Pennsylvania, is barred from practicing law in any court of the United States, and accordingly the motion is fatally tainted, is denied. In support of their motion plaintiffs cite "62 Stat. 926, sec. 955, 28 U. S. C. A. 955." This section reads as follows:

> "The clerk of each court and his deputies and assistants shall not practice law in any court of the United States."

It so happens that Mr. Smith is law clerk to Chief Judge John W. Murphy. He is not a clerk of any court nor a deputy or assistant clerk of any court. This motion is frivolous in the extreme.

[*Judicial Notice*]

Now as to the motions of all defendants to dismiss the complaint.

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This Court takes judicial notice of the fact that El Rancho Adolphus Products, Inc., a corporation; Scientific Living, Inc., a corporation; and Adolphus Hohensee, an individual, were found guilty by verdict of a jury on seven counts charging misbranding of drugs in interstate commerce. The trial judge, Hon. Albert L. Watson, a defendant herein although not served, refused defendants' motions in arrest of judgment and for a new trial (140 F. Supp. 645). Judge Watson imposed a penitentiary sentence on defendant Hohensee.

About the same time there was before Chief Judge Murphy of this Court, a defendant herein, application by Federal Trade Commission for an order requiring Scientific Living, Inc., a corporation under investigation, to comply with a subpoena duces tecum of the Commission duly authorized and served on corporation in course of investigation. Judge Murphy refused defendants' motion to quash the subpoena and ordered compliance (150 F. Supp. 495). Plaintiff herein, Adolph Hohensee, was a principal officer of the said Scientific Living, Inc., the corporation then before Judge Murphy.

The brief of the Government in the instant proceeding states that the defendants, Hommel, Zimmerman, Taylor and Jacobs, were officials of the United States Northeastern Penitentiary,[1] Lewisburg, Pennsylvania, during the time the plaintiff, Adolph Hohensee, was incarcerated there. This has not been denied.

Plaintiffs have had considerable experience in the United States District Court for the Middle District of Pennsylvania and they are not happy about it.[2] In fact, they feel aggrieved to the tune of Ten Million Dollars which even in a time of billion dollar budgets is not to be "sneezed at."

The plaintiffs are fortified by four of the phantom Roe family as co-plaintiffs. Albeit with the inclusion of almost one thousand from the phantom Doe family, actually seven defendants were served. These defendants include the Chief Judge of this Court, before whom on occasion the plaintiff, Adolph Hohensee, was a litigant; the five employees of the United States Penitentiary, whose duties included that of hosting the plaintiff, Adolph Hohensee, during his involuntary stay at that institution; and The Scranton Times, whose duty to publish all the news that is fit to print and which apparently did from time to time publish the activities of the United States District Court for the Middle District of Pennsylvania, including those involving the said Adolph Hohensee. Defendant George Clark who was not served but joined his employer, The Scranton Times, in its motion to dismiss, was the reporter who apparently wrote the news items of the said court proceedings. Out of that background we are asked to find the kind of stuff that makes for a violation of the antitrust laws of the United States.

[*Interstate Commerce*]

There is nothing in the complaint to indicate a diversity of citizenship. That is jurisdictional and the responsibility of showing such is on the plaintiffs. Lacking diversity the plaintiffs must look to a federal statute or the Constitution to establish jurisdiction. They have elected to proceed under the antitrust laws which do not include diversity as a jurisdictional prerequisite.

Clearly, the complaint fails to state a claim against any of the defendants upon which relief can be granted. The complaint sets forth no interstate involvement nor that any of the defendants are in competition with plaintiffs or have any interest in any competing business.

In *Glenn Coal Co. v. Dickinson Fuel Co., et al.* [1932-1939 Trade Cases ¶ 55,062], 4 Cir., 72 F. (2) 885, 887, the court said:

> "Thus it has been held in numerous federal decisions that in a civil suit under this special Act the declaration must allege facts from which the court can determine that there has been a violation of the Act with resultant damage proximately caused thereby to the plaintiff. In *Alexander Milburn Co. v. Union Carbide & Carbon Corp.* (C. C. A. 4) 15 F. (2) 678, 680 (certiorari denied, 273 U. S. 757, 47 S. Ct. 459, 71 L. Ed. 876) this Court, by Judge Parker, said:
>
> 'For it is not sufficient that the declaration be framed in the words of the statute, or that it allege mere conclusions

[1] The correct designation is now "United States Penitentiary, Lewisburg, Pennsylvania."

[2] *United States v. El Rancho Adolphus Products, et al.*, D. C. M. D. Pa., 140 F. Supp. 645, aff. 243 F. 2d 367, cert. den. 353 U. S. 976; *Federal Trade Commission v. Scientific Living, Inc.* [1957 TRADE CASES ¶ 68,673], D. C. M. D. Pa., 150 F. Supp. 495.

of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and, in doing so, must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize. * * *'"

[*Public Injury*]

The complaint is furthermore fatally defective in that it fails to charge any injury to the public.

In *Shotkin v. General Electric Co.* [1948-1949 TRADE CASES ¶ 62,341], 10 Cir., 171 F. 2d 236, 239, the court stated:

"* * * In other words, the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or any other like evil consequence in the free flow of interstate commerce. Instead, the pleading bore clear internal indications of a personal grievance on the part of plaintiff based solely and exclusively upon the declination of the defendant Westinghouse Electric & Manufacturing Company further to transact business with him as an outlet for its manufactured merchandise, with no evil consequence to the consuming public. * * *."

And *Feddersen Motors, Inc. v. Ward, et al.* [1950-1951 TRADE CASES ¶ 62,579], 10 Cir., 180 F. 2d 519, 522, citing *Shotkin, supra,* stated:

"* * * But injury to plaintiff alone is not enough upon which to predicate such an action. There must be harm to the general public in the form of undue restriction of interstate commerce. An appreciable part of such commerce must be the subject of the monopoly, restraint, or conspiracy. And a general allegation of the forming of such a combination or conspiracy with resulting injury to the public and to the plaintiff is not enough. While detail is not necessary, it is essential that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendency, or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce. * * *"

[*Freedom of Press*]

As to The Scranton Times and its reporter, George Clark, it will suffice to say that the freedom of the press guaranteed by the First Amendment precludes any claim by plaintiffs against them under the antitrust laws of the United States. As no details of what part either the "Times" or Clark played in the alleged conspiracy it would appear that reference is had to various news items of plaintiffs' numerous court appearances. There is nothing to indicate libel and even if so, certainly no violation of the antitrust laws.

[*Civil Liability of Judge*]

The case against Judge Murphy and the five employees of the United States Penitentiary is likewise easily disposed of. It is hornbook law that so long as a judge has jurisdiction he is not civilly liable to the parties in a law suit for his rulings in a case.

In *Bradley v. Fisher,* 13 Wall., 80 U. S. 335, 347, 20 L. Ed. 646, Justice Field speaking for the Court said:

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of *Floyd and Barker,* reported by Coke, in 1608, where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would 'tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations.'"

See also 48 C. J. S. Judges § 63; *Allen v. Biggs,* D. C. E. D. Pa., 62 F. Supp. 229; *Paul Ginsburg v. Horace Stern and Patrick N. Bolsinger,* 3 Cir., Slip Opinion, February 17, 1959.

In *Cooper v. O'Connor et al.,* C. A. D. C., 99 F. 2d 135, 141, the court said:

"In several of the cases in which the rule of immunity has been applied the rationalization used has been that the particular defendant was a judicial officer, or was engaged in a judicial determination, or was so closely associated with the judicial process as to make necessary

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his protection from harassment in order to protect the judicial process. * * *

"* * * the rule as now declared in many cases has been applied, not only to officials judicial and quasi-judicial, but to executive officers generally, such as the Postmaster General, the Secretary and Assistant Secretary of the Treasury, Members of the United States Parole Board, the Parole Executive, the Warden of a Federal penitentiary, the Director of the Bureau of Prisons, the Commissioners of the District of Columbia, the Chairman of the Tariff Commission, a building inspector, the United States Commissioner of Indian Affairs, and the Chief of Record and Pension Office of the War Department."

[*Protecting Judicial Process*]

Certainly the five employees of the penitentiary, defendants herein, were "so closely associated with the judicial process as to make necessary (their) protection from harassment in order to protect the judicial process," there being nothing in the complaint to indicate any other activities on their part aside from the performance of their duties as penitentiary employees.

[*Action Dismissed*]

Accordingly, the action should and will be dismissed.

[¶ 69,314] United States v. The Watchmakers of Switzerland Information Center, Inc., et al.

In the United States District Court for the Southern District of New York. Civ. 96-170. Filed March 11, 1959.

Case No. 1207 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act and Wilson Tariff Act

Department of Justice Enforcement and Procedure—Civil Suit for Injunctive Relief—Interrogatories—Obtaining Evidence—Narrowing of Issues.—In a civil action charging antitrust violations in the manufacture, importation, and sale of watches in the United States, the Government was required to answer interrogatories which, it contended, required a compilation of data more easily available to the defendants and required evidentiary matters. The scope of the subject matter of the interrogatories was as broad as the subject matter of oral depositions. Thus, it was no ground for refusal to answer an interrogatory that the answer constituted evidentiary detail. The obtaining of evidence, or even information which might lead to evidence, is one of the functions of interrogatories. A further function is to obtain admissions and narrow the issues to be tried. The Government was also required to give further answers where those that it had given were incomplete, equivocal, contradictory, and unresponsive. In addition, a further answer was required where the Government's answer referred to other answers and other documents. Neither the court nor the defendants should be forced to pursue the laborious process of following cross-references to numerous other documents or answers which might not be completely relevant to the inquiry. The Government was not, however, required to state its "claims" in regard to facts of which it had no knowledge; forcing it to answer such interrogatories would be merely allowing the defendants to use interrogatories "as a device or stratagem to maneuver the adverse party into an unfavorable position."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.260.

For the plaintiff: Richard B. O'Donnell, Chief, New York Office, Antitrust Division, Department of Justice; and Mary Gardiner Jones, Elliott H. Feldman, and Elhanan C. Stone, Attorneys, Department of Justice.

For the defendants: Goodwin, Danforth, Savage & Whitehead, New York, N. Y., by Donovan, Leisure, Newton & Irvine (James V. Hayes, William F. Clare, Jr., Sidney P. Howell, Jr., and John A. Manning, of counsel), for Longines-Wittnauer Watch Company and Wittnauer et Cie, S. A.; and Robert Perret, New York, N. Y., by Solinger & Gordon (Eugene H. Gordon, of counsel), for Federation Suisse des Associations de Fabricants D'Horlogerie and Ebauches, S. A. Uhrenfabrick.

For prior opinions of the U. S. District Court for the Southern District of New York, see 1955 Trade Cases ¶ 68,096 and 68,145.

Opinion

[*Interrogatories*]

CASHIN, District Judge [*In full text*]: This is a civil anti-trust action instituted on October 19, 1954. Plaintiff has already had extensive discovery. The present motions are by two groups of defendants, the first, Longines-Wittnauer Watch Company and Wittnauer et Cie, S. A. (hereafter collectively "Longines/Wittnauer"), and the second, Federation Suisse Des Associations De Fabricants D'Horlogerie and Ebauches, S. A. (hereafter collectively "F. H./Ebauches"). These motions attack the plaintiff's answers to the interrogatories as insufficient, for various reasons. The interrogatories of Longines/Wittnauer were served on September 6, 1957 and the interrogatories of F. H./Ebauches on September 20, 1957. The time to answer or move with respect to the interrogatories was extended until late in 1958, at which time plaintiff objected to certain categories of interrogatories. The objections were sustained by me, in their entirety, in an Opinion dated December 23, 1958. Although the answers attacked must, because of the various bases for the attack, be considered separately, certain fundamental principles as to the functions of interrogatories must first be reviewed before any separate discussion. Interrogatories to parties are covered in Rule 33 of the Federal Rules of Civil Procedure. The scope of the subject matter of the interrogatories is as broad as the subject matter of oral depositions taken under Rule 26. Thus, it is no ground for objection to an interrogatory, or for refusal to answer an interrogatory, that the answer constitutes evidentiary detail. The obtaining of evidence, or even information which may lead to evidence, from an adverse party is one of the functions of interrogatories. A further function is to obtain admissions and narrow the issues to be tried. Of course, if "annoyance, expense, embarrassment or oppression" would be caused to a party served with interrogatories, a protective order, under the provisions of Rule 33 itself, or under the provisions of Rule 30(b) as incorporated in Rule 33, could be obtained. Viewed within the framework of the foregoing restatement of certain fundamental principles, I will now consider, *seriatim,* the answers attacked.

I.

Motion of F. H./Ebauches.

(*The portion of the motion concerning interrogatories Nos.* 39, 124, 123, 147 *and* 148 *has been withdrawn.*)

A.

[*Compilation of Data*]

Interrogatory No. 38 in subdivisions (d) and (e) asks, with reference to certain entities, the name and address of each person who participated in said act (any act performed by a party in adhering to the terms of the Collective Convention), the nature of such participation and the business entity or other body represented by such person. The plaintiff merely answers that "These defendants acted through their officers, employees and agents which included among others defendant American Watch Association, Inc. (herein called AWA)".

The only reason advanced by the plaintiff for failing to name the individuals requested was that such an answer would require a compilation of data much more easily available to the defendants than to the plaintiff, and thus not required in the plaintiff's answer. Under the fundamental principles heretofore reviewed, plaintiff's reason for not answering is not persuasive. Defendants are entitled to know upon what evidence the plaintiff intends to rely in order that they may prepare their defense. The information requested in Interrogatory No. 38 is the type of information which will facilitate the preparation of defenses. Accordingly, plaintiff is directed to supply those names and addresses, together with the names of the entities that those persons are claimed to have represented.

B.

[*Enforcement of Regulations*]

Interrogatories Nos. 116, 120 and 121 request details concerning the imposition of penalties for failure to abide by the provisions of various documents which regulate or prescribe conduct of individuals engaged in the watch industry, investigations concerning the imposition of penalties, and decisions made to enforce, or not to enforce, any ruling. The plaintiff defends the answers given by it on the ground that enforcement of regulations against specific persons, at specific times, or investigations or decisions concerning such enforcement, are evidentiary

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matters and that, in any event, plaintiff does not have knowledge of all specific instances. Once again, the reasons advanced in defense of plaintiff's answers are not persuasive. As pointed out heretofore, evidentiary matters are the proper subject of inquiries. Lack of knowledge of all instances of enforcement of violations is no excuse for not giving information as to the instances of which plaintiff does have knowledge. Of course, if plaintiff has absolutely no knowledge, its sworn statement to that effect will suffice. Accordingly, plaintiff will supply answers to Interrogatories Nos. 116, 120 and 121 to the extent of its knowledge, in accordance with the tenor of the interrogatories.

C.

[*Issues*]

Interrogatories Nos. 123, 127, 141 and 145 all begin with the general query:—"State whether the violation or violations of Section 1 of the Sherman Act or Section 73 of the Wilson Tariff Act alleged by plaintiff consist, in whole or in part, or are evidenced by:". Each of these interrogatories then lists numerous subdivisions. It is clear that defendants seek by these interrogatories to determine which of the matters covered in the subdivisions remain in issue in the case so that they may intelligently prepare a defense. I cannot perceive any reason why the plaintiff cannot, unequivocally, answer all of these interrogatories. Qualifications concerning the plaintiff's rights, as respect to the proprietary of the form of the interrogatories, are not now available. The plaintiff has already objected to the interrogatories and has received favorable action on those objections. Once again, it might be noted that plaintiff need answer these interrogatories, as all interrogatories, based upon its present knowledge. If it obtains further information which would necessitate any change in its answers, amended answers may be served. Plaintiff is directed to answer Interrogatories Nos. 123, 127, 141 and 145, unequivocally, without qualification, based upon its present knowledge.

D.

[*Evasiveness*]

Interrogatory No. 124 requests information as to whether sales or resales of watches, component parts or repair parts, referred to in the answers to various subdivisions of Interrogatory No. 123, are on any level ranging from a sale from the manufacturer to the importer through a sale from the retailer to the consumer. The plaintiff's answer makes it clear that any sale or resale within the United States is included within the purview of its answer to Interrogatory No. 123. This is clearly a sweeping affirmative answer and thus cannot, in any way, be considered evasive. The answer cannot be successfully attacked on this ground.

[*Alleged Contradictions*]

Defendants further charge, however, that the answer to Interrogatory No. 124 contradicts the answers to Interrogatories Nos. 72 and 71. Interrogatory No. 72 reads as follows:—

> "Identify each agreement entered into by each defendant listed in paragraph 33 of the complaint and by each person referred to in the complaint as a co-conspirator by which such parties agreed that watches and component parts shall not be offered for sale in the United States subject to any guaranties other than those approved by FH by stating the date thereof and the parties thereto".

Interrogatory No. 71 reads as follows:—

> "Identify each agreement entered into by each defendant listed in paragraph 33 of the complaint and by each person referred to in the complaint as a co-conspirator by which such parties agreed that watches and component parts shall not be sold in the United States at prices lower than agreed upon as minimum prices by stating the date thereof and the parties thereto".

To both of these interrogatories plaintiff has unequivocally answered "None". However, in its answer to Interrogatory No. 124 plaintiff has stated the following:—

> "Plaintiff alleges in its complaint that defendants have agreed that they will not guarantee any watch sold by them under any but the agreed upon conditions and have also agreed that no one else shall be permitted to offer for sale or sell Swiss watches under guarantee conditions different from those agreed upon by the defendants".
>
> "Plaintiff alleges in its complaint that defendants have agreed to establish minimum sales prices for Swiss watches . . . from United States importers to other persons in the United States principally retail jewelers and from retailers to consumers".

Plaintiff argues that the charged contradictions are not real but only apparent. To support this conclusion the plaintiff points to its footnote to its answer to Interrogatory No. 9, which reads as follows:—

> "Counsel for defendants FH and Ebauches advised plaintiff that its term 'agreement' as used throughout its interrogatories is intended to refer only to formal contracts either written or oral. Plaintiff's replies to defendants' interrogatories herein are responsive to this definition of the term 'agreement'."

and states, in its affidavit in opposition, that—

> "When the plaintiff uses the word 'agreements' in its answer, however, the word carries a much broader meaning and evidence of a formal contract to fix prices need not be introduced to prove the offenses alleged."

I must confess that I do not understand exactly what is connoted by the two uses of the term "agreement". Accordingly, I direct that a further answer be given to Interrogatory No. 124 in which the distinction between the definitions of the word "agreement" as used in the interrogatories, and as used in the answer, is clarified.

E.

[*Incomplete Answers*]

Interrogatories Nos. 143 and 144 ask information concerning the agreements or meetings or oral discussions with respect to each subdivision of Interrogatory No. 141 to which plaintiff gave an affirmative reply. As stated under Subdivision "C" of this Opinion, plaintiff has not yet given unequivocal answers to Interrogatory No. 141. Thus, the answers to Interrogatories Nos. 143 and 144, being based upon an insufficient answer to Interrogatory No. 141, must necessarily be incomplete. The giving of unequivocal answers to Interrogatory No. 141 would, perhaps, enable plaintiff to give further answers to Interrogatories Nos. 143 and 144. However, even that portion of the answers to Interrogatories Nos. 143 and 144 which was given is attacked by defendants on the ground that the answer merely refers to the answer to other interrogatories and to a portion of the Statement of Plaintiff's Claims. I have attempted, by following the references given in the answers to Interrogatories Nos. 143 and 144, to ascertain whether such references do give adequate answers. Possibly extended efforts on my part would enable me to spell out such complete answers. I do not, however, believe that either I, or the defendants, should be forced to pursue this laborious process. Plaintiff has indicated in its answer to Interrogatory No. 126 that it can efficiently answer a similar type of interrogatory in detail with no cross-references. The plaintiff is, therefore, directed to serve a further answer to Interrogatories Nos. 143 and 144, which will enable defendants to obtain the information requested without referring to numerous other documents or answers which may or may not be completely relevant to the inquiry.

F.

[*Equivocal Answer*]

Interrogatory No. 139 requests information concerning any "understanding between the parties" referred to in the Collective Convention. The plaintiff's answer to the interrogatory is, on its face, equivocal. However, an analysis of the answer indicates that there is no "understanding between the parties" except the Convention itself. The plaintiff's affidavit in opposition to the motion agrees with this analysis. In order that no misunderstanding might later result, it is directed that plaintiff serve a further answer to Interrogatory No. 139 unequivocally stating that there is no "understanding between the parties" except for the Convention.

II.

Motion of Longines/Wittnauer

A.

[*Jurisdiction*]

Interrogatory No. 1 requests plaintiff to state facts upon which personal jurisdiction over Wittnauer et Cie, S. A. (hereafter "Wittnauer") is based. Defendant seeks to strike the answer as unresponsive and conclusory and seeks the compelling of a responsive and detailed answer. A prior motion to dismiss the complaint as to Wittnauer, addressed to Judge Walsh, has been denied on the basis of affidavits. However, the denial was without prejudice to renewing the motion at the trial. Thus, the issue of lack of jurisdiction over the person of Wittnauer is still in the case. Plaintiff claims that it has, in its answer, given all facts within its knowledge. On the papers

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before me I cannot state that this assertion is incorrect. Accordingly, the answer will not be stricken. The plaintiff's answer to Subsection c to Interrogatory No. 1, which subsection, generally, requests any facts relied on by plaintiff to support personal jurisdiction over Wittnauer, is as follows:

> "Facts stated in Section I, 3B of Statement of Plaintiff's Claims, in answer to interrogatories herein respecting defendants' liability and in all the papers filed in connection with Wittnauer's Motion to Dismiss referred to above."

The remarks made under I, E of this Opinion are apposite here. Accordingly, the plaintiff is directed to serve a further answer to Interrogatory No. 1 c, which will enable defendant Wittnauer to obtain the information requested without referring to numerous other documents or answers which may or may not be completely relevant to the inquiry.

B.

[*Lack of Knowledge*]

Defendants Longines/Wittnauer move to strike, as unresponsive, much of plaintiff's answers to Interrogatories Nos. 14, 15, 16, 17, 18, 25, 27 and 43 because plaintiff generally denies knowledge of the facts inquired into. Defendants wish further answers to be served wherein plaintiff will state what it "claims" the facts to be irrespective of its knowledge or lack of knowledge concerning those facts. While I consider a function of interrogatories to be the narrowing of the issues, I do not believe that issues should be narrowed by forcing a party to answer, under oath, as to facts of which it has no knowledge. Plaintiff, of course, will be precluded at the trial of the action from proving any facts of which it presently asserts it has no knowledge, absent a showing that it could not reasonably have had knowledge of the facts at this time. Forcing the plaintiff to such a position, based upon facts of which it has no knowledge, would be merely allowing defendants to use interrogatories "as a device or a stratagem to maneuver the adverse party into an unfavorable tactical position." (*Aktiebolaget Vargos v. Clark* (D. C. D. C. 1949) 8 F. R. D. 635).

The answers to Interrogatories Nos. 14, 15, 16, 17, 18, 25, 27 and 43 will stand.

C.

[*Responsiveness of Answers*]

Defendants Longines/Wittnauer attack the answers to Interrogatories Nos. 19, 21, 24, 27, 34, 36 and 41 on the ground that no answers at all, or unresponsive answers have been made to part of those interrogatories. The answers attacked will be considered separately below:

(1) Defendants have requested in a portion of Interrogatory No. 19 that plaintiff specify each price established for products sold by Longines or Wittnauer during the period covered by the complaint. The plaintiff contends that its answer denies any knowledge whatsoever. A reading of the answer shows that there is possible ground for more than one interpretation of the plaintiff's answer. This follows because specific reference is made to the fact that plaintiff has no knowledge of "date of each price set." Thus, it might be argued that plaintiff knows the prices set but not the date, or even that plaintiff knows the prices and dates in many instances but not in all. A further answer is, therefore, directed which will either state beyond peradventure of doubt the fact that plaintiff has no knowledge of any prices set at any date or will set out specifically the prices and dates presently known to plaintiff.

Defendants Longines/Wittnauer also request that a portion of the answer of plaintiff to Interrogatory No. 19 appearing on page 12 be stricken as devoid of any of the facts called for by the interrogatory, and as argumentative in nature. Plaintiff merely states that the material contained on page 12 of its answer is responsive. I have examined the interrogatory and the answer and find that neither party's contention is wholly correct. Thus, the question in the interrogatory asks for any acts in which Longines or Wittnauer participated in establishing prices. Subsection 2 of the answer refers to the enactment of regulations by F. H., on behalf of Wittnauer, binding on Wittnauer and Longines, as enumerated in Section I, 5B of the Statement of Plaintiff's Claims. This section of the Statement of Plaintiff's Claims lists numerous documents by number and date. Thus, a portion of the answer is responsive. However, Subsection 3 of the answer merely refers to Section I, 3B(6)(a) of the Statement of Plaintiff's Claims. That section is quoted, in full, as follows:

"American importers of Swiss watches shall refrain from soliciting or accepting any reduction from the cost price of the watch fixed in Switzerland."

Clearly, there is no detail of fact contained in this answer. I will not further review the remaining portions of the answer. I merely hold that the answer, as it stands, shall be stricken and direct that the plaintiff serve a further answer either setting forth specific facts or denying knowledge.

(2) The portion of Interrogatory No. 21, the answer to which is attacked, requests details as to activities of Longines or Wittnauer in recommending or participating in blacklisting or boycotting violators. As in the answer to Interrogatory No. 19, there appears doubt from plaintiff's answer as to whether it is stating that Longines' or Wittnauer's participation is only through the activities of F. H., whether plaintiff knows only some but not all specific instances of blacklisting and boycotting, or whether plaintiff has no knowledge whatsoever of specific instances participated in by Longines or Wittnauer. In view of this doubt I will strike the portion of the answer attacked, and direct that the plaintiff serve a further answer setting out, in detail, all instances of blacklisting or boycotting known to it, with names, dates and places, and setting out whether the participation of Longines or Wittnauer was based upon their own acts or the vicarious acts of F. H. Similarly, if any blacklisting or boycotting was, to the knowledge of plaintiff, initiated on the recommendation of Longines or Wittnauer, all details known should be specifically stated. Of course, a lack of knowledge of any or all instances of blacklisting, boycotting or recommendations may be set forth. However, a statement of such lack of knowledge should be couched in terms which will leave no doubt as to precisely what knowledge is being denied.

(3) Interrogatory No. 24 refers to Paragraph 29(a) of the complaint. Paragraph 29(a) of the complaint charges an agreement between defendant Benrus and coconspirator Super-holding that Benrus would abandon manufacture of watches and component parts within the United States and liquidate its plant so that no other manufacturer would be able to continue the former activities of Benrus. The interrogatory, insofar as the answer is attacked, requests information as to "every act of Longines or Wittnauer claimed to show such participation." Plaintiff's answer to this clearly indicates that the only participation of Longines or Wittnauer in the acts set forth in Paragraph 29(a) of the complaint are vicarious acts because of the fact that Wittnauer is a signatory to the Collective Convention and a member of F. H. Interpreted in this manner the answer is responsive and will stand.

(4) Interrogatory No. 27 requests information as to whether plaintiff claims that Longines participated in "negotiating or performing" specified agreements. The answer states: "Plaintiff does not claim that Longines or Wittnauer participated in the negotiation of any agreements to which they or their subsidiaries are not signatories." The only ground for attack on this answer by defendants is that it mentions only "negotiation" and is silent as to "performance." Plaintiff, in its affidavit in opposition, states that the omission of the words "or performance" after the word "negotiation" in its answer was inadvertent. Accordingly, the plaintiff is directed to further answer Interrogatory No. 27 with the words "or performance" properly inserted.

(5) Interrogatory No. 34 requests detailed information concerning the use by Longines, in connection with sales of watches and component parts, of only guaranties which were approved by F. H. One detail requested is: "The terms of every such guarantee subject to which Longines was sold (watches and component parts)." In its affidavit in opposition plaintiff admits that it has made no such specification; and admits that it has not denied knowledge with which to answer the interrogatory, but states that the giving of the specifications is not necessary. I cannot comprehend the position of the plaintiff in this regard. In part of the answer to Interrogatory No. 34 it is stated that the plaintiff claims that Longines "sold watches in the United States under such guarantee terms." In its affidavit in opposition to the motion plaintiff states that it "has no objection to stating that it has no knowledge as to any individual sale of watches by Longines under the terms of the guarantee used pursuant to F. H. regulations." To me, these statements seem utterly contradictory.

Under these circumstances, I am unable to give any precise direction as to the answering of the interrogatory. I will, there-

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fore, order the answer stricken and direct plaintiff to give all information it has with respect to the subject matter covered by Interrogatory No. 34.

(6) The portion of Interrogatory No. 36, the answer to which is attacked, is as follows:

> "36. Does the term 'all persons' as used in Paragraph 34 of the Complaint refer to persons other than the named defendants and other co-conspirators who entered into the agreement alleged therein? If so, who were such other persons?"

Plaintiff's answer to that portion is "'all persons' refers to all persons selling watches imported from Switzerland in the United States. Plaintiff does not know the names of all such persons." Paragraph 34 of the complaint charges that the defendants, and named co-conspirators, agreed that all persons who did not adhere to established prices would be reported to defendants F. H. and Ebauches for possible reprisal action. If plaintiff were to be forced to answer the request with reference to "all persons" literally, it would merely give the defendants a catalogue of all dealers and importers of Swiss watches. While, perhaps, plaintiff should have objected to this portion of the interrogatory, it would seem clear that its failure to do so was mere oversight. This oversight will be overlooked.

The balance of plaintiff's answer to Interrogatory No. 36 lists the "persons" who were reported to F. H. and Ebauches by Longines/Wittnauer for possible reprisal action, the dates of the reports, the substance of the reports, and the action taken where known. Defendants thus have all information in the possession of plaintiff necessary to prepare their defense. No further answer to the interrogatory is necessary. The alternative relief requested by defendants, namely, that plaintiff be ordered to give the names of the persons on whom it will rely as witnesses, or from whom it has derived evidence, is correctly characterized by plaintiff as an attempt to propound a supplemental interrogatory under the guise of objecting to plaintiff's answer. This alternative relief is also denied.

(7) Interrogatory No. 41, insofar as it is attacked, seeks details with regard to Longines' refusal to deal with entities in the United States who were "blacklisted" in accordance with the alleged conspiracy. Plaintiff admits that its answer, as it stands, is unresponsive to the portion of the interrogatory which is the basis of the attack. However, in its affidavit in opposition, it states that it has no knowledge of any of the details alleged. Such a statement under oath, in a further answer, will, of course, suffice.

D.

[Relief Sought]

The answers attacked by this branch of Longines/Wittnauer's motion, namely, the answers to Interrogatories Nos. 48, 52 and 54, have to do with the relief sought by plaintiff. I find, however, that the answers to the interrogatories are, at this time, sufficient. The precise relief to be granted, in the event a trial of the action shows violation of the law, will await further proceedings. Thus, no further answers to these interrogatories will be directed.

It is so ordered.

[¶ 69,315] Secatore's, Inc. v. Esso Standard Oil Company.

In the United States District Court for the District of Massachusetts. Civil Action No. 58-891-F. Dated March 17, 1959.

Robinson-Patman Price Discrimination Act

Price Discrimination—Clayton Act, Section 2(a)—Charging Lower Prices to Consumer Than to Retailer—Non-Competing Purchasers—Effect on Competition.—Alleged sales of gasoline by a refiner to certain direct buying ultimate consumers at lower prices than it charged an operator of retail gasoline stations did not constitute a violation of Section 2(a) of the Clayton Act because the alleged price differential did not actually affect competition. The ultimate consumers did not compete with the retailer, and they were not customers of the retailer. Also, there was no claim that competition between the plaintiff-retailer and other retailers was affected. Although there was potential competition between the refiner and the retailer as to those consumers who bought directly from the

refiner, even that potential competition could not have actually been affected since the retailer could not successfully compete for those customers. Clearly, there would have been no discrimination if the refiner had sold to those ultimate consumers at the same price at which it sold to the retailer. Even then, however, the retailer could not compete for their business since, as a matter of practical economics, it would have to charge them more than it paid for the gasoline. Since the retailer could not compete with the refiner for those customers if there was no price differential, it would not be harmed by any further reductions in price which the refiner might make in the price it charged them. The refiner was under no obligation to sell to the retailer at a lower price than it charged to consumers who bought directly from it in order to enable the retailer to compete with it for the business of those customers.

See Price Discrimination, Vol. 1, ¶ 3505.620, 3506.300, 3506.700.

Price Discrimination—Services or Facilities Furnished by Seller Under Clayton Act, Section 2(e)—Time of Payment—Extending Credit to Some Retailers and Denying Credit to Another—Legality.—A gasoline retailer's allegation that a refiner required it to pay for gasoline on a "c. o. d." basis while extending thirty days' credit to other retail sellers stated no claim for relief under Section 2(e) of the Clayton Act. The extension of credit is not one of the services or facilities which, under that section, must be accorded to all purchasers on proportionally equal terms. Services or facilities are normally aids which are connected with the processing, handling, or resale of the commodity by the purchaser. The extension of credit is connected only with the original sale and not with any further handling or resale. In addition, the extension of credit involves problems not found in the furnishing of ordinary promotional aids. Some of those problems are illustrated by the fact that, in the instant case, the retailer owed the refiner a large sum of money at the time when credit was withdrawn from the retailer, and that the money was not paid until suit had been brought for its recovery. In those circumstances, the denial of credit was justifiable even if, under some circumstances, differentiation between customers as to credit terms might constitute a violation of Section 2(e). It would be absurd to say that the statute required the refiner to deny credit to all of its retail customers if it wished to protect itself by denying credit to the plaintiff.

See Price Discrimination, Vol. 1, ¶ 3524.340, 3524.870.

Private Enforcement and Procedure—Damages Recoverable for Antitrust Violations—Sufficiency of Proof of Damages—Alleged Price Discrimination—Speculative Damages.—A gasoline retailer's allegation that, if it could have bought gasoline from a refiner at the lower price allegedly paid by certain ultimate consumers, it would have increased its profits by the amount of that price differential, constituted a claim for damages that was entirely speculative. That claim assumed that the retailer could have continued to sell gasoline at the same price while paying less for it; however, such an eventuality was unlikely in view of the fact that it was in competition with other retail dealers who would have had to receive the benefit of such a lower price from the refiner, and who could have, therefore, lowered their retail prices. In any event, such a loss of profit afforded no basis for recovery since the alleged discrimination did not affect actual or potential competition.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.560.

For the plaintiff: Arthur Brogna, Boston, Mass.

For the defendant: Robert W. Meserve (John R. Hally and Nutter, McClennen & Fish with him).

Memorandum of Opinion
On
Defendant's Motion for Summary Judgment

[*Price Discrimination*]

FORD, District Judge [*In full text*]: Plaintiff brings this action under the provisions of 15 U. S. C. A. § 15 and 26 for damages and injunctive relief, alleging violations by defendant of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. A. § 13. Defendant moves for summary judgment on the basis of the pleadings and the depositions of the plaintiff's president and principal stockholder. The facts as set forth in these documents have not been controverted.

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[*Parties*]

Plaintiff operates two large retail gasoline stations in East Boston. It actually sells only to customers who bring their vehicles to one of its stations where gasoline is pumped into the tanks of the vehicles and has no facilities for delivering or selling off its premises. Defendant is a refiner and distributor of petroleum products. It operates no retail gasoline stations. It sells gasoline to customers who take delivery in their own tank trucks at defendant's refinery and also delivers in its own tank trucks to customers who have storage tanks and pumps on their own premises.

[*Alleged Discriminatory Sales*]

Counts 1 and 3 charge that defendant discriminated in price in violation of 15 U. S. C. A. § 13(a)[1] by selling to certain direct buying consumers at prices lower than it charged plaintiff. The consumers to whom sales were allegedly made at a lower price are all ultimate consumers, large industrial or commercial users who do not resell any of the gasoline they purchase. None of them has ever been a customer of plaintiff. Plaintiff has never tried to sell gasoline to them and does not have the facilities to deliver gasoline to their tanks as defendant actually does.

[*Effect on Competition*]

Assuming, as alleged, that defendant did sell to these ultimate consumers at a lower price than it sold to plaintiff, such a price differential would not constitute the discrimination in price forbidden by § 13(a) unless it affected competition. The competition affected could only be that between plaintiff and defendant. Admittedly these ultimate consumers who are alleged to have bought gasoline at a lower price are not in competition with plaintiff. There is no claim that competition between plaintiff and other retail gasoline dealers has been affected, since defendant's price to them was always the same as its price to plaintiff. There is a potential competition between plaintiff and defendant as to these ultimate consumers. Although plaintiff has never sold to them or tried to sell to them, and although admittedly he has lost no customer to defendant, nevertheless as ultimate consumers of gasoline they are possible future customers of plaintiff. It is only this potential competition which could possibly have been affected by any price differential offered to these ultimate consumers by defendant.

[*Competition Between Distributor and Retailer*]

However, even this potential competition could not actually be affected by the alleged price differential. Clearly there would be no discrimination if defendant sold to these ultimate consumers at the same price at which it sells to plaintiff. But even then plaintiff could not compete with defendant for their business for it would as a matter of practical economics have to charge them more than it paid defendant for the gasoline in order to cover its expenses of operation, to say nothing of making a profit on the transaction. If plaintiff cannot successfully compete with defendant for these customers when there is no price differential, it is not harmed by any further reduction which defendant may make in the price it charges to them. *Jarrett v. Pittsburgh Plate Glass Co.* [1940-1943 Trade Cases ¶ 56,241], 131 F. 2d 674, 676; *A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corporation* [1948-1949 Trade Cases ¶ 62,355], 81 F. Supp. 890, 893. Defendant is under no obligation to sell to plaintiff at a lower price than it charges to consumers who buy directly from it in order to enable plaintiff to compete with it for the business of those customers. But unless it does this, plaintiff will never be able to compete successfully with defendant, at least with respect to price.

[*Damages*]

In fact, the only claim made by plaintiff's president as to damages actually suffered is

[1] "§ 13. Discrimination in price services, or facilities—Price; selection of customers

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

his statement that if plaintiff could have bought its gasoline at the lower price allegedly paid by other purchasers, it would have increased its profits by the amount of this price differential. This is, of course, entirely speculative. It assumes that plaintiff could have continued to sell gasoline at the same price while paying less for it, an unlikely eventuality in view of the fact that it was in competition with other retail dealers buying from defendant who would also have to receive the benefit of a lower price from defendant and could therefore lower their retail price. In any event, such a loss of profit would afford no basis for recovery unless it could be shown that it was due to a price discrimination affecting competition. It is clear that the only price differential alleged here has not actually affected competition and further as has been pointed out above, it could not have any effect on potential competition between plaintiff and defendant.

[*Services and Facilities—Credit*]

Count 2 alleges discrimination by defendant in violation of 15 U. S. C. A. § 13(e)[2] against plaintiff in favor of other purchasers of its gasoline in that defendant since June 1, 1957, has refused to sell to plaintiff, as it does to competing retail sellers of gasoline, on thirty days' credit and has placed plaintiff on a c. o. d. basis. This raises the question of whether the granting or withdrawing of credit is a service or facility with respect to which discrimination is forbidden by § 13(e). The services and facilities referred to are normally those aids connected with processing or handling or resale of the commodity by the purchaser. They include in particular various promotional and merchandising aids connected with resale of the commodity. The extension of credit is not ordinarily thought of as a service or facility of this type. It is connected only with the original sale of the product to a retailer such as plaintiff here and not with any further handling or resale. The extension of credit involves problems not found in the furnishing of ordinary promotional aids. It may involve difficult questions of business judgment as to the future willingness or ability of the customer to pay. It may entail a possibility of substantial financial loss to the creditor. It may require difficult decisions as to whether to risk financial loss by extending credit or losing a customer's business by denying it.

[*Credit Difficulties*]

The facts surrounding defendant's denial of credit to plaintiff in this case are illustrative of some of the difficulties involved. Defendant formerly extended credit to plaintiff on a 30-day basis. Plaintiff's monthly purchases amounted to $50,000 to $60,000. Beginning in 1956 plaintiff began to withhold large sums from its monthly payments on the claim that defendant owed it its legal expenses in connection with other litigation then pending between the parties. Although agreeing on April 1, 1957, to make payment, plaintiff failed to do so. On June 7, 1957, when credit was withdrawn, plaintiff owed defendant $103,045.75 and this sum was not finally paid until August 1957 after defendant had brought suit against plaintiff to recover this amount. Certainly in these circumstances defendant was clearly justified in refusing further credit to plaintiff. It would be absurd to say that § 13(e) would require it to deny credit to all its retailer customers if it wished to protect itself by denying further credit to plaintiff.

[*Conclusion*]

The conclusion must be that the extension of credit is not one of the services or facilities covered by § 13(e) and that Count 2 therefore fails to state any claim for relief under that section, and further that even if under any circumstances differentiation between customers as to credit terms might constitute a violation of § 13(e), a justifiable denial of credit such as that which occurred in this case would not be such a violation.

[*Summary Judgment Allowed*]

Defendant's motion for summary judgment is allowed.

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[2] "(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

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[¶ 69,316] Klor's, Inc. v. Broadway-Hale Stores, Inc., Admiral Corporation, Admiral Distributors, Inc., et al.

In the Supreme Court of the United States. October Term, 1958. No. 76. Dated April 6, 1959.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Injunctive Relief and Treble Damages—Necessary Allegations—Public Injury—Group Boycott Allegations Sufficient to Establish Public Injury.—A local retailer's allegations that interstate manufacturers and distributors of household appliances conspired among themselves and with a local chain of department stores not to sell to the retailer or to sell to it only at discriminatory prices and highly unfavorable terms, and that the local chain of department stores used its "monopolistic" buying power to bring about the conspiracy, showed a group boycott, one type of trade restraint and public harm the Sherman Act forbids; therefore, the dismissal, by summary judgment, of the retailer's action on the ground that public injury was not alleged or shown was reversed.

There are certain agreements whose validity under the Sherman Act depends upon surrounding circumstances; however, there are classes of restraints which from their "nature or character" are unduly restrictive and hence forbidden by the Act. As to such classes of restraints, Congress has determined its own criteria of public harm, and it is not for the courts to decide whether in an individual case injury has actually occurred. Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They cannot be saved by allegations that they are reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." The alleged boycott interferes with the natural flow of interstate commerce; it clearly has, by its "nature and character," a "monopolistic tendency." "As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.315, 2005.533, 2005.785; Monopolies, Vol. 1, ¶ 2610.720; Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

For the petitioner: Irvin Goldstein and Maxwell Keith, San Francisco, Cal.

For the respondents: Moses Lasky for Broadway-Hale Stores, Inc.; Herbert W. Clark for Admiral Corp.; H. W. Glensor for Leo J. Meyberg Co.; Robert E. Burns for Zenith Radio Corp.; Nat Schmulowitz for Emerson Radio & Phonograph Corp.; Alvin H. Pelavin for Whirlpool-Seeger Corp.; Marion B. Plant for Philco Corp.; David B. Gideon for H. R. Basford Co.; Malcolm T. Dungan for Rheem Mfg. Co.; Francis R. Kirkham for Radio Corp. of America; Everett A. Mathews for General Electric Co.; and Philip S. Ehrlich for Olympic Radio & Television, Inc., all of San Francisco, Cal.

Reversing and remanding a decision of the U. S. Court of Appeals, Ninth Circuit, 1958 Trade Cases ¶ 69,007, which affirmed a decision of the U. S. District Court, Northern District of California, Southern Division, 1956 Trade Cases ¶ 68,495.

[*Private Antitrust Charges*]

Mr. Justice Black delivered the opinion of the Court [*In full text*].

Klor's, Inc., operates a retail store on Mission Street, San Francisco, California; Broadway-Hale Stores, Inc., a chain of department stores, operates one of its stores next door. The two stores compete in the sale of radios, television sets, refrigerators and other household appliances. Claiming that Broadway-Hale and 10 national manufacturers and their distributors have conspired to restrain and monopolize commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, Klor's brought this action for treble

damages and injunction in the United States District Court.[1]

In support of its claim Klor's made the following allegations: George Klor started an appliance store some years before 1952 and has operated it ever since either individually or as Klor's, Inc. Klor's is as well equipped as Broadway-Hale to handle all brands of appliances. Nevertheless, manufacturers and distributors of such well-known brands as General Electric, RCA, Admiral, Zenith, Emerson and others[2] have conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms. Broadway-Hale has used its "monopolistic" buying power to bring about this situation. The business of manufacturing, distributing and selling household appliances is in interstate commerce. The concerted refusal to deal with Klor's has seriously handicapped its ability to compete and has already caused it a great loss of profits, goodwill, reputation and prestige.

[*Lower Court Rulings*]

The defendants did not dispute these allegations, but sought summary judgment and dismissal of the complaint for failure to state a cause of action. They submitted unchallenged affidavits which showed that there were hundreds of other household appliance retailers, some within a few blocks of Klor's who sold many competing brands of appliances, including those the defendants refused to sell to Klor's. From the allegations of the complaint, and from the affidavits supporting the motion for summary judgment, the District Court concluded that the controversy was a "purely private quarrel" between Klor's and Broadway-Hale, which did not amount to a "public wrong proscribed by the [Sherman] Act." On this ground the complaint was dismissed and summary judgment was entered for the defendants. The Court of Appeals for the Ninth Circuit affirmed the summary judgment. [1958 TRADE CASES ¶ 69,007] 255 F. 2d 214. It stated that "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured." 255 F. 2d, at 233. It held that here the required public injury was missing since "there was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality . . . ." *Id.*, at 230. The holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively. We granted certiorari to consider this important question in the administration of the Sherman Act. 358 U. S. 809.

[*Scope of Sherman Act*]

We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and § 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce. In the landmark case of *Standard Oil Co. v. United States,* 221 U. S. 1, this Court read § 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. *Id.*, at 59-60. The Court construed § 2 as making "the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof . . . ." *Id.*,

[1] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." Section 2 of the Act reads, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, states, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

[2] The appliance manufacturers named in the complaint are: Admiral Corp., Emerson Radio and Phonograph Corp., General Electric Co., Olympic Radio and Television, Inc., Philco Corp., Rheem Manufacturing Co., Radio Corp. of America, Tappan Stove Co., Whirlpool Corp., Zenith Radio Corp.

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at 61. The effect of both sections, the Court said, was to adopt the common-law proscription of all "contracts or acts which it was considered had a monopolistic tendency . . ." and which interfered with the "natural flow" of an appreciable amount of interstate commerce. *Id.*, at 57, 61; *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 609. The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U. S., at 58, 65.[3] As to these classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. *Id.*, at 63-68.[4]

[*Group Boycotts*]

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.[5] They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild v. Federal Trade Comm'n* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.*, 273 U. S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Cf. *United States v. Patten*, 226 U. S. 525, 542.

[*"Monopolistic Tendency"*]

Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another,[6] nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.[7] Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one"

[3] See also *United States v. American Tobacco Co.*, 221 U. S. 106, 179, where the Court noted that the statute forbade all "acts or contracts or agreements or combinations . . . which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."

[4] See also *United States v. Trenton Potteries Co.*, 273 U. S. 392, 395-401; *Radovich v. National Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445, 453-454. In this regard the Sherman Act should be contrasted with § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45(b), which requires that the Commission find "that a proceeding by it . . . would be to the interest of the public" before it issues a complaint for unfair competition. See *Federal Trade Comm'n v. Klesner*, 280 U. S. 19, 27. But cf. *Fashion Originators' Guild v. Federal Trade Comm'n* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457, 466-467.

[5] See, *e. g.*, *Eastern States Lumber Assn. v. United States*, 234 U. S. 600; *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291; *Fashion Originators' Guild v. Federal Trade Comm'n* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457; *Kiefer-Stewart Co. v. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211, 214; *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, 625; *Northern Pacific R. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1, 5.

[6] Compare *United States v. Colgate & Co.*, 250 U. S. 300, with *United States v. Schrader's Son, Inc.*, 252 U. S. 85; *United States v. Bausch & Lomb Optical Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707, 719-723; *Lorain Journal Co. v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143.

[7] The court below relied heavily on *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES

or "one that proceeds at full gallop." *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, 396.

[*Reversed and Remanded*]

The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court for trial.

Reversed.

[Concurring Opinion]

MR. JUSTICE HARLAN, believing that the allegations of the complaint are sufficient to entitle the petitioner to go to trial, and that the matters set forth in respondents' affidavits are not necessarily sufficient to constitute a defense irrespective of what the petitioner may be able to prove at the trial, concurs in the result.

[¶ 69,317] Lyndon H. LaRouche, a. k. a. L. H. LaRouche v. United Shoe Machinery Corporation.

In the United States District Court for the District of Massachusetts. Civil Action No. 57-392-S. Dated January 30, 1958.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—When Recovery Under Antitrust Laws May Be Barred—Statute of Limitations—Tolling of Period of Limitation—Pendency of Government Action.—A complaint filed in April, 1957, by an individual who had manufactured shoe machinery from 1938 to 1946 stated no cause of action against a manufacturer of shoe machinery who allegedly monopolized that business. Competition between the individual and the manufacturer ceased in 1946; therefore, with respect to the individual's activities in the manufacturing and marketing of shoe machinery, the manufacturer could not have invaded his interests after that time. Section 4B of the Clayton Act provides for a four-year statute of limitation for any suit brought to enforce a cause of action under the antitrust laws. Therefore, the complaint could not support a recovery based on any cause of action which arose prior to April, 1953. Hence, any cause of action which the individual might have had as a result of the alleged unlawful acts of the manufacturer during the period 1938 to 1946 was barred by the statute of limitations. Furthermore, that statute was not tolled, under Section 5 of the Clayton Act, by the pendency of a Government action against the manufacturer. The Government's case was terminated, at the latest, in June, 1954. The present action, which was brought well over a year later, was therefore barred.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100, 9010.275.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Injury to Plaintiff—Direct or Incidental Injury.—An individual engaged in the business of shoe manufacturing "research" failed to state a cause of action against a manufacturer who allegedly monopolized the manufacture of shoe machinery. It is a fundamental requirement of any claim brought under the antitrust laws that the plaintiff be an actual going business and that the injury be a direct, and not incidental, result of the defendant's unlawful acts. Since the plaintiff's business involved only the sale of information, he could not have possibly been directly injured by the manufacturer's alleged monopolization of the shoe machinery business.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275.

¶ 56,039], 310 U. S. 469, in reaching its conclusion. While some language in that case can be read as supporting the position that no restraint on trade is prohibited by § 1 of the Sherman Act unless it has or is intended to have an effect on market prices, such statements must be considered in the light of the fact that the defendant in that case was a labor union. The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives. See *United States v. Hutcheson* [1940-1943 TRADE CASES ¶ 56,091], 312 U. S. 219; *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers* [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797. Moreover, cases subsequent to *Apex* have made clear that an effect on prices is not essential to a Sherman Act violation. See, *e. g., Fashion Originators' Guild v. Federal Trade Comm'n* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457, 466.

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Monopolies—Practices as Evidence of Monopolization—Refusal to Deal—Manufacturer's "Attitude" Toward Plaintiff.—A manufacturer of shoe machinery did not violate the antitrust laws by (1) refusing to furnish an individual engaged in the business of shoe machinery "research" with its price lists, (2) dealing directly with its customers rather than through that individual, and (3) maintaining its "attitude" toward that individual. None of those acts appeared to be illegal under the Sherman Act. Denial of a generally available price list is not an unlawful means of monopolization, and there is no language in the Sherman Act which prohibits a manufacturer from dealing directly with a customer. In addition, no law subjects a corporation to damages for its "attitude" toward a particular person.

See Monopolies, Vol. 1, ¶ 2610.720.

For the plaintiff: Joseph H. Todisco, Boston, Mass., and Edward J. Dressler, Belmont, Mass.

For the defendant: Choate, Hall & Stewart, Boston, Mass., by John L. Hall, John B. Reigeluth, Conrad W. Oberdorfer, and Jeptha H. Wade.

Opinion

[*Motion*]

SWEENEY, Chief Judge [*In full text*]: There is before the court the defendant's motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. The basis of the motion is that the action is barred by the Statute of Limitations, 15 U. S. C. § 15b, and also that the plaintiff has failed to allege any unlawful acts on the part of the defendant which were in furtherance of the defendant's alleged monopoly and which injured the plaintiff.

[*Monopoly Charged*]

The original complaint made allegations to the effect that the plaintiff was a competitor of the defendant and that he was damaged by the defendant's alleged monopoly. However, upon motion duly filed by the defendant, the plaintiff was compelled to set up a more definite statement and, in that statement, he alleges that he had been engaged in the development, design, manufacturing and marketing of shoe machinery, in which business he was in direct competition with the defendant, from 1938 to 1946. After 1946, the plaintiff limited his activities to the business of "research of shoe machinery and shoe manufacturing, which embodies technical analysis of all types of shoe machinery, shoe materials, shoe designs, shoe processes and construction of shoes." The plaintiff publishes the results of this research in bulletin form, in correspondence with his clients, and in trade magazines. In addition to the above, the plaintiff also acted as a consultant to shoe manufacturers, shoe machinery manufacturers, and engineering firms. Thus, it can be seen that the plaintiff was in open competition with the defendant and vice-versa up to 1946, but that direct competition ceased at that time.

[*Statute of Limitations*]

Section 15b of Title 15 provides for a four-year Statute of Limitations for any suit brought to enforce a cause of action under Section 15. This complaint was filed on April 18, 1957 and cannot, therefore, support a recovery based on any cause of action which arose prior to April 18, 1953. With respect to the plaintiff's activities in the manufacturing and marketing of shoe machinery, it is apparent that the defendants could not have invaded his interest after 1946. Clearly, then, any cause of action which the plaintiff may have as a result of alleged unlawful acts of the defendant during the period 1938-1946, arose prior to April 18, 1953 and are consequently barred by the Statute of Limitations.

[*Tolling of Statute*]

It might be argued that the Statute of Limitations was tolled by Section 16(b) of Title 15. This contention is entirely without merit, since the government's case against this defendant, *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 [1953 TRADE CASES ¶ 67,436], aff'd. 347 U. S. 521 [1954 TRADE CASES ¶ 67,755], was terminated at the latest on June 23, 1954, and this action was not begun until well over a year later.

[*Injury to Plaintiff*]

As to the period subsequent to 1946, I find and rule that the complaint does not state a cause of action under the anti-trust

laws. It is a fundamental requirement of any claim brought pursuant to § 15 of Title 15 that the plaintiff be in an actual going business and that the injury be a direct, not incidental, result of the defendant's unlawful acts. *Peller v. International Boxing Club, Inc.* [1955 TRADE CASES ¶ 68,202], 227 F. 2d 593, *Image and Sound Service Corp. v. Altec Service Corp.* [1956 TRADE CASES ¶ 68,581], 148 F. Supp. 237, *Conference of Studio Unions v. Loew's, Inc.* [1950-1951 TRADE CASES ¶ 62,953], 193 F. 2d 51. Since the plaintiff's business now involves only the sale of information, he could not possibly have been *directly* injured by the defendant's alleged monopolization in the manufacture of shoe machinery.

[*Refusal to Deal*]

In addition, the complaint does not set forth any unlawful acts of the defendant. The plaintiff alleges that the defendant violated the anti-trust laws in that it refused to furnish the plaintiff with its price lists, that it insisted on dealing with its customers directly rather than through the plaintiff, and by its attitude toward the plaintiff. None of these acts appear to be illegal under the Sherman Act. Denial of a generally available price list is not an unlawful means of monopolization, and there is no language in the Sherman Act which prohibits a manufacturer from dealing directly with a customer, while no law has been devised yet which subjects a corporation to damages for its attitude toward a particular person.

[*Judgment on Pleadings*]

From the foregoing I find and rule that the motion for judgment on the pleadings must be allowed.

[¶ 69,318] Sandee Manufacturing Co. v. Rohm & Haas Company.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 55 C 1974. Dated March 20, 1959.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—Excluding Competitors by Supply Control, Price Fixing, and "Price Squeeze".—A manufacturer of chemical products which allegedly prevented a producer of plastic materials from competing in the manufacture of "acrylic sheet" was denied a motion to strike from a complaint references to the basic ingredient used in making that product. The manufacturer contended that references to the basic ingredient were immaterial since the producer did not claim to have ever dealt in it. That contention, however, failed to give credit to the structure of the producer's allegation. The complaint charged that the manufacturer, which occupied 70 per cent of the domestic market in that basic ingredient, accounted for the other 30 per cent by price fixing agreements with all other manufacturers, both domestic and foreign. It was alleged that, as a result of the manufacturer's all but complete actual control of the field, it kept the price of its "acrylic sheet" at a low level while keeping the price at which it sold the basic ingredient used in making the product at a high level, thus making it impossible for others to compete. The producer claimed that it was forced out of competition in the "acrylic sheet" field by the manufacturer's device of charging itself less for the basic ingredient than it charged other potential manufacturers of "acrylic sheet." That allegation was one of the central links in the structure of the producer's allegations, and the practice, if established, stood clearly condemned.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2011.247; Monopolies, Vol. 1, ¶ 2610.640, 2610.800.

Private Enforcement and Procedure—Pretrial Procedures—Production of Evidence—Interrogatories—Statute of Limitations—Period of Plaintiff's Competitive Activities—Confidential Information.—In an action charging a manufacturer of "acrylic sheet" with monopolizing the field and excluding a competitor, interrogatories seeking information beyond (1) the two-year time period of the applicable statute of limitations, and (2) the time when the competitor began production of the product, were not objectionable. In suits seeking to establish a defendant's monopoly position, discovery is not limited to such time periods. Further, interrogatories concerning 25 other products, which the manufacturer's

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answer contended were in competition with each other and the competitive product, could not be attacked since they were directly relevant to the issues raised by the pleadings. Also, interrogatories dealing with the basic ingredient used in making the competitive product were relevant to the plaintiff's claim that the manufacturer was preventing competition by keeping prices of the basic ingredient high and employing the device of charging itself less for that ingredient, in making the competitive product, than it was charging other purchasers. Interrogatories allegedly inquiring into confidential cost information and internal bookkeeping were also relevant to that charge. As to the claim that certain interrogatories sought confidential manufacturing processes, the court noted that the interrogatories were confined to information regarding the ingredients of the products without directly calling for the proportions in which the ingredients were used in manufacturing any product. There is no absolute privilege protecting such information; if otherwise relevant to the issues, it is not protected from disclosure.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiff: James C. Spangler and Erwin H. Greenberg, Chicago, Ill.

For the defendant: Robert H. Bork of Kirkland, Ellis, Hodson, Chaffetz & Masters, Chicago, Ill., and Cravath, Swaine & Moore, New York, N. Y.

Memorandum and Order

[*Treble Damage Action*]

CAMPBELL, District Judge [*In full text*]: Plaintiff is an Illinois corporation engaged in the extrusion of plastic materials which it sells in interstate commerce. Defendant is a Delaware corporation engaged in the manufacture and sale of various chemical products, including methyl methacrylate monomer from which it produces cast sheet and molding powder.

The complaint states that the action is based on Sections 1, 2, 7, and 8, of the Sherman Act and Sections 1, 4, 12, and 16, of the Clayton Act. Plaintiff seeks treble damages under Section 4 of the Clayton Act. Defendant has filed a motion to strike certain portions of the complaint and an objection to certain interrogatories propounded to it by plaintiff. I shall first consider defendant's motion to strike.

[*Alleged Exclusion of Competitor*]

Briefly, the complaint states that plaintiff is in competition with defendant in the sale of acrylic sheet; that as a result of defendant's violation of the sections of the Sherman and Clayton Acts relied on, plaintiff has been prevented from competing with defendant in the sale of acrylic sheet from on or about November 15, 1953, to and including the date when this complaint was filed which is November 1, 1955; that the acrylic sheet which plaintiff was thus prevented from manufacturing and selling in competition with defendant's sheet, is sheet extruded from a powder, known as acrylic molding powder, which in turn is manufactured from a liquid, known as methyl methacrylate monomer; that the acrylic sheet which defendant is manufacturing and selling and with which competition by plaintiff's extruded sheet has been prevented, is sheet cast directly from the methyl methacrylate monomer. The complaint alleges that since 1950 defendant has produced and sold approximately 70% of all the methyl methacrylate monomer sold in the United States, that E. I. DuPont deNemours & Co. has produced and sold approximately the remaining 30% thereof, and that *Rohm & Haas Gesellschaft mit beschraenkter Haftung,* a corporation organized and existing under the laws of West Germany, and Imperial Chemical Industries, Ltd., a corporation organized and existing under the laws of Great Britain, are the only other producers and sellers of methyl methacrylate monomer but that little if any methyl methacrylate monomer is imported into the United States. The complaint further alleges that prior to June 1, 1953, defendant has manufactured and sold approximately 80% of all the acrylic cast sheet produced in the United States, and that E. I. DuPont deNemours & Co. has produced and sold approximately the remaining 20% thereof; that after June 1, 1953, defendant has manufactured and

sold approximately 99% of all the acrylic cast sheet produced in the United States and that little or no acrylic cast sheet is imported from without the United States. The complaint further alleges that since 1950 defendant has manufactured and sold approximately 75% of all of the acrylic molding powder produced and sold in the United States, and that E. I. DuPont de-Nemours & Co. has manufactured and sold approximately the remaining 25% of such molding powder. Little or no acrylic molding powder is imported from without the United States.

[*Alleged Unlawful Acts*]

Defendant's acts, upon which plaintiff relies as violations of the cited provisions of the Sherman and Clayton Acts, are alleged to be as follows:

(1) That defendant has sought to monopolize the production, manufacture and sale within the United States, of the methyl methacrylate monomer, the cast acrylic sheet and the acrylic molding powder, in particular:

(2) That despite a reduction in the cost of the principal ingredients, the price at which methyl methacrylate monomer is sold by defendant has not been correspondingly reduced.

(3) That defendant has entered into an agreement with E. I. DuPont de-Nemours & Co., *Rohm & Haas Gesellschaft mit beschraenkter Haftung* and Imperial Chemicals Industry Ltd., to fix and maintain in the United States and in various parts of the world, the price of methyl methacrylate monomer at a level which is disproportionate to the reduced cost of the principal ingredients.

(4) That defendant has kept and is keeping the price of acrylic molding powder at a level which does not reflect the reduction in cost of the principal ingredients used in the production of methyl methacrylate monomer and thus of the powder itself.

(5) That defendant has entered into an agreement with E. I. DuPont de-Nemours & Co. to keep the price of the acrylic molding powder high disproportionately to the reduced cost of the principal ingredients.

(6) That defendant charges itself for the methyl methacrylate monomer used in its production of cast acrylic sheet a price far below the price at which it is willing to sell such monomer to any purchaser.

(7) That defendant charges itself for the methyl methacrylate monomer used in its production of acrylic molding powder a price far below the price at which it is willing to sell such monomer to any purchaser.

[*Production Control*]

The gist of plaintiff's complaint, therefore, is that as a result of defendant's all but complete alleged actual control of the production, manufacture and sale of methyl methacrylate monomer, cast acrylic sheet and acrylic molding powder, and its alleged complete control of the field through agreements with other producers, manufacturers and sellers of these materials and products, it has been able and has in fact kept the price of cast acrylic sheet low and the price at which it sells the basic ingredient, the monomer, and the other product, the powder, high thus making it impossible for others (a) to compete in the manufacture and sale of cast acrylic sheet and (b) to compete in the manufacture and sale of acrylic molding powder.

Plaintiff's position is that it has been forced out of competition with defendant in the acrylic sheet field either because the price of the molding powder, from which plaintiff extrudes its competitive product, the extruded acrylic sheet, is kept at an artificially high level through the device of keeping the basic ingredient, the monomer, high, or in the alternative, because the price of the cast acrylic sheet has been kept at an artificially low level through the device of keeping the basic ingredient, the monomer, at a considerably higher price when offered to purchasers than the price which defendant charges itself for that ingredient in the manufacture of cast acrylic sheet.

[*Motion to Strike*]

Defendant's motion to strike seeks to expunge from the complaint all reference to the methyl methacrylate monomer including reference to the price which defendant charges itself for such monomer (a) in the production of the cast sheet and (b) in the production of the acrylic molding powder, on the ground that such reference is immaterial since plaintiff does not claim ever to have purchased, utilized or sold any monomer, or to have attempted to do so, but claims solely to have been damaged with regard to loss of an investment and profits from extruded methyl methacrylate

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sheet manufactured from methyl methacrylate powder. In addition defendant objects to any reference to the activities of *Rohm & Haas Gesellschaft mit beschraenkter Haftung* and Imperial Chemical Industry, Ltd. with respect to methyl methacrylate monomer, as irrelevant and prejudicial to defendant in its effect upon a jury.

[*Alleged "Price Squeeze"*]

Defendant's position here cannot be accepted. Its contention that all reference in the complaint to methyl methacrylate monomer is irrelevant to plaintiff's claim fails to give credit to the structure of plaintiff's allegations. One of the central links in this structure is the allegation that defendant charges itself less for the basic ingredient, the monomer, from which both the cast sheet and the powder are manufactured, than it charges other potential manufacturers of such sheet and powder. Such practice, if established, stands clearly condemned in *United States v. Aluminum Co. of America* [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416, 438 (C. A. 2d Cir). Defendant argues that this central link in the structure of plaintiff's complaint is meaningless without some show of unlawful monopoly in the basic ingredient, the monomer. It points to the fact that in *United States v. Aluminum Co. of America, supra,* there was proof of restrictive practices in the basic material. While it is an interesting question whether a bare allegation of defendant's actual substantial occupation of the domestic market in the monomer coupled with an allegation that defendant is offering such monomer at a substantially higher price to potential domestic producers of cast sheet and molding powder, than that which it charges itself for the monomer in the manufacture of the sheet and molding powder, would be sufficient to charge a violation under the Sherman and Clayton Act, plaintiff in fact goes further. Plaintiff alleges, in effect, that defendant, not satisfied with its actual 70% occupation of the domestic market in the monomer, entered into an agreement with E. I. DuPont deNemours & Co., which accounts for the other 30% of the domestic market, and with *Rohm & Haas Gesellschaft mit beschraenkter Haftung* and Imperial Chemical Industries Ltd., the only other producers of the monomer, to fix prices of the monomer. This is therefore not a case where allegations of restrictive practices in the basic ingredient, of both cast sheet and molding powder, are lacking. It is, on the allegations of the complaint, a case which is on all fours with *United States v. Aluminum Co. of America, supra.* These allegations are certainly relevant and possibly essential to support the central link in the structure of plaintiff's complaint.

[*Motion to Strike Denied*]

Defendant's motion to strike is denied.

[*Interrogatories*]

I come next to the interrogatories. So far as material to the objections raised by defendant, its answer alleges, in substance, that during the period August 1950 through November 1955 plaintiff was at all times able to purchase methyl methacrylate monomer on the open market and to convert it into cast sheet or molding powder; that during the same period plaintiff was at all times able to purchase all the ingredients which go into the manufacture of methyl methacrylate monomer itself on the open market; that during the same period other firms in the United States were engaged in the manufacture and sale of cast methyl methacrylate sheet in successful competition with defendant (naming them); that during the same period other firms in the United States were engaged in the manufacture and sale of extruded methyl methacrylate sheet in successful competition with defendant's cast sheet (naming them); that cast methyl methacrylate sheet competes not only with extruded methyl methacrylate sheet but with other acrylic products, other members of the vinyl compound family, and other plastics, all of which are produced and sold in the United States by defendant's competitors. In addition defendant's answer sets up the defense of the applicable period of limitation which, in this jurisdiction, is two years. *Hoskins Coal & Dock Corp. v. Truax Traer Coal Co.* [1950-1951 TRADE CASES ¶ 62,925], 191 F. 2d 912; *Shiffman Bros. & Texas Co.,* 196 F. 2d 695.

[*Period of Limitation—Period of Competition*]

Defendant's first objection to the interrogatories is that they range over a period from August 1950 to November 1955. Defendant seeks to limit these interrogatories to the period November 1953 to November 1955 as being the two year period of limita-

tion. In any event, defendant argues that the scope of discovery ought not to precede July 1951 the month in which plaintiff entered the production of extruded methyl methacrylate sheet. Defendant's objection cannot be sustained. It is well settled that in suits of this nature, where defendant's monopoly position is sought to be established, discovery is not limited to the period of limitation (*Burroughs v. Warner Bros. Pictures Inc.* [1952 TRADE CASES ¶ 67,339], D. C. 12 F. R. D. 491), nor is it limited to a period measured from the date when plaintiff first came into existence or commenced competing activities. *Caldwell-Clements Inc. v. McGraw Hill Pub. Co.* [1952 TRADE CASES ¶ 67,261], D. C. 12 F. R. D. 531; *Hillside Amusement Co. v. Warner Bros. Pictures Inc.* D. C. 7 F. R. D. 260; see *Baush Machine Tool Co. v. Aluminum Co. of America* [1932-1937 TRADE CASES ¶ 55,057], 72 F. 2d 236, 239 (C. A. 2d Cir.) cert. den. 293 U. S. 589, 55 S. Ct. 104.

[*Relevance*]

Defendant's second objection to the interrogatories is that they are not confined to defendant's manufacture and sale of methyl methacrylate powder and cast methyl methacrylate sheet but range over other acrylic products. Defendant's main point here is that any interrogatories involving methyl methacrylate monomer are irrelevant to plaintiff's claim. This objection involves the same reasons as were urged in support of defendant's motion to strike all reference to the monomer in the complaint. My rejection of this objection proceeds on the same grounds as my rejection of defendant's motion to strike and I need not repeat them here. Defendant's other objection here is that some of the interrogatories inquire into the characteristics and uses of a whole range of acrylic products manufactured and sold by defendant and by others, there being 25 such products, and that this inquiry cannot possibly have any relevance to plaintiff's claim. I cannot say that this inquiry has no relevance to plaintiff's claim when it is part of defendant's contention in the answer that those products compete with each other and that since many of them are manufactured and sold by other firms it is unrealistic to isolate two of them, methyl methacrylate cast sheet and extruded methyl methacrylate sheet, for independent consideration on the issue of monopoly. While it is not necessary, to sustain the relevancy of interrogatories, that they be relevant directly to the issues raised by the pleadings provided that they are or may become relevant to the subject matter of the action (*Glick v. McKesson & Robbins Inc.* D. C. 10 F. R. D. 477; *Gutowitz v. Pen. R. Co.* D. C. 7 F. R. D. 144; 4 Moore's *Fed. Prac.* 2d Ed. par. 33.15), clearly where such interrogatories are relevant directly to the issues raised by the pleadings they cannot be attacked. *Browning King Co. v. Browning King & Co.* D. C. 5 F. R. D. 386.

[*Confidential Information*]

Defendant's third and final objection to the interrogatories is that they inquire into confidential cost information and defendant's internal bookkeeping, and require disclosure of defendant's confidential manufacturing processes, capacity, customers and sales. As to the cost information and defendant's internal bookkeeping, the inquiries are clearly relevant to plaintiff's claim which is that defendant is keeping prices of methyl methacrylate monomer and molding powder high and is employing the device of charging itself less for the monomer used in the production of cast methyl methacrylate sheet and molding powder than it is charging other purchasers, in order to prevent competition. I see nothing secret or confidential about such information. But defendant contends that many of the questions involving cost require disclosure of confidential manufacturing processes, and that some of the interrogatories specifically ask for such information. The general rule here is that there is no absolute privilege protecting such information from disclosure (*Louis Weinberg Associates v. Monte Christi Corp.* D. C. 15 F. R. D. 493; *Cities Service Oil Co. v. Celanese Corporation of America* D. C. 10 F. R. D. 458; 8 *Wigmore on Evidence,* 3rd Ed. Sec. 2212; 4 Moore's *Fed. Prac.* 2d Ed. par. 26.22). But the courts at their discretion will protect such information from disclosure where it appears that it is not sufficiently important in its bearing on the issues in the case. Plaintiff's interrogatories do not seek to force defendant to reveal any secret processes, concealed methods of compounding and the like. So far as they seek to obtain information with regard to defendant's products they are confined to information regarding the ingredients of such products without directly

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calling for the proportions in which such ingredients are used in the manufacture of any such product. It is well settled that such information, if otherwise relevant to the issues in the case, is not protected from disclosure. *Glick v. McKesson & Robbins Inc.* D. C. 10 F. R. D. 477; *Lenerts v. Rapidol Distributing Corp.* D. C. 3 F. R. D. 42.

Defendant's objection to interrogatories requiring disclosure of capacity, customers and sales must equally fall in view of its position in the answer that certain named companies successfully compete with it in the manufacture and sale both of the cast sheet and of the extruded sheet.

[*Objections to Interrogatories Overruled*]

Defendant's objections to interrogatories are overruled.

[¶ 69,319] Federal Trade Commission v. Hallmark, Inc., and Ben Cole, Vice President, Hallmark, Inc.

In the United States Court of Appeals for the Seventh Circuit. No. 12467. September Term, 1958—January Session, 1959. Dated March 30, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. PHILIP L. SULLIVAN, District Judge.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence and Witnesses—Investigations—Lack of Hearing on Motion to Quash Subpoenas—Subpoenas Returnable Before Investigator—Constitutionality.—A District Court properly ordered compliance with Federal Trade Commission subpoenas requiring the production of documents by a distributor of watches and the testimony of one of its officers. It was contended that the Commission violated the Administrative Procedure Act by (1) denying a motion to quash the subpoenas without a hearing, and (2) making the subpoenas returnable before an investigative employee of the Commission rather than before an independent hearing examiner. Both arguments were rejected on the ground that the investigation did not qualify as an "adjudicative proceeding" under the Administrative Procedure Act. "Adjudication" is an "agency process for the formulation of an order." An order is an agency's "final disposition" of any matter. The Commission had issued no complaint, but sought information on which to determine whether or not there was reason to believe that a violation of the Federal Trade Commission Act had occurred; the investigation itself would result in no final disposition of the rights and duties of the distributor. Neither the Administrative Procedure Act nor the requirements of due process barred the Commission from making the subpoenas returnable before the investigator. Further, the distributor would not have been entitled to a hearing on its motion to quash the subpoenas even if an adjudicative proceeding had been involved. Since enforcement of the subpoenas in a court would have resulted in a "trial of the law and the facts *de novo*," the matter was within an exception to those cases which, under the Administrative Procedure Act, require an agency hearing.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.10, 8741.55.

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence—Subpoena *Duces Tecum*—Relevance of Information Sought—Scope of Subpoena—Trade Secrets.—A District Court properly ordered a distributor of watches to comply with a Federal Trade Commission subpoena *duces tecum* which sought documents relating to the computation and publication of wholesale and retail prices for its products, invoices of sale, and corresponding customer purchase orders. It was contended that the information sought was irrelevant to an investigation of "fictitious pricing" since that offense usually consisted of misrepresentation of retail prices, while the distributor sold only to wholesalers. Even if the distributor sold only to wholesalers, it could have supplied dealers with the means of misleading the public by ticketing its products with fictitious "retail" prices. However, the Commission asserted that one facet of its investigation involved the question of whether or not the distributor was a retailer. In

that respect, the documents sought were relevant. Also, the challenged specifications of the subpoena were not unduly broad general demands, but were limited to documents pertinent to the investigation described in the subpoena. Lastly, the court did not reach the issue of whether or not the documents contained trade secrets; the investigation was not a public one, and the documents would routinely go into the Commission's files.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741.55, 8741.70.

For the petitioner-appellee: Robert Tieken, John Peter Lulinski, Richard C. Blelock, James E. Corkey, and Carlton A. Harkrader.

For the respondents-appellants: Seymour Rady.

Affirming a judgment of the U. S. District Court, Northern District of Illinois, Eastern Division, 1957 Trade Cases ¶ 68,673, ordering compliance with a Federal Trade Commission subpoena *duces tecum*.

Before Duffy, Chief Judge, and Hastings and Knoch, Circuit Judges.

[*Enforcement of FTC Subpoenas*]

Knoch, Circuit Judge [*In full text*]: The Federal Trade Commission, hereinafter called the "Commission," applied to the District Court, under authority of Section 9, Federal Trade Commission Act (15 U. S. C. A. Sec. 49) for order requiring Hallmark, Inc., to produce certain books, papers, and documents listed in a subpoena *duces tecum,* and requiring Ben Cole, Vice President of Hallmark, Inc., to testify in accordance with a subpoena *ad testificandum,* both issued by the Commission on March 14, 1958.

For several years, the Commission had been conducting an investigation (its file No. 552 1105) to determine whether Hallmark, Inc., was using misleading and deceptive representations, in violation of Section 5 of the Act (15 U. S. C. A. Sec. 45) in advertising, sale and distribution in commerce of Hallmark and Waltham watches.

In the course of the investigation, the Commission issued the two administrative subpoenas, both returnable Monday, April 7, 1958, before Daniel Zmuda, attorney and examiner, who was also the agency investigator in charge of the investigation, for the Commission.

[*Motion to Quash*]

On Friday, April 4, 1958, Hallmark, Inc., and Ben Cole, (both hereinafter referred to as "Hallmark") moved to quash the subpoenas. The motion was denied the same day by order issued over the official seal of the Commission, stating on its face: "By the Commission," and signed by the Secretary of the Commission.

In conferences between Zmuda and Hallmark's attorney, prior to the issuance of the subpoenas, Zmuda made available to Hallmark's attorney an "Outline of Procedure" which indicated that the information sought related in part to proposed analysis of the spread between cost and price, or "mark-up."

The return date of the subpoenas was changed by agreement to April 14, 1958. Hallmark's attorney on behalf of Hallmark appeared and refused obedience to the subpoenas, in so far as they pertained to invoices and purchase orders which would permit analysis of cost.

[*Order*]

On September 17, 1958, the District Judge entered an order enforcing the subpoenas and setting new return dates. This appeal followed.

[*Arguments on Appeal*]

Hallmark's position may be summarized as follows:

1. Denial of the motion to quash the subpoenas without oral hearing and opportunity to present argument violated the Administrative Procedure Act (5 U. S. C. A. Sections 1001-1011).

2. The subpoenas were improperly made returnable before an investigative employee, not qualified as a Hearing Officer under the Administrative Procedure Act, who

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sought thus to secure material for use in his investigation.

3. Mark-up between cost and the wholesale price and between wholesale and retail price is irrelevant to investigation of alleged use of deceptive representations in advertising, sale and distribution.

[*Right to Argue Motion—Administrative Procedure Act*]

Both parties agree that Hallmark's assertion of a right to oral argument on motion to quash the subpoenas presents a novel question.

[*"Adjudicative Proceeding"*]

Hallmark relies in part on certain sections of the Administrative Procedure Act which provide for hearings on agency processes exercised under a rule making, adjudicative, or licensing power. Sections 1004(b) and (c) and 1005(a) [1] cited by Hallmark follow an introductory unnumbered paragraph which reads:

"Sec. 1004 Adjudications

"In every case of adjudications required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives."

We do not agree, as will appear below, that the investigation involved in this case presently qualifies as an adjudicative proceeding. In any event, the Commission may invoke Court aid in cases of disobedience to a subpoena, which will result in "a subsequent trial of the law and facts *de novo* . . ." thus bringing the matter within the first exception noted above.

Section 1005(a) provides for an interested person to appear before any agency or its responsible officers or employees, so far as the orderly conduct of public business permits. Oral hearing before the Commission

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[1] "§ 1004. Adjudications
* * *

"Procedure

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

"Authority and functions of officers and employees

"(c) The same officers who presided at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

"§ 1005. Ancillary matters

"Except as otherwise provided in this chapter—

"Appearance and representation of parties

(a) Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding."

itself is not provided. In the instant case, the return date of the subpoenas might have had to be postponed, thus perhaps interfering with the orderly conduct of public business.

[*Court Subpoenas Distinguished*]

In contending that Rule 45(b) Federal Rules of Civil Procedure, and cases interpreting its operation, may be helpful to construe statutes granting the power of administrative subpoena, Hallmark draws a false analogy to subpoenas issued by a District Court. Disobedience to subpoenas issued by a District Court subjects the witness to possible punishment for contempt. Administrative subpoenas do not subject the witness to punishment for contempt until the agency has secured enforcement from a District Court after proceedings in which, as in the case before us, the witness has an opportunity to raise all issues pertinent to a motion to quash a subpoena alleged to be unreasonable or oppressive.

In support of its view of the requirements of a proper administrative hearing, Hallmark cites two cases which are readily distinguished. Neither involved a subpoena. *Green Spring Dairy Co. v. Commissioner of Internal Revenue,* 4 Cir., 1953, 208 F. 2d 471, concerned on adjudicative proceeding to determine a tax deficiency. *Morgan v. United States,* 1937, 304 U. S. 1, related to a rule making proceeding which fixed maximum rates to be charged by stockyards commission men.

[*Order Signed by FTC Secretary*]

The order denying Hallmark's motion to quash states that it was "Before Federal Trade Commission", (listing the participating Commissioners), and that it was determined "By the Commission". Absent evidence of irregularity, the mere fact that the Secretary signed it, as he signs all orders of the Commission, does not render the order suspect.

[*Subpoenas Returnable Before Investigator*]

Hallmark contends that the subpoenas ought to have been returnable before an independent hearing examiner as described in the Administrative Procedure Act (5 U. S. C. A. Sec. 1010) and that the Federal Trade Commission Act (15 U. S. C. A. Sec. 49) requires return before a member of the Commission, or an independent hearing examiner.

As yet, however, the Commission has issued no complaint against Hallmark. The Commission seeks to acquire information on which to determine whether or not there is reason to believe that Hallmark has been using deceptive practices in commerce, and whether or not it appears that further proceedings would be in the public interest. At the conclusion of its investigation, the Commission may or may not, issue a formal complaint giving rise to an adjudicative proceeding to which the Administrative Procedure Act would be applicable.

The Federal Trade Commission Act empowers the Commission to investigate the practices and management of any corporation engaged in commerce (15 U. S. C. A. Sec. 46) and to require by subpoena the attendance of witnesses and the production of all documentary evidence relating to any matter under investigation. (15 U. S. C. A. Sec. 49).

"Adjudication" is defined by 5 U. S. C. A. Sec. 1001(d) as meaning "agency process for the formulation of an order". The same section defines "order" as meaning "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing." The present investigation does not qualify as an adjudicative adversary process for which an independent hearing examiner is required by the Administrative Procedure Act. The investigation may eventually lead to an adjudicative proceeding, but the investigation itself will result in no final disposition of the rights and duties of Hallmark. In *Pinkett et al., v. United States,* D. Md., 1952, 105 F. Supp. 67, cited by Hallmark, the District Court did set aside an order of the Interstate Commerce Commission as invalid, in part because the examiner who conducted the hearing was not appointed in accordance with the requirements of the Administrative Procedure Act. In that case, however, the Interstate Commerce Commission had directed issuance of a certificate of public convenience and necessity, an adjudicative act, as a result of a hearing before the unqualified examiner without notice to interested parties.

It is uncontested that Section 9 of the Federal Trade Commission Act (15 U. S.

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C. A. Sec. 49)[2] grants two kinds of powers; access and subpoena. Citing *F. T. C. v. Tuttle* [1957 Trade Cases ¶ 68,669], 2 Cir., 1957, 244 F. 2d 605 as authority for its analysis of Sec. 9,[3] Hallmark argues that the Commission's duly authorized "agents" may have access to documentary evidence of any corporation, but, if it becomes necessary for the Commission to issue subpoenas, then only "members and examiners" of the Commission may examine witnesses on return of such subpoenas. Zmuda has been designated an "examiner", but Hallmark contends that "examiner" as used in the Federal Trade Commission Act must be construed to include only independent hearing examiners as defined in the later Administrative Procedure Act.

This identical question was considered in *Federal Trade Commission v. Scientific Living* [1957 Trade Cases ¶ 68,673], D. C., M. D., Pa. 1957, 150 F. Supp. 495, appeal dismissed 3 Cir., 1957, unreported, and decided adversely to Hallmark's position. Hallmark argues that the District Court in *Scientific Living* misconstrued the applicable statutory provisions. We cannot agree. The opinion seems well reasoned and sound. It has been followed in Judge Bryan's opinion filed January 14, 1959, In the Matter of the Application to Enforce an Administrative Subpoena *Duces Tecum* of the *Federal Trade Commission v. Waltham Watch Company,* a corporation [1959 Trade Cases ¶ 69,242], Case No. M 18-304, District Court, Southern District of New York.

There is no question that the Commission is here conducting an investigation under Sections 46 and 49 and not issuing a complaint under Section 45 of the Act.

Hallmark also argues that "hearing" as prescribed in the Administrative Procedure Act (5 U. S. C. A. Sec. 1006) and made specifically applicable to hearings contemplated by Section 1003 (Rule Making) and 1004 (Adjudications) was intended to apply also to Section 1005 (Ancillary Matters). We find no basis for this conclusion.

Neither the Administrative Procedure Act nor the requirements of due process bar making these subpoenas returnable before Zmuda.

[*Relevance*]

Hallmark further protests that Specifications 2 and 5 of the subpoena *duces tecum*[4] seek production of material irrelevant to the investigation.

In the District Court, Hallmark contended that as a manufacturer-importer, engaged in sale or distribution to the wholesale trade, it does not sell directly to the customer; that "fictitious prices" usually consist of misrepresentation of retail prices as "regularly sold at" or "formerly sold at" for some higher figure than the retail customer is asked to pay.

The Commission asserts that one facet of its investigation involves the question of whether Hallmark is or is not a retailer. The documents sought would be relevant in that respect. Even if Hallmark sells only to the wholesale trade, Hallmark could supply dealers with the means of misleading the public as to the customary selling prices of its watches by ticketing them with fictitious "retail" prices. The tags themselves, freely produced by Hallmark, are of little value without the actual selling prices of the watches as shown by the documents sought.

Although the Commission asserts that the subpoenas themselves must govern, rather than the "Outline of Procedure" supplied as a courtesy for Hallmark's convenience, "mark-up" would be relevant to an investi-

[2] "§ 49. Documentary evidence; depositions; witnesses

"For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence. * * *"

[3] The *Tuttle* case differs from that before us in that it concerned a subpoena duces tecum issued to third parties after complaint had been filed by the Commission charging violation of the Clayton Act.

[4] "Specification 2. All memoranda, bulletins, and other correspondence and a specimen of each different tag, label and labeling relating to the computation, establishment and publication of wholesale and retail prices for 'Hallmark' and 'Waltham' watches sold during the calendar year of 1957. * * * Specification 5. All invoices of sales of 'Hallmark' and 'Waltham' watches issued by Hallmark Inc. during the months of May 1957 and November 1957 and the corresponding customer purchase orders."

* * *

gation into alleged ticketing with fictitious retail prices.

[*Scope of Subpoenas*]

Unlike the subpoenas condemned in *F. T. C. v. American Tobacco Co.*, 1923, 264 U. S. 298; *Federal Trade Commission v. Baltimore Grain Co., etc.*, D. Md. 1922, 284 Fed. 886; *F. T. C. v. Smith, et al.*, S. D., N. Y. 1929, 34 F. 2d 323, and *U. S. v. Basic Products*, W. D. Pa., 1919, 260 Fed. 472, cited by Hallmark, Specifications 2 and 5 of the subpoena *duces tecum* before us are not unduly broad general demands but are limited to documents pertinent to the investigation described in the subpoena.

[*Trade Secrets*]

As the investigation is not a public one and the documents will routinely go into the Commission's files, we do not reach the issue of whether or not the documents contain trade secrets.[5]

[*Judgment Affirmed*]

The judgment of the District Court is affirmed.

[¶ 69,320] United States v. Crane Co.; Industries Supply Co. of San Diego; San Diego Pipe & Supply Co.; Southern Equipment & Supply Co.; and The Republic Supply Company of California.

In the United States District Court for the Southern District of California, Southern Division. Civil No. 2150-SD-W. Filed March 19, 1959.

Case No. 1393 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing—Exchanging Price Lists.—Five firms connected with the wholesale distribution of plumbing supplies in the San Diego, California, area were prohibited by a consent decree from entering into any agreement with any wholesaler to fix the price or other terms or conditions for the sale of plumbing supplies to any third person in the plumbing industry in California. In addition, the firms were prohibited from agreeing with any wholesaler, or any trade association or central agency for wholesalers, to fix or use any arbitrary, average or purported average cost of doing business, mark-up, or margin of profit in determining or fixing the price of plumbing supplies. The decree also enjoined the firms from exchanging with, or disclosing to, any wholesaler information as to the price for the sale of any plumbing supplies to third persons prior to the time when such information is generally available to the trade.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2011.218.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; and W. D. Kilgore, Jr., Homer W. Hanscom, James M. McGrath, and Stanley E. Disney.

For the defendants: Jack D. Most for San Diego Pipe & Supply Co.; Walker, Wright, Tyler & Ward, by W. D. Caldecott, for The Republic Supply Co. of Cal.; Sheppard, Mullin, Richter, Balthis & Hampton, by Gordon F. Hampton, and Fox & White, for Industries Supply Co. of San Diego; O'Melveny & Myers, by Philip F. Westbrook, Jr., for Crane Co.; Luce, Forward, Kunzel & Scripps, by Arvin H. Brown, Jr., for Southern Equipment & Supply Co.

Final Judgment

[*Consent Decree*]

JAMES M. CARTER, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on the 11th day of June, 1958, and all of the defendants having appeared and filed their respective answers to such complaint denying the sub-

[5] "§ 46. Additional powers of commission
"The commission shall also have power—
* * *
"Publication of information; reports
"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

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stantive allegations thereof; and the plaintiff and said defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any of the parties hereto in respect to any such issues;

Now, Therefore, before any testimony has been taken, and without trial or adjudication of any issue of fact or law herein, and upon consent of all of the parties hereto, it is hereby Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Plumbing supplies" shall mean those materials and fixtures customarily used in the plumbing industry in the installation or repairing of water, gas, or waste disposal systems in homes, dwellings, commercial buildings and industrial buildings, and includes, among other items, steel, soil galvanized, black and cast iron pipe, fittings, valves and trim, vitreous china lavatories, sinks, bathtubs, water closets, copper tubing and water heaters;

(B) "Wholesaler" shall mean a person engaged in the business of selling plumbing supplies in large lots and quantities to "third persons" in the plumbing industry. A manufacturer who sells plumbing supplies to third persons in the plumbing industry in the State of California shall be deemed a "wholesaler" as herein defined, but only with respect to such sales;

(C) "Person" shall mean an individual, partnership, firm, association, corporation or other business or legal entity;

(D) "Defendants" shall mean those defendants who consent to the entry of this Final Judgment, except that the defendant Republic Supply Company of California shall be subject to the provisions of this Final Judgment only as to activities carried on by or through its Division now known as Mission Supply Company;

(E) "Third Person" in the plumbing industry shall mean plumbing contractors, retailers of plumbing supplies, and purchasers in large quantities of plumbing supplies for use in water, gas or waste disposal systems.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its officers, directors, agents and employees, and all persons in active concert or participation with any defendant who shall receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Price Fixing*]

Each of the defendants is enjoined and restrained from:

(A) Entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program with any wholesaler to fix, stabilize or maintain the price, mark-up, or other terms or conditions for the sale of plumbing supplies to any third person in the plumbing industry in the State of California;

(B) Exchanging with or disclosing to any wholesaler information as to the price for the sale of any plumbing supplies to third persons in the plumbing industry in the State of California prior to the time when such information is available generally to the trade; provided, however, that such information may be disclosed or exchanged to or with non-competing wholesalers in advance of such release where the ownership and majority control of said non-competitor is substantially the same as that of the defendant disclosing or exchanging said information so long as said ownership and majority control continues;

(C) Entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or agreement with any wholesaler, or any trade association or central agency for wholesalers, to fix or use any arbitrary, average or purported average

cost of doing business, mark-up or margin of profit in determining, fixing, or maintaining the price of plumbing supplies to third persons in the plumbing industry in the State of California.

V

[*Enforcement and Compliance*]

For the purposes of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its principal office, and subject to any legally recognized privilege, be permitted:

(A) Reasonable access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of such defendant, and without restraint or interference from it, to interview officers and employees of such defendant (who may have counsel present) regarding such matters.

Upon written request, any defendant shall submit such written reports to the Department of Justice with respect to matters contained in this Final Judgment as from time to time may be necessary to the enforcement of said Final Judgment. No information obtained by the means provided in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VI

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, and for the enforcement of compliance therewith and the punishment of violations thereof.

[¶ 69,321] United States v. Fur Shearers Guild, Inc.; Philip Amster; Louis Ferrari; Samuel Weinstein; Peter Del Bianco; William Bet; and Milton Husack.

In the United States District Court for the Southern District of New York. C 157-289. Filed April 1, 1959.

Case No. 1427 in the Antitrust Division of the Department of Justice.

Sherman and Clayton Antitrust Acts

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Right to Plead *Nolo Contendere*.—A motion by defendants to withdraw their pleas of not guilty and interpose pleas of *nolo contendere* was denied. The court, in rejecting the plea under Rule 11 of the Federal Rules of Civil Procedure, noted that (1) the Government opposed the motion, making a detailed offer of proof which purported to demonstrate a persistent and long continued course of illegal conduct by the defendants, (2) the defendants were charged with a conspiracy to fix prices, one of the more serious infractions of the law, (3) there was an absence of countervailing considerations of sufficient weight, and (4) private litigants would be deprived of the *prima facie* case they would have, under Section 5 of the Clayton Act, if the defendants should be found guilty upon trial.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.860.

For the plaintiff: Richard B. O'Donnell, Augustus A. Marchetti, and Paul D. Sapienza, Attorneys, Department of Justice.

For the defendants: Landy, Cash & Gold, and Arthur Cooperman, all of New York, N. Y.

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[*Nolo Contendere*]

PALMIERI, District Judge [*In full text*]: The oral motion of the defendants, for permission to withdraw their pleas of not guilty and interpose pleas of *nolo contendere,* is denied. In view of the Government's opposition, and its detailed offer of proof, purporting to demonstrate a persistent and long continued course of illegal conduct by the defendants, and absent countervailing considerations of sufficient weight, I feel impelled to withhold the consent required by Fed. R. Crim. P. 11. I note also that the defendants are charged with a conspiracy to fix prices, one of the more serious infractions of the law; and that the civil action brought by the Government was terminated on consent [1959 TRADE CASES ¶ 69,312], thus making the presumption available to private litigants under Section 5 of the Clayton Act, 38 Stat. 731 (1914), as amended, 15 U. S. C. § 16 (Supp. V), unavailable here.

The considerations to be evaluated in ruling on a motion of this sort have been set forth by Judge Weinfeld in *United States v. Standard Ultramarine & Color Co.* [1955 TRADE CASES ¶ 68,237], 137 F. Supp. 167 (S. D. N. Y. 1955), and I concur with the views expressed in that opinion.

I need hardly add that my determination of this motion should not be taken as any indication that I have reached any conclusion, however tentative, on the guilt of the defendants. That remains to be proven in a trial at which they are accorded the presumption of innocence and where the Government has the burden of proof.

So Ordered.

[¶ 69,322] Frank A. Kerran and Cameron A. Kerran, Individuals and Co-Partners Trading and Doing Business as Double Eagle Refining Company v. Federal Trade Commission.

In the United States Court of Appeals for the Tenth Circuit. November Term—1958. No. 5850. Dated March 19, 1959.

On Petition for Review of an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresenting Character of Product—Failure to Make Material Disclosures—Failure to Disclose Fact of Motor Oil's Previous Use.—Oil refiners' practice of marketing re-refined lubricating motor oil in containers indistinguishable from those used generally to market oil refined from virgin crude oil, without any disclosure that such re-refined oil was made from previously used oil, constituted a deceptive practice within the intent and meaning of Section 5(a) of the Federal Trade Commission Act. The Commission's hearing examiner found, in effect, that a substantial portion of the public preferred new and unused motor oil to that produced by the re-refining of crankcase drainings and other previously used motor oil. While it might have been true, as contended by the refiners, that their oil was just as good in quality as that produced from virgin crude oil, the public was entitled to know the facts and to make its own choice between new and re-refined oil, even though that choice was predicated, at least in part, upon ill-founded sentiment, belief, or caprice.

See Unfair Practices, Vol. 2, ¶ 5081.552, 5105.61.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Validity of Cease and Desist Order—Power to Prevent Deceptive Practices—Tendency of Practices to Deceive.—A Federal Trade Commission order which required oil refiners to cease and desist from selling lubricating oil composed in whole or in part of reclaimed or previously used oil, without disclosing such prior use by a clear and conspicuous statement to that effect on the container, was not invalid since the Commission is empowered to

prevent unfair methods of competition and unfair or deceptive acts or practices declared unlawful by Section 5(a) of the Federal Trade Commission Act. Under the enlarged sweep of the statute, the Commission may take appropriate action to prevent such practices in interstate commerce which are inimical to the public interest. The refiners contended that the order was invalid since their re-refined oil was as good in quality as oil refined from virgin crude oil, there was no prejudice to either the public or their competitors, and disclosure would result in injury to their business, thereby restricting competition and causing a waste of natural resources. The vice, however, that made the acts and practices of the refiners unfair and deceptive business practices, within the meaning of Section 5 of the Act, was the deception of the purchasing public.

See Unfair Practices, Vol. 2, ¶ 5201.341.

For the petitioners: Josh Lee (John B. Ogden was with him on the brief).

For the Federal Trade Commission: E. K. Elkins (Earl W. Kintner, General Counsel, and James E. Corkey, Assistant General Counsel, were with him on the brief).

Affirming and enforcing a Federal Trade Commission cease and desist order in Dkt. 6432.

Before BRATTON, Chief Judge, and PICKETT and BREITENSTEIN, Circuit Judges.

[*Labeling Motor Oil*]

BRATTON, Chief Judge [*In full text*]: This proceeding is here on petition to review an order of the Federal Trade Commission. Petitioners Frank A. Kerran and Cameron A. Kerran, partners doing business under the trade name of Double Eagle Refining Company, at Oklahoma City, Oklahoma, are engaged in the business of re-refining previously used lubricating oil, principally crankcase drainings collected at gasoline stations; packaging the re-refined oil in tin cans of the same general size, kind, and appearance as those used for packaging lubricating oil produced directly from virgin crude; and selling the re-refined oil without indicating on the containers or otherwise that the commodity is produced from previously used oil. Some of the supply of previously used oil comes to the refinery of petitioners from other states, and some of the finished product is sold and distributed in interstate commerce. The order of the Commission required petitioners to cease and desist from representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil; and from advertising, offering for sale, or selling lubricating oil that is composed in whole or in part of oil which had been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the container.

[*Public Preference—Deceptive Practice*]

The order is challenged upon the ground that the Commission erred in holding that the methods of competition employed by the petitioners are unfair, because the Commission did not base its decision upon all of the pertinent facts of record but upon only a minor part of them; because there is little likelihood that the public is misled since re-refined oil is identical to that which is refined directly from virgin crude; because when previously used oil is re-refined it loses its identity as previously used oil and is now oil in every sense of the term; and because the circumstances which must accompany seller silence in order for it to constitute an unfair method of competition are not present in the proceeding. It is the position of petitioners that lubricating oil does not wear out; that use does not change the chemical composition of the oil or its molecular structure but merely contaminates it; that contamination from use as well as additives put into the oil by the prior producer are eliminated by the re-refining process; that the re-refined oil which petitioners sell is new oil; and that such re-refined product is the equivalent in quality of lubricating oil produced from virgin crude. Evidence was adduced at the hearing before the hearing examiner to the effect that lubricating oil does not wear out with use; that use does not change the chemical composition of the oil or its molecular structure but merely contaminates it; and that contamination from use as well as additives put into the oil by the prior pro-

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ducer are eliminated by the re-refining process. But the hearing examiner in the first instance found in effect that a substantial portion of the public who purchase lubricating oil prefer new and unused oil to that produced by the re-refining of crankcase drainings and other previously used oil; that the failure of petitioners to disclose that their oil is made from previously used oil has a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new and unused made from virgin crude oil; and that such failure has a tendency and capacity to cause such members of the public to purchase petitioners' oil as a result of the erroneous and mistaken belief so engendered. These crucial findings were adopted by the Commission. They were adequately sustained by evidence adduced upon the hearing and therefore must stand on review. It may be that lubricating oil does not wear out with use. It may be that use does not change the chemical composition or molecular structure of oil. It may be that contamination from use and additives put into oil by the prior producer are eliminated by the re-refining process of petitioners. And it may be that the oil sold by petitioners is just as good in quality as lubricating oil produced from virgin crude. But the public is entitled to know the facts with respect to the lubricating oil sold by the petitioners being produced from previously used oil and then make its own choice with respect to purchasing such oil or oil produced from virgin crude, even though the choice is predicated at least in part upon ill-founded sentiment, belief, or caprice. *Federal Trade Commission v. Algoma Lumber Co.* [1932-1939 Trade Cases ¶ 55,041], 291 U. S. 67. And therefore the practice of the petitioners in marketing their re-refined lubricating oil in containers indistinguishable from those used generally to market lubricating oil refined from virgin crude, without any disclosure that it is made from previously used oil, constitutes a deceptive practice within the intent and meaning of section 5(a) of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U. S. C. A. § 45(a). *Mohawk Refining Corp. et al. v. Federal Trade Commission* [1959 Trade Cases ¶ 69,276], CA-3, — F. (2d) —; *Royal Oil Corp., et al. v. Federal Trade Commission* [1959 Trade Cases ¶ 69,234], CA-4, — F. (2d) —.

[*Prejudice to Public—Power of FTC*]

Petitioners urge further that the order of the Commission is invalid because the purchasing public is not prejudiced by their methods of competition since the public preference is for quality in lubricating oil and not for any particular origin; because the competitors of petitioners are not prejudiced by the methods of competition which petitioners practice since petitioners do not enjoy any unfair advantage over their competitors; because enforcement of the order would result in actually restricting competition since it would destroy the business of petitioners and other re-refiners and thereby eliminate them as potential competitors of the major oil companies; because it is contrary to public policy to require useless disclosures which would result in injury to a company engaged in the business of re-refining oil and selling it in interstate commerce; and because it would result in wasting unnecessarily a precious natural resource. The general trend of the argument in support of the several grounds of challenge to the order is that the practices of petitioners do not prejudice the public; that they do not prejudice the competitors of petitioners; that disclosure would result in injury to the business of petitioners; and that disclosure would result in waste of a natural resource. But section 5(a) of the Act, *supra*, as amended in 1938, declares unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce to be unlawful; and with exceptions not having any present material bearing, it empowers the Commission to prevent such methods, acts, or practices. Under the statute, as amended, the Commission is vested with power to prevent the use of unfair methods of competition in commerce and also to prevent the use of unfair or deceptive acts or practices in commerce. Under the enlarged sweep of the statute, the Commission may take appropriate action to prevent unfair or deceptive practices in commerce which are inimical to the public interest. *Thomas v. Federal Trade Commission*, 116 F. (2d) 347; *Wolf v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,326], 135 F. (2d) 564; *Globe Cardboard Novelty Co. v. Federal Trade Commission* [1950-1951 Trade Cases ¶ 62,947], 192 F. (2d) 444; *Koch v. Federal Trade Commission* [1953 Trade Cases ¶ 67,526], 206 F. (2d) 311. The vice in the acts and

practices of petitioners lies in the deception of the purchasing public of lubricating oil with respect to the oil sold by petitioners being re-refined oil instead of refined oil from virgin crude. And that vice constitutes an unfair and deceptive business practice within the intent and meaning of section 5 of the Act, *supra. Mohawk Refining Corp. et al. v. Federal Trade Commission, supra; Royal Oil Corp. v. Federal Trade Commission, supra.*

[*Order Affirmed*]

A decree will be entered affirming and enforcing the order of the Commission.

[Dissenting Opinion]

BREITENSTEIN, Circuit Judge (dissenting) [*In full text*]: The majority opinion sustains the Federal Trade Commission in requiring the manufacturer of an admittedly high quality domestic product to disclose in its advertising and on its container labels the source of its product. It does so in the absence of any claim that such manufacturer has ever made a deceptive or misleading statement in connection with the marketing of the product, re-refined lubricating oil. A deceptive practice is said to result from the marketing of the product "in containers indistinguishable from those used generally to market lubricating oil refined from virgin crude, without any disclosure that it is made from previously used oil." The deception is inferred from the assumption that the buying public prefers a lubricant produced from so-called virgin crude oil.

[*Quality of Product*]

Certain facts shown by the uncontradicted evidence are pertinent. After crude oil is taken from the ground it is refined first to secure the more volatile distillates such as gasoline. The residuum is then refined again to obtain lubricating oils. Oil does not lose its chemical composition or its molecular structure by use. It does not wear out. The petitioner takes oil which has been drained from automobile crankcases and refines it just as the residuum of crude oil is refined after the capture of the more volatile distillates. The product so obtained has as high quality as that obtained from the residuum of the gasoline distillation.

Many minerals are processed and reprocessed and used and re-used over and over again. In this regard oil is no different from iron, gold and silver. The saving, accumulation, reprocessing and re-use of dental gold, silver ornaments and automobile steel does not differ in basic concept from the similar operations in regard to oil disclosed by this record.[1] The assumption that a purchaser is deceived when he buys a good oil derived from a secondary processing operation is no different from an assumption that a purchaser of a new automobile is deceived if the steel in that automobile has been derived from the processing of scrap iron obtained from a junk yard.

Section 5(a) of the Federal Trade Commission Act, as amended,[2] empowers and directs the Commission to prevent the use of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Here the unfair method and the unfair or deceptive practice are said to arise from the use of the same type container as that used by manufacturers who produce from virgin crude and from the failure to disclose on the container that the lubricant is produced from previously used oil. There is nothing unfair or deceptive in using the same, common tin can type of container that is used for a multitude of products. The action of the Commission depends solely on the fact that the source of the oil is not disclosed.

[*Public Preference*]

With due deference to administrative expertness in fact finding, I see nothing in the record to sustain a finding that the public prefers lubricating oil produced from virgin crude. As testified, in substance, by the only witness who covered the attitude of the public,[3] the purchaser desires quality and buys by brand names. Granting that a purchaser is entitled to get what he asks for, even if he is put off with something as good or better,[4] quality is material in determining whether there is customer deception in circumstances where there is no misrepresentation. The fact that a buyer desires a good oil or a brand oil does not mean that he has any interest in the origin of that oil. The assumption that the public prefers a lubri-

[1] The most common use and re-use of a natural resource probably occurs in the utilization of water.

[2] 15 U. S. C. § 45(a).

[3] The witness, a distributor for a major oil company, was called by and testified for the Commission.

[4] See *Ohio Leather Co. v. Federal Trade Commission*, 6 Cir., 45 F. 2d 39, 41.

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cant produced from virgin crude does not follow from the fact that the public seeks to buy a good oil. Yet the Commission makes such an assumption and from it finds a deception.

The product involved here is admittedly of high quality and the petitioner has admittedly made no false statements in regard to either the product or its use. Hence this is not a case for the Commission to exercise its well-recognized negative power of preventing falsity by forbidding certain conduct. Instead it is one where the Commission exercises an affirmative power to require a statement as to origin for the prevention of a falsity which is not shown to exist.

In the foreign origin cases the power of the Commission to require an affirmative disclosure of origin has been upheld.[5] In such cases the assumption of a popular preference for homemade goods is entirely reasonable and is supported by the provision of the tariff laws requiring the marking of imported goods with the name of the country of origin.[6]

[*Cases Considered*]

Royal Oil Corporation v. Federal Trade Commission, 4 Cir., — F. 2d —, involved reclaimed, not re-refined, oil,[7] and did not discuss the issues raised in this case. It is obvious that the sale of reclaimed oil without appropriate disclosure may be a deception. The same conclusion does not follow when the oil is re-refined as then the quality is as high as that found in oil produced from virgin crude.

Mohawk Refining Corporation v. Federal Trade Commission [1959 Trade Cases ¶ 69,276], 3 Cir., — F. 2d —, affirmed an order similar to that involved here and did so in a case concerning re-refined oil. Reliance was placed on the statement in *Federal Trade Commission v. Algoma Lumber Co.* [1932-1939 Trade Cases ¶ 55,041], 291 U. S. 67, 78, that the public is entitled to get what it chooses, though the choice be dictated by caprice or ignorance. *Algoma* was a case of mislabeling.[8] Neither in *Mohawk* nor in the case at bar was there any false labeling. Although the right to make a capricious or ignorant choice is protected against misrepresentation, the recognition of such right does not require that a manufacturer foresee caprice or ignorance and not only refrain from misrepresentation but also affirmatively state every fact regarding his product which might conceivably be deemed important by the prejudiced and uninformed.

Mohawk quotes approvingly from *P. Lorillard Co. v. Federal Trade Commission* [1950-1951 Trade Cases ¶ 62,747], 4 Cir., 186 F. 2d 52, 58, that: "To tell less than the whole truth is a well known method of deception * * *." The validity of such statement is unquestionable but it has no applicability. The omission here of the statement of source has no relation to the quality or usability of the product. Nondisclosure may amount to a deceptive practice when it is accompanied by an affirmative act calculated to deceive, when it has a bearing on quality or usability, or when the nondisclosed facts pertain to national policy. None of these situations is found here.

[*Power of FTC*]

It may be that advertisements and labels should be much more informative than they ordinarily are in current custom and practice. But Congress has never given to the Commission unrestricted power affirmatively to require informative statements. Its pertinent power is limited to the prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce. Granting that the Commission is the expert body to determine the remedy necessary to eliminate such methods or practices,[9] nevertheless, the affirmative function of requiring informative disclosures may only be exercised to prevent unfairness or deception.[10] Believing as I do that nondisclosure of source of origin of product, standing alone and unaccompanied by any of the factors which I have mentioned, does not constitute unfairness or deception, I am brought to the con-

[5] Eg. *L. Heller & Son v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,931], 7 Cir., 191 F. 2d 954; *American Tack Co. v. Federal Trade Commission* [1954 TRADE CASES ¶ 67,713], 2 Cir., 211 F. 2d 239.

[6] See 19 U. S. C. § 1304.

[7] Reclaimed oil is used oil which has been strained or otherwise treated to remove contaminants. Re-refined oil is oil that has been produced by a refining process similar to that used in producing oil from virgin crude.

[8] "Yellow pine" lumber was falsely labeled as "white pine."

[9] *Jacob Siegel Co. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,451], 327 U. S. 608, 612.

[10] Cf. *Alberty v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,583], D. C. Cir., 182 F. 2d 36, 39, cert. denied 340 U. S. 818.

clusion that there is no rational basis for the findings, and no legal basis for the order, of the Commission. It is not necessary to comment on the far-reaching implications of the Commission's action under present conditions wherein scientific advances establish methods of reprocessing without loss of quality and thus permit the use and re-use of many substances which are in limited supply.

I most respectfully dissent from the opinion of my associates.

[¶ 69,323] **Afran Transport Company; Calendar Navigation Corp.; California Transport Corporation; Carib Marine Company; Grand Bassa Tankers, Inc.; Hemisphere Transportation Corporation; Kupan Transport Company; Mobil Tankers Company; S. A. Norness Shipping Company, Inc.; Panama Transport Company; Seatankers, Inc.; Tanker Transport, Inc.; Theater Navigation Corp.; Trans-Atlantic Navigation Corporation; and Universe Tankships, Inc. v. National Maritime Union; Seafarers International Union of North America; Joseph Curran, individually and as an officer and member representative of all the members of the National Maritime Union; and Joseph Algina, individually and as an officer and member representative of all the members of the Seafarers International Union of North America.**

In the United States District Court for the Southern District of New York. Civil 140-156. Filed February 24, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Labor Unions—Restrictions on Injunctive Relief—Status of Unions Under Norris-LaGuardia Act—Alleged Conspiracy to Picket and Boycott Foreign Ships—Labor Dispute.—Foreign shippers, in an action seeking to enjoin two seamen's unions from picketing or boycotting their ships, were entitled to go to trial on their contentions that (1) there was no "labor dispute" involved, (2) the unions combined with a non-labor group, and (3) the National Labor Relations Board did not have exclusive primary jurisdiction. The shippers contended that no "labor dispute" was involved since the unions were not acting pursuant to a legitimate labor objective, but were motivated by political, international, and governmental considerations. If that was so, the unions might not be entitled to the protection which the Norris-LaGuardia (anti-injunction) Act would otherwise give them. Also, the shippers contended that an international union with which the unions allegedly combined was not, in fact, a labor union acting in furtherance of a labor purpose. That contention was relevant to the question of whether or not the unions had combined with a non-labor group. A further question of fact, whether or not the National Labor Relations Board had exclusive primary jurisdiction, also remained open for final determination at a trial, since it appeared that some of the shippers operated no ships that had been transferred from United States to foreign registry.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.265, 2441.34, 2453.

Private Enforcement and Procedure—Injunctive Relief from Violations of Antitrust Laws—Pretrial Procedures—Summary Judgment—Issues of Fact.—An action by foreign shippers to enjoin two seamen's labor unions from picketing and boycotting their ships raised numerous issues of fact and could not be decided on the unions' motion for summary judgment. In a prior opinion, 1958 Trade Cases ¶ 69,220, the court had denied the shippers' motion for a temporary injunction where it appeared, from the showing made at that time, that the controversy involved a "labor dispute" and that the court, therefore, had no jurisdiction under the Norris-LaGuardia Act to grant injunctive relief. However, successfully resisting a motion for a preliminary injunction does not entitle a party to summary judgment, without a trial. The shippers' failure to make out the clear and convincing showing which would have entitled them to a preliminary injunction did not mean that there were no issues of fact to be tried. While they failed to establish, in their motion for a preliminary injunction, that the unions were not acting pursuant to a legitimate labor objective and that no "labor dispute" was involved, the shippers were entitled to present evidence on that question at a trial. Other questions of fact raised by the affidavits were whether or not the

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unions had combined with a non-labor group, and whether or not the National Labor Relations Board had exclusive primary jurisdiction of the controversy.

See Private Enforcement and Procedure, Vol. 2, ¶ 9026.60.

For the plaintiffs: Maclay, Morgan & Williams (C. Dickerman Williams, Hugh S. Williamson, and Granville Whittlesey, of counsel), New York, N. Y.

For the defendants: Cooper, Ostrin & De Varco (Herman E. Cooper, H. Howard Ostrin, George A. Nicolau, and Eugene N. Sosnoff, of counsel), New York, N. Y., for National Maritime Union and Joseph Curran; Seymour W. Miller (Seymour W. Miller, William Feldesman, Milton Horowitz, and Ralph P. Katz, of counsel), Brooklyn, N. Y., for Seafarers International Union of North America, AFL-CIO, and Joseph Algina.

Amicus Curiae: Bigham, Englar, Jones & Houston (Leonard J. Matteson and J. Bond Smith, Jr., of counsel), New York, N. Y., for the Republic of Panama, *Amicus Curiae;* and Burlingham, Hupper & Kennedy, New York, N. Y., for the Republic of Liberia, *Amicus Curiae.*

For a prior opinion of the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 69,220.

Memorandum

[*Injunction Sought*]

Bryan, District Judge [*In full text*]: This is an action by twelve Liberian and three Panamanian corporations to enjoin the defendant unions and two named officers of the defendant unions from picketing, boycotting or inducing others to picket or boycott plaintiffs' ships or from interfering in any manner with their operation.

[*Alleged Labor Union Conspiracy*]

The complaint alleges, in substance, that the defendants, acting in concert with the International Transport Workers Federation, are engaging in a conspiracy to restrain the foreign commerce of the United States in violation of the Sherman Anti-Trust Act and to the irreparable damage of the plaintiffs.

The case originally came before me on plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss the complaint. At that time the defendants had announced their intention of staging a five day demonstration against plaintiffs' vessels and because of the urgency of the matter and the need for haste, I filed a lengthy opinion on the following day in which I denied plaintiffs' motion for a preliminary injunction, while reserving decision on the cross-motion to dismiss the complaint. I will now pass on the cross-motion upon which the parties have submitted additional material.

[*Motion to Dismiss*]

The motion to dismiss is based upon the ground (1) that the court lacks jurisdiction of the subject matter of the action because exclusive primary jurisdiction lies in the National Labor Relations Board, and (2) that the complaint fails to state a claim upon which relief can be granted.

In view of the fact that affidavits have been submitted both in support of and in opposition to the cross-motion, it will be treated as a motion for summary judgment under Rule 56, F. R. C. P. See Rule 12(b), F. R. C. P.

[*Prior Proceedings*]

The facts in this important and far-reaching case were fully set forth in my prior opinion [1958 Trade Cases ¶ 69,220] (Civil 140-156, December 19, 1958, — Fed. Supp. —) and need not be repeated here.

[*"Labor Dispute"*]

In denying plaintiffs' motion for preliminary relief I held that it appeared, from the showing made before me, that the controversy was one involving or growing out of a "labor dispute" and that this court, therefore, had no jurisdiction under the Norris-LaGuardia Act, § 4, to grant injunctive relief. I also indicated that under the Labor Management Relations Act of 1947 the case might be one which lay within the exclusive jurisdiction of the National Labor Relations Board and that, if this was so, only the Board, after following the procedure outlined in the Act, could petition the courts for injunctive relief.

The standards used to determine the motion for a preliminary injunction were necessarily quite different from those which

must be applied to the motion at bar. Plaintiffs' failure to make out the clear and convincing showing which would entitle them to a preliminary injunction is not in any way determinative of the present motion nor does it mean that there are no issues of fact to be tried. Indeed, if substantial issues of fact requiring a trial have been raised this in itself is usually ground for denial of a motion for a preliminary injunction. Successfully resisting a motion for a preliminary injunction does not entitle a party to summary judgment without a trial. See *Anderson-Friberg, Inc. v. Justin R. Clary & Son, Inc.* [1950-1951 TRADE CASES ¶ 62,852], D. C. S. D. N. Y., 98 F. Supp. 75, 83. See, also, *Arnstein v. Porter,* 2 Cir., 154 F. 2d 464.

[*Issues of Fact*]

The affidavits before me raise numerous issues of fact, and the case is therefore not one which can properly be disposed of on a motion for summary judgment. Plaintiffs contend that the defendants are not acting pursuant to a legitimate labor objective, but that they are motivated by political, international and governmental considerations and that there is therefore no "labor dispute" within the meaning of the Norris-LaGuardia Act. While plaintiffs did not establish this to be so on the affidavits submitted in support of their motion for a preliminary injunction, they are entitled to an opportunity to present evidence bearing on this question upon the trial. If, as the plaintiffs claim, the defendants are not acting pursuant to a legitimate labor objective, they may not be entitled to the protection which the Norris-LaGuardia Act would otherwise give them. See *Allen Bradley Co. v. Local Union No. 3* [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797; *I. P. C. Distributors v. Chicago Moving Pictures Machine Operators* [1955 TRADE CASES ¶ 68,107], D. C. N. D. Ill., 132 F. Supp. 294.

A question has also been raised as to whether the International Transport Workers Federation with which defendants are claimed to have combined is, in fact, a labor union acting in furtherance of a labor purpose. This is of course relevant in determining whether the defendants have combined with a labor or a non-labor group within the meaning of *Allen Bradley Co. v. Local Union No. 3, supra.* Plaintiffs are entitled to develop this more fully upon the trial.

Furthermore, it appears that some of the plaintiff corporations do not operate any ships which have been transferred from United States to foreign registry and have no United States affiliate which has ever transferred ships to foreign registry. Whether or not, under these circumstances, the National Labor Relations Board has exclusive primary jurisdiction over the controversy remains open for final determination. These complex questions should not be disposed of upon affidavits.

The mention of these issues of fact requiring a trial is sufficient to indicate that the motions for summary judgment should be denied. See *Arnstein v. Porter, supra; Doehler Metal Furniture Co. v. United States,* 2 Cir., 149 F. 2d 130. It is unnecessary to discuss any other issues of fact there may be.

[*Dismissal Denied*]

Defendants' motions for summary judgment are denied.

So ordered.

[¶ 69,324] Fleischmann Distilling Corp. v. Frontier Liquor Corp.

In the New York Supreme Court, New York County, Special Term, Part I. 141 N. Y. L. J., No. 65, page 13. Dated April 6, 1959.

Sherman and New York Antitrust Laws

Combinations and Conspiracies—Antitrust Violations as Defenses—Where Alleged Antitrust Violation Is Collateral to Right Sued Upon.—A plaintiff's alleged illegal restraint of trade did not bar it from recovering the price of goods sold where the defendant did not deny that the price was fair and reasonable, and similar to the price charged to others. A provision of a contract of sale, even though it may be in violation of the antitrust laws, does not bar the right to recover the price of goods sold where that illegal

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provision is not an inherent part of the contract and is separable from the promise or obligation to pay for the goods.

See Combinations and Conspiracies, Vol. 1, ¶ 2407.34; Private Enforcement and Procedure, Vol. 2, ¶ 9042.475.

[*Antitrust Violations as Defense*]

LEVEY, Justice [*In full text except for omissions indicated by asterisks*]: Plaintiff moves for summary judgment and for other relief. The complaint states two causes of action, the first an account between plaintiff and defendant and the second involving payment for alcoholic beverages sold and delivered by plaintiff to defendant, during the period between May 14, 1958, and June 17, 1958, in the net sum of $128,944.85. Defendant in its answer, in addition to denials of liability, has pleaded five defenses, all concerning illegal practice by the plaintiff, to wit, restraint of trade. As a matter of fact, in no instance is there any denial by defendant that the price of the goods sold was fair and reasonable and similar to that charged to all other distributors and wholesalers. * * *

Finally, it is well settled that where a provision of a contract of sale, even though it may be in violation of anti-trust laws, is not an inherent part of the contract and is separable from the promise or obligation to pay for the goods sold, such illegal provision does not bar the right to recover the price (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.;* 236 U. S. 165; *General Aniline & Film Corp'n v. Bayer* [1953 TRADE CASES ¶ 67,552], 305 N. Y. 479; *Jamaica Sash & Door, Inc., v. Prudential Imp. Service, Inc.* [1954 TRADE CASES ¶ 67,896], 137 N. Y. S. 2d 593). Accordingly, the motion for summary judgment is granted. The plaintiff's prayer for the other relief, as well as the cross-motion, is academic. Settle order.

[¶ 69,325] Empire Sportswear, Inc. v. Newsday, Inc.

In the New York Supreme Court, Appellate Division, Second Department. 141 N. Y. L. J., No. 66, page 13. Dated April 7, 1959.

Appeal from the New York Supreme Court, Nassau County. HOGAN, Justice.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Advertising or Offering for Sale—Reasonableness of Newspaper's Refusal to Publish Advertisements That Violate Fair Trade Laws—Newspaper's Liability for Publishing Unlawful Advertisements.—A trial court properly refused to direct a newspaper to publish advertisements which proposed sales in violation of fair trade agreements under the New York Fair Trade (Feld-Crawford) Act. The advertising contract provided that the "subject matter, form, size, wording, illustrations, and typography of all advertising" were subject to the newspaper's approval. Under that contract, the newspaper was not required to publish the advertisements, even if it was assumed that a publisher who knowingly and willfully publishes an advertisement of articles to be sold in violation of the fair trade law is not liable to the manufacturer or complying retailers.

See Fair Trade, Vol. 1, ¶ 3252.34.

For the appellant: Milton Pinkus, Hempstead, N. Y.

For the respondent: Townley, Updike, Carter & Rodgers, New York, N. Y. (James W. Rodgers, of counsel).

Affirming a judgment of the New York Supreme Court, Nassau County, 1958 TRADE CASES ¶ 69,145.

[*Fair Trade—Advertising*]

Before NOLAN, Presiding Justice; and WENZEL, MURPHY, HALLINAN, and KLEINFELD, Justices [*In full text*]: In an action by the owner of a retail store (1) to compel a publisher of a daily newspaper to accept an advertisement for publication and similar advertisements, (2) to enjoin during the existence of an advertising contract the rejection of similar advertisements, and (3) to recover damages, the appeal is (a) from an order denying the retailer's motion for an order directing the publisher to accept for immediate publication the rejected advertisement, and granting the publisher's crossmotion for summary judgment (Rules Civ. Prac., rule

113), and (b) from the judgment entered thereon. Order and judgment unanimously affirmed, with $10 costs and disbursements. The advertising contract provided that the "subject matter, form, size, wording, illustrations and typography of all advertising is subject to the approval of the publisher." Prior to the execution of the contract between the parties, respondent was notified by the manufacturer of the articles involved in the sale that they were subject to fair trade agreements under the Fair Trade Law of New York (General Business Law, Art. XXIV-A) and that newspapers carrying advertising in violation of that law were equally liable with a non-complying retailer to damage actions. Respondent concedes that it could not arbitrarily reject any advertising copy submitted under the contract and that its refusal to publish the advertisement was required to have a reasonable basis. Appellant does not deny that the proposed sale, which the advertising copy submitted involved, would have been in violation of the fair trade agreements under the Fair Trade Law. We shall assume that the publisher of a newspaper, who knowingly and willfully publishes an advertisement of articles to be sold in violation of the Fair Trade Law, is not liable to the manufacturer or to a complying retailer. Nevertheless, under the contract, respondent was not required to publish an advertisement for a sale which was to be held in violation of the Fair Trade Law (*Amalgamated Furniture Factories v. Rochester Times-Union*, 128 Misc. 673, 675).

[¶ 69,326] Tri-Continental Financial Corporation v. Tropical Marine Enterprises, Inc., et al.

In the United States Court of Appeals for the Fifth Circuit. No. 17543. Dated April 8, 1959.

Appeal from the United States District Court for the Southern District of Florida.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Practices—Restrictive Covenant in Sale of Ship—Covenant Not to Compete—Reasonableness As to Time and Territory.—A restrictive covenant in a bill of sale which provided that a ship would not be operated by the purchaser in the ferry trade between Cuba and certain states of the United States for a period of ten years was reasonably limited as to time and territory. Therefore, it did not violate Section 1 or 2 of the Sherman Antitrust Act. Running for ten years only, the restriction limited the vessel's use in carrying cargo to Cuba in railroad cars, vehicles, or containers. It did not restrict the vessel's use in any other trade anywhere in the world. In addition, the covenantor and its successors were free to use any other ship with no restriction.

Also, the legality of that covenant was properly before the trial court. The plaintiff, a mortgagee seeking a foreclosure decree permitting it to sell the ship free of all restrictions, had contended that the restrictive covenant was illegal under the Sherman Act and had moved for summary judgment on "all the issues." It could not ask for summary judgment on the issues raised by its adversaries while, at the same time, withholding some of those issues.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.826; Monopolies, Vol. 1, ¶ 2610.240; Private Enforcement and Procedure, Vol. 2, ¶ 9026.60.

For the plaintiff: Albert R. Connelly, New York, N. Y.; Arthur W. Milam, Jacksonville, Fla.; and Claude Pepper, Miami, Fla.

For the defendants: William Alonzo Carter and Harold B. Wahl, Jacksonville, Fla.; Franklin J. Fort, Washington, D. C.; and Marshall S. Scott and Stuart W. Patton, Miami, Fla.

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Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

[*Restrictive Covenant*]

HUTCHESON, Chief Judge [*In full text*]: Appealing from a summary judgment entered in a proceeding to foreclose a mortgage on a vessel, the Abaco Queen, plaintiff-appellant, challenging as erroneous the findings and conclusions[1] of the district judge, that the restrictive covenant in the bill of sale to the Queen against its use in the specified trade was valid and of binding force against the mortgagee and any purchaser at the foreclosure sale, seeks a reversal and rendition or at least a reversal and remand of the judgment giving effect to these findings and conclusions.

[*Mortgage Foreclosure*]

The action which resulted in the judgment under attack was begun July 6, 1957, by plaintiff-appellant, Tri-Fi, the mortgagee, as an ordinary proceeding to foreclose its mortgage. Original parties to it were the mortgagor, Tropical Marine Enterprises, Inc. (T. M. E.), T. M. T. Trailer Ferry Co., Inc., parent of T. M. E., and insolvent guarantor of the mortgage indebtedness, and one Gibbs Corp. (Gibbs), a junior lienor.

[*Intervention*]

On September 4, 1957, appellee Owens Illinois Glass Corp. (Owens) intervened, alleging: that on April 18, 1956, it had purchased the Queen from West India Fruit and Steamship Co. (West India), subject to a restrictive covenant;[2] that on November 20, 1956, it had sold the vessel to T. M. E., subject to the covenant; and that Tri-Fi had taken the mortgage with knowl-

[1] As pertinent here, these are:

Impleaded defendant West India Fruit & Steamship Co., Inc., chiefly engaged in car ferry operations between the United States and Cuba, sold the vessel now known as "Abaco Queen" to National Container Corporation (now intervener Owens-Illinois Glass Co.) in January, 1956. The bill of sale contained a restrictive covenant that the vessel, for 10 years, would not be operated between ports or places in the States of Georgia, Florida, Mississippi, Alabama, and Louisiana, or any one or more of them, and ports or places on the Island of Cuba, as a car ferry, train ferry, truck ferry, auto ferry, or passenger ferry, or any combination thereof, or in any service or trade between said ports or places for the transportation of passengers, or of cargo in trailers, containers, rail cars, automobile or trucks. The covenant also provided that should it be violated National Container (now Owens-Illinois Glass Co.) would be liable to West India in the sum of $1,250,000.00.

"National Container later resold the vessel to defendant Tropical Marine Enterprises, Inc., with the same restrictive covenant. Plaintiff Tri-Continental Financial Corporation financed the transaction with knowledge of the covenant in the bill of sale and took a mortgage on the vessel (which mortgage is here sought to be foreclosed) although the mortgage made no reference to the restriction.

"Plaintiff now brings this suit to foreclose the mortgage, the defendant Tropical Marine Enterprises, Inc. interposes no defense thereto and plaintiff is entitled to a decree of foreclosure subject only to the question of (a) whether the vessel should be sold subject to the restrictive convenant and (b) * * *."

"* * * West India, by affidavit, makes it clear it would never have sold the vessel could the vessel have been used in competition with West India. The Court is convinced that the restrictive covenant is reasonable in time, territory and extent, and is binding on any purchase of the vessel who has notice thereof. A decision of the United States Supreme Court upholding an almost identical restriction is *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64. To much the same effect is *Cincinnati P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179. Under these cases there is no violation of the anti-trust laws. See also *West Shore Restaurant Corp. v. Turk* (Fla. 1958) 101 So. (2d) 123, and *Diamond Match Co. v. Roeber* (1887) 106 N. Y. 473, 13 NE 419.

"The Court specifically holds that not only was this a valid covenant as between the original parties, but that it is an equitable servitude, valid and binding on subsequent purchasers with notice. See *Tulk v. Moxhay*, 2 Phil. Ch. 774, 41 Eng. Rep. 1143 (1848) *Capitol Records v. Mercury Records Corp.* (C. A. 2) 221 F. (2d) 657; *Lord Strathcona Steamship Co. v. Dominion Coal Co.* (1926) A. C. 108 (P. C.) where the English Privy Council pointed out that the vessel was not bought as a free ship and that the buyer could not extinguish the right in the vessel of which he had notice; *Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co.* (C. A. 7) 239 Fed. 603; and *Palmer v. Chamberlin* (C. A. 5) 191 F. (2d) 532.

"On consideration thereof, it is

"Considered, Ordered and Adjudged that the motion for summary judgment be and the same is hereby granted since there is no genuine issue as to any material fact, provided that plaintiff's mortgage is superior to the Gibbs Corporation lien, and that the sale be subject to the restrictive covenant aforesaid."

[2] This provided *inter alia:*

". . . as a part of the consideration inducing the seller to enter into the agreement for the sale and transfer of the vessel [Abaco Queen] pursuant to this contract, the buyer, for a period of ten years from the date of delivery of the vessel, will not operate said vessel, or cause or permit said vessel to be operated, or sell or charter said vessel to be operated, between ports or places in the State of Georgia, Florida, Mississippi, Alabama, and

edge of, and subject to the covenant. So alleging Owens prayed that the decree of foreclosure provide that the sale of the Queen be made subject to the restrictive covenant, and that it should be binding on the purchaser.

[*Sherman Antitrust Act*]

Tri-Fi, admitting that it had taken its mortgage with notice of the covenant not to compete and opposing the relief sought by West India and Owens, prayed that the decree of foreclosure permit the Abaco Queen to be sold free of all restrictions on its use. Tri-Fi asserted two issues in defense, viz., (1) that the covenant on the Abaco Queen is, as a matter of law, not enforceable against Tri-Fi as a non-assenting mortgagee, i. e., that such covenants do not run with chattels and (2) that the terms of the covenant not to compete on the Abaco Queen constituted illegal restraints of trade under Sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1 and 2).

Thereafter West India, made a party by Owens, filed a plea and prayer in general effect the same as the one Owens had filed, except that, unlike Owens, it sought a declaratory judgment that the covenant was not illegal under the Sherman Act. Tri-Fi then moved on the pleadings and the undisputed facts [3] for "an order (1) granting plaintiff summary judgment against defendant, Tropical Marine Enterprises, Inc., for the relief demanded in the Complaint (with the amount of attorneys' fees to which plaintiff is entitled, subsequently to be determined), (2) granting plaintiff summary judgment against defendant, Gibbs Corporation, for the relief demanded in the Com-

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Louisiana, or any one or more of them, and parts or places on the Island of Cuba, as a car ferry, train ferry, truck ferry, auto ferry, or passenger ferry, or any combination thereof, or in any service or trade between said ports or places for the transportation of passengers, or of cargo in trailers, containers, rail cars, automobiles or trucks.

* * *

"The Buyer agrees that any subsequent sale of the vessel by it or by successor transferees shall be made subject to all the terms, conditions, and restrictions contained herein, and that at or before the vessel shall be transferred to any subsequent purchaser, it shall obtain and deliver to Seller, or cause to be obtained and delivered to Seller, agreement in writing from any such purchaser that said vessel shall not be operated between the ports or places as hereinabove set forth.

"In the event that the buyer and/or any subsequent purchaser of the vessel, whether or not such purchasers have agreed to the conditions contained herein, shall operate, or cause said vessel to be operated in the trade prohibited by this agreement, then and in that event the buyer shall pay the seller as liquidated damages and not as a penalty, the sum of $1,250,000.00. In addition to said payment, the seller may have relief by injunction to prevent operation of the vessel in the trades hereinabove described, together with any other relief provided by law for enforcement of this agreement."

[3] Appellee West India Fruit & Steamship Co., Inc. has, since 1946, been a steamship carrier of general cargo in railroad cars between the United States and Cuba. It operates railroad car ferries between Palm Beach and Havana and between Belle Chasse (Louisiana) and Havana, and a passenger and automobile ferry between Key West and Havana. It serves shippers throughout the central and eastern United States and competes with at least ten general cargo carriers serving Cuba through East and Gulf Coast ports from New York to Houston.

In 1956 West India sold one of its vessels, the SS Abaco Queen (ex-Antonio Maceo) for $750,000.00 to National Container Corp. for use in transporting wood pulp between Jacksonville and the Bahamas. The parties understood that West India would not sell the vessel if she were to be operated in the ferry trade between Florida, Georgia, Mississippi, Alabama, or Louisiana and Cuba, and National Container did not intend such use. The contract of sale provided as set out in note 2 *supra*, and further provided that in the event the vessel should ever be operated in the restricted trade, then National Container would pay West India $1,250,000 as liquidated damages.

Running for ten years only the restriction does not limit use of the vessel either for the carriage of cargo to Cuba otherwise than in railroad cars, vehicles, or containers, or for any use whatever in any other trade in the United States, or anywhere in the world. And the covenantor and its successors are free to use any other vessel with no restriction.

Late in 1956 National Container sold the vessel to appellee Tropical Marine Enterprises (TME) for $875,000.00. In the contract of sale, TME bound itself by a restriction substantially the same as that upon National Container and agreed to pay National Container $1,250,000 as liquidated damages if the restriction were breached by TME or by any subsequent purchaser. At about this time National Container was merged into appellee Owens-Illinois Glass Co.

To finance the purchase, TME borrowed $775,000.00 from appellant (Tri-Fi) upon a note secured by a chattel mortgage on the ship. As part of the consideration for the loan, Tri-Fi received a warrant or option to purchase 193,750 shares of the stock of TMT Trailer Ferry, Inc. (TMT) an affiliate of TME. Tri-Fi entered into the loan agreement, made the loan, and accepted the chattel mortgage and warrant with full knowledge of the existence and terms of the covenant. This is admitted.

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plaint; (3) granting summary judgment in plaintiff's favor on the issues raised by the petition of Owens-Illinois Glass Company, the answer to that petition and counterclaim of plaintiff, and the petition of West India Fruit and Steamship Co., Inc., on the ground that the restrictive agreement relied upon by Owens-Illinois and West India do not 'run with the boat' so as to bind plaintiff or the purchaser at a foreclosure sale; * * *". (Record p. 142.)

[*Judgment of Court Below*]

The district judge rejecting plaintiff's contentions and embodying in the judgment of foreclosure provisions directly contrary thereto, appellant is here arguing with earnestness and conviction that in so holding and adjudging, the district judge went counter to established law.

[*Issues on Appeal*]

With equal earnestness, insisting that it did not ask for a summary judgment on the anti-trust issue, it urges upon us that in holding and adjudging that the covenant was not in violation of the Sherman Act and illegal, the district judge erred (1) procedurally (a) in dealing with that issue, though plaintiff did not present it for summary determination, and (b) in concluding that in respect to it, there was no issue as to any material fact, and (2) as a matter of substantive law, in holding (a) that the covenant is reasonable in time, territory and extent, (b) that it does not violate the anti-trust laws; and (c) that it is binding on the mortgagee and will be on the purchaser at foreclosure sale.

Taking no position with respect to the validity of the restriction under the Sherman Act, except to assert that appellant, for the purpose of the determination of its motion for summary judgment, conceded its validity in that respect, but taking strong issue with appellant's position that the finding and judgment, that the mortgagee took subject to the restrictive covenant and the purchaser at the foreclosure sale would likewise take subject thereto, were erroneous, appellee Owens is here insisting that the judgment must be affirmed.

[*Ultimate Issue*]

Posting the ultimate issue for decision below and here as whether the covenant between vendor and vendee of the Queen restricting her use in respect to a specific trade is binding upon the mortgagee who with full knowledge of the covenant loaned the vendee the money necessary to purchase the vessel and consequently is binding upon the purchaser at the sale, appellee West India insists that this issue and all the facets of it, including the validity of the covenant against the claim that it violated the anti-trust laws, was properly before the court for decision, the parties, in support of their respective views, its cross action and the intervention of Owens, and was properly decided by the district judge on the undisputed facts.

[*Discretion of District Court*]

Upon the interesting questions thus presented for decision, the parties, in support of their respective views, have in briefs and arguments, exhibiting a high order of advocacy, marshalled the facts and canvassed the applicable law, and, greatly aided thereby, we have reached the firm conclusion that the district judge was right in permitting the introduction of parties into the foreclosure suit and the tender for declaratory judgment thereon of issues other than those necessary to the mere foreclosure of the mortgage lien.

This is not to say that, since under the general doctrine, "In a proceeding to foreclose a mortgage lien, while it is proper to make anyone claiming under the mortgagor a party to such foreclosure proceedings, it is not allowed to put in issue the mortgagor's title",[4] i. e., the foreclosure passes the mortgaged interest, it neither adds to nor detracts therefrom, we have not had some difficulty in concluding that the district judge was right in determining that there was an actual controversy as to the matters introduced into the foreclosure suit by the pleadings of the parties. It is to say, though, that, considering the wideness of the decretion vested in the district judge by the declaratory judgment statute, Sec. 2201, Title 28 U. S. C. and Rule 57, Federal Rules of Civil Procedure, Title 28 U. S. C.,[5] we conclude that the district judge did not

[4] *Hampshire v. Greeves,* 104 Texas at 624. Cf. *Kirby Lumber Corp. v. Williams,* 230 F. (2d) 332, and cases there cited.

[5] *State Farm Mutual v. Bonwell,* 248 F. (2d) 862.

abuse his discretion in proceeding as he did to a judgment which, not at all undertaking to add to or subtract from the mortgagor's interest foreclosed, merely declared the existing nature and condition of that interest.

[*Request for Summary Judgment*]

For the reasons hereafter stated, we think that he was right (1) in regarding all of the issues decided by him as properly before him for decision, (2) in the conclusions that he reached as to these issues, and (3) in the judgment entered in accordance therewith. We recognize that appellants present and argue, not queryingly and tentatively but positively and with confidence, that the anti-trust question was not in issue in the summary judgment proceeding, and we have no disposition to treat this contention lightly. We think, however, that, in the light of the proceedings below taken as a whole, including the pleadings of the parties and particularly plaintiff's motion seeking specifically summary judgment for debt and foreclosure and "summary judgment in plaintiff's favor on the issues raised by the petition of Owens Illinois Glass Co., the answer to that petition and counter claim of plaintiff, and the petition of West India Fruit and Steamship Co., Inc." appellant's reliance on *Prepo Corp. v. Pressure Can Corp.*, 234 F. (2d) 700 will not do, and that its position may not be maintained.

It is true that the ground put forward by plaintiff to support the claim "for summary judgment on all the issues raised" by the litigants is "that the restrictive agreement relied on by Owens Illinois and West India does not 'run with the boat' so as to bind plaintiff or the purchaser at a foreclosure sale", and that the ground that the covenant was illegal under the Sherman Act was not specifically put forward in the motion. This, however, makes against, not for, appellant's present position that, though in its motion it asked for a judgment "in plaintiff's favor on the issues raised" by the pleadings of its adversaries it was at the same time withholding submission of some of those issues. In short, when it is recognized, as it must be, that a final judgment in the suit for debt and foreclosure could not have been entered with the reservations now asserted and there is added to this the specific prayer of the motion that judgment be entered in its favor on all the issues, it appears, we think, in the plainest kind of way beyond the power of argument to change it, that appellant's position, that the request for summary judgment and the granting of the summary judgment were with legally effective reservations, is in fact and in law wholly untenable. *Floyd v. Franklin*, 245 F. (2d) 896.

When, these procedural questions determined against appellant, we reach those going to the merits, we think it equally clear that its position on both aspects of the case, the validity and the binding force upon it of the covenant, rest upon an approach to the decision of the case which finds no support in the record and none in the applicable law.

[*Reasonableness of Restrictive Covenant*]

As we understand them, these are its positions as to the anti-trust issue; (1) that the court erred in holding that there was no issue as to any material fact; (2) that the covenant is reasonable in time, territory and extent; and (3) that enforcement of it does not, and will not, violate the anti-trust laws.

Of these, it is sufficient to say: that every fact, which is material here in the determination of these questions, clearly appears from the pleadings, the undisputed facts, and the terms of the instrument itself; that, measured by rules governing such ancillary agreements,[6] the covenant, limited as it is in time and in scope, is, in every respect important here, reasonable in time, territory and extent, and of no further extent than is necessary to protect West India; and that the authorities are almost uniform that such a restriction does not violate the antitrust laws. It will serve no useful purpose, therefore, to discuss these cases. Some of them are cited in the conclusions of the district judge, note 1, *supra*. Others cited in the briefs are *Chicago Sugar Co. v. American Sugar Refining Co.* [1948-1949 TRADE CASES ¶ 62,449], 176 F. (2d) 1, cert. denied 338 U. S. 948; *Cinn. P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179; *Hedrick v Perry*, 102 F. (2d) 802; *Janet Realty Corp. v. Hoffman's Inc.*, 17 So. (2d) 114; *Kentucky Nat. Gas Corp. v. Indiana Gas & C. Corp.*,

[6] *Bruces Juices, Inc. v. American Can* [1946-1947 TRADE CASES ¶ 57,553], 330 U. S. 743; *Bookhaut v. Schine* [1958 TRADE CASES ¶ 68,987], 253 F. (2d) 292; *Productive Inventions v. Trico Prods. Corp.* [1955 TRADE CASES ¶ 68,104], 224 F. (2d) 678; *Automatic Radio Mfg. v. Hazeltine* [1948-1949 TRADE CASES ¶ 62,476], 176 F. (2d) 799.

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118 F. (2d) 831; *Schwartz v. Van Der Plate & Co.*, 132 N. J. Eq. 132, 27 A. (2d) 209; *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, affirmed 175 U. S. 211; Restatement, Contracts, Sec. 516; 6 Corbin, Contracts Sec. 1389.

The quotations following from Florida cases are typical of the general attitude of American courts on this question:

> "Contracts entered into between parties, having as their objectives the removal of a rival competitor in a business are not to be regarded as contracts in restraint of trade, because they do not close the field of competition but affect only the parties to the agreement." *Janet Realty Corp. v. Hoffman's Inc.*, 17 So. (2d) 453.

In the recent case of *West Shore Restaurant Corp. v. Turk*, 101 So. (2d) 123, the Supreme Court of Florida quoted approvingly from a Colorado decision as follows:

> "'Where one is so lost to a sense of moral obligation as to accept a full consideration for his stock in trade and good-will, upon express condition that he refrain from again entering that business for a limited time, within a certain territory, and then immediately, having pocketed the fruits of the agreement, deliberately and willfully ignores the controlling condition thereof, courts should certainly not hunt for legal excuse to uphold him in such moral delinquence. *Barrows v. McMurty Mfg. Co.*, 54 Colo. 432, 449, 131 P. 430, 436.'"

Ancillary restrictions of this kind have, therefore, under facts such as appear here, been uniformly sustained as valid.

[*Covenants "Running with the Land"*]

We come then to the issue which appellant admits was directly joined and decided against it below, to say that we think appellant makes too much of early and overtechnical common law considerations distinguishing between covenants with respect to chattels and those with respect to land, too little of equitable considerations in dealing with both. As Owens in its brief points out, appellant has stated the question so as to make its and West India's right to the protection of a court of equity against breach of the covenant depend upon whether the restrictive covenant involved "runs with the boat" in the sense that certain covenants related to real estate have been considered by the courts to "run with the land."

[*Equitable Considerations*]

The position of Owens and West India is that their right to protection at the hands of a court of equity depends not upon whether the covenant can be considered as "running with the boat" but upon principles of right and justice recognized by courts of equity under the influence of which a mere personal covenant restricting the use of property "not running with the land" or "with the boat" will be enforced in equity against purchasers taking with notice to the extent that the use of the property in violation of the covenant should be prevented by injunction or other appropriate equitable remedy. In support they cite the many cases collected in the annotation to *Oliver v. Hewitt* (Va.), 60 S. E. (2d) 1, 23 A. L. R. (2d) 516; *Vetzel v. Brown* (Fla.), 86 So. (2d) 138; and 32 C. J. "Injunctions", Sec. 315, p. 203, where it is stated:

> "Where restrictive covenant with respect to the use of property, real or personal, is valid, it may be enforced by injunction but only as against one under obligation not to violate the covenant. Since a purchaser with notice gets title subject to the restriction he may be enjoined from using the property in violation of the restriction."[1]

Finally, they insist, citing cases in support, that if, as appellant seems to argue, the question of the validity of the covenant as against the mortgagee and the purchaser at a sale under it should be determined upon whether the covenant should be regarded not as a merely personal one but as one appurtenant to and running with the vessel, there is ample authority to support a reasoned view that even then appellant would be wrong.

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[1] To the same effect see 43 C. J. S. "Injunctions" Sec. 87 at page 579 and 28 Am. Jur. "Injunctions" Sec. 89 *et seq* and Secs. 101, 102, 103, and 104, "restrictions on trade or business", where the reason for granting such injunctions is stated to be to prevent the interference with obligations justly assumed by persons knowing of their existence. Cf. *Lorillard v. Weingarden*, 280 Fed. 238; *In Re: Waterson*, 48 F. (2d) 704; *Waring v. WDAS Broadcasting Co.*, 194 ALR 631; *Weissman v. Lincoln Corp.*, 76 So. (2d) 478; *Tulk v. Moxhay*, 2 Phil. Ch. 774, 41 Eng. Rep. 1143; *Capitol Records v. Mercury Records*, 221 F. (2d) 657.

The case, however, is not to be determined on that ground. It is rather to be determined by whether, under circumstances of the kind disclosed here, where the mortgagee, having itself furnished the money to make the trade with full knowledge of the covenant, is now undertaking to deprive the beneficiary of its benefits and at the same time to impose upon Owens, with whom it arranged to make the mortgage, the burden of the heavy loss which will follow its breach, equity will prevent appellant from taking this plainly inequitable, if not unconscionable course by holding it estopped[8] or otherwise bound by it in equity.

[*Technical Distinction*]

Under the circumstances obtaining here, a great deal more should be put forward by plaintiff, in support of its claim, to rid the vessel and the parties dealing with it of the covenant, than the dry as dust and technical common law distinction between chattels and realty. The distinction, which has its proper force in some situations, has no place or force here since the judgment did not attempt to add anything to or take anything from the binding force of the covenant but merely declared and applied to the facts of the case the controlling equitable principles.

The judgment is Affirmed.

[Dissenting opinion]

TUTTLE, Circuit Judge, Dissenting [*In full text*]: With deference I dissent from that part of the opinion that holds that the appellant's mortgage is subject to the restrictive covenant to which it was not a party. The Court places its decision squarely upon the ground that it would be "inequitable, if not unconscionable" for the mortgagee of the vessel to be permitted to sell it at foreclosure sale freed of all restrictive covenants.

Believing, as I do, that there is a rational basis of continuing validity for the traditional difference between the principle of law which permits the burdening of real estate with restrictive covenants and that which favors the sale of tangible personal property unencumbered by even known restrictive covenants, I think it no more accords with equity and good conscience to permit the owner, Owens, to sit at the closing table and accept the purchase price from Tri-Continental on a mortgage executed by the purchaser without requiring inclusion of the restriction in the mortgage and thereafter to insist that it is binding on Tri-Continental than for Tri-Continental to be permitted to advance the money which is paid to Owens on a mortgage which is silent as to the restriction, but which is known to it, and later foreclose and sell the mortgaged property free of restriction.

In short, I think no such equity is here established to warrant the fashioning of a rule of law not heretofore shown to be applicable in the sale of chattels.

I would reverse and remand for a dismissal of the intervention.

[¶ 69,327] **John F. Blaski v. Inland Steel Company, Inland Steel Products Company, and Joseph T. Ryerson & Son, Inc.**

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 58 C 415. Filed March 31, 1959

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief and Treble Damages—Necessary Averments To State Cause of Action—Injury to Plaintiff—Acquisitions of Stock or Assets Under Section 7 of Clayton Act.—A manufacturer of steel products (including two of its subsidiaries) which allegedly acquired various companies in violation of Section 7 of the Clayton Act was entitled to a summary judgment where the plaintiff merely alleged that as a result of such acquisitions, he, as a purchaser and user of steel products, has suffered and will continue to suffer damage. The plaintiff failed to show anything from which it could be deduced that anything that the defendants had done had

[8] *Palmer v. Chamberlin*, 191 F. (2d) 532; *Prindiville v. Johnson & Higgins*, 92 N. J. Eq. 515, 113 Atl. 915; Cf. *Alaska ex rel Com. of Veterans' Affairs v. Guerin*, 140 F. Supp. 440, 443; *RFC v. Sun Lbr. Co.*, 126 F. (2d) 731, 736; *Cowall v. Colo. Springs Co.*, 100 U. S. 55; *Jones v. Niebergall*, 53 So. (2d) 918.

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injured him. At the most, the plaintiff described a situation that could affect the economy of the nation as a whole. He had no power to correct this under the antitrust laws, since that is the function of the Attorney General. The plaintiff apparently claimed that "things" would be better if there were more small steel companies operating; however, this would not absolve the plaintiff from the necessity of proving direct damage to himself as a result of the defendants' acts.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.

For the plaintiff: Joseph Keig, Sr., Chicago, Ill.

For the defendants: Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Ill.

Memorandum

[*Alleged Acquisitions*]

PHILIP L. SULLIVAN, District Judge [*In full text*]: The complaint here seeks injunctive relief and treble damages under Section 7 of the Clayton Act (Title U. S. C. Sec. 18). Its allegations, summarized, are that:

Plaintiff, who is engaged in making and selling steel products, is a purchaser of steel sheets, galvanized steel sheets and steel angles. Defendants, Inland Steel Company (Inland) and its subsidiaries, Inland Steel Products Company (Products), and Joseph T. Ryerson & Son, Inc. (Ryerson) manufacture, sell, and distribute steel products. Inland which was incorporated in 1917 has been engaged for many years in a program of expansion which has been accomplished by its acquisition of entire or partial control of other related corporations. Inland itself manufactures and sells steel and iron. It "acquired" defendant Ryerson, a steel service organization, as a subsidiary in 1935, and Products, which manufactures steel, in 1936. Inland also acquired, and either merged with itself or used the facilities of, Wilson & Bennett Manufacturing Company (1939), Cleveland Steel Barrel Co. (1955), and Arthur C. Harvey Co. (1955). Over the years since 1917, it has also acquired varying degrees of control or interest in seventeen companies engaged in mining ore, seven companies that mine coal and produce coke, two that mine limestone and flourspar, as well as a rolling mill company, a rail rerolling mill, and a steel post company. Some of these companies were dissolved after Inland acquired them. Primarily as a result of all these "acquisitions", Inland's production has shown a phenomenal increase, and in fact its "growth has been much greater than that of the aggregate of the entire steel industry." Another result has been that the competition acquired by it has been eliminated; Inland's competitors can no longer sell to or (in varying degrees) obtain iron ore, coal, or limestone from various of the "acquired" companies; and purchasers of steel can no longer buy from others. The final allegation is that "As a result of the acquisitions made by Inland, which acquisitions have substantially lessened competition or have tended to create a monopoly, the plaintiff, as a purchaser and user of steel products, has suffered, and is now suffering, and will continue to suffer damage."

[*Summary Judgment Motion*]

Defendants have taken plaintiff's deposition and relying on this and on the complaint, they have filed a motion for summary judgment which is now before the court (Rule 56(c), F. R. C. P.). They contend that the complaint fails adequately to allege damage to the plaintiff and thus fails to state a cause of action, and that the deposition demonstrates that the plaintiff in fact has suffered no damage which can be traced to defendants' actions.

[*Damage to Plaintiff*]

Individual damage to the plaintiff, aside from any injury to the public as a whole, is the essence of a private suit under the anti-trust laws. The remedy given to private persons is only for one who has been *"injured in his business or property* by reason of a violation of the anti-trust laws". (Title 15 U. S. C., Sec. 15). Further, the alleged violations must be the direct and proximate cause of the injury (*Tepler v. Frick* [1953 TRADE CASES ¶ 67,482], 204 F. (2d) 506 (2nd Cir., 1953); *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8 (1913)). The complaint here totally fails to allege anything from which it could

be deduced that anything defendants have done has injured the plaintiff. The most that can be said of it is that it describes a situation that may affect the economy of the nation as a whole. The plaintiff has no power to correct this under the anti-trust laws (*Jack v. Armour & Co.*, 291 Fed. 741, 745 (8th Cir., 1923)).

As this court remarked in another case, that is the function of the Attorney General (*Robinson v. Lull* [1956 TRADE CASES ¶ 68,521], 145 F. Supp. 134 (N. D. Ill. 1956)).

Plaintiff's deposition is equally devoid of any showing of damage to him. On the contrary, the most he offers is a vague feeling that things would be better if there were more small steel companies operating. Whether or not this is true as a tenet of philosophy or economics, it does not absolve the plaintiff from the necessity of proving direct damage to him by the defendants' acts.

[*Summary Judgment Proper*]

There is no doubt that a summary judgment is proper in this type of action (*United States v. United States Gypsum Co.* [1950-1951 TRADE CASES ¶ 62,729], 340 U. S. 76, 82 (1950); *Marion County Cooperative Ass'n v. Carnation Co.* [1954 TRADE CASES ¶ 67,792], 214 F. (2d) 557, 560 (8th Cir., 1954)). Here plaintiff does not deny this and further does not assert that there is any "genuine issue as to any material fact". On the contrary, he too relies on his deposition. "It has been said that a summary judgment should be granted, if under the facts, the court would be required to direct a verdict for the moving party". (*Hurd v. Sheffield Steel Corp.*, 181 F. (2d) 269, 271 (8th Cir., 1950)). Certainly that is the case here in view of the complete absence from either the complaint or the deposition of any showing of damage to the plaintiff.

The motion of defendants for a summary judgment will be allowed.

[¶ 69,328] A. C. Becken Co. v. The Gemex Corporation.

In the United States District Court for the Northern District of Illinois, Eastern Division. In Equity. No. 56 C 1962. Dated March 27, 1959.

Clayton and Sherman Antitrust Acts

Combinations and Conspiracies—Monopolies—Refusal to Sell to Dealer Which Did Not Sell at Suggested Resale Prices—Legality.—A manufacturer of watch bands did not attempt to engage in an unlawful combination and conspiracy to prevent and restrict the sale of products manufactured by its competitors, to discriminate against the plaintiff as a wholesaler, or to compel the plaintiff to enter into an illegal contract for fixing illegal prices. The manufacturer had advised the wholesaler that it did not wish to sell to wholesalers who cut prices and do not sell at factory suggested resale prices and then informed the wholesaler that it would no longer sell its bands to the wholesaler. The manufacturer's refusal to sell was not the result of any combination or conspiracy and did not have any effect on prices charged to the public. There was no evidence that the manufacturer contracted with any retailer, wholesaler, or competitor for the maintenance of resale prices and no evidence that the manufacturer refused to deal with any other wholesaler. Furthermore, the wholesaler was not damaged, and there was no evidence that the public was injured.

See Monopolies, Vol. 1, ¶ 2610.720; Resale Price Fixing, Vol. 1, ¶ 3015.70; Exclusive Dealing, Vol. 1, ¶ 4009.420; Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.475.

For the plaintiff: Dixon, Morse, Knouff, Potter & Holmes, Chicago, Ill.

For the defendant: Haight, Lockwood & Simmons, Chicago, Ill.

Findings of Fact

[*Parties*]

JULIUS H. MINER, District Judge [*In full text*]: 1. Plaintiff Becken is an Illinois corporation having its principal place of business at Chicago, Illinois, and is engaged in the wholesale jewelry business in interstate commerce.

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2. Defendant Gemex is a New Jersey corporation having its principal place of business at Union, New Jersey, and is engaged in the manufacture and sale of jewelry products, including metal watch bracelets or bands, to the wholesale jewelry trade in interstate commerce.

[*Business Relationship*]

3. Plaintiff, as a wholesaler, has purchased watch bands intermittently over the past twenty years from the defendant, as the manufacturer. In 1953 or 1954 plaintiff again commenced buying defendant's watch bands for resale as an additional line to the other watch band lines then and now being handled by plaintiff.

[*Refusal To Deal—Prices*]

4. On August 2, 1956, representatives of defendant met with representatives of plaintiff and advised them that defendant did not wish to sell to wholesalers who cut prices and did not sell at factory suggested resale prices. At this meeting plaintiff made certain recriminatory remarks to the effect that defendant, as a manufacturer, could not tell plaintiff, a wholesaler, how to run its business. Reply recriminatory remarks were made to the effect that plaintiff could not tell defendant how to run its business. At this meeting defendant informed plaintiff that it would no longer sell its watch bands to plaintiff, and thereupon, closed plaintiff's account.

5. Defendant thereupon made arrangements to return for credit certain of its watch band items then in the inventory of plaintiff, some of which in turn were later returned to plaintiff.

6. There is no evidence that the discontinuance of defendant's sales to plaintiff had any effect whatsoever on the prices charged to the public for defendant's products by others.

7. Defendant's refusal to sell was not the result of any combination, conspiracy, or attempt to combine and conspire by defendant and anyone.

8. There is no evidence that defendant had before or has since refused to sell to any wholesaler other than plaintiff.

9. There is no evidence that at any time defendant or its representatives contracted or attempted to contract or agree with any retailer in the jewelry business for the maintenance of any suggested resale prices.

10. Defendant did not combine, conspire, or attempt to combine or conspire, or to enter into any agreement, understanding or concert of action with its wholesalers to maintain or fix artificial resale prices.

11. Defendant did not combine or conspire with any of its competitors for any purpose.

12. Defendant did not attempt to fix prices on merchandise manufactured by its competitors.

[*Injury*]

13. Plaintiff was not damaged as a result of defendant's refusal to sell watch bands to plaintiff subsequent to August 2, 1956.

14. There is no evidence that the public was in any way injured by defendant's refusal to sell watch bands to plaintiff.

Conclusions of Law

1. The evidence as a whole does not support the allegations of Paragraphs 8 and 9 of the complaint. Defendant did not attempt to engage in a wrongful and unlawful combination and conspiracy to prevent and restrict the sale of products manufactured by its competitors nor to discriminate against plaintiff as a wholesaler nor to compel plaintiff to enter into an illegal contract or agreement for fixing illegal prices.

2. No violation of Section 1 of the Sherman Act has been shown; no violation of Section 2 of the Sherman Act has been shown; no violation of Section 3 of the Clayton Act has been shown.

3. Plaintiff has not been damaged and is not entitled to any relief.

4. The complaint should be dismissed with prejudice and award of costs.

[¶ 69,329] Jewel Tea Co. v. Local Unions Nos. 189, 262, 320, 546, 547 and 638, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. 58 C 1415. Filed March 31, 1959. Amended, May 19, 1959 (1959 TRADE CASES ¶ 69,439).

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Labor Unions—Restrictions on Injunctive Relief Under Clayton Act, Section 20, and Anti-Injunction Act—Exemption Under Clayton Act, Section 6—Combining with Non-Labor Group.—A motion to dismiss an action charging that certain locals of a labor union conspired with an association of food retailers to suppress competition among retail meat markets in the Chicago, Illinois, area, to limit the retail sale of fresh meats to designated hours, and to monopolize, for members of the union, the retail portion of the trade in fresh meats was denied. The fact that a labor union is a defendent under proceedings for violation of the antitrust laws does not, *per se,* bring it within the exemptions contained in Section 6 of the Clayton Act or Section 20 of the Clayton Act. Congress did not intend, by the Clayton or the Norris-LaGuardia Act, that labor unions could aid non-labor groups to create business monopolies and control the marketing of goods and services. The Norris-LaGuardia Act was specifically intended to protect the normal activities of workingmen to form a union and to act together to further their interests as members of the union, though such activities might, to some extent, affect interstate commerce; however, where labor unions combine upon objects outside the field of labor relations, they become amenable to the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063, 2101.110, 2101.248, 2101.265, 2111.102.

Private Enforcement and Procedure—Injunctive Relief from Violations of Antitrust Laws—Necessary Averments to State Cause of Action—Sherman Act Violations—Interstate Commerce.—A complaint charging that certain locals of a labor union conspired with an association of food retailers to suppress competition among retail meat markets, prevent the sale of fresh meat before 9 A. M. or after 6 P. M. Mondays through Saturdays, and to monopolize, for members of the union, the retail trade in such meats, stated a valid cause of action under the antitrust laws. Restrictive union rules which limit market distribution would seem to be within the purview of the antitrust laws if the conditions of interstate commerce and intent are met. The complaint alleged a joinder of purpose between the union and independent employers which sufficiently placed in doubt the objectives sought by the union. It was also sufficiently alleged that the restriction on the retailers' operating hours had the effect of restraining interstate commerce. Local restraints having an adverse effect on such commerce are within the prohibition of the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9022.20, 9022.75.

Private Enforcement and Procedure—Antitrust Violations as Defense—Participation in Alleged Violations as Defense to Antitrust Action—*Pari Delicto.*—A motion to dismiss an antitrust action on the ground that the plaintiff was a party to the allegedly unlawful contract and, therefore, in *pari delicto,* was denied. While a party to an illegal contract usually cannot invoke the aid of a court in its enforcement, a party will not, as a general rule, be barred from setting up the illegality of a contract that is violative of a statute, particularly when doing so will further the public interest which the statute was designed to protect.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.350.

For the plaintiff: Winston, Strawn, Smith & Patterson, Chicago, Ill.

For the defendants: Asher, Gubbins & Segall, Chicago, Ill.

Memorandum

[*Labor Unions—Alleged Conspiracy with Non-Labor Group*]

LA BUY, District Judge [*In full text*]: This declaratory judgment suit is brought pursuant to the treble damage section of the antitrust laws, 15 U. S. C. A. § 15, charging that certain locals of the defendant union and their officers conspired with the Associated Food Retailers of Greater

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Chicago, Inc., an association of independent retail stores, to suppress competition among retail meat markets in the Chicago area, and to prevent the sale of fresh meats, i.e., beef, veal, lamb, mutton and pork and meat products before 9 A. M. or after 6 P. M. Mondays through Saturdays, and to monopolize for members of the defendant unions the retail portion of the trade or commerce in such meats; that pursuant to such conspiracy, defendants agreed

(1) that no one be permitted to make retail sales of said fresh meats before 9 A. M. or after 6 P. M.;

(2) that union members be prohibited from participating in any sale of such meats before 9 A. M. or after 6 P. M.;

(3) that no one be permitted to sell such meats outside these hours with or without employment of union members;

(4) that defendant members of the Associated Food Retailers agreed among themselves to insist that all collective bargaining agreements between them and defendant union, or between defendant union and plaintiff or other operators, contain the prohibition of retail sales of fresh meats outside these hours;

(5) that Associated conspired and agreed with other defendants that neither plaintiff nor any other merchandiser is to be permitted to compete with them by operating self-service meat markets between 6 P. M. and 9 P. M.;

(6) that defendant unions have acted as the enforcing agent of the conspiracy.

It is also alleged that in 1957 when negotiations on new agreements were required because of the expiration of the old agreement, the plaintiff insisted the clause relating to restriction of hours of operation was illegal, and that it was willing and able to operate its self-service markets after 6 P. M. on one or more nights a week without requiring any members of defendant union to work such hours; that defendant Associated refused to enter into an agreement to permit night openings and defendant union supported and abetted such refusal; that defendant union threatened to strike and picket any operator who refused to sign such contract and under compulsion of said conspiracy plaintiff did sign the agreement; that in May 1958 defendant Kelly, an officer of Local 546 of defendant union, at a meeting with representatives of market operators in this area reported that he and other defendants had learned in several instances markets had been operated outside the designated hours, and that if such continued there would be no arbitration procedure followed and that butchers would be removed from service in such stores.

[*Alleged Effects of Conspiracy*]

It is further alleged that the effect of this combination and conspiracy has been the unlawful restraint of (1) plaintiff's right to sell fresh precut meats at reasonable hours; (2) competition among retail meat dealers and consequent denial to the public of the benefits thereof, and that the cost of meats at retail in Chicago has been held higher than it otherwise would be; (3) interstate trade and commerce of meats and meat products in that a major part of all of said goods is produced in states other than the State of Illinois and is shipped in interstate commerce from such states, and, insofar as plaintiff is concerned in 1957 its sales of meat, poultry and fish was $85,000,000 and approximately 77.5% of such products retailed by it originate outside the State of Illinois; and (4) plaintiff's right to freely use its property and facilities with a consequent loss of profits in excess of $25,000.

[*Relief Sought*]

It is requested that the court declare the alleged conspiracy and combination an unlawful restraint of trade and commerce; that defendants be enjoined from continuing the same; that the restriction on hours of marketing be declared illegal, null and void and that defendants be enjoined from enforcing the same; that the defendants be enjoined from harassing, intimidating, hindering, striking or picketing plaintiff for the purpose of restricting the hours of marketing.

[*Working Hours*]

In the pertinent parts to be considered here, the collective bargaining agreement in Article 4 covers Working Hours and other conditions of employment expressly confining the basic work day to eight hours, work to begin at 9 A. M. and stop at 6 P. M. Article 5 which follows covers Market Operating Hours, and is the clause which is challenged in these proceedings. It provides

"Market operating hours shall be 9 A. M. to 6 P. M. Monday through Saturday, inclusive. No customer shall be served before or after the hours set forth above, except that customers in the market at closing time shall be served."

[*Motion to Dismiss*]

Defendants have filed a motion to dismiss the complaint for the reason (1) that because the complaint alleges the clause restricting market hours is null and void, the plaintiff being a party to the contract is in *pari delicto* and can not recover any damages; and, in any event has suffered no injury; (2) the alleged activities and contract provision do not affect interstate commerce; (3) the alleged activities are not within the proscription of the antitrust laws since the clause is a reasonable regulation of trade; (4) the alleged controversy regulating market operating hours constitutes a labor dispute over which this court has no jurisdiction; and (5) the alleged controversy comes within the labor exemption to the antitrust law.

The general premise guiding courts in their considerations on motions to dismiss complaints is to be applied in this case as well; that is, would the plaintiff be entitled to relief upon any state of facts which might be proved in support of its allegations.

[*Labor Unions—Antitrust Exemption*]

At the outset, it is established that the fact that a labor union is a defendant under proceedings for violation of a antitrust laws does not *per se* bring it within the exemption from suit contained in § 6 of the Clayton Act (15 U. S. C. A. § 17) or injunction contained in § 20 of the Clayton Act (29 U. S. C. A. § 52). The decision of the Supreme Court of the United States in *Allen Bradley Co. v. Union* [1944-1945 TRADE CASES ¶ 57,386], (1944) 325 U. S. 808, declared that

> "Congress did not intend by the Clayton or the Norris-La Guardia Act that labor unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."

The Norris-La Guardia Act was specifically intended to protect the normal activities of workingmen to form a union and to act together to further their interests as members of the union even though such union activities might to some extent affect interstate commerce, 29 U. S. C. A. § 104, but where labor unions combine upon objects outside the field of labor relations they do become amenable to the Sherman Act. *Internat'l Assn. Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.* [1940-1943 TRADE CASES ¶ 56,116], (C. A. 8, 1941) 118 F. (2d) 615, 621, cert. den. 314 U. S. 639.

The challenged provision is contended and alleged by plaintiffs to be the means of effectuating the alleged combination and conspiracy; but, the defendants assert its purpose is related solely to employer-employee relationship and its existence is an integral part of the terms and conditions of employment. On a motion to dismiss this question is not possible of determination. Restrictive union rules with [which] limit market distribution would seem to be within the purview of the antitrust laws if the conditions of interstate commerce and intent are met. The complaint alleges a joinder of purpose between union and independent employers inimicable to legitimate objectives of labor organizations and sufficiently places in doubt the objective sought to be attained.

[*Interstate Commerce*]

It is also sufficiently alleged that this provision has the effect of restraining interstate commerce. Local restraints having an adverse effect on such commerce are within the prohibition of the antitrust laws. *United States v. Employing Plasterers* [1954 TRADE CASES ¶ 67,692], (1954) 347 U. S. 186.

[*"Pari Delicto"*]

It is also clear that the determination of the efficacy of the defense of *pari delicto* raised by defendants on their motion to dismiss cannot be made at this time and on this state of the pleadings. While a party to an illegal contract usually cannot invoke the aid of a court in its enforcement, as a general rule where the contract is violative of a statute, a party will not be barred from setting up its illegality, particularly when it will further the public interest which the statute was designed to protect.

[*Dismissal Denied*]

The court is of the opinion that the complaint does state a claim for relief under the antitrust statutes and the defendants' motion to dismiss should be overruled. An order in accord therewith has this day been entered.

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[¶ 69,330] **Anheuser-Busch, Inc. v. Federal Trade Commission.**

In the United States Court of Appeals for the Seventh Circuit. September Term, 1958. April Session, 1959. No. 12284. Dated April 13, 1959. Amended, April 21, 1959.

Petition to Review and Set Aside Order and Decision of the Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Price Discrimination—Geographical Price Discrimination—Cutting Prices in One Market—Legality.—A brewer selling on a nationwide basis did not unlawfully discriminate in prices when it reduced its prices in the St. Louis market to practically equal those charged for local and regional beers in that market, while not making such a reduction elsewhere in the country. The price reductions were not price discriminations within the proscription of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act; therefore, a Federal Trade Commission order prohibiting such price reductions was set aside. The Commission had found that the reductions disrupted the St. Louis market to the injury of the brewer's local competitors in that market, and it was not seeking to protect the brewer's competitors in other markets. Assuming that the reductions were directed at local competitors, they were not discriminatory. The brewer did not thereby discriminate among its local competitors in that market; it employed the same means of competition against all of them. Moreover, it did not discriminate among those who bought its beer in the St. Louis market since all could buy at the same prices.

Price discrimination means more than a mere difference in price. There must be some relationship between the different purchasers which entitles them to comparable treatment. Where two purchasers from a seller are competing with each other, that competition creates a relationship that entitles them to comparable treatment as to price. However, where the purchasers from a seller are located in different areas of the country and are not in competition with each other, there is generally no relationship which entitles them to be charged the same prices. It cannot be said that because the brewer's acts gave its customers in another area a right to relief, its St. Louis market competitors became entitled to relief under Section 2(a) of the Act. Lacking a showing of discrimination within the St. Louis market, there was no relationship existing between the brewer's competitors in that area, and either its competitors or its customers in other areas, which justified the Commission's conclusion that a discrimination had been shown which brought section 2(a) into play. That section says nothing about lowering prices in any market; such a practice is covered in Section 3 of the Robinson-Patman Act, which does not amend the Clayton Act. The fact that the Commission has not been given the power to enforce Section 3 of the Robinson-Patman Act does not justify an attempt by it to enlarge the scope of section 2(a) to include a matter lying expressly within the scope of section 3.

See Price Discrimination, Vol. 1, ¶ 3505, 3505.620, 3506.627, 3508.546, 3515.503, 3515.600, 3551.10; FTC Enforcement and Procedure, Vol. 2, ¶ 8801.856.

For the petitioner: Edgar Barton and Edward Wolfe, New York, N. Y.; and Charles M. Price and Robert C. Keck, Chicago, Ill.

For the respondent: James E. Corkey, Washington, D. C.

Setting aside a cease and desist order in Federal Trade Commission Dkt. 6331.

Before DUFFY, Chief Judge, and SCHNACKENBERG and KNOCH, Circuit Judges.

[*FTC Order—Review*]

SCHNACKENBERG, Circuit Judge [*In full text*]: By its petition, Anheuser-Busch, Inc., a Missouri corporation, herein referred to as AB, asks us to review and set aside a cease and desist order issued on September 10, 1957 by the Federal Trade Commission, based upon a complaint charging AB with a violation of section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.[1] 15 U. S. C. A. § 13(a).

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodi-

[*FTC Complaint*]

In its brief, the Commission states that AB was charged in the complaint with territorial price discrimination. The complaint alleged two price reductions on its beer products made by AB to retailers in the St. Louis, Missouri area during 1954, resulting in substantially lower prices to its customers there than to its customers located elsewhere in the United States. AB's answer consisted in part of a denial and contained an affirmative defense that the reductions were made in good faith to meet the equally low prices of competitors. See section 2(b) of the Clayton Act, amended as aforesaid, 15 U. S. C. A. § 13(b).[2]

Following hearings before an examiner, he entered an initial decision, in which he made findings of fact and concluded that AB had violated section 2(a) as charged, and entered a provisional order. The Commission issued its final order now before us, adopting the findings and conclusions of the examiner,[3] and filed its opinion.

[*Beer Market and Sales*]

The evidence is not in substantial conflict. As found by the examiner, the controlling facts which we deem material here are, in summary, as follows:

At all times relevant in this case, AB, a manufacturer of beers, including Budweiser, sold its beers on a nationwide basis, in competition with other brewers in commerce. AB and four other named breweries selling on a nationwide basis, sold and shipped into all states. They were known as national brewers and their products as national beers. There were throughout the country a number of beers having merely local or regional distribution.

There were many separate marketing areas for beer in the country. Each market had a distinct pattern of prices and the prices charged for the same beers varied among the different marketing areas. While it appears that there was no uniform or constant differential, in the great majority of markets Budweiser and the other national beers were sold at some price higher than the price charged for beers having merely regional or local distribution.

In 1953, a strike closed the plants of the other four national brewers and AB became the nation's leading producer. After the strike, the national brewers generally

ties of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

[2] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

[3] It modified in some respects the provisional order to cease and desist.

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increased prices, though in varying amounts depending on locality. However, neither AB nor its three local or regional competitors in the St. Louis area [4] increased their prices on sales in the St. Louis market.

[*Local Price Reduction*]

On January 4, 1954 and June 21, 1954, AB reduced its prices on Budweiser beer in the St. Louis market to practically equal those charged for local and regional beers there. These reductions AB did not make elsewhere.

[*FTC Ruling*]

These price cuts, the Commission held, constituted a discrimination in price "as between purchasers differently located." The examiner found, and the Commission concurred, that these price "discriminations" had the effect of diverting substantial business to AB from its competitors in the St. Louis market; the effect of substantially lessening competition in the line of commerce in which AB and its local competitors "are engaged"; and the further effect of tending to create a monopoly and having the potentialities to continue to do so.

We find it unnecessary to determine whether the evidence proved the effects to which the Commission alluded, or whether the evidence established AB's affirmative defense of good faith.

The Commission makes it clear that no complaint is made by it as to AB's regular practice of selling its beer at different prices in the different markets of the country. It says:

> "We are concerned only with the lowering of the price in one area while maintaining prices in all other areas albeit the maintained prices might be different prices.
>
> "* * * The proceeding was designed to stop a predatory pricing practice, a practice by which a national seller can disrupt any given market to the injury of its local competitors in that market.
>
> "* * * The Commission found the price reductions confined to the St. Louis area to be price discriminations violative of Section 2(a) of the amended Clayton Act. Petitioner maintains there was no violation of law."

[*Discrimination Under Section 2(a)*]

We are confronted here with the basic question of whether AB's price cuts in the St. Louis area, which, as contended by the Commission, disrupted that market to the injury of its local competitors in *that* market, were price discriminations within the proscription of section 2(a). Even if we assume that these cuts were directed at AB's local competitors, they were not *discriminatory*. AB did not thereby *discriminate* among its local competitors in the St. Louis area. By its cuts AB employed the same means of competition against all of them. Moreover, it did not discriminate among those who *bought* its beer in the St. Louis area; all could buy at the same prices. We have here, as far as the St. Louis area is concerned, a nondiscriminatory pricing activity, as to which the affirmative defense of good faith becomes relevant only if the price cuts constituted a violation of section 2(a).

[*Relationship Between Purchasers—Right to Equal Treatment*]

Actually the only discrimination claimed is said to result from AB's St. Louis price cuts when it failed to make similar cuts in other areas. But it is significant that the Commission is not seeking to protect AB's competitors in the other areas. In fact the Commission does not even say that they have been injured. In effect, the situation is that, while the cuts were discriminatory against AB's competitors only in other areas (about which there is no complaint by the Commission) and the effects on AB's local competitors in the St. Louis area were not discriminatory as among them, the Commission argues that section 2(a) can be used "to stop a predatory pricing practice" in that area. However, it is not every price difference that amounts to a discrimination in price under the Act. Price discrimination means more than a mere difference in price. There must be some relationship between the different purchasers which entitles them to comparable treatment. Inasmuch as the Commission admits that the prices charged in the St. Louis area, on the one hand, and in other areas, on the other hand, were different and that this difference is not the subject of its complaint, it is clear that the mere fact of difference in price resulting from difference of markets, is not price discrimination under the Act. The Commission complains only about the lowering of the price in one

[4] Falstaff, Griesedieck Western and Griesedieck Brothers.

area while the prices in all other areas are maintained, albeit the maintained prices might be different from those charged in the area where the lowering took place. But Representative Utterback, a manager of the conference bill which became section 2(a) (80 Cong. Rec. 9416), stated:

> "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."

Where two purchasers from a seller are competing with each other, that competition creates a relationship that entitles them to comparable treatment as to price, without which treatment there would be a discrimination in price within the meaning of section 2(a). On the other hand, in a case like this, where the purchasers from a seller are located in different areas of the country and are not in competition with each other, there is generally no relationship which entitles them to be charged the same prices. This is particularly true when different prices in different markets are characteristics of all sellers in the industry. Thus, a retailer in Boston or San Francisco, in paying a higher price for beer than a retailer in St. Louis or Chicago, is in no way prejudiced or treated unfairly.

Moreover, if it were assumed that AB's price cuts in the St. Louis area were injurious to its customers in some other area and that the latter customers were given by section 2(a) a right to relief, we find no language in that section transferring that right to AB's *competitors* in the St. Louis area. It is a complete *nonsequitur* to say that, because AB's acts gave its *customers* in *another* area a right to relief, its *St. Louis* market *competitors* became entitled to relief under section 2(a). Certainly congress has not said so in that section and we have no right to extend the section to benefit a group which lies beyond the purpose and scope of the language used.

[*Geographical Discrimination Under Section 3*]

Lacking a showing of discrimination within the St. Louis area, there is no relationship existing between AB's competitors in that area and either its competitors or its customers in other areas which justifies the Commission's conclusion that a discrimination has been shown in the St. Louis area which brings section 2(a) into play. In reality, the Commission is not complaining of a price discrimination between purchasers in different markets, but rather of a lowering in price in St. Louis, whether or not discriminatory. But section 2(a) says nothing about lowering prices in any market. Such a practice congress did meet head-on when, in 1936, it enacted section 3 of the Robinson-Patman Act, 15 U. S. C. A. 13a, which does not amend the Clayton Act, but stands on its own footing and carries its own sanctions. *Nashville Milk Co. v. Carnation Company,* [1958 TRADE CASES ¶ 68,915], 355 U. S. 373, affirming our decision, 238 F. 2d 86. As the Supreme Court said in that case at 377, in regard to section 3:

> "* * * It prohibits three kinds of trade practices, (a) general price discriminations, (b) geographical price discriminations, and (c) selling 'at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.' * * *"

Although there is a partial overlap between the price discrimination clauses of section 3 of the Robinson-Patman Act and those of section 2 of the Clayton Act, as amended by the first section of the Robinson-Patman Act, as stated by the Supreme Court in the *Nashville Milk Co., supra,* at 378, we do not find in section 2(a) the price discrimination proscription sought by the Commission in this case. On the other hand, section 3 of the Robinson-Patman Act, in the prohibitions [(b) and (c) pointed out by the Supreme Court, *supra*] has imposed severe sanctions on geographical price discrimi-

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nations and selling at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

The fact that the Commission has not been given power by 15 U. S. C. A. 21 to enforce section 3, which is known as 15 U. S. C. A. 13a, does not justify an attempt by it to enlarge the scope of section 2(a) to include a matter lying expressly within the scope of section 3.

[*Order Set Aside*]

Neither by a charge in the complaint nor by the evidence has the Commission shown a violation by AB of section 2(a) of the Act. For the foregoing reasons, therefore, the cease and desist order issued by the Commission on September 10, 1957, is set aside.

Order Set Aside.

[¶ 69,331] Thomas v. Coastal Industrial Services, Inc.

In the Supreme Court of Georgia. 20401. Decided April 9, 1959.

Georgia Antitrust Laws

Combinations and Conspiracies Under State Antitrust Laws—Employee's Contract Not to Compete With Former Employer—Reasonableness of Territorial Restriction Which Exceeds Employer's Area of Operations.—An employee's agreement that he would not rent uniforms, wiping cloths, and such items to service stations, garages, and similar businesses in 34 named Georgia counties and 12 South Carolina counties for a period of one year after the termination of his employment was void and unenforceable. The employer did business in only 31 of the 34 named Georgia counties, and did no business in the South Carolina counties in which the employee was restricted from working. Contracts in general restraint of trade are contrary to the public policy of Georgia, while contracts in partial restraint of trade, reasonably limited as to time and territory, are valid. In the instant case, the time limitation of one year was unquestionably reasonable; however, the territorial limitation unduly restricted the employee without any reasonable necessity therefor. Prohibiting a former employee from working in a territory where an employer has never had customers is not reasonably necessary for the protection of the employer. Since the contract was void, the trial court improperly enjoined the employee from working in the 31 Georgia counties where the employer did have customers.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.12.

For the plaintiff in error: J. Walter Cowart and Thomas Delano Maurice, both of Savannah, Ga.

For the defendant in error: Corish, Alexander & Shea, Savannah, Ga.

[*Contract Not to Compete*]

Mobley, Justice [*In full text*]: The exception is to the judgment of the Superior Court of Chatham County overruling the general demurrer to the petition of Coastal Industrial Services, Inc., and to the granting of a temporary injunction against the defendant. The petitioner sought to enjoin the defendant from violating the terms of a contract of employment in which the defendant agreed that during his employment and for a year after termination thereof he would not solicit business or patronage of the kind he had performed for the petitioner of any person whatsoever in 34 named Georgia counties and 12 named South Carolina counties. The court enjoined the defendant from doing business in 31 of the 34 Georgia counties named in the contract. *Held:*

[*Consideration*]

1. "Though a promise may be *nudum pactum* when made, because the promisee is not bound, it becomes binding when he subsequently furnishes the consideration contemplated, by doing what he was expected to do." *Brown v. Bowman,* 119 Ga. 153 (1) (— S. E. —). Even though the agreement does not disclose what salary the defendant was to be paid or the length of time he was to be employed by the plaintiff, and despite the fact that the defendant

was already employed by the plaintiff at the time the agreement was entered into, mutuality and sufficient consideration to vitalize the ancillary agreement were supplied by performance under the agreement. *Breed v. National Credit Ass'n,* 211 Ga. 629, 632 (— S. E. 2d —). Accordingly, the covenant sued upon was not void for lack of consideration; and the trial court properly overruled the demurrers.

[*Reasonableness as to Time and Territory*]

2. Although contracts in general restraint of trade are void as being contrary to public policy (Code § 20-504), "a contract concerning a lawful and useful business in partial restraint of trade and reasonably limited as to time and territory is not void." *Black v. Horowitz,* 203 Ga. 294 (— S. E. 2d —). Unquestionably, under many rulings of this court, the time limitation of one year in this case is reasonable. *Griffin v. Vandegriff,* 205 Ga. 288, 295 (— S. E. 2d —). Reasonableness as to territory depends not so much on the geographical size of the territory as on the reasonableness of the territorial restriction in view of the facts and circumstances of the case. *Rakestraw v. Lanier,* 104 Ga. 188, 195 (— S. E. —). ". . . as a matter of law, such a contract is to be upheld, if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public." *Rakestraw v. Lanier, supra,* page 194. The evidence showed that the plaintiff company did business in only 31 of the 34 named Georgia counties and that he did no business in the South Carolina counties included in the territory in which the defendant was restricted from working and had no intention of doing so. The plaintiff company is engaged in the business of renting uniforms, wiping cloths, etc., to service stations, garages and similar businesses located on routes out of Savannah. During his employment by the plaintiff company, the defendant serviced these routes as a driver-supervisor, one of his duties being to solicit customers for the plaintiff company. The defendant serviced routes in 31 of the 34 Georgia counties set out in the restrictive covenant; and it was in these 31 counties that the trial court enjoined the defendant from competing with the plaintiff corporation. We are of the opinion that this case comes squarely within the case of *Orkin Exterminating Co. of South Ga. v. Dewberry,* 204 Ga. 794 (— S. E. 2d —), that this case is controlled by the decision in the *Orkin* case, and that the restrictive covenant is void and unenforceable. In *Orkin Exterminating Co. of South Ga. v. Dewberry, supra,* the plaintiff sought to enjoin the defendant from violating the terms of a restrictive covenant ancillary to a contract of employment, which provided that for a period of one year following termination of employment the employee should not engage in the exterminating business in Macon, Dublin, Milledgeville, Perry, Jeffersonville, Forsyth and Barnesville or at any place within a 75-mile radius of any of those towns. The evidence showed that the plaintiff corporation did not operate in all the towns or the adjacent territory but that it intended to expand its operations into all the area covered by the restrictive covenant when business conditions rendered the time opportune for such expansion. The trial judge rendered a judgment temporarily restraining the defendant from calling on customers of the plaintiff company in Bibb County, Dublin, Barnesville, Forsyth, McRae and Reynolds, in which places the defendant had worked while in the plaintiff company's employ, but which constituted only a portion of the restricted territory. This court held that the trial court erred in granting the injunction. In reversing the lower court, it was stated: "In the protection of the employer against the possibility of a former employee's contacting its customers, it is not reasonably necessary that he should be prohibited from working in a territory where the employer has never had customers. Certainly, the inclusion of such territory in a restrictive covenant is broader than reasonably necessary to protect the employer where there is no anticipation of immediately extending the company's business into the prohibited territory, but the anticipation is nothing more than a hope, based upon contingencies, which may or may not occur. Whatever may be the rule with regard to contracts of sale, it is our opinion, in view of the repeated rulings that employment contracts require more limited restraints, that such broad territorial limitation unduly restricts the employee

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without any reasonable necessity therefor." *Orkin Exterminating Co. of South Ga. v. Dewberry, supra,* page 807.

[*Judgment*]

Judgment affirmed in part and reversed in part. All the Justices concur.

[¶ 69,332] Rita Gottesman, Maria Mattiello, Arlyne Zucker and Paul J. Peyser v. General Motors Corporation and E. I. du Pont de Nemours & Company.

In the United States District Court for the Southern District of New York. Civil No. 121-251. Filed March 24, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit—Parties Plaintiff—Stockholders' Derivative Suit—Explaining Failure to Have Action Brought by Corporation Through Demand on Majority of Stockholders.—Four of an automobile manufacturer's stockholders, in a stockholders' derivative antitrust action against a chemical company which, according to the United States Supreme Court, 1957 Trade Cases ¶ 68,723, violated Section 7 of the Clayton Act by acquiring and using 23 per cent of the automobile manufacturer's stock, sufficiently explained, under Rule 23(b) of the Federal Rules of Civil Procedure, why they did not attempt to secure, from the majority of the stockholders, the bringing of the action by their corporation, the automobile manufacturer. The complaint alleged that such a demand upon the majority of the stockholders would have been futile. The practical effect of such a demand would have been to involve the four stockholders in an expensive proxy contest, and a demand that the corporation bring the action, even if made by the majority of the stockholders, would not have been honored by the automobile manufacturer's board of directors and/or officers, a majority of whom were elected and/or controlled by the chemical company.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.70.

For the plaintiffs: Netter & Netter, General Counsel (Henry L. Bayles and Edward A. Rothenberg, of counsel) all of New York, N. Y.

For the defendants: Henry M. Hogan and George A. Brooks (Edward B. Wallace, of counsel), New York, N. Y., for General Motors Corp.; Charles A. Horsky, Washington, D. C., and Frank H. Gordon, New York, N. Y. (Covington & Burling, Washington, D. C., of counsel), for E. I. du Pont de Nemours & Co.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 68,928.

Opinion

[*Stockholders' Antitrust Action*]

Sugarman, District Judge [*In full text*]: Shortly after the Supreme Court decided *United States v. du Pont* [1957 Trade Cases ¶ 68,723], 353 U. S. 586 (1957), three actions by stockholders of General Motors were commenced in this court against General Motors and du Pont. They were consolidated and an amended consolidated complaint was filed.

It states eleven claims. The first six seek triple damages against du Pont in behalf of General Motors under the antitrust laws. The next four seek simple damages against du Pont in behalf of General Motors. The eleventh seeks injunctive relief. The complaint relies heavily upon the aforesaid decision of the Supreme Court.

[*Motion to Dismiss*]

Defendants move "(1) for an order dismissing the consolidated amended complaint and action herein upon the ground that said complaint fails to state a claim upon which relief can be granted, in that the allegations of the complaint are insufficient to excuse the failure of the plaintiffs to make demand on the stockholders of General Motors Corporation to bring this action, as is required by Federal Rule of Civil Procedure 23(b); . . ."

On a motion of this nature the defendants admit the existence and validity of the claim

asserted but challenge the plaintiffs' right to relief. The allegations of the complaint must be viewed in a light most favorable to the plaintiffs, admitting and accepting as true, all facts well pleaded.[1]

.[*Failure to Secure Corporate Action*]

Defendants' attack is confined solely to the alleged failure of plaintiffs to comply with that part of F. R. Civ. P. 23(b) which requires a showing in a stockholders' secondary action complaint of what efforts the plaintiffs made to secure from the shareholders the corporate action sought by the plaintiffs and their reasons for failing to obtain it or for not making the effort.

The first rule from which F. R. Civ. P. 23(b) evolved was Equity Rule 94 adopted in 1882, 104 U. S. IX. It came into being during the term at which *Hawes v. Oakland,* 104 U. S. 450, was decided. It did not contain the requirement that a stockholder's bill state the reasons for not making an effort to secure the action sought from the stockholders. That addition was made to the rule when it became Equity Rule 27 at the 1912 term of the Court, 226 U. S. 656. The change was made three years after the Delaware decision, *infra.* The added language was continued into F. R. Civ. P. 23(b).

[*Failure to "Make Effort"—Futility*]

This being a motion under F. R. Civ. P. 12(b)(6) its determination is confined solely to the notice of motion and the complaint. Defendants do not challenge the 20th paragraph of the complaint which alleges the reasons for the futility of a demand upon the directors of General Motors. The only point raised is the sufficiency of the allegations explaining the failure of the plaintiffs to make an effort to secure from the stockholders the action sought.

The pertinent paragraphs of the complaint read:

"7. At all times since June 30, 1949, and for some time prior thereto, defendant du Pont owned at least approximately 23% of the total outstanding common stock of General Motors. In addition, the officers and directors of du Pont, their relatives and associates, directly and indirectly owned or controlled shares of the common stock of said corporation in amounts which are presently unknown to the plaintiffs herein. The balance of said corporation's outstanding common stock was divided between several hundreds of thousands of other stockholders who resided in widespread parts of the world, none of whom individually owned as much as 10% of the corporation's outstanding stock and nearly all of whom owned relatively small amounts of shares of said stock. For example, in 1957, out of approximately 667,000 stockholders other than du Pont, approximately 500,000 owned no more than 200 shares each and approximately 159,000 owned no more than 25 shares each. By reason of the foregoing du Pont's stock interest in General Motors exerted a potent influence on the affairs of General Motors, promoted the acts and transactions herein alleged, and induced General Motors to participate therein. Furthermore, by reason of the facts herein alleged, defendant du Pont had working control (sometimes hereinafter referred to as 'control') over General Motors, which permitted it to nominate and elect and/or dominate and control the majority of the Board of Directors and/or officers of said corporation, and to select and/or dominate and control a large part of the personnel of said corporation concerned with the acts and transactions herein alleged, to determine a large part of said corporation's policies including those relating to said acts and transactions, and to cause General Motors to participate in said acts and transactions."

"21. No demand has been made by plaintiffs on the body of stockholders of General Motors to obtain such action as they desire, because:

. . .

B. Such demand would have been futile for any or all of the following reasons:

(1) If the majority of stockholders had demanded that suit be brought, such demand would not have been honored by General Motors' Board of Directors and/or officers by reason of the facts hereinbefore alleged.

(2) The practical effect of any such demand would have been to involve the plaintiffs in a proxy contest to prevent ratification (if the body of stockholders of General Motors had the power to ratify the wrongful acts of the defendant du Pont) and/or to oust the existing Board of Directors of General Motors and to supplant it with a new Board which would have exercised independent and unbiased judgment in determining

[1] 1 Barron & Holtzoff 618; 2 Moore's Fed. Prac. (2d ed.) 2244.

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whether suit should have been instituted by said corporation against du Pont; and such a proxy contest would have required clearance of proxy material by the Securities and Exchange Commission and the circulation of said material to all stockholders of General Motors, all at considerable and prohibitive personal expense to plaintiffs. Such proxy contest would have been waged with du Pont and/or the management of General Motors, who also owned substantial blocks of the common stock of General Motors and had control over said corporation's proxy solicitation machinery. The latter's proxy solicitation would have been undertaken at the corporation's expense. By reason of the facts hereinbefore alleged, and the inertia and indifference of most of the widespread and relatively small stockholders, and their reluctance to oust management during a period of prosperity, for all practical purposes it would have been impossible for plaintiffs to have emerged the victor in such a proxy contest."

[*Allegations Adequate*]

Accepting the allegations of paragraphs 7 and 21B of the complaint as true, the complaint, contrary to defendants' assertion, states a claim upon which relief can be granted because those allegations adequately set forth reasons for not making the effort to obtain from the shareholders the action by General Motors now sought against du Pont.

In small corporations, the holding of less than a majority of the stock would not amount to control; in large corporations, with stock widely distributed among many shareholders, a compact united ownership of a substantial block of stock, although less than a majority, could be ample to control the operations of the corporation.[2]

[*Similar Case*]

When the Court, in 1912, by the addition in Equity Rule 27, accorded to plaintiffs in derivative stockholders' suits the privilege of setting forth in their complaints the reasons for not seeking redress from the shareholders of the corporate beneficiary of the suit, it is obvious that it intended to cover a situation ruled upon by it but three years earlier.[3]

There is a marked similarity between the certified facts in the *Delaware* case (which, as above noted, was decided after the promulgation of Equity Rule 94 in 1882 and before the promulgation of Equity Rule 27 in 1912 which added the requirement now being discussed) and the case at bar. If anything, the defendants' position in the *Delaware* case was more formidable than is the position of the defendants here. In the *Delaware* case the complainants and the allied protective committee controlled a percentage of issued stock of Susquehanna almost equal to the 25 per cent controlled by the Delaware Company and the directors. Further, the amount of stock involved and the diversification of its ownership was far less than is here presented.

The facts here presented are governed by the ruling in the *Delaware* case and hence the first branch of defendants' motion is denied.[4]

The notice of motion asks "(2) in the alternative, for an order staying this action and directing that the plaintiffs seek approval for bringing this suit from the stockholders of General Motors Corporation at their next annual meeting to be held on May 22, 1959, and dismissing this action in the event they do not secure such approval . . ."[5] Granting of the alternative relief sought, that plaintiffs be stayed until they poll the stockholders of defendant General Motors, would negative the holding on the first branch of the motion that the complaint states a claim upon which relief can be granted in so far as it states reasons for not consulting the shareholders. Hence, the second branch of defendants' motion is denied.

Recognizing that this decision enables a relatively small stockholder interest to plunge two large corporations into inevitably long and expensive litigation which, should this determination be erroneous, would result in

[2] *United States v. Union Pacific Railroad Company*, 226 U. S. 61, 95 (1912).

[3] *Delaware and Hudson Company v. Albany and Susquehanna Railroad Company*, 213 U. S. 435 (1909).

[4] *Cf. Berg et al. v. Cincinnati, Newport & Covington Ry. Co. et al.*, 56 F. Supp. 842, 845 (E. D. Ky. 1944); *Pergament et al. v. Frazer et al.*, 93 F. Supp. 9, 13 (E. D. Mich. 1949).

[5] Defendant du Pont has offered not to vote its stock on the question at the meeting and defendant General Motors has agreed to abide by the court's directive as to procedures to be used in connection with its proxy machinery to insure a fair presentation of plaintiffs' position to the stockholders.

a futile waste of time and money by both the plaintiffs and the defendants, this court will, if it is timely made, grant a certificate pursuant to 28 U. S. C. § 1292(b).

The defendants' motion is in all respects denied.

This is the court's order[6] and no further order is necessary.

[¶ 69,333] **United States v. The Procter & Gamble Company, et al.**

In the United States District Court for the District of New Jersey. Civil Action No. 1196-52. Filed March 19, 1959.

Case No. 1150 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures—Discovery—Abandonment of Plans for "Two-Stage" Trial—Avoidance of Time Lapse Between Stages of Trial.—In an action charging a conspiracy to fix prices and to monopolize the manufacture and sale of household soaps and detergents, plans for a "two-stage" trial of the protracted case were abandoned in favor of the usual single trial where (1) the defendants did not want a two-stage trial if they had to complete their discovery before beginning the first stage of the trial, (2) the Government had never wanted a two-stage trial, and (3) the court, contrary to its earlier thought, doubted that the second stage of the trial could be avoided. The defendants had requested a delay of their "second stage" discovery until after the first stage of the trial; however, the court had overruled that request in order to prevent the defendants' lengthy "second stage" discovery from causing a time lapse between the two stages of the trial and thus the comparison of stale evidence with fresh evidence as to related issues.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.

For the plaintiff: Chester A. Weidenburner, United States Attorney, by Charles H. Hoens, Jr., Assistant United States Attorney; and Joseph E. McDowell, Antitrust Division, Department of Justice.

For the defendants: O'Mara, Schumann, Davis & Lynch, and Cahill, Gordon, Reindel & Ohl, by Mathias Correa, for Colgate-Palmolive Co. Bailey & Schenck, and Arnold, Fortas & Porter, by Abe Fortas, for Lever Brothers Co. Toner, Crowley, Woelper & Vanderbilt; Royall, Koegel, Harris & Caskey, by Kenneth C. Royall; Dinsmore, Shohl, Sawyer & Dinsmore, by Joseph Dinsmore; and Taft, Stettinius & Hollister, by Charles Sawyer, for Procter & Gamble Co. Davies, Richberg, Tydings & Landa, by Shelby Fitze; and McCarter, English & Studer, for Association of American Soap & Glycerine Producers.

Addendum **to a prior opinion of the U. S. District Court, District of New Jersey, 1959 Trade Cases ¶ 69,260. For a prior opinion of the U. S. Supreme Court, see 1958 Trade Cases ¶ 69,046, reversing a judgment of the U. S. District Court, District of New Jersey, 1956 Trade Cases ¶ 68,488. For prior opinions of the District Court, see 1956 Trade Cases ¶ 68,457 and 68,335, 1955 Trade Cases ¶ 68,228, 1954 Trade Cases ¶ 67,677, and 1953 Trade Cases ¶ 67,497.**

Addendum to Opinion on Cut-Off Date

[*Plans for "Two-Stage" Trial Abandoned*]

HARTSHORNE, District Judge [*In full text*]: Shortly following the filing of the cut-off opinion herein, dated January 27, 1959 [1959 TRADE CASES ¶ 69,260], the Court advised all counsel at pretrial that, in the light of the Government's previous written representations as to the nature of its prewar proof, it had real doubt as to whether it would not be obliged to give the Government the right to introduce such proof ultimately. Further that, in order not to do injustice by comparing stale evidence with fresh evidence as to related issues, the Court must insist that months on end not be permitted to intervene between the

[6] General Rule 10(a) for the Southern and Eastern Districts of New York.

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first stage and the second stage of trial, in order to permit the defendants then to carry through their lengthy prewar discovery. Accordingly, the Court insisted that, before any trial, all parties would be required to complete both their prewar and postwar discovery. Therefore, the Court overruled the request of the defendants to delay their prewar discovery until after the first stage of trial. Thereupon the defendants indicated generally, with the exception of Colgate-Palmolive, and that of the Association which, though requested, did not state its viewpoint, that they did not want a two-stage trial, if they had to complete their discovery before any trial. Since the Government had never wanted a two-stage trial, the Court, particularly because of its doubt that a second stage trial could be avoided, determined to abandon the two-stage trial in favor of the usual single trial.

[*Clarification—Miscellaneous Matters*]

In the interest of accuracy, the Court would call attention to the following in its cut-off opinion:

> "The Government admits that it does not desire to give evidence as to the intermediate war period from, presumably, 1941 to 1946, when the Government's wartime regulations of business were in effect."

This does not mean that the Government admits that such are accurate dates, or that no violations by the defendants occurred between such dates. Nor does the Government admit the defendants' claim that it may use almost a million documents in its proof. However, it is clear that the Government will use documents literally in the thousands, so the exact number of documents to be used is theoretically, though not practically, immaterial.

[¶ 69,334] Aircoach Transport Association, Inc., et al. v. Atchison, Topeka & Santa Fe Railway Co., et al.

In the United States District Court for the District of Columbia. Civil Action No. 875-57. Dated February 24, 1959.

Sherman Antitrust Act

Combination and Conspiracies—Applicability of Sherman Act to Common Carriers—Jurisdiction of District Court and Interstate Commerce Commission—Referral of Issues to Commission Prior to Court's Decision.—A trial court which had held that railroads' concerted rate quotations were illegal *per se* under the Sherman Act was required, by an opinion of a reviewing court, to retain jurisdiction of air carriers' treble damage action against the railroads, but withhold its decision until the Interstate Commerce Commission has had an opportunity to decide initially whether, in its view, the railroads could be relieved of the operation of the antitrust laws by virtue of Section 5a(9) of the Interstate Commerce Act and, if so, whether they had been so relieved by an agreement approved by the Commission. The reviewing court had further held that it was unnecessary to refer to the Commission an aspect of the case in which it was charged that the railroads, in combination and conspiracy, made an effort to eliminate the competition of the air carriers. However, according to the trial court, a subsequent United States Supreme Court decision modified that holding by requiring that the issue of the intent and effect of an agreement approved by the Commission must, in a case where such issue is the sole or dominant issue in the case, first be referred to the Commission prior to a court determination of whether such an agreement violated the antitrust laws. As to that aspect of the case in which it was asserted that the railroads' purpose was to destroy competition, the issue of the intent and effect of the agreements was the sole or dominant issue; therefore, the railroads were granted a motion to submit that issue to the Commission for its determination along with the other issues previously submitted to it.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.355, 2039.70; Private Enforcement and Procedure, Vol. 2, ¶ 9007.60.

For the plaintiffs: David I. Shapiro and Gerhard P. Van Arkel, Washington, D. C.

For the defendants: Douglas F. Smith, Stuart S. Ball, Howard P. Robinson, Howard J. Trienens, and Richard J. Flynn (Sidley, Austin, Burgess & Smith); John Bodner, Jr.;

Hugh B. Cox and Paul F. McArdle (Covington & Burling); William E. Miller, Stephen Ailes, and Richard A. Whiting (Steptoe & Johnson), all of Washington, D. C.

For a prior opinion of the U. S. Court of Appeals, District of Columbia, vacating a judgment of the U. S. District Court, District of Columbia, 1957 Trade Cases ¶ 68,762, see 1958 Trade Cases ¶ 68,958.

Memorandum

[Motion to Vacate Denied]

JOSEPH MCGARRAGHY, District Judge *[In full text]*: The Court is of the opinion that plaintiffs' motion to vacate the order of April 18, 1958 must be denied.

[Decision Withheld—ICC Action Pending]

The Interstate Commerce Commission has disclaimed jurisdiction to pass upon the question of law, but is proceeding to a hearing on the issues of fact stated in the order.

In my opinion, the opinion and mandate of the Court of Appeals in this case [1958 TRADE CASES ¶ 68,958], require that this Court withhold decision on the interpretation of the existing agreements, insofar as the challenged practices are concerned, until the Commission has had an opportunity to decide the issues raised in the petition now pending before it.

The following passages from the opinion of the Court of Appeals, in my opinion, require this ruling:

"Nevertheless, we think the general statutory scheme referred to does not necessitate a conclusion that no section 22 reduced rates may be concertedly offered under the authority of an agreement approved by the Commission under section 5a. Though not subject to the same regulation as commercial rates, all section 22 terms for governmental carriage are not, for that reason, altogether beyond concerted action permissible under section 5a. The Act is designed primarily for commercial traffic. Section 22 is apart from this primary design. It is a concession to the Government. But the fact that section 22 reduced rates are not within the chief regulatory plan for commercial rates does not remove them from the Act entirely. . . ."

* * *

"We resolve the ambiguous situation by holding as a matter of statutory construction that not all reduced rates under section 22 are necessarily to be excluded from concerted action under agreements approved by the Commission under section 5a, and therefore left unprotected from the operation of the antitrust laws under section 5a(9). . . ."

* * *

"It does not follow, however, that the practices here involved may validly be included, or in fact are included, within any agreement which has been approved under section 5a."

* * *

"The Railroads vigorously contend at this point that the question whether or not the practices can be or are covered by any section 5a agreement is within the exclusive primary jurisdiction of the Commission. They rely principally upon section 5a(7), here set forth in the margin. We do not read that provision as do the Railroads. It seems to us to authorize the Commission to determine whether an agreement which it has approved, or the terms and conditions of its approval, conforms with the standard set forth in paragraph 5a(2), or whether such terms and conditions are not necessary for that purpose, and to determine that either the approval or the terms and conditions of the approval, should be modified to bring about conformity with such standard . . ."

* * *

"Nevertheless, the questions are appropriate for Commission consideration, even though, as we believe, exclusive primary jurisdiction over either of them does not reside in the Commission by reason of section 5a(7). Compare *Myers v. Bethlehem Corp.*, 303 U. S. 41, 48. The agreements relied upon by the Railroads had Commission approval. While the challenged practices arose subsequently to such approval, and seriously affect another industry, they arose nonetheless in the industry with respect to which the Commission has expertise and large responsibilities, and they are defended as authorized by the Commission's governing statute and by its administration thereof. In this situation, 'the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue'. . . ."

* * *

"In short, the court, while retaining jurisdiction, should in its discretion withhold decision on the interpretation of the statute and existing agreements approved under section 5a, insofar as the challenged practices are concerned, until the Commission has had an opportunity to decide initially whether in its view the Railroads can, with respect to those practices, be

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relieved of the operations of the antitrust laws under the statute and, if so, whether they have been so relieved by any approved agreement, and, if so, by which agreement or agreements, by what provisions thereof, and as of what date. The Commission might disclaim jurisdiction, or for some other reason might refrain from deciding these questions. We do not hold that it is required to decide them. The court could then proceed according to its own light to interpret either the statute or the agreements."

The foregoing relates to the practices which this Court has held are illegal *per se* and the Court of Appeals agreed unless they are relieved by virtue of section 5a(9).

[*Alleged Conspiracy—Intent and Effect of Agreements*]

With respect to the second aspect of the case in which the plaintiffs charge an effort by the defendants in combination or conspiracy to eliminate the competition of plaintiffs, the Court of Appeals held that this aspect need not be submitted for consideration or initial decision by the Commission as to either questions of fact or of law.

After the decision of the Court of Appeals in this case, the Supreme Court decided *Federal Maritime Board v. Isbrandtsen Co.*, 356 U. S. 481, in the light of which the Court of Appeals in *Riss & Co., Inc. v. Atlantic Coast Line R. Co.*, [1958 TRADE CASES ¶ 69,122] held "that the *Isbrandtsen* opinion modifies the holding of the *Aircoach* case by requiring that the issue of the intent and effect of an agreement approved by the Commission must, in a case where such issue is the sole or dominant issue in the case, first be referred to the Commission prior to a Court determination of whether such agreement violates the anti-trust laws."

Defendants have now moved to supplement the order of April 18, 1958, by including the intent and effect of the challenged rate practices of the defendants as issues which the Commission shall first have an opportunity to pass upon.

While plaintiffs have not indicated a desire to proceed to hearing at this time on that aspect of the case in which they assert defendants' purpose to destroy competition, it remains in the case, and the Court is of the opinion that with respect thereto the issue of intent and effect is the sole or dominant issue. Accordingly, under *Isbrandtsen* and *Riss*, the issue of intent and effect must first be referred to the Commission.

Plaintiffs contend that such action at this time would be premature since plaintiffs have no present intention of proceeding on "the intent and effect" issue so long as the case may be decided on the plaintiffs' theory of *per se* illegality.

However, the Court is of the opinion that since the Commission has now set for hearing the issues of fact embodied in the Court's order of April 18, 1958, the orderly and expeditious procedure would be to include the issue of intent and effect for consideration and determination by the Commission in a single proceeding.

Accordingly, the defendants' motion to supplement the order of April 18, 1958 will be granted.

Counsel for defendants will submit an order in conformity with the foregoing.

[¶ 69,335] Melrose Distillers, Inc., CVA Corporation and Dant Distillery and Distributing Corporation v. United States.

In the Supreme Court of the United States. October Term, 1958. No. 404. Dated April 20, 1959.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Case No. 1225 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Dissolution of Corporate Defendant After Return of Indictment—Survival of Criminal Liability. —Criminal actions charging Maryland and Delaware corporations with violations of the Sherman Act were not abated by the dissolution of the corporations after the return of the indictment. Section 8 of that Act defines "person" to include corporations "existing" under the laws of any state. Whether a corporation "exists" for any purpose is deter-

mined by reference to state law. Under a Maryland survival statute, a corporation continues "in existence for the purpose of paying, satisfying, and discharging any existing debts and obligations" and "such dissolution" does not "abate any pending suit or proceeding by or against the corporation." A Delaware survival statute provided that any "proceeding" begun by or against a corporation before or within three years after dissolution should continue "until any judgments, orders, or decrees therein shall be fully executed." The term "proceeding" was elsewhere used in the Deleware Code as including criminal prosecutions, and that seemed to be consistent with its normal construction. However, no matter how the courts of Maryland and Delaware might construe them, those survival statutes sufficiently continued the existence of the corporations for the purposes of Section 8 of the Sherman Act. Also, policy reasons accorded with that result. After dissolution, the corporations simply became divisions of a new corporation under the same ultimate ownership. There was no more reason to allow them to escape criminal penalties than damages in a civil suit. A corporation cannot be sent to jail; the discharge of its liabilities, whether criminal or civil, can be effected only by the payment of money.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.300.

For the petitioners: Robert S. Marx and Roy G. Holmes, Cincinnati, Ohio; and Hilary W. Gans, Baltimore, Md.

For the respondent: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; and Richard A. Solomon and Henry Geller, Attorneys, Department of Justice, Washington, D. C.

Affirming a decision of the U. S. Court of Appeals, Fourth Circuit, 1958 Trade Cases ¶ 69,129. For a prior opinion of the U. S. Court of Appeals, Fourth Circuit, see 1957 Trade Cases ¶ 68,600. For prior opinions of the U. S. District Court, District of Maryland, see 1956 Trade Cases ¶ 68,243 and 1958 Trade Cases ¶ 69,016.

[*Criminal Liability of Dissolved Corporations*]

Mr. Justice Douglas delivered the opinion of the Court [*In full text*]:

Petitioners are corporations—two organized under Maryland law and one under Delaware law—and wholly owned subsidiaries of Schenley Industries, Inc. They were indicted with others for restraining trade, conspiring to monopolize and attempting to monopolize commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 2. Shortly after the indictment was returned, petitioners were dissolved under their respective state statutes and became separate divisions of a new corporation under the same ultimate ownership. They then moved to dismiss the indictment on the ground that their dissolution abated the proceeding. The District Court denied the motions, holding that under the applicable Maryland and Delaware statutes the existence of the dissolved corporations continued so far as prosecution of this criminal proceeding was concerned. 138 F. Supp. 385 [1956 Trade Cases ¶ 68,243]. Petitioners then pleaded *nolo contendere* and the District Court levied fines against them. The Court of Appeals affirmed, 258 F. 2d 726 [1958 Trade Cases ¶ 69,129]. The case is here on a petition for a writ of certiorari which we granted because of a conflict among the Circuits.[1] 358 U. S. 878.

[*Applicable Law*]

We start from the premise that in the federal domain prosecutions abate both on the death of an individual defendant (*List v. Pennsylvania,* 131 U. S. 396; *Schreiber v. Sharpless,* 110 U. S. 76) and on the dissolution of a corporate defendant (*Defense Supplies Corp. v. Lawrence Warehouse Co.,* 336 U. S. 631, 634), unless the action is saved by statute. We need not decide whether federal law alone would be sufficient to save a federal cause of action against a corporation dissolved under state law. We have here a situation where the interplay of federal and state law makes it clear that petitioners did not escape criminal responsibility under the Sherman Act by

[1] See *United States v. Line Material Co.* [1953 TRADE CASES ¶ 67,456], 202 F. 2d 929; *United States v. United States Vanadium Corp.* [1956 TRADE CASES ¶ 68,283], 230 F. 2d 646. Cf. *United States v. P. F. Collier & Son,* 208 F. 2d 936.

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the kind of dissolution decreed under Maryland and Delaware law.

The Sherman Law in § 8 defines "person" to include corporations "existing" under the laws of any State. The question whether a corporation "exists" for any purpose is thus determined by reference to state law. We conclude that under both Maryland and Delaware law the lives of these corporations were not cut short, as is sometimes done on dissolution, cf. *Chicago T. & T. Co. v. Wilcox Bldg. Corp.*, 302 U. S. 120, but were sufficiently continued so that this proceeding did not abate.

[*Maryland "Survival" Statute*]

In Maryland, during the period relevant here, though the dissolution of the corporation was effective when the articles of dissolution had been accepted, the corporation continued "in existence for the purpose of paying, satisfying, and discharging any existing debts and obligations . . . ." (Flack's 1 Md. Ann. Code, 1951, Art. 23, § 72(b).) It was also provided in § 78(a) that "such dissolution" shall not "abate any pending suit or proceeding by or against the corporation . . . ." We have found no Maryland decisions interpreting these sections; but we are satisfied that the term "proceeding," no matter how the state court may construe it,[2] implies enough vitality to make the corporation an "existing" enterprise for the purposes of § 8 of the Sherman Act.

[*Delaware "Survival" Statute*]

The Delaware statute seems equally clear, though again there is no authoritative interpretation of it. It provides that any "proceeding" begun by or against a corporation before or within three years after dissolution shall continue "until any judgments, orders, or decrees therein shall be fully executed." Del. Code Ann., 1953, Tit. 8, § 278; *Addy v. Short*, 47 Del. 157, 89 A. 2d 136, 139. The term "proceeding" is elsewhere used in the Delaware Code as including criminal prosecutions;[3] and that seems to us to be consistent with its normal construction.[4] We conclude that irrespective of how the Delaware statute may be construed by the Delaware courts, it sufficiently continued the existence of this corporation for the purpose of § 8 of the Sherman Act.

[*Policy*]

Policy reasons look to the same result. Petitioners were wholly owned subsidiaries of Schenley Industries, Inc. After dissolution they simply became divisions of a new corporation under the same ultimate ownership. In this situation there is no more reason for allowing them to escape criminal penalties than damages in civil suits. As the Court of Appeals noted, a corporation cannot be sent to jail. The discharge of its liabilities whether criminal or civil can be effected only by the payment of money.

Affirmed.

[¶ 69,336] Concrete, Inc. v. Arkhola Sand and Gravel Co.

In the Arkansas Supreme Court. 5-1821. Opinion delivered March 30, 1959.

Appeal from Benton Circuit Court; MAUPIN CUMMINGS, Judge; reversed.

Arkansas Unfair Practices Act

Price Discrimination Under State Antitrust Laws—Constitutionality of Arkansas Unfair Practices Act—Discriminating Between Areas to Destroy Competition.—A complaint charging that a seller of ready-mix concrete charged a lower rate in certain terri-

[2] A memorandum filed by the Attorney General's office states that while there are no rulings on the point by the Maryland Court of Appeals or by the Attorney General, "the issue has been fully covered in opinions of the District Court and the Fourth Circuit Court of Appeals." And it adds, "We wish to express, however, our concurrence with the rulings of the lower courts in the pending litigation."

[3] "Whenever a corporation is informed against in a criminal proceeding . . . ." Tit. 11, § 1702.

[4] An agrument to the contrary is premised on Del. Code Ann., 1953, Tit. 8, § 281, which provides that the trustees of a dissolved corporation shall, after payment of allowances, expenses, and costs, pay "the other debts due from the corporation." It is urged that "debts" in this setting means existing debts. But that seems to us too narrow a reading in light of the provisions in § 279 which contemplates the entry of judgments against the corporation.

tories than it charged in others, with the intent to destroy a competitor, was improperly dismissed by a trial court which held, in effect, that the Arkansas "Unfair Practices Act" was unconstitutional. That Act made it unlawful for a distributor of a commodity in general use to discriminate between different sections, by selling at a lower rate in one than in another, with the intent to destroy competition. In addition, the Act gave injured persons the right to treble damages and an injunction. For purposes of regulation under the police power, a commodity of general use or consumption is impressed with a public interest. Therefore, the Act was a proper exercise of the police power. It was not a price fixing statute; its purpose was to guard against monopolies and encourage competition, and the means adopted were reasonable and appropriate for promoting that purpose. Furthermore, the Act was not void for indefiniteness. The language of the Act set forth as definite a standard as was permitted by the evil to be remedied, namely, the destruction of competition by depressing prices in a locality where there was competition while offsetting the loss by raising prices in another locality where there was no competition.

See Price Discrimination, Vol. 1, ¶ 3903.

For the appellant: Hardy W. Croxton.

For the appellee: Wade & McAllister and Daily & Woods.

[*Arkansas "Unfair Practices Act"—Constitutionality*]

Sam Robinson, Associate Justice [*In full text*]: Appellant, Concrete, Inc., is a domestic corporation engaged in the ready-mixed concrete business, with offices at Rogers, Arkansas. Appellee, Arkhola Sand & Gravel Company, a domestic corporation, is also engaged in the ready-mixed concrete business and has offices located at Fort Smith, Fayetteville, and Lowell, Arkansas.

Appellant commenced this action against the appellee, for an injunction and treble damages, in the Benton County Circuit Court, under the "Unfair Practices Act," Act 253 of 1937 (Ark. Stat. § 70-301). The trial court sustained appellee's demurrer, holding in effect that the Act was unconstitutional, and dismissed the complaint.

[*Lowering Prices to Destroy Competition*]

The complaint, among other things, alleges that the prices charged by appellee for its ready-mixed concrete in the Rogers and Springdale territory are at lower rates than those charged in other sections and cities served by appellee, after making allowance for transportation, grade, quality and quantity, and that the sale of said ready-mixed concrete at such rates is made with the intent to destroy the competition of appellant, a regularly established dealer.

The "Unfair Practices Act" makes it unlawful for one engaged in the distribution of a commodity of general use or consumption to discriminate between different sections, communities or cities or portions thereof, with intent to destroy competition, by selling at a lower rate in one such section than in another after making allowance for difference in grade, quality or quantity, and the actual cost of transportation. The injured person is given the right to treble damages and an injunction (Ark. Stat. § 70-310).

[*Police Power*]

Although appellee candidly points out that the "Unfair Practices Act" has been upheld against an attack on its constitutionality in *Baratti v. Koser Gin Co.*, 206 Ark. 813, 177 S. W. 2d 750, and that similar acts have been upheld by the decisions of other states, it is argued that the doctrine embraced in the Act has never been and should never become a part of Arkansas law. The contention that the Act is not a proper exercise of the police power is without merit. In addition to the *Baratti* decision, our Constitution, Art. 2, § 19, provides: "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; . . ."

[*Cases Considered*]

The Supreme Court of Nebraska, in *State v. Drayton*, 82 Neb. 254, 260, 117 N. W. 768, 770, in upholding a similar statute regulating monopolies under the police power of the state, said:

". . . It is within the knowledge of all that in many instances persons engaged in the sale of commodities in general use by the people have depressed prices in one locality where there was competition and increased them in others where there

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was none, thus avoiding loss, until the competitor was driven out of business, when prices would be raised to an unreasonable and oppressive extent, and the people of the district or community supplied from that point would be the sufferers. It was evidently the intention of the legislature to prevent that course of conduct if resorted to for that purpose. The law afforded no protection from the injurious effects of such predatory course. If no protection could be furnished to the people who were compelled to purchase the commodities, it would be easily within the range of possibilities for one person or corporation to practically control the whole commerce of a community, a county, or even the state, exacting such prices as greed might dictate, and yet seeing to it that no others should be allowed to engage in a similar business as competitors . . ."

[*Public Interest*]

Appellee, citing such case as *Noble v. Davis,* 204 Ark. 156, 161 S. W. 2d 189, and *Union Carbide & Carbon Corp. v. White River Distributors, Inc.* [1955 Trade Cases ¶ 67,953], 224 Ark. 558, 275 S. W. 2d 455, contends that this Court has never upheld price fixing or other regulation of a business of common right in the absence of a finding that it was impressed with a public interest.

The appellee's assumption that this is a price fixing statute is erroneous. *Dunnell v. Shelley,* 38 Cal. App. 2d 118, 100 P. 2d 830. The purpose of the Act, as stated in Ark. Stat. § 70-313, is to safeguard against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. We think the means adopted are reasonable and appropriate to promote the purposes mentioned.

It is true that this Court, in *Baratti v. Koser Gin Co.,* went into the question of whether a cotton gin was impressed with a public interest and thus subject to regulation under the police power, but it was there pointed out that one who devotes his property to a use in which the public has an interest, in effect grants to the public an interest in that use and must submit to be controlled by the public, for the common good, to the extent of the interest thus created. Thus it logically follows that a commodity *of general use or consumption,* as regulated by the "Unfair Practices Act," is impressed with a public interest for purposes of regulation under the police power.

[*Indefiniteness*]

Appellee says the Act is void, under Art. 2, § 8, of the Constitution of Arkansas, because it fails to define with reasonable certainty the acts that it declares unlawful. The particular language complained of as being vague and indefinite is "to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State." Statutes with somewhat similar language were held void for indefiniteness in *State v. Standard Oil Co. of New Jersey* [1940-1943 Trade Cases ¶ 56,065], 195 S. C. 267, 10 S. E. 2d 778, and *People v. Austin,* 301 Mich. 456, 3 N. W. 2d 841.

In those cases we think the courts overlooked the evils to be remedied by the Act —*i. e.,* to prevent a business from destroying competition by depressing prices in one locality where there is competition and offsetting the loss by raising the prices in another locality where there is no competition. The language in our Act sets forth as definite a standard as the evil to be regulated will permit. For, as was said in *State v. Lanesboro Produce & Hatchery Co.,* 221 Minn. 246, 21 N. W. 2d 792, 163 A. L. R. 1108, the kind of activity here regulated is such that the use of general and flexible terms in fixing the standard is inescapable. That court upheld, as against the contention here made, a statute prohibiting discrimination between "different sections, localities, communities, cities, or villages . . . by purchasing at a higher rate in one locality . . . than is paid . . . in another section, locality, community, city or village." See annotations in 52 A. L. R. 169 and 163 A. L. R. 1124.

Reversed.

[¶ 69,337] United States v. Retail Floor Covering Association of Greater Philadelphia; H. S. Bright & Co., Inc.; Morton Floor Covering Co.; Reinhart, Inc.; Gold Floor Coverings; Martin Lieberson; and Isadore Klinghoffer.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 24401. Filed April 20, 1959.

Case No. 1377 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Prohibited—Boycotts—Coercion—Exclusion from Trade—Refusal to Deal.—Retail sellers of floor covering materials and their trade association were prohibited by a consent decree from entering into agreements to hinder or prevent the sale of floor covering materials to any person. The decree also prohibited agreements to induce or coerce manufacturers or wholesalers to refuse to deal with or discriminate against any person or class of persons, to refuse to purchase from or deal with any manufacturer or wholesaler, and to induce or coerce any person or class of persons to refrain from dealing in materials produced or distributed by any person.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533, 2005.575, 2005.660, 2005.785.

Combinations and Conspiracies—Consent Decree—Trade Associations—Association Membership as Means of Trade Restraint—Coercion.—Retail sellers of floor covering materials were prohibited by a consent decree from belonging to or participating in the activities of any trade association or other organization whose activities were inconsistent with the decree. Also, the decree prohibited the association and its members from refusing to deal with any wholesaler or manufacturer, inducing or coercing others not to deal in materials produced or distributed by any person, and inducing or coercing manufacturers or wholesalers not to deal with any person. In addition, the association was ordered to incorporate the prohibitions of the decree into the association's by-laws and to require compliance as a condition to membership.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121, 2017.300.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Incorporation of Decree's Prohibitions Into Trade Association's By-Laws.—An association of retail sellers of floor covering materials, in an action charging the association and its members with boycotting manufacturers which sold to non-approved wholesalers and retailers, was ordered by a consent decree to incorporate the prohibitions of the decree into its by-laws and to make compliance therewith a condition to membership.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60, 8421.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; William D. Kilgore, Jr., Lewis Bernstein, William L. Maher, Donald G. Balthis, John J. Hughes, and Morton M. Fine, Attorneys, Department of Justice.

For the defendants: Trommer, Silver and Barsky, by Jay D. Barsky.

Final Judgment

[*Consent Decree*]

THOMAS C. EGAN, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on April 2, 1958; the defendants having appeared herein and filed their answers to said complaint denying any violations of law; and the plaintiff and the said defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or of law herein; and specifically without admission by any party in respect to any such issue; and the Court having considered the matter and being duly advised;

Now, Therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto,

It is hereby Ordered, Adjudged, and Decreed as follows:

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I

[*Jurisdiction*]

The Court has jurisdiction of the subject matter hereof and all the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means an individual, partnership, firm, corporation, association, trustee or any other business or legal entity;

(B) "Floor covering materials" means both hard and soft surface floor coverings, including but not limited to rugs, rug cushions, carpet, linoleum, and tile of types other than ceramic;

(C) "Retail store" or "retailer" means any person who maintains stocks of floor covering materials for resale to consumers; and

(D) "Wholesaler" means any person engaged in the purchase of floor covering materials from manufacturers thereof for sale or distribution to retail stores or other persons selling to ultimate consumers.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant and to his or its officers, agents, servants, employees, subsidiaries, co-partners, successors and assigns, and to all persons in active concert or participation with any defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Exclusion from Trade—Boycotts*]

The defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, any contract, agreement, understanding, plan or program, among themselves or with any other person directly or indirectly to:

(A) Hinder, restrict, limit or prevent the sale of floor covering materials to any person or group or class of persons;

(B) Hinder, restrict, limit or prevent any manufacturer or wholesaler of floor covering materials from selling floor covering materials to any person;

(C) Refuse or threaten to refuse to purchase floor covering materials from or otherwise deal with any manufacturer or wholesaler thereof;

(D) Induce, compel or coerce, or attempt to induce, compel or coerce any person or group or class of persons to refrain from purchasing, selling or distributing floor covering materials produced or distributed by any person; and

(E) Induce, compel or coerce, or attempt to induce, compel or coerce any manufacturer or wholesaler of floor covering materials to refuse to deal with or discriminate against any person or group or class of persons in connection with the purchase, sale or distribution of floor covering materials.

V

[*Practices Prohibited*]

Each defendant is enjoined and restrained from directly or indirectly:

(A) Inducing, compelling or coercing, or attempting to induce, compel or coerce any manufacturer, wholesaler or retailer to refrain from purchasing, selling or discriminating in the purchase, sale or distribution of floor covering materials from or to any person or group or class of persons; and

(B) Belonging to, organizing, becoming a member of, or participating in the activities of any trade association or other organization, the activities of which are or may be inconsistent with any provision of this Final Judgment.

VI

[*Specific Relief*]

The defendant Association is ordered and directed:

(A) Within thirty (30) days after entry hereof, to serve upon each of its present and former members a conformed copy of this Final Judgment;

(B) To institute forthwith and to complete within three months from the date of this Final Judgment such proceedings as may be appropriate and necessary to adopt by-laws incorporating therein Sections IV and V of this judgment;

(C) To furnish to each of its present and future members a copy of its by-laws adopted in accordance with subsection (B) of this Section VI and require compliance with said by-laws as a condition of membership or continued membership;

(D) To expel promptly from membership any present or future member who shall violate any of those provisions of its by-laws which incorporate Sections IV and V of this Final Judgment when said Association shall have knowledge of such violation; and

(E) Within four months after the date of entry of this Final Judgment to file with this Court and serve upon the plaintiff an affidavit setting forth the fact and manner of its compliance with this Section VI.

VII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, be permitted,

(A) Access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference from it, to interview officers and employees of such defendant who may have counsel present, regarding such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing to the Department of Justice as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parites to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 69,338] Standard Motor Products, Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. No. 88—October Term, 1958. Docket No. 25091. Argued February 5, 1959. Decided April 15, 1959.

On Petition to Review an Order of the Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Price Discrimination—Quantity Discounts Based on Annual Dollar Volume—Granting Discounts to Distributors Purchasing Through Buying Organizations—Legality.—An automotive parts manufacturer's practice of granting rebates to its distributors based on annual dollar volume of sales was properly found by the Federal Trade Commission to have violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Under the manufacturer's standard rebate contracts, a distributor was granted a percentage rebate of the list price of the purchased articles, varying with the net amount of its purchases in the calendar year from nothing at all for purchases totaling less than $1,800 to a maximum of 20 per cent of list price where the distributor's annual purchases were more than $100,000. Also, the manufacturer sold to distributors who had joined

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together in co-operative buying groups. They ordered and received shipments from the manufacturer exactly as if they had not belonged to the group; however, payments, which were made through the group office, were for list price, less a percentage discount equivalent to the rebate allowed under the uniform contracts for annual purchases equal to the aggregate purchases of the group. Under the discount plans, competing distributors bought at different net prices. The volume discounts, which related to the amount of the customer's total annual purchases and not to individual sales, did not reflect any cost savings which might accrue to the manufacturer on large individual orders, but merely benefited the more powerful purchasers in the industry. The buying groups brought into being by the widespread use of the discounts made no improvement in the efficiency or real cost of distributing auto parts to the public; they functioned entirely through their aggregate buying power. The conditions in the industry as disclosed in the instant case were apparently precisely those which the Robinson-Patman Act was intended to eliminate.

See Price Discrimination, Vol. 1, ¶ 3508.754, 3508.885.

Price Discrimination—Effect of Price Discrimination on Competition—Quantity Discounts and Group Buying Organizations—Reasonable Probability of Unlawful Effect—Effect on Competition as Distinguished from Effect on Competitors.—Where an automotive parts manufacturer's practices of granting rebates to its distributors based on annual dollar volume of sales and of granting discounts to group buying distributors based on the aggregate purchases of the group were found to have resulted in different net prices to competing distributors, the manufacturer contended that its pricing practices did not have an unlawful effect on competition in the resale of its products. It stressed the testimony of many of its distributors that they never lost sales because of having to pay a higher price than competitors paid and emphasized its proof of several competitive situations where a distributor paying a higher net price than its competitors nevertheless maintained a more prosperous and more rapidly expanding business. It was held that the "statute, however, speaks of effects on competition—not on competitors—and substantially probable, rather than actual, effects are all that it requires." The manufacturer's varying volume rebate schedules and the similar practices of others in the industry had been a substantial factor in the formation of the distributor's joint purchasing groups, and, as acknowledged by the manufacturer, competition as to price in the resale of its products was all but completely nonexistent because distributors consistently followed manufacturers' suggested resale price lists. In view of the evidence of the distributors' competitive mood, the growth of joint purchasing groups could tend only further to lessen competition, and the manufacturer's pricing practices could well foster that tendency.

See Price Discrimination, Vol. 1, ¶ 3506.400, 3506.460, 3506.788.

Price Discrimination—Defenses—Meeting Competition—Meeting Individual Rather Than General Competitive Conditions—Retention of Customers.—Where an automotive parts manufacturer's practices of granting rebates to its distributors based on annual dollar volume of sales and of granting discounts to group buying distributors based on the aggregate purchases of the group were found to be unlawful, the manufacturer's contention that its prices were made in good faith to meet competition was rejected. "As this defense is made only as to its sales to joint purchasing groups, the Commission's order must stand in any event, since the standard distributor contracts [granting such rebates] have themselves been shown to result in discriminations in price which may lessen competition." Moreover, it is well settled that a lowered price is within the defense only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system and only if it is used defensively to hold customers rather than to gain new ones. The testimony of the manufacturer "belies its assertion here that net prices paid by a buying group were always individually negotiated, and not merely an outgrowth of its standard distributor contracts; and the record is also clear that petitioner gained many new customers through the buying groups with which it dealt."

See Price Discrimination, Vol. 1, ¶ 3515.202, 3515.452, 3515.502.

For the petitioner: Edward S. St. John, New York, N. Y. (Thomas P. Dougherty, New York, N. Y., on the brief).

For the respondent: James E. Corkey, Assistant General Counsel, FTC, Washington, D. C. (Earl W. Kintner, General Counsel, FTC, and Francis C. Mayer and Edwin S. Rockefeller, Attorneys, FTC, Washington, D. C., on the brief).

Affirming a Federal Trade Commission order to cease and desist in Dkt. 5721.

Before: CLARK, Chief Judge, MADDEN, Judge, United States Court of Claims,* and HINCKS, Circuit Judge.

Standard Motor Products, Inc., petitions to review and set aside a cease and desist order of the Federal Trade Commission. Order affirmed.

[*Discrimination Order—Review*]

CLARK, Chief Judge [*In full text*]: This proceeding brings for review an order of the Federal Trade Commission directing the petitioner, Standard Motor Products, Inc., to cease and desist from discriminating in the net sale prices of its products in violation of § 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a). The Commission's order is directed against Standard's practices of making rebates to its distributors based on volume sales. Standard's pricing practices here in question are closely similar to those of other manufacturers of replacement auto parts, and this case is one of several instituted by the Commission throughout the industry.[1]

[*Pricing Practices*]

Standard manufactures and sells to distributors throughout the United States automotive ignition parts and related items for replacement purposes. These distributors do not have exclusive territories, but compete with other dealers within a fifty-mile or larger radius in the resale of petitioner's products. The majority of petitioner's customers buy from it under one of its two standard rebate contracts, which each grant the distributor a percentage rebate of the list price of the purchased articles, varying with the net amount of its purchases in the calendar year from nothing at all for purchases totaling less than $1,800 to a maximum of 20% of list price where the distributor's annual purchases are more than $100,000. In addition, petitioner sells a substantial portion of its output to distributors who have joined together in cooperative buying groups. These distributors order and receive shipments direct from Standard exactly as if they did not belong to a buying group; but payments, made through the group office, are for list price, less a percentage discount equivalent to the rebate allowed under petitioner's uniform contracts for annual purchases equal to the aggregate purchases of the group. The proof before the trial examiner showed, as is apparent from the above facts, that in many instances competing distributors in effect buy petitioner's products at different net prices. Both the hearing and the Commission concluded that these pricing practices violated the Robinson-Patman Act.

[*Robinson-Patman Act*]

The conditions in the replacement auto parts industry disclosed by the record here seem precisely those which the Robinson-Patman Act was intended to eliminate. The statute was enacted in direct response to the growth of a few nationwide chain store corporations in the 1920's and 1930's. It is evident from the legislative history that Congress sought to curtail the concentration of economic power in the distributive area of the economy by eliminating inequalities derived from sheer economic power, while at the same time not stifling competition based on real cost savings

* Sitting by designation pursuant to the provisions of 28 U. S. C. § 291(a).

[1] See *Moog Industries, Inc. v. F. T. C.*, 8 Cir., [1956 TRADE CASES ¶ 68,527] 238 F. 2d 43, affirmed [1958 TRADE CASES ¶ 68,918] 355 U. S. 411; *C. E. Niehoff & Co. v. F. T. C.*, 7 Cir., [1957 TRADE CASES ¶ 68,587] 241 F. 2d 37, modified *F. T. C. v. C. E. Niehoff & Co.*, [1958 TRADE CASES ¶ 68,918] 355 U. S. 411; *P. Sorensen Mfg. Co. v. F. T. C.*, D. C. Cir., [1957 TRADE CASES ¶ 68,721] 246 F. 2d 687; *P. & D. Mfg. Co. v. F. T. C.*, 7 Cir., [1957 TRADE CASES ¶ 68,693] 245 F. 2d 281, certiorari denied 355 U. S. 884; *E. Edelmann & Co. v. F. T. C.*, 7 Cir., [1956 TRADE CASES ¶ 68,558] 239 F. 2d 152, certiorari denied 355 U. S. 941; *Whitaker Cable Corp. v. F. T. C.*, 7 Cir., [1956 TRADE CASES ¶ 68,559] 239 F. 2d 253, certiorari denied 353 U. S. 938; *In the Matter of Guaranteed Parts Co.*, F. T. C. Docket 6987; and cases cited note 2 *infra*.

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and increased efficiency. H. R. Rep. No. 2287, 74th Cong., 2d Sess. 6-7; Sen. Rep. No. 1502, 74th Cong., 2d Sess. 3. See also F. T. C., Final Report on the Chain Store Investigation (1934); Sen. Res. 224, 70th Cong., 1st Sess., 69 Cong. Rec. 7857 (1928). The volume discounts here—which relate to the amount of the customer's total annual purchases, and not to individual sales—do not reflect any cost savings which might accrue to petitioner on large individual orders, but merely benefit the more powerful purchasers in the industry. And the buying groups brought into being by the widespread use of these discounts make no improvement in the efficiency or real cost of distributing auto parts to the public, but, as is clear from the testimony of Standard's own witnesses, function entirely through their aggregate buying power.

[*Competitive Effects*]

On this petition to review petitioner vigorously attacks the Commission's finding that its pricing activities have an unlawful effect on competition in distributors' resale of its products. It stresses the testimony of many of its distributors that they never lost sales because of having to pay a higher price than competitors paid for Standard's products and emphasizes its proof of several competitive situations where a distributor paying a higher net price than its competitors nevertheless maintained a more prosperous and more rapidly expanding business. The statute, however, speaks of effects on competition—not on competitors — and substantially probable, rather than actual, effects are all that it requires: It prohibits all price discriminations "where the effect of such discrimination *may be* substantially to lessen *competition* or *tend* to create a monopoly in any line of commerce, or to injure, destroy, or prevent *competition* with any person who either grants or knowlingly receives the benefit of such discrimination, or with customers of either of them." 15 U. S. C. § 13(a). (Italics supplied.) It is clear that petitioner's varying volume rebate schedules and the similar practices of other manufacturers in the industry have been a substantial factor in the formation of the distributor's joint purchasing groups. And, as petitioner readily acknowledges, competition as to price in the resale of its products is presently all but completely nonexistent because distributors consistently follow manufacturers' suggested resale price lists. It is apparent, in view of this clear evidence of the distributors' competitive mood, that the growth of joint purchasing groups among the distributors can tend only further to lessen competition,[2] and petitioner's pricing practices may well foster this tendency. In short, we have here not the bare minimum prima facie case held sufficient in *F. T. C. v. Morton Salt Co.* [1948-1949 Trade Cases ¶ 62,247], 334 U. S. 37, 1 A. L. R. 2d 260, and *Samuel H. Moss, Inc. v. F. T. C.*, 2 Cir., [1944-1945 Trade Cases ¶ 57,353] 148 F. 2d 378, certiorari denied 326 U. S. 734, but rather an industry-wide pricing system with decided anticompetitive tendencies. Cf. *F. T. C. v. Cement Institute* [1948-1949 Trade Cases ¶ 62,237], 333 U. S. 683, 721-726; *F. T. C. v. A. E. Staley Mfg. Co.* [1944-1945 Trade Cases ¶ 57,364], 324 U. S. 746; *Corn Products Refining Co. v. F. T. C.* [1944-1945 Trade Cases ¶ 57,363,], 324 U. S. 726. Whatever conflict may occasionally arise between the Robinson-Patman Act and more fundamental antitrust goals, cf. *Automatic Canteen Co. of America v. F. T. C.* [1953 Trade Cases ¶ 67,503], 346 U. S. 61, 74; *Standard Oil Co. v. F. T. C.* [1950-1951 Trade Cases ¶ 62,746], 340 U. S. 231, 249, we perceive none in the Commission's action in this case.

[*Meeting Competition Defense*]

Petitioner also seeks to avail itself of the affirmative defense provided in § 2(b) of the Act, 15 U. S. C. § 13(b), which exempts differences in price made in good faith to meet an equally low price offered the favored purchaser by a competitor. As this defense is made only as to its sales to joint purchasing groups, the Commission's order must stand in any event, since the standard distributor contracts have themselves been shown to result in discriminations in price which may lessen competition. Moreover, it is well settled that a lowered price is within § 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system, *F. T. C. v. Cement Institute, supra*, [1948-1949 Trade Cases ¶ 62,237] 333 U. S.

[2] These buying groups have themselves been the subject of Commission proceedings. *In the Matter of Warehouse Distributors, Inc.*, F. T. C. Docket 6837; *In the Matter of Mid-West Warehouse Distributors, Inc.*, F. T. C. Docket 6888; *In the Matter of Metropolitan Automotive Wholesalers Cooperative, Inc.*, F. T. C. Docket 5724.

683, 721-726; *F. T. C. v. A. E. Staley Mfg. Co., supra,* [1944-1945 TRADE CASES ¶ 57,364] 324 U. S. 746, and only if it is used defensively to hold customers rather than to gain new ones. *Standard Oil Co. v. F. T. C.* [1950-1951 TRADE CASES ¶ 62,746], 340 U. S. 231, 249-250. The testimony of petitioner's own vice president belies its assertion here that net prices paid by a buying group were always individually negotiated, and not merely an outgrowth of its standard distributor contracts; and the record is also clear that petitioner gained many new customers through the buying groups with which it dealt. Hence the Commission's rejection of Standard's claim under § 2(b) is supported by substantial evidence.

[*Affirmed*]

We see no further merit in petitioner's contentions. Nor do we deem it necessary or useful to entertain its motion to strike portions of the Commission's and its own appendices.

Order affirmed.

[¶ 69,339] George W. Warner & Co., Inc. v. The Black & Decker Manufacturing Company, Inc. and Gus F. Fischer.

In the United States District Court for the Eastern District of New York. Civil Action No. 19039. Dated April 16, 1959.

Sherman, Clayton, and Robinson-Patman Price Discrimination Acts

Combinations and Conspiracies—Elements and Proof of Conspiracy—Absence of "Agreement."—A wholesale distributor's charge that a manufacturer of portable electric power tools terminated its distributorship pursuant to a price fixing scheme, combination, and conspiracy was dismissed on the ground that it failed to contain the essential allegation of agreement or contract. Without that allegation, no cause of action could have been stated. The essence of a conspiracy is an agreement, which means that two or more persons, however informal the medium may be, agree to do or refrain from doing one or more things. It was alleged that the distributorship was terminated after the distributor, having received a contract to supply a government agency by submitting a lower bid than "competing distributors," refused to revise its quoted prices to conform to those suggested by the manufacturer. It does not follow, however, that the severance was the result of a contract, combination, or conspiracy. In the absence of an allegation to the contrary, the bids submitted must be deemed unrestrained individual acts; each of the distributors might have believed that it was to its individual interest to follow the manufacturer's resale price recommendations. A state of facts was recited that could have had their origin in a conspiracy, but the complaint did not state that one ever came into existence, and did not name the period embraced or the parties thereto.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360, 2005.395.

Price Discrimination—Analysis and Scope of Clayton Act, Section 2(a)— Selection of Customers—Refusal to Deal—Termination of Distributorship.—A manufacturer of portable electric power tools did not violate the antitrust laws by terminating the franchise of a distributor where the distributorship was terminable at the option of either party. In view of the termination of the commercial relationship of the parties, the manufacturer had the right to refuse to sell anything to the distributor.

See Price Discrimination, Vol. 1, ¶ 3505.950.

Price Discrimination—Practices Constituting Discrimination—Classification of Customers—Quantity Discounts—Causing Others to Discriminate—Legality.—A distributor of portable electric power tools, in an action alleging that it was compelled to discriminate against its smaller volume purchasers by a manufacturer's resale price fixing plan, failed to allege ultimate facts asserting a cause of action. There was no allegation that the manufacturer had contrived its recommended prices so that one purchaser had been charged a higher price for like goods than had been charged to one or more of that purchaser's competitors. It was unclear as to whether the distributor claimed the recom-

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mended price differentials, which were based upon volume of purchase, were illegal as such, or whether the distributor condemned the formula employed by the manufacturer in reaching its suggested scale of prices. In either case, the nature of the claim for relief was obscure. Damages were claimed by way of loss of sales, but that was a mere assertion and not sufficient as a pleading. Also, if any sales were lost, the distributor's own conduct in maintaining its distributorship contributed to that result.

See Price Discrimination, Vol. 1, ¶ 3505.460, 3508, 3508.295.

Price Discrimination—Services or Facilities Furnished by Seller—Manufacturer's Repair of Tools Owned by Distributor's Customers—Absence of "Sale."—A distributor's allegation that a manufacturer of portable electric power tools, in repairing tools owned by the distributor's customers, granted less favorable discounts than it granted to other distributors stated no cause of action under the Robinson-Patman Price Discrimination Act. No sale of chattels is involved in the making of necessary repairs to mechanical devices. Cases cited by the distributor did not meet that argument since those cases involved services and facilities which were incident to sales promotion efforts and constituted an element thereof. In the instant case, the repairs had no relation to the original sale of the article itself but to an independent transaction. With respect to a sale of repair parts for $2.88, the matter was too small to engage the attention of the court.

See Price Discrimination, Vol. 1, ¶ 3524.

For the plaintiff: Daniel Kornblum.

For the defendants: Milbank, Tweed, Hope & Hadley, by A. Donald MacKinnon, of counsel.

For a prior opinion of the U. S. District Court, Eastern District of New York, see 1958 Trade Cases ¶ 69,214.

[*Motion to Dismiss*]

Byers, Chief Judge [*In full text*]: This is a defendants' motion addressed to the amended complaint filed January 7, 1959 following the decision of this court of December 1, 1958, reported in 167 Fed. Supp. 860 [1959 Trade Cases ¶ 69,214].

The relief sought is a dismissal of the three causes as now pleaded, (F. R. C. P. 12b) or for summary judgment on the third cause for lack of a genuine issue as to any material fact; and for such other relief, etc.

It is not proposed to rehearse what has been already written concerning the general nature and apparent scope of the controversy between these parties, and reference to the said opinion will be confined to the plain necessities of this motion.

[*Plaintiff's Brief*]

The plaintiff's present brief contains the following:

"The core of the case: illegal and predatory price fixing

"The basic challenge of the complaint is to the vertical and discriminatory price fixing plan and scheme by defendant Black & Decker (called 'B & D' herein), whereby B & D not only illegally maintains and controls the resale prices charged to the regular trade by certain of its named distributors of its industrial line of tools, equipment and parts, but also dictates and manipulates the resale prices charged by those distributors on government purchases of B & D products."

The brief continues for some thirty pages to argue the merits of the plaintiff's claim for relief.

The present task of the court is to examine the pleading as such, to ascertain if it is adequate to present triable issues.

The first paragraph asserts the filing of the complaint under the Clayton Act, the Sherman Act, and the Robinson-Patman Act. The next seven paragraphs purport to describe the corporate defendant, its plant and several officers (incidentally that it proclaims itself, and on information and belief that it is "the world's largest and predominant manufacturer of portable electric power tools, equipment and accessories"*).

* If this is meant to ascribe to the defendant B & D the status of a monopoly, it is legally insufficient in the opinion of this court.

Also comprehended is the description of the defendant Fischer as a District Manager of its New York office; the widespread use of the defendants' products, and its sale thereof to distributors, and the resale thereof; and the place that appliances, parts and equipment occupied in the business of the defendant. That the B & D two-inch portable electric hammers with self-contained electric motor are alone manufactured by the defendant. That would seem to be an obvious thing, and free from any taint of illegality.

The next three paragraphs recite the plaintiff's corporate status, and its business activities; also its relations to defendant prior to August 6, 1958.

The foregoing may be thought of as descriptive and as introductory to the controversy.

Paragraph 12 refers to the 30% discount to wholesale distributors in general, in the New York and Newark areas, among which was the plaintiff, until the date last mentioned.

Paragraph 13 contains a list of seven distributors other than plaintiff, followed by the words "(The above designated distributors are hereinafter called 'competing distributors')."

[*First Cause of Action*]

The asserted first cause of action is found in paragraphs 15 to 23 inclusive.

15 alleges bidding for purchases by governmental agencies of such devices, the specifications "for descriptive or other like purposes," (a cryptic expression) "often expressly designate products and accessories of Black & Decker by name as being the kind and quality of tools, etc. required by them."

16 alleges that the course of such trade "has been predicated upon free, competitive and non-collusive bidding by the prospective sellers thereof, the government contracts to purchase the same being awarded to the responsible bidder offering to sell and deliver to required articles at the lowest price."

17 alleges that in June 1957 the defendants in order to control and restrain competition between "competing distributors" including plaintiff, devised etc. a plan and scheme artificially fixing and controlling minimum sales prices on such bids, to which plaintiff was expected to adhere.

18. In furtherance thereof, five specifications are pleaded:

(a) Surveillance and report concerning any distributor who failed or refused to adhere to such minimum prices.

(b) Threats to blacklist and boycott such distributors.

(c) Threats to cancel the distributorship of such distributors.

(d) Threats to reduce or eliminate the 30% discount of such distributors.

(e) Require all distributors "to ascertain and clear with Black & Decker District Office" under Fischer's management, such minimum prices.

19. "In effect the price fixing plan and scheme described in paragraphs 17 and 18 above was and is the product of and results in agreement, understanding, combination and conspiracy by and between Black & Decker, Fischer and its distributors as aforesaid to restrain competition and lessen trade and commerce in the sale of goods and commodities among the several States of the United States and the District of Columbia."

[*Termination of Distributorship*]

20, 21, 22 and 23 may be paraphrased to recite the submission of a bid by plaintiff to the New York City Housing Authority on July 16, 1958 at a lower price than any of the other "competing distributors" who also submitted bids. That on July 22, 1958 Fischer threatened that unless plaintiff's quoted prices were to be revised to conform to the scale suggested by defendant, plaintiff would cease to be a B & D distributor. That plaintiff received the contract from the Housing Authority as the lowest bidder on July 30, 1958. That on August 6, 1958 plaintiff's distributorship was terminated by defendant. That this was done pursuant to the price fixing scheme, combination and conspiracy in restraint of trade as alleged.

It will be seen that the plaintiff's real grievance is the loss of its distributorship, which as has been heretofore explained, was terminable at the option of either party.

[*Conspiracy*]

The first complaint was inadequate to charge a conspiracy between the defendant and any named person or persons, so that a clear issue on the subject could be

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framed for the purpose of a responsive pleading. Does the amended complaint cure the defect?

To answer that question, it is necessary to remember that the essence of a conspiracy is an agreement, which means that two or more persons—however informal the medium may be—agree to do or refrain from doing one or more things. A conspiracy may embrace an illegal object, or a legal purpose illegally to be effected, but the fundamental requirement is none the less to be averred, in order that issue may be joined for the purpose of trial.

[*Absence of "Agreement"*]

The amended complaint is replete with alleged evidence, but is deficient in failing to contain the essential allegation of agreement or contract, without which no cause can be deemed to have been stated.

The bids for the Housing Administration contract, in the absence of an allegation to the contrary, must be deemed to have been the unrestrained individual act of each of the bidders, not a concerted thing, or done pursuant to an agreement between any of them and the defendant, or among themselves.

For all that is alleged in the challenged pleading, each of the other "competing distributors" may have believed that it was to his (its) individual interest to follow the resale price recommendations promulgated by defendant and therefore acted accordingly; the plaintiff elected otherwise as was its right. Having done so, it does not follow that the severance of its mutually terminable distributorship was the result of a "contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or otherwise * * *" since no such thing is alleged.

The most that can be said for the amended complaint is that it recites a state of purported facts that could have had their origin in a conspiracy, but it does not state that one ever came into existence, naming the period embraced, or the parties thereto.

The mere recital of the names of the competing distributors, does not supply the deficiency above discussed. Apparently the plaintiff's grievance is in part against them; since each of them has the right to conduct business according to his or its own concepts of expediency, if and when acting alone, no reason is pleaded or perceived to clothe the plaintiff with the right to interpose any legal bar to the exercise of that right, on the part of each of the plaintiff's competitors.

The plaintiff's apparent reliance upon *U. S. v. Bausch & Lomb Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707, is difficult to understand, in view of the elaborate system of contracts between manufacturer, distributors and retail dealers present in that case. In modifying a decree obtained by the government, the court observed (p. 728):

> "In a business, such as Soft-Lite, which deals in a specialty of a luxury or near luxury character," (tinted optical lenses) "the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection. *United States v. Colgate & Co.*, 250 U. S. 300, 307; *Federal Trade Comm'n v. Raymond Co.*, 263 U. S. 565, 573. * * * The path is narrow between the permissible selection of customers under the decision in *Colgate & Co.* and unlawful arrangements as to prices under this decree, but we think Soft-Lite is entitled to traverse it, after a reasonable interim, etc."

The plaintiff's characterization of the *Colgate* decision as "dubious," is not in accord with the foregoing views of the Supreme Court.

[*Conspiracy Charge Dismissed*]

Without extending the discussion, it is clear to this court that the amended complaint does not plead ultimate facts as to the alleged conspiracy or contract in restraint of trade, necessary to present its asserted claim for relief. As to the first cause of action as pleaded, the defendants' motion to dismiss is granted.

[*Second Cause of Action—Price Discrimination*]

The second cause is still difficult to understand.

Apparently the plaintiff's present brief calls attention to but one difference from the original complaint, namely that the differential in recommended prices, based upon the quantity of merchandise involved, has

"nothing to do with 'quantity or volume' economies. Rather, it is expressly alleged that such price distinctions are 'wholly arbitrary and artificial * * * having no actual relation to savings to Black & Decker or its said distributors in the cost of the manufacture, sale and delivery of said products from any different methods or quantities in which the said goods are sold' * * * and that the 'affected' customers are themselves 'in general competition with each other'."

Since this alleged cause includes paragraphs 1 through 13 already stated, and avers that in 1954 the defendant promulgated the said plan, and since the plaintiff was one of such distributors for the ensuing period until August 6, 1958, there is a manifest significance in the fact that it did not deem itself to be the victim of what it now complains, until the termination of its distributorship.

If upon the promulgation of the suggested price differentials, the plaintiff had seceded from its distributor status for the reasons now advanced, its conduct would have been consistent with a sense of mission to protect a theoretical public interest, but which by its own conduct it has foreclosed itself from now asserting.

That which is still unclear in the amended pleading is whether recommended price differentials based upon volume of purchase is claimed to be illegal as such; or whether it is the formula employed by defendant in reaching its suggested scale of prices that is condemned by plaintiff. In either case, the nature of plaintiff's claim for relief is obscure.

[*Alleged Loss of Sales*]

True, paragraph 31 alleges that plaintiff sustained damages by way of loss of sales, and in 32 that the continued existence of the complained of list of recommended prices threatens it with irreparable harm and damage; these mere assertions however are not of themselves sufficient for the purposes of even average good pleading. See *Mason City etc. v. Clapper* [1956 TRADE CASES ¶ 68,553], 144 F. Supp. 754 at 766.

If any sales were indeed lost to plaintiff between 1954 and 1958, that result was contributed to by its own conduct in maintaining its distributorship.

There is no requirement of law cited in plaintiff's brief, or otherwise revealed, to the effect that in order to assert its present alleged cause, plaintiff was required to operate under the selling plan of which it now complains, for a certain number of years, to the end that its grievances should ripen into a claim for relief, or cause of action, whichever term is preferred.

There is no allegation that defendant has contrived its recommendations so that one purchaser has been charged a higher price for like goods than has been charged one or more of the latter's competitors. That would be necessary to invoke *Fed. Trade Comm'n. v. Morton Salt Co.* [1948-1949 TRADE CASES ¶ 62,247], 334 U. S. 37.

While this, and other cases cited by plaintiff, were Federal Trade Commission proceedings, undertaken in the public interest, it is not presently suggested that the plaintiff under appropriate circumstances, could not assert in its own behalf, an alleged cause of action, said to arise from illegal conduct on the part of the defendant. It is the present opinion, however, that plaintiff has not alleged ultimate facts to assert a cause under the statutes which have been invoked, arising during the period of its distributorship, to render the amended complaint as to the second cause, any more adequate as a pleading, than the original one. Cf. *Gerli v. Silk Ass'n.*, 36 F. (2d) 959.

In paragraph 16 the nature of the competition between all distributors of B & D products, prior to the termination of plaintiff's distributorship, is described as having been "free, competitive and non-collusive" which must be read as part of this second cause. That being admitted for present purposes, it is apparent that any inherent infirmity in the scale of defendant's recommended prices which allegedly operated to the detriment of the plaintiff, should be the subject of a precise factual allegation, not a mere statement in argumentative form of conclusions drawn from dissertations and judicial opinions having to do with unrelated circumstances.

[*Second Cause Dismissed*]

The requirements of good pleading in such cases is clearly stated in *Baim & Blank etc. v. Admiral, etc.* [1955 TRADE CASES ¶ 68,088], 132 F. Supp. 412. This amended pleading does not survive the test.

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As to the second cause, the defendants' motion is granted.

[*Third Cause of Action*]

As to the third cause, the motion for summary judgment has much to commend it, in view of the narrow scope of the controversy; seemingly but two items are involved as to transactions occurring since August 6, 1958, (a) the sale of repair parts for $2.88; (b) the making of repairs to tools owned by plaintiff's customers, in the sum of $240.71.

These are said to have been subject to a less favorable discount than is accorded to defendant's distributors listed in the amended complaint.

[*Services or Facilities Furnished by Seller*]

As to the second item, the plaintiff does not meet the argument that no sale of chattels is involved in the making of necessary repairs to mechanical devices, by citing the Federal Trade Commission cases of *Elizabeth Arden* [1946-1947 Trade Cases ¶ 57,467], (156 F. (2d) 132) and *Simplicity Pattern Co.* [1958 Trade Cases ¶ 69,047], (258 F. (2d) 673). Both involved aids to selling, i.e. demonstrators in the first, and cabinets and catalogues in the second. These services and facilities were incident to sales promotion efforts and constituted an element thereof.

Here the repairs had no relation to the original sale of the article itself, but to an independent transaction, the occasion for which was consequent upon but quite remote from what had gone before.

The reasoning contained in *General Shale etc. v. Struck etc.* [1940-1943 Trade Cases ¶ 56,243], 132 F. (2d) 425, (cert. denied, 318 U. S. 780) at page 428, second column, is similar to that which is applicable to this repair job. The transaction in its essence was between the defendant and the owner of the device to which repairs were made, although the plaintiff was the go-between and is dissatisfied with its handling commission.

In view of the termination of the commercial relationship of the parties, the defendants' right to refuse to sell anything to the plaintiff, does not constitute a violation of law. *Naifeh v. Ronson, etc.* [1955 Trade Cases ¶ 67,925], 218 F. (2d) 202.

With respect to the $2.88 sale, it is too small a matter to engage the attention of the court, even to assuage the plaintiff's appetite for litigation.

[*Summary Judgment Granted*]

At best, the plaintiff's third cause as pleaded is a make-weight which adds nothing to its claim for relief, as set forth in the first asserted cause. The pleadings and the affidavits considered in this connection now make it clear to this court that there is no material issue of fact which ought to be tried. It follows that as to this branch of the amended complaint, the defendants' motion under Rule 56 must be granted.

Settle order in accordance with the foregoing.

[¶ 69,340] Riss & Company, Inc. v. Association of American Railroads, et al.

In the United States District Court for the District of Columbia. Civil Action No. 4056-54. Dated April 3, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Production of Evidence—Scope of Interrogatories—Compilation of Data—Burdensome Research.—A motor carrier which charged railroads with conspiring to destroy its business was not required to answer interrogatories seeking detailed data as to the pounds of freight handled and the revenue received by each of the motor carrier's terminals. Interrogatories under Rule 33 of the Federal Rules of Civil Procedure were never intended to compel an adversary to search and analyze more than five million documents in order to furnish the answers. It was contended that the railroads were entitled to know the traffic gained or lost by the motor carrier in order to be able to test the carrier's charges that its losses of business were due to the railroad's alleged unlawful conduct. However, burdensome research is properly considered beyond the scope of Rule 33. That rule requires parties

served with interrogatories to furnish such information as is "available" to them; however, the courts have applied a kind of "rule of reason" in the construction and application of the rule. An interrogated party should not be required to search its own records in order to compile and correlate information for the benefit of its adversary where the adversary has the right to inspect the records itself.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.875.

For the plaintiff: Antonia Chayes, A. Alvis Layne, Jr., H. Charles Ephraim, Lester M. Bridgeman, and T. S. I. Perlman, all of Washington, D. C.

For the defendant: Gregory S. Prince, Washington, D. C.

For a prior opinion of the U. S. Court of Appeals, District of Columbia Circuit, see 1958 Trade Cases ¶ 69,122; for prior opinions of the U. S. District Court, District of Columbia, see 1958 Trade Cases ¶ 68,959 and 1959 Trade Cases ¶ 69,244.

Opinion

[*Objections to Interrogatories*]

JOHN J. SIRICA, District Judge [*In full text*]: On April 12, 1955, defendants Baltimore and Ohio Railroad, et al., served the plaintiff with certain interrogatories under Rule 33 of the Federal Rules of Civil Procedure. The Plaintiff answered some of these questions and objected to others. The questions still under objection as of this date fall into two classes. The first group [1 A-E-23(a)-(f)], seeks detailed data as to the pounds of freight handled inbound and outbound by each of plaintiff's truck terminals and the monthly gross revenue received by Riss for traffic handled solely by Riss at each of its terminals. These questions also deal with "interline" traffic; i. e., traffic from connecting truck lines, at each terminal and request information as to the monthly figures on collections from shippers, the amount of these collections kept by Riss, the amount paid to interline carriers and the amount received by Riss from connecting lines. The second group of interrogatories [I-M and I-P], yet under objection, seek information as to the plaintiff's net income before taxes for all trucking operations performed for the United States and identical information with respect to the transport of ammunition and explosives for the United States.

[*Compilation of Data*]

With respect to the first group, it is plaintiff's position that, in view of the manner in which its records are kept, the only way to obtain the precise information desired by defendants would be to analyze every individual freight bill cut by Riss. It is argued that this would be a burdensome task since about five million bills would be involved in the operation. Defendants reply that they are entitled to know the traffic gained or lost by plaintiff at each of its terminals during the years 1950 to 1957 in order to be able to test plaintiff's charges that its losses of business were due to defendant's unlawful conduct.

[*Prior Proceedings*]

The court has heard argument on these objections several times in whole or in part. At the last session, on February 24, 1959, the court urged both sides to hold a conference among themselves in an effort to work out an arrangement satisfactory to all. Such a conference was held on March 3 and its results were first brought to the court's attention by a letter from Mr. McGlothlin dated March 9, 1959 sent on behalf of defendants concerned with these interrogatories. It was there stated that plaintiff's counsel had agreed to furnish, among other data, monthly figures as to revenue inbound and outbound from each of its terminals, along with revenues and tonnage received from connecting carriers. With respect to the second group of requests, it was said that plaintiff had agreed to provide the defendants with a study it was preparing showing a breakdown of the cost of the plaintiff's operations for the United States Government, if the study appears satisfactory to the plaintiff from an accounting standpoint. Plaintiff's counsel, however, in his letter to Mr. McGlothlin dated March 13, 1959, states a different version of what he had agreed to during the conference. He explains that he had only offered to provide certain samples of the kind of records kept by the company, some of them involving monthly figures and had offered to furnish complete sets of records in the form regularly kept if defendants

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would be willing to accept them instead of a bill-by-bill analysis. In a letter dated March 16 to the court, Mr. McKay, an associate of Mr. McGlothlin, contended that defendants' counsel had not agreed to and had not been authorized to agree to accept "monthly figures" as adequate answers to the first group of interrogatories. In view of the inability of counsel to reach a settlement, defendants request the court to rule on the objections now.

[*Rule 33*]

The initial sentence of Rule 33, Federal Rules of Civil Procedure, reads as follows:

> "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish *such information as is available to the party.*" (Emphasis supplied.)

[*"Burdensome Research" Not Required*]

The term "available" could be used in an absolute sense as meaning obtainable at any cost in time, money and effort or it could indicate that which is *reasonably* available to the party interrogated. In dealing with interrogatories involving substantial amount of research and compilation of data, the courts have often exercised their discretion and applied a kind of "rule of reason" in the construction and application of Rule 33. As Judge Holtzoff pointed out in *Vargos v. Clark*, 6 F. R. D. 635 (D. C. D. C. 1949) at page 636:

> "So, too, interrogatories are not to be used in an oppressive manner. An adverse party should not be required to perform burdensome labors or to execute difficult and expensive tasks, in searching for facts and classifying and compiling data. A litigant may not compel his adversary to go to work for him."

It has also been said that the court should not require an interrogated party to search its own records in order to compile and correlate information for the benefit of its adversary where the adversary has the right to inspect the records themselves. *Porter v. Bremer*, 12 F. R. D. 187 (N. D. Ohio 1951). In *Porter v. Montaldo's*, 71 F. Supp. 372 (S. D. Ohio 1946), the court declined to require the defendant in a Price Control Act Suit brought by the government to go through complicated accounting and auditing operations on his own books in order to show in what instances defendant had violated the price regulations. It was also pointed out in *Cinema Amusements, Inc. v. Loew's, Inc.* [1946-1947 TRADE CASES ¶ 57,622], 7 F. R. D. 318, 321 (D. Del. 1947) that:

> ". . . Clearly an interrogated party must furnish relevant information in his possession which can be obtained without great labor or expense.
>
> "Interrogatories under Rule 33, however, cannot be construed so as to displace entirely the right or necessity of a party to obtain information and compile data at his own expense by discovery process through the inspection of books or documents under Rule 34."

The underlying rationale of these decisions seems to be that burdensome research is properly considered beyond the scope of Rule 33. It is the court's conclusion that interrogatories under Rule 33 were never intended to compel an adversary to search and analyze more than five million documents in order to furnish the answers.

[*Objections Sustained*]

Therefore, plaintiff's objections to interrogatories I A-E 23(a)-(f) in their present form must be sustained.

[*Ruling Withheld*]

No ruling will be made with respect to the objections filed as to interrogatories I-M and I-P since the above-mentioned correspondence indicates a possibility that these matters might be settled by an agreement of counsel. Counsel for the parties will be allowed 30 days from this date within which to arrive at an agreement regarding these interrogatories.

Counsel for plaintiff will submit an appropriate order.

[¶ 69,341] Talon, Inc. v. Union Slide Fastener, Inc. Union Slide Fastener, Inc. v. Talon, Inc.

In the United States Court of Appeals for the Ninth Circuit. No. 15,714. Dated April 23, 1959.

Appeal from the United States District Court for the Southern District of California, Central Division.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable—Sufficiency of Proof—Fact of Damages as Distinguished from Amount—Causation—Competency of Proof—Loss of Hypothetical Profits.—In a patent infringement action, a zipper manufacturer's counterclaim charging the patentee with unlawfully combining and conspiring to restrain and monopolize trade was properly dismissed because of lack of proof of damage and causation. In its offer of proof as to the fact of injury, all that the manufacturer offered was the testimony of a certified public accountant regarding a loss of hypothetical profits. The rule precluding the recovery of uncertain damages applies to those damages which are not the certain result of the wrong; it does not apply to those which are definitely attributable to the wrong, but only uncertain as to the amount. If a causal connection between the unlawful acts of the patentee and the resultant injury to the manufacturer's property or business had been established with reasonable probability, the court could have made a just and reasonable estimate of the damages. However, the offer of proof of loss of hypothetical profits did not establish that such loss was a proximate result of the patentee's alleged unlawful acts. The trial court was not compelled to infer the fact of injury from the fact that certain of the patentee's alleged unlawful acts were directed at the manufacturer. Since the manufacturer failed to show damage or causation, it was unnecessary to consider the trial court's findings that the patentee violated the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.250, 9011.385.

Private Enforcement and Procedure—Damages—Attorney's Fees—Allowance as Incident to Successful Prosecution of Damage Action Under Antitrust Laws—Allowance as Incident to Successful Defense of Patent Infringement Action.—A successful defendant in a patent infringement action was not entitled to $1,500 of a $20,000 award of attorney's fees. In making the award of $20,000 under 35 United States Code, Section 285 (a section of the patent statute providing for the award of attorney's fees to the prevailing party in "exceptional cases"), the trial court stated that, if a reviewing court found no antitrust violations, then the value of the services of the defendant's attorneys was $18,500. Having dismissed the defendant's antitrust counterclaim, the trial court was without the power to award attorney's fees under the antitrust laws. Such an allowance can only be made as an incident to the successful prosecution of an action for damages for violations of the antitrust laws. Furthermore, the $1,500 award could not be sustained under the patent statute, although the trial court had found that the work of the defense attorneys, with regard to the antitrust violations, was also done as part of the work of showing the defense of "unclean hands." An award may include services rendered in connection with a separate defense set forth in the answer; in the instant case, however, the allegations of antitrust violations were not pleaded as a separate defense until after the trial and the dismissal of the defendant's antitrust counterclaim.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011, 9011.725.

For the appellant: Lyon & Lyon, Charles G. Lyon, and Leonard S. Lyon, Los Angeles, Cal.; and McCoy, Greene & TeGrotenhuis, William C. McCoy, and William C. McCoy, Jr.

For the appellee: Delavan Smith, Edwin S. Shapiro, and Smith & Auslander, New York, N. Y.; William J. Graham, New York, N. Y.; and Alan D. Mockabee, Los Angeles, Cal.

Before: Fee, Chambers and Jertberg, Circuit Judges.

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[*Patent Infringement Action—Antitrust Counterclaim*]

JERTBERG, Circuit Judge [*In full text except for omissions indicated by asterisks*]: Talon, Inc., a Pennsylvania corporation, hereinafter designated Talon, instituted this action for a patent infringement against Union Slide Fastener, Inc., a California corporation, hereinafter designated Union, seeking relief by way of injunction and damage. Union denied the validity of Talon's patents, and by counterclaim Union charged Talon with an unlawful combination and conspiracy to restrain and monopolize trade. Union prayed for treble damages and attorney's fees against Talon.

[*Judgment of Trial Court*]

The district court found and concluded that Talon's patents were invalid and void and not infringed by Union. The district court adjudged that Talon take nothing, and that its complaint be dismissed. The court further concluded that Union take nothing on its counterclaim, and adjudged that the counterclaim be dismissed. The district court further adjudged that Union have and recover from Talon the sum of $20,000 for attorney's fees. Talon appeals from the judgment of the district court dismissing its complaint, and from the judgment of the district court awarding attorney's fees to Union. Union appeals from the judgment of the district court dismissing its counterclaim, and denying relief thereunder.

We will first consider the merits of Talon's appeal. The district court concluded that claims 1 through 4 and 16 and 17 of the United States Patent Number 2,078,017 to one Poux, and claims 1 through 4, 13, and 32 through 40 of the United States Letters Patent 2,437,793 to one Silberman were invalid and void. Talon has appealed to this Court only on the issue of the validity of the patent it acquired from Silberman, and the award of attorney's fees to Union.

Validity and Infringement

* * *

* * * We hold that the trial court did not err, and applied the proper standard of invention in concluding that the Silberman patent was invalid.

In view of what has just been stated, we deem it unnecessary to consider the questions of whether the patent was ever operative, whether Union was verbally licensed to use the Silberman patent, whether Talon is estopped from asserting the patent, or whether there was infringement.[5]

Before discussing Talon's appeal from the judgment of the district court awarding attorney's fees to Union, we will consider the merits of Union's appeal.

Union's Appeal

[*Injury to Antitrust Claimant*]

Union's three specifications of error[6] are based upon the alleged errors of the trial court in concluding that Union was not damaged by Talon's effort to control competition in violation of the anti-trust laws, and refusing to admit evidence of damage, or grant a new trial on the issue of damages. The specifications of error attack the conclusion of the district court that

> "The defendant Union having failed to prove injury to defendant Union in its business or property arising out of any of the actions complained of in the Counterclaim, the Counterclaim cannot be maintained and must be dismissed."

---

* * *

[5] *Bergman v. Aluminum Lock Shingle Corp. of America, supra; Thys Co. v. Oeste, supra.*

[6] Specifications of error in Union's appeal are:

"The District Court erred:

"1. By concluding that Union was not damaged and that there was no showing of causal connection between Talon's acts and Union's injuries, resulting from what the Court itself found to be a continuing attempt by Talon to control competition in a substantial portion of the zipper industry in violation of the anti-trust laws.

"2. By concluding that Talon's acts regarding Union were isolated acts rather than the concluding steps in the final links in a chain of anti-trust violations extending over a period of twenty years and directed not only against the public in general but at Union in particular.

"3. By failing to admit evidence or permit a new trial to show damage to Union flowing directly from Talon's efforts to control competition, comprising the acquisition by Talon of an invalid patent from a third party and the institution of an infringement suit against Union, in bad faith and without reasonable belief in the validity of Talon's patents; the introduction of a zipper sold below cost in Los Angeles, following a price control meeting in that city staged by Talon, and, under the pretext of examining Union's machines to determine possible infringements of which Talon had no knowledge, wrongfully appropriating improvements made by defendant."

[*Proximate Cause*]

In addition to establishing that Talon has violated the antitrust laws, Union before being entitled to award of damages must establish that Talon's violations of the antitrust laws were a proximate cause of injury to it, and must also prove the extent of that injury. As stated by this Court in *Flintkote Company v. Lysfjord* [1957 TRADE CASES ¶ 68,674], (1957), 246 F. 2d 368, at 392, certiorari denied 355 U. S. 835:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue."

If Union had established with reasonable probability the causal connection between the unlawful acts of Talon and the resultant injury to Union in its property or business, the district court, in the absence of evidence which would have established the amount or extent of damage with reasonable probability, could have made a just and reasonable estimate of damage based on relevant data and could have rendered its verdict accordingly. *Bigelow v. R. K. O. Radio Pictures, Inc.* [1946-1947 TRADE CASES ¶ 57,445], (1945), 327 U. S. 251, 264. The distinction then is "between the question of proof necessary to show the *fact* as distinguished from the *amount* of damage." *Flintkote Company v. Lysfjord, supra.*

As stated by the Supreme Court in *Story Parchment Co. v. Paterson Co.* (1930), 282 U. S. 555 at 562:

> "* * * there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. * * *" See also *Eastman Kodak Co. v. Southern Photo Co.* (1926), 273 U. S. 359, 379.

[*Alleged Loss of Profits*]

Implicit in the conclusion of the district court that Union failed to prove injury to its business or property is the finding by the trial court that Union had not sustained the burden of proof resting upon it to establish that Talon's unlawful acts were the proximate cause of Union's loss of profits. The only ruling of the district court occurring during the trial of which Union complains in its brief relates to the rejection of Union's offer of proof[7] of loss of profits.

[7] The offer of proof was made as follows:

"Mr. Mockabee [Attorney for Union]: Regarding Schedule II, your Honor, Mr. Lester Greene of the firm of Greer and Greene, certified public accountants, would, if called to the stand, testify that the items in Schedule II regarding estimated net profits that should have been earned is based upon a figure of 10 per cent of the invested and borrowed long-term capital and is a fair return on such investment. And he would also testify that from an inspection of the books of Union Slide Fastener, Inc., the profits and losses shown in Schedule II for the fiscal years ending February 28, 1950, through February 28, 1955, the last year being estimated because the books are not yet closed, are a true reflection of the profits and/or losses during that period.

"The Court: Is that what his testimony would be?

"Mr. Mockabee: He would further testify with regard to items on the books, which appear on the books, with regard to the other schedules, your Honor.

"The Court: Is that your offer of proof?

"Mr. Mockabee: Yes, sir.

"Mr. Leonard Lyon [Attorney for Talon]: I object to the offer as incompetent, irrelevant and immaterial.

"The Court: Of course, the general objection is good and it will be sustained. In addition, there is no causal connection shown, nor can any be shown, between what the loss is on the books for each fiscal year and any activities of the plaintiff in this action. Nor is the estimated earnings any more than a mere estimate based upon 10 per cent of invested capital, which doesn't take into account competition, the competitive conditions in the industry. This is a very competitive industry. We have heard testimony on that already. It doesn't include new devices coming out, new companies coming into the field, and such things as the introduction of the Wilzip zipper, or some other zipper that might come in by some other company.

"Mr. Mockabee: Of course, we maintain, your Honor, that the introduction of the Wilzip zipper was not normal competition, but was the consummation of a threat to do what plaintiff had done back East, and that is wrecked small companies through the introduction of a cut-price zipper, if defendants and others on the West Coast did not maintain prices.

"The Court: All right. The objection to the offer of proof is sustained. You may step down, Mr. Witness."

* * *

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No attempt or offer of Union was made to show that it sold less zipper machines or less zippers, or that it was forced to sell its machines or zippers at reduced prices, or that it was otherwise impaired or adversely affected in its business, because of the unlawful acts of Talon. In its offer of proof as to the fact of injury, all that Union offered was that a certified public accountant would testify that "the items in Schedule II regarding estimated net profits that should have been earned is based upon a figure of 10 per cent of the invested and borrowed long-term capital and is a fair return on such investment," and that "from an inspection of the books of Union Slide Fastener, Inc., the profits and losses shown in Schedule II for the fiscal years ending February 28, 1950, through February 28, 1955, . . . are a true reflection of the profits and/or losses during that period." Clearly the offer of proof of loss of hypothetical profits which the trial court rejected did not establish that such loss was a proximate result of Talon's unlawful acts. Contrary to Union's argument, the trial court was not compelled to infer the fact of injury from the fact that certain of the unlawful acts of Talon were directed at Union. The action of the trial court in rejecting the proffered testimony is proper.

On Union's motion for a new trial on the issue of damages, Union stated that its credit had been impaired, that it was unable to secure loans through lending agents, as a result of which it was forced to enter into a bankruptcy reorganization proceeding, all because of Talon's unlawful activities. Union did not claim that any of the matters set forth in the motion were "newly discovered", and no reason was advanced as to why such evidence was not offered at the trial of the action. The trial court denied Union's motion. The granting or refusal to grant a new trial rests in the sound discretion of the trial court. From the record in this case we are unable to hold that the trial court abused its discretion.

In light of the foregoing discussion, any consideration of the district court findings and conclusions that Talon was in violation of the anti-trust laws would be purely academic. Therefore, we deem it unnecessary to consider such findings and conclusions.

Award of Attorney's Fees

[Unclean Hands]

Talon claims that the court erred in awarding attorney's fees to Union in that the findings on which the award was made were clearly erroneous. The court in substance found that the action was brought by plaintiff in bad faith and without reasonable belief in the validity of the patent, and the litigation proves harassment and misconduct on plaintiff's part. Specifically, in respect to attorney's fees, the court found as follows:

> Finding of Fact XLVII: "Having considered the acts of plaintiff leading up to the prosecution of this action against defendant and the fact that plaintiff has acted in bad faith and with unclean hands and has misused its patents, defendant is entitled to reasonable attorney's fees. Taking into consideration the nature and complexity of the case; the length of the trial; the depositions taken; the experience, standing and eminence of counsel; the quality of skill demonstrated; the importance of the case to the plaintiff and defendant; the risk of the client and responsibility of the counsel; the time fairly and properly expended in preparation out of court; time in court; and the results accomplished, it is found that the reasonable value of the services of attorneys for the defendant is Twenty Thousand Dollars ($20,000.00).
>
> "In considering the relative importance of the work done by defendant's attorneys with regard to violations of the anti-trust laws, while it was done in part in support of defendant's counterclaim, it was also done as part of the work showing the defense of unclean hands and the material regarding anti-trust violations was used as a shield in defense of the patent suit as well as a sword in connection with the counterclaim. It was nearly all pertinent to the defense to plaintiff's action, even though the counterclaim failed.
>
> "It is found that the anti-trust problem is the only substantial issue if an appeal is taken. To provide for the contingency that on appeal the reviewing court should find no violation of anti-trust laws and be

"Mr. Mockabee: May I have the opportunity to present some law on the question of some of these matters in these schedules which have been objected to and the objection sustained?

"The Court: No, I am not going to permit you to do that. I have taken some proof on attorney's fees and expenses, and time. These other matters are pure speculation. It is highly speculative. From the facts of this case I can't see how loss would be sustained by defendant by virtue of quota agreements entered with other manufacturers . . ."

confronted with an apportionment of fees, and a remand for the purpose of fixing of fees without regard to services rendered on the anti-trust violation, then, excluding the services regarding anti-trust violations, the reasonable value of attorney's fees for defendant is Eighteen Thousand and Five Hundred Dollars ($18,500.00)."

Under 35 U. S. C. A. Sec. 285, "the court in exceptional cases may award reasonable attorney's fees to the prevailing party." This section enacted in 1952[8] adopted the language of the repealed 35 U. S. C. A., Section 70, except that the wording "exceptional cases" was substituted for "in its [the court's] discretion." This change was explained by the revisors as merely expressing the intent of 35 U. S. C. A. 70, as shown by its legislative history and as interpreted by the courts.[9] Both before and after the change in wording, this Court has interpreted this section as making the trial court's determination of attorney's fees final where it has clearly stated the basis for the award, "except where there is an abuse of discretion amounting to caprice or an erroneous conception of the law on the part of the trial judge."[10]

In the cases cited by Talon where attorney's fees were refused, the trial court either failed to make a finding of unfairness or bad faith on the part of the party against whom the award was made,[11] or the record did not support the finding of the trial court that there was bad faith.[12] But here the trial court's findings of fact that the action was brought by Talon without sufficient investigation, in bad faith, without reasonable belief in the validity of the patents, and that the litigation proves harassment and misconduct on the part of Talon, are all clearly supported by the record. We hold that the trial court did not abuse its discretion in awarding attorney's fees to Union.

[*Attorney's Fee—Antitrust Issue*]

It is to be noted in the findings of the district court that the court found that the reasonable value of the services of attorneys for the defendant is $20,000, but in the event that this court should find no violation of the anti-trust laws, then, excluding the services regarding anti-trust violation, the reasonable value of attorney's fees is $18,500. We must confess that some of the findings quoted in the last two quoted paragraphs are, to say the least, unusual and create a problem for this Court where none would otherwise exist. Apparently the trial court was aware, having dismissed the counterclaim of Union, that it was without power to award attorney's fees to Union on its counterclaim. Section 15, Title 15 U. S. C. A. provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

We feel that the proper construction of the statute in regard to the award of attorney's fees was set forth in the following language in *Alden-Rochelle, Inc. et al. v. American Society of Composers, Authors and Publishers, et al.* [1948-1949 TRADE CASES ¶ 62,288], 80 F. Supp. 898 at page 899:

> "I have concluded that plaintiffs have not shown any injury from defendants' violations of the anti-trust laws and that, even if we presume injury, plaintiffs have not proved anything from which the court could approximate the damages. It follows that plaintiffs are not entitled to a money judgment and therefor cannot be awarded 'a reasonable attorney's fee' under 15 U. S. C. A. § 15. 'The court cannot properly award it except as an incident to the successful prosecution of a law action for recovery of damages based on a violation of the anti-trust laws.' *Allen Bradley Co. v. Local No. 3,* D. C., 51 F. Supp. 36 at page 40. In *Decorative Stone Co. v. Building Trades Council,* 2 Cir., 23 F. 2d 426, 428, it was held that 'the allowance of an attorney's fee * * * is incidental to the statutory right to damages, and was properly denied in the equity proceedings,' brought under 15 U. S. C. A.

[8] July 19, 1952, c. 590, Sec. 1, 66 Stat. 813.
[9] U. S. Cong. News 1952, 2423.
[10] *Dubil v. Rayford Camp & Co.* (1950) (9 Cir.), 184 F. 2d 899, 903; *Shingle Product Patents v. Gleason* (1954) (9 Cir.), 211 F. 2d 437; *Pacific Contact Laboratories v. Solex Laboratories* (1953) (9 Cir.), 209 F. 2d 529; *Speed Corp. v. Webster* (9 Cir.), 262 F. 2d 482.
[11] *Day Brite Lighting v. Ruby Lighting Corp.* (1950) (7 Cir.), 191 F. 2d 521.
[12] *Associated Plastics Co. v. Gits Molding Corp.* (1950) (7 Cir.), 182 F. 2d 1000; *Park-in Theaters v. Perkins* (1951) (9 Cir.), 190 F. 2d 137.

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§ 26. Even though plaintiffs have made out a case for equitable relief under 15 U. S. C. A. § 26 they may not recover 'a reasonable attorney's fee' because they have failed to establish their claim for damages under 15 U. S. C. A. § 15."

[*Separate Evaluation Not Required*]

Recognizing its lack of power to award attorney's fees on the counterclaim, the district court, in the first quoted paragraph of the findings, indicated that the allowance of the sum of $20,000 for attorney's fees was made under Section 285, Title 35, which we have quoted, *supra*. If the findings on this subject had ended there, we should and would have affirmed the award of $20,000. However, under the language contained in the third paragraph of the quoted findings, the district court has stated that if this Court fails to find a violation of the anti-trust laws then the reasonable value of the services rendered by attorneys is $18,500. The effect of such finding is an attempt to force this Court to decide an issue which we have heretofore indicated would serve no practical purpose in this case, and is an issue which we deem unnecessary to pass upon.

[*Attorney's Fees for Asserting Defense of Antitrust Violations*]

A proper construction of Title 35, Section 285, does not require a district judge in awarding attorney's fees to a prevailing defendant to separately evaluate the services rendered under each separate defense contained in the defendant's answer and then to reduce or increase such award depending upon whether a particular defense failed or is sustained. Under the statute a district judge, in exceptional cases, may award reasonable attorney's fees to the prevailing party. In our view, such award to a defendant may include services rendered by his attorney in connection with a separate defense set forth in the answer even though the trial court should ultimately conclude that such defense had not been sustained; provided that such defendant prevails in the action and that such defense was relevant and material, and was asserted and maintained in good faith. In the second paragraph of the quoted finding, the district court stated:

> "while it [work done by defendant's attorneys with regard to violations of the anti-trust laws] was done in part in support of defendant's counterclaim, it was also done as part of the work showing the defense of unclean hands and the material regarding anti-trust violations was used as a shield in defense of the patent suit as well as a sword in connection with the counterclaim. * * *"

It may well be that in a proper case a district judge would be warranted in including in its basis for awarding attorney's fees to a prevailing defendant the services rendered by the defendant's attorney in connection with a separate defense of anti-trust violations even though the district judge should fail to sustain such defense.

[*Pleading*]

In the case before us, Union filed an answer, amended answer and counterclaim. The amended answer and counterclaim did not contain as a separate defense the allegations of anti-trust violations by Talon. The trial was conducted on the basis of such pleadings. Presumptively the services of Union's attorneys, in relation to anti-trust violations, in the preparation and conduct of the trial were designed to use the anti-trust violations as a sword to inflict damages upon Talon under Union's counterclaim. Following the trial of the action, the district court in a memorandum to counsel stated,

> "The Antitrust laws may be used as a sword or a shield. The attempt of the defendant to invoke them here, as a sword, fails because of lack of proof of damage and causation. We believe however, if properly pleaded, they are here available as a defense, * * *"

Thereafter the district court permitted Union to file an amended answer, setting forth as an additional and separate defense Talon's alleged violations of the anti-trust laws. The record is, therefore, clear that the violations of the anti-trust law did not become a shield to protect Union from Talon's complaints until the district court decided that such anti-trust violations were not effective as a sword. Under such facts, the "bonus" of $1,500 awarded as part of the attorney's fees cannot be sustained.

[*Amount Awarded*]

Talon further contends that an award of attorney's fees of $20,000 or $18,500 is clearly excessive. It cites *Dubil v. Rayford Camp & Co., supra,* where this Court held $15,000 as attorney's fees was excessive for a patent trial which, like this one, ran nine

days. But in the *Dubil* case there was involved only one patent for a comparatively simple method of preserving fresh meat, as opposed to the six very complex machinery patents in this case against which Union's attorneys were required to prepare a defense.[13] The most important distinction between the *Dubil* case and this one, however, is that this Court in *Dubil* set aside an award of attorney's fees and directed that they be redetermined because the trial court awarded them not only for the work in connection with the patent in suit but, erroneously, also in conjunction with a cause of action over which the court had no jurisdiction.[14] We hold that the trial court's reasons for awarding attorney's fees were clearly stated and supported by the record.

The sum of $18,500, in light of all of the circumstances of this case, is not excessive.

[*Judgment Modified*]

From the foregoing opinion it follows that the judgment appealed from should be and is hereby modified by reducing the award of attorney's fees from $20,000 to $18,500, and in all other respects should be and is affirmed. Each party shall bear its own costs on appeal.

[¶ 69,342] Federal Trade Commission v. Mandel Brothers, Inc.

In the Supreme Court of the United States. October Term, 1958. No. 234. Dated May 4, 1959.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Fur Products Labeling Act

Fur Labeling—False Invoicing of Furs Under Fur Products Labeling Act—Retail Sales Slips as "Invoices" Subject to Information Disclosure Requirements—Interstate Commerce.—A retail sales slip for a fur product is an "invoice" within the meaning of the Fur Products Labeling Act, and, therefore, as such, it must disclose the information set forth in the Act. A fur product is falsely "invoiced" if the retail sales slip does not contain the required information.

The avowed purpose of the Act, among other things, is to protect consumers against deception resulting from the misbranding, false advertising, or false invoicing of fur products; therefore, Section 2(f) of the Act, which contains the definition of "invoice," should be read hospitably with that end in view. "Section 2(f) uses 'invoice' to include a 'written account' and 'memorandum.' So far a retail sales slip is included. Section 2(f) requires the 'invoice' to be issued 'in connection with any commercial dealing' in furs. A retail sale is plainly a 'commercial dealing.' Section 2(f) requires the invoice to be issued to a 'purchaser.' There again a customer of a retailer is a 'purchaser.'" The last phrase of the section which reads "or any other person who is engaged in dealing commercially in fur products or furs" applies only to the last antecedent, and it will not be construed to make the invoice provisions inapplicable to retail sales. Furthermore, the inclusion of retail sales slips as invoices has been the consistent administrative construction of the Act, and this contemporaneous construction is entitled to great weight, even though it was applied in cases settled by consent rather than in litigation. The contention that a retailer's sale is a local transaction not subject to the exercise by Congress of the commerce power was rejected.

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[13] Four patents were dropped from the case at the pretrial conference, and a fifth on appeal.

[14] At page 902 of 184 F. 2d, it was stated: "It is unnecessary to decide in the instant case whether an award of a reasonable attorney's fee made in a case in which an action on a patent has been properly joined with another cause of action (one for unfair competition, for example) must be based solely on the work done by the attorney in connection with the cause of action arising on the patent or whether the fee may be enlarged by virtue of the work done by the attorney in connection with the other cause of action. In this respect note the phrase of the statute '* * * upon the entry of judgment on any patent case.' But it is clear, we think, that an award of an attorney fee may not be made in connection with a cause of action over which the court has no jurisdiction. It follows that that portion of the judgment awarding the fee must be set aside and the court below must redetermine what are reasonable attorney fees."

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See Fur Labeling, Vol. 2, ¶ 6601.30, 6610.81, 6614.26, 6625.61, 6625.65, 6625.83, 6631.45, 6631.46, 6632.77, 6645.70, 6646.61; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.93.

Fur Labeling—Scope of Federal Trade Commission Cease and Desist Order—Validity of Order Prohibiting Practices Violative of Law but Not Found to Have Been Engaged in by Respondent.—A Federal Trade Commission cease and desist order directed against the misbranding of fur products by failing to affix labels to fur products showing each of the six categories of information required by Section 4(2) of the Fur Products Labeling Act was valid, where the Commission found that the respondent had committed numerous violations of three of the six disclosure requirements contained in the section, but that there was no evidence that the respondent had not complied with the other three disclosure requirements. The Commission did not abuse the "wide discretion" that it has in a choice of a remedy "deemed adequate to cope with the unlawful practices" disclosed by the record. It is not limited to prohibiting "the illegal practice in the precise form" existing in the past. As in Sherman Act decrees, the question of the extent to which related activity should be enjoined is one of kind and degree. The Supreme Court sits only to determine if the trier of facts has exercised an allowable discretion. "Where the episodes of misbranding have been so extensive and so substantial in number as they were here, we think it permissible for the Commission to conclude that like and related acts of misbranding should also be enjoined as a prophylactic and preventive measure." However, the order was rephrased to avoid any suggestion that the respondent sold fur products contrary to the disclosure requirements not found to have been violated.

See Unfair Practices, Vol. 2, ¶ 5201.481; Fur Labeling, Vol. 2, ¶ 6625.61, 6625.65, 6625.67, 6625.83, 6645.70; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.91, 8621.450.

For the petitioner: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; Daniel M. Friedman, Assistant to the Solicitor General; Ernest L. Folk, III, Attorney, Department of Justice; Earl W. Kintner, General Counsel, FTC; James E. Corkey, Assistant General Counsel, FTC; and Alvin L. Berman, Attorney, FTC, Washington, D. C.

For the respondent: Anderson A. Owen, Chicago, Ill., and Samuel H. Horne, Washington, D. C.

Reversing, in part, a decision of the U. S. Court of Appeals, Seventh Circuit, 1958 Trade Cases ¶ 68,993, and rephrasing, in part, a cease and desist order of the Federal Trade Commission in Dkt. 6434.

Mr. Justice Douglas delivered the opinion of the Court [*In full text*]:

[*FTC Ruling*]

Petitioner issued a complaint charging respondent, a retail department store, with violations of the Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. § 69. Violations were found and a cease-and-desist order was issued. One of the principal violations found was that many of respondent's retail sales were falsely "invoiced" in violation of § 3 of the Act.[1] The term "invoice" is defined in § 2(f) as "a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs." Section 5(b)

[1] Section 3 provides in part:
"(a) The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.
"(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act."

provides that a fur product or fur is falsely "invoiced" if it is not "invoiced" to show (a) the name of the animal that produced the fur; and where applicable, that the product (b) contains used fur, (c) contains bleached, dyed, or otherwise artificially colored fur, (d) is composed in whole or substantial part of paws, tails, bellies, or waste fur; (e) the name and address of the person issuing the "invoice"; and (f) the country of origin of any imported furs.

The Commission found that respondent had violated the "invoice" provisions of the Act by failure to include in many of its retail sales slips of fur products, (a) its address, (b) whether the fur was bleached, dyed, or otherwise artificially colored, and (c) the correct name of the animal producing the fur.

The Act in § 4 also provides[2] that a fur product is misbranded (1) if it is "falsely or deceptively labeled . . . or identified," (2) if there is not affixed a label setting forth substantially the same six items of information required for an "invoice," or (3) if the label designates the animal that produced the fur by some name other than that prescribed in the Fur Products Name Guide.[3] The Commission found that the labels on respondent's fur products were false in numerous instances by reason of the failure to include information in three of the categories listed under the second part of § 4. It held, however, that there was no evidence that the labels were deficient in the other three categories of information. Nevertheless, it issued a cease-and-desist order against misbranding by failure to include in the labels the required six categories of information, all of which were listed.

[*Appellate Court Ruling*]

On appeal, the Court of Appeals *first* eliminated the prohibitions relating to invoicing on the ground that a retail sales slip was not an "invoice" within the meaning of the Act; and *second*, it struck from the order the prohibition against misbranding through omission of the three categories as to which no violations were found. [1958 TRADE CASES ¶ 68,993] 254 F. 2d 18. The case is here on a petition for a writ of certiorari. 358 U. S. 812.

I.

[*Fur Invoicing*]

First, as to invoicing. We start with an Act whose avowed purpose, *inter alia*, was to protect "consumers . . . against deception . . . resulting from the misbranding, false or deceptive advertising, or false invoicing of fur products and furs." S. Rep. No. 78, 82d Cong., 1st Sess., p. 1. The House Report also emphasizes that the bill was "designed to protect consumers and others from widespread abuses" arising out of false and misleading matter in advertisements and otherwise. H. R. Rep. No. 546, 82d Cong., 1st Sess., p. 1. The Title of the Act (which, though not limiting the plain meaning of the text, is nonetheless a useful aid in resolving an ambiguity (see *Maguire v. Commissioner*, 313 U. S. 1, 9)), states that its purpose was to "protect consumers and others against . . . false invoicing of fur products and furs." 65 Stat. 175. So we have an avowed purpose to protect retail purchasers against improper "invoicing." We therefore should read § 2(f) which contains the definition of "invoice" hospitably with that end in view.

[2] Section 4 provides:
"For the purposes of this Act, a fur product shall be considered to be misbranded—
"(1) if it is falsely or deceptively labeled or otherwise falsely or deceptively identified, or if the label contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product;
"(2) if there is not affixed to the fur product a label showing in words and figures plainly legible—
"(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act;
"(B) that the fur product contains or is composed of used fur, when such is the fact;
"(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;
"(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;
"(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;
"(F) the name of the country of origin of any imported furs used in the fur product;
"(3) if the label required by paragraph (2)(A) of this section sets forth the name or names of any animal or animals other than the name or names provided for in such paragraph."

[3] This is a register of the names of hair, fleece, and fur-bearing animals which § 7 of the Act requires the Commission to maintain.

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Section 2(f) is not unambiguous. Yet we do not have here the problem of a penal statute that deserves strict construction. We deal with remedial legislation of a regulatory nature where our task is to fit, if possible, all parts into an harmonious whole. *Black v. Magnolia Liquor Co.*, 355 U. S. 24, 26.

[*Retail Sales Slip*]

Section 2(f) uses "invoice" to include a "written account" and "memorandum." So far a retail sales slip is included. Section 2(f) requires the "invoice" to be issued "in connection wtih any commercial dealing" in furs. A retail sale is plainly a "commercial dealing." Section 2(f) requires the invoice to be issued to a "purchaser." There again a customer of a retailer is a "purchaser." The case for inclusion of a retail sales slip in "invoice," as that term is used in the Act, would therefore seem to be complete. What turned the Court of Appeals the other way was the last phrase in § 2(f)—"or any other person who is engaged in dealing commercially in fur products or furs." It held that "engaged in dealing commercially" modifies not only "any other person" but also all the other preceding terms in the subsection including "purchaser." *Cf. United States v. Standard Brewery,* 251 U. S. 210, 218. That is a possible construction. We conclude, however, that this limiting clause is to be applied only to the last antecedent.[4] We think it would be a partial mutilation of this Act to construe it so that the "invoice" provisions were inapplicable to retail sales. In the first place, the language of § 2(f) specifies in sweeping language the categories of persons for whose benefit the invoicing requirements were imposed, *viz.,* purchaser, consignee, factor, bailee, correspondent, or agent. Then as a general catch-all "any other person who is engaged in dealing commercially in fur products or furs" was added. In the second place, only by construing "invoice" to include retail sales slips can the full protection of the Act be accorded consumers. We do not agree with the point stressed by respondent that the consumer's protection is to be found solely in the label on the fur product and that invoices are required only at each antecedent step of delivery or transfer to a person dealing commercially in either furs or fur products. The advertising and mislabeling prohibitions in § 3(b) of the Act[5] are plainly applicable to retail sales. Yet the prohibition of false invoices is contained in the same clause. If we held that Congress, in spite of its desire to protect consumers, withheld from them the benefits of reliable invoices, we would have to read the clauses of § 3 distributively, making only some of them applicable to retail sales. That would be a refashioning of § 3, an undertaking more consonant with the task of a congressional committee than with judicial construction.

Moreover, fur product "labels," we are advised, are not pieces of cloth sewn into garments but tags which the purchaser is likely to throw away after the purchase. The "invoice" is the only permanent record of the transaction that the retail purchaser has. Its importance was emphasized by the Commission:

> "Inasmuch as the invoice may serve as a documentary link connecting the sale of specific fur products back through the retailer's records with advertisements therefor, the application of the invoicing provisions of the Act to transactions between retailers and consumers represents a key implement for effective administration of the Act."

The inclusion of retail sales slips in invoices has been the consistent administrative construction of the Act.[6] This contemporaneous construction is entitled to great weight (*United States v. American Trucking Assns.,* 310 U. S. 534, 549; *Black v. Magnolia Liquor Co., supra; Federal Housing Adm'n v. Darlington, Inc.,* 358 U. S. 84, 90) even though it was applied in cases settled by consent rather than in litigation.

[*Commerce Power*]

Finally respondent urges that a retailer's sale is a local transaction not subject to the exercise by Congress of the commerce power. Misbranding a drug held for sale

[4] *Cf. United States v. Hughes,* 116 F. 2d 613, 616; *Puget Sound Electric R. Co. v. Benson,* 253 F. 710, 711; 2 Sutherland, Statutory Construction (3d ed. 1943), § 4921.

[5] Note 1, *supra.*

[6] See *Ed Hamilton Furs, Inc.,* 51 F. T. C. 186. We are advised that since that case, decided in 1954, the Commission has issued 137 complaints charging violations of the Act involving false and deceptive retail invoicing. There are presently outstanding 110 cease-and-desist orders relating to retail invoicing. In 92 other cases furriers have agreed to discontinue false and deceptive retail invoicing.

after shipment in interstate commerce was held to be within the commerce power in *United States v. Sullivan*, 332 U. S. 689. That decision and its predecessors sanction what is done here.

We conclude that a retail sales slip is an "invoice" within the meaning of the Act and accordingly the judgment of the Court of Appeals setting aside the part of the cease-and-desist order which requires this retailer to give a proper "invoice" to each purchaser is reversed.

II.

[*False Labeling—Scope of Order*]

Second, as to false labeling. The Commission, as we have noted, found that respondent had committed numerous violations of three of the six disclosure requirements contained in § 4(2) of the Act,[7] noting that there was no evidence that it had not complied with the other three disclosure requirements of § 4(2). The cease-and-desist order of the Commission was however directed against "misbranding fur products by: 1. Failing to affix labels to fur products showing" each of the six categories of information required by § 4(2). The Court of Appeals struck from the order the prohibition with respect to the three categories as to which there was no evidence of violation.

We do not believe the Commission abused the "wide discretion" that it has in a choice of a remedy "deemed adequate to cope with the unlawful practices" disclosed by the record. *Jacob Siegel Co. v. Federal Trade Comm'n* [1946-1947 TRADE CASES ¶ 57,451], 327 U. S. 608, 611. It is not limited to prohibiting "the illegal practice in the precise form" existing in the past. *Federal Trade Comm'n v. Ruberoid Co.* [1952 TRADE CASES ¶ 67,279], 343 U. S. 470, 473. This agency, like others, may fashion its relief to restrain "other like or related unlawful acts." *Labor Board v. Express Pub. Co.*, 312 U. S. 426, 436. The practice outlawed by § 4 is "misbranding." The disclosure required for a properly branded garment is specified. These disclosure requirements are so closely interrelated that the Commission might well conclude that a retailer who for example failed to disclose that the fur was bleached or dyed might well default when it came to disclosure of the fact that used fur was contained in the garment. One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be fenced in. Here, as in Sherman Act decrees (*Local 167 v. United States* [1932-1939 TRADE CASES ¶ 55,043], 291 U. S. 293, 299; *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, 400-401; *International Boxing Club v. United States* [1959 TRADE CASES ¶ 69,231], 358 U. S. 242, 253), the question of the extent to which related activity should be enjoined is one of kind and degree. We sit only to determine if the trier of facts has exercised an allowable discretion. Where the episodes of misbranding have been so extensive and so substantial in number as they were here,[8] we think it permissible for the Commission to conclude that like and related acts of misbranding should also be enjoined as a prophylactic and preventive measure.

[*Wording of Order*]

Respondent objects to the wording of the cease-and-desist order saying it suggests that the store has sold garments contrary to the disclosure requirements not found to have been violated here. The Commission bows to the suggestion that Part A, par. 1 of the cease-and-desist order be rephrased to enjoin "misbranding fur products by failing to affix labels to fur products showing each element of information required by the Act." We so order.

On this phase of the case the judgment of the Court of Appeals is also reversed, the cease-and-desist order to be rephrased as we have indicated.

It is so ordered.

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[7] See note 2, *supra*.

[8] The Commission found 12 instances of failure to label the product with the correct name of the animal producing the fur, 15 instances of failure to disclose that the product was bleached, dyed or otherwise artificially colored, and 58 instances of failure to show the country of origin of imported furs. There were in addition 187 other violations of the rules of the Commission which provide additional labeling requirements and standards. See 16 CFR, Pt. 301.

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[¶ 69,343] Zenith Radio Corporation v. Marshall-Wells Company.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 58 C 51. Filed April 15, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Antitrust Violations as Defense to Trademark Suit—Relationship Between Alleged Illegal Practices and Relief Sought.—A manufacturer of trademarked radionic products, in its trademark suit, was denied a motion to strike from the defendant's answer an allegation that the manufacturer was precluded from any relief because it had connived and co-operated with its distributors to pay a major portion of the advertising costs expended by favored customers in the advertising and promotion of the manufacturer's products. In some instances, the doctrine of "unclean hands" can preclude a plaintiff's recovery, especially where 15 United States Code, Section 1115 (section of Trade-Mark Act providing a defense to infringement actions where "the mark has been or is being used to violate the antitrust laws of the United States"), is properly invoked. The defense of "unclean hands" must, however, be scrutinized with a "critical eye"; therefore, a full factual disclosure must be made before it can be determined whether the alleged illegal trade practices bear an immediate and necessary relation to the relief sought.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.600, 9042.750.

For the plaintiff: Thomas C. McConnell and Philip J. Curtis, Chicago, Ill.

For the defendant: Thompson, Raymond, Mayer, Jenner & Bloomstein, Chicago, Ill.

Memorandum on Motion of Plaintiff to Strike Defendant's Sixth Defense from Its Answer

[*"Unclean Hands"*]

ROBSON, District Judge [*In full text*]: Plaintiff has moved to strike defendant's Sixth Defense from its answer. This defense, in substance, raises an issue of "unclean hands" on the part of plaintiff, in that it has connived and co-operated with its distributors to pay a major portion of advertising costs expended by favored customers in the advertising and promotion of Zenith trademarked radionic products. It is defendant's legal position that such conduct of plaintiff precludes it from any right to relief in this trademark, unfair competition suit, predicated upon the trademarks pertaining to Zenith.

[*Relationship Between Alleged Illegality and Relief Sought*]

There can be no doubt that in some instances the doctrine of "unclean hand" can be invoked to preclude plaintiff's recovery (*Morton Salt Co. v. G. S. Suppiger Co.*, [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488; *Worden v. California Fig Syrup Co.*, 187 U. S. 516; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Strey v. Devine's, Inc.*, 217 F. 2d 187 (C. A. 7); *Extractol Process v. Hiram Walker & Sons* [1946-1947 TRADE CASES ¶ 57,460], 153 F. 2d 264 (C. A. 7); *American Cooperative Serum Assn. v. Anchor Serum Co.* [1946-1947 TRADE CASES ¶ 57,447], 153 F. 2d 907 (C. C. A. 7); Nims, *Unfair Competition and Trademarks*, Sec. 390; Toulmin, *Anti-Trust Laws of the U. S.*, Sec. 27.23). This applies especially where the statute 15 U. S. C. A. Sec. 1115, which provides a defense where "the mark has been or is being used to violate the anti-trust laws of the United States," is properly invoked. The court cannot determine at this time whether the illegal trade practices alleged bear that immediate and necessary relation to the relief which plaintiff seeks, which is necessary to bar the relief sought. (*Vanity Fair Mills v. Cusick* [1956 TRADE CASES ¶ 68,522], 143 F. Supp. 452.) Since the defense of unclean hands must be scrutinized with a "critical eye" (*The Coca-Cola Company v. The Koke Company of America, et al.*, 254 U. S. 143), there must be a full factual disclosure before there can be a determination of the closeness of the antitrust unclean hands defense to the trademark involved in this suit.

[*Motion Denied*]

The motion of plaintiff to strike the Sixth Defense from defendant's answer is denied.

[¶ 69,344] Commercial Communications, Inc., et al. v. Public Utilities Commission of the State of California.*

Watson Communications Systems, Inc., et al. v. Public Utilities Commission of the State of California.

The City of Los Angeles v. Public Utilities Commission of the State of California.

In the Supreme Court of the State of California. In Bank. Nos. S. F. 19722, S. F. 19723, and S. F. 19725, respectively. Filed June 27, 1958. Appeal to the United States Supreme Court dismissed on April 27, 1959.*

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Interpretation of Consent Decree Prohibiting Certain Business Activities—Alleged Avoidance of Consent Decree.—An order of the California Public Utilities Commission accepting a tariff schedule submitted by a telephone company's subsidiary for installing, leasing, and maintaining private mobile communications systems did not conflict with a Federal antitrust consent decree (1956 TRADE CASES ¶ 68,246), which enjoined the company from "engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communications services . . . ." However, this provision did not apply, for a period of five years from the date of the decree, to "leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date" of the decree. While it had been argued before the commission that the subsidiary's motive in filing the tariff was to avoid the consent decree, the commission held that there was no proof to that effect; that it would not take judicial notice of good or bad intentions; that if the court which entered the consent decree wished to bar such activities, even though subject to regulation, it would have made such a provision; and that there was nothing in the decree to prompt it to change its ruling that the service was a utility service subject to its jurisdiction. The reviewing court saw no reason why the decision of the commission should be disturbed.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10, 8421.

For the petitioners: McClean, Salisbury, Petty & McClean, Robert S. McClean, John E. Scheifly, Edward M. Berol, Bruce R. Geernaert, Berol & Silver, Robert N. Lowry, Brobeck, Phleger & Harrison, Gerald H. Trautman, Brent M. Abel, Thomas B. McGuire, McCutchen, Thomas, Matthew, Griffiths & Greene, Jerome Preston, Jr., Lawrence A. Sullivan, Foley, Hoag & Eliot, Roger Arnebergh, City Attorney, Alan G. Campbell, Assistant City Attorney.

Amicus curiae on behalf of the petitioners: Joseph E. Keller, Dow, Lohnes & Albertson, John E. Scheifly, McClean, Salisbury, Petty & McClean, Brobeck, Phleger & Harrison, Robert N. Lowry, Francis L. Cross and Cross & Brandt.

For the respondent: Everett C. McKeage, Roderick B. Cassidy, Hugh N. Orr, Boris H. Lakusta and H. J. McCarthy.

For the Real Party in Interest: Pillsbury, Madison & Sutro, Arthur T. George, Eugene M. Prince, Francis N. Marshall, Dudley A. Zinke and G. H. Eckhardt, Jr.

[*Construction of Antitrust Consent Decree*]

SHENK, Justice [*In full text except for omissions indicated by asterisks*]: This is a consolidated proceeding to review an order of the Public Utilities Commission accepting, with modifications and directions, tariff schedule No. 108-T filed by Pacific Tele-

[* On April 27, 1959, the United States Supreme Court in *Commercial Communications, Inc. v. Public Utilities Commission of the State of California* (Dkt. 719) ruled as follows:

"*Per Curiam:* The motions to dismiss are granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Brennan took no part in the consideration or decision of this case."]

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phone and Telegraph Company, hereinafter called Pacific. The schedule was voluntarily filed and covered the installing, leasing and maintaining of private mobile communications systems. The tariff was originally accepted to become effective April 30, 1956, but at the request of petitioners a rehearing was granted and the commission conducted an investigation into the proposed rates and conditions and an inquiry as to the scope of its own jurisdiction. The petitioners, with the exception of the City of Los Angeles, are private persons or firms engaged in furnishing similar service on a private contract basis, in competition with Pacific, which heretofore has offered this service only on a contract basis. The City of Los Angeles has appeared on behalf of customer interests of its own and its inhabitants, and pursuant to its public-spirited interest in utility regulation and growth. The petitioners[1] urge that the commission has incorrectly determined in favor of its own jurisdiction in this matter and contend that their rights under the Constitution of the United States and of this state are violated. They also urge that the tariff creates a conflict with federal law and with the provisions of a consent decree[2] to which Pacific, as a subsidiary of American Telephone and Telegraph Company, was a party.

* * *

This leaves for consideration the question of any probable conflict between the jurisdiction of the federal and state commissions and of an alleged limitation on the state commission by reason of the provisions of the New Jersey consent decree hereinbefore referred to.

* * *

In January 1956 the Department of Justice brought a proceeding under the Sherman Act in the United States District Court in New Jersey against Western Electric Company, Inc. and American Telephone and Telegraph Company. By consent of the parties and without trial of the issues a consent decree was entered [1956 TRADE CASES ¶ 68,246]. Under the federal antitrust laws where no trial is had and no testimony taken, a consent decree is not evidence of or an admission of any of the charges contained in the complaint. (15 U. S. C. 16; *Barnsall Refining Corp. v. Birnamwood Oil Co.* [E. D. Wis. 1940] 32 F. Supp. 308, 310-311.) The New Jersey court specifically retained continuing jurisdiction to issue orders and directions with reference to the construction or enforcement of this final judgment. From the briefs submitted in the proceeding before this court it appears that the original parties to the New Jersey proceeding take opposing views as to the meaning and effect of subdivision (d) of section V of that decree which provides as follows:

> "The defendant AT & T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply . . . (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment . . . ."

The Department of Justice takes the view that under subdivision (d) the defendants in that action were prohibited from engaging in the business of leasing and maintaining facilities for private mobile communications systems, but were allowed a cut-off period of five years for serving those who were lessees within 45 days after the date of the judgment. Its view is that the phrase in subdivision (d) reading "the charges for which are not subject to public regulation" is descriptive of the fact stated, namely, that such charges *are not subject to public regula-*

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[1] Petitioner Thomas Poor, an individual doing business as Bakersfield Electronics, appears as one of the petitioners on the Watson Communication Systems, Inc. brief. He did not petition for a rehearing before the commission, and therefore has no standing before this court as a petitioner for review. (Pub. Util. Code, § 1731).

Petitioner Gamewell Company did not petition for rehearing and likewise has no standing to petition for review. This court gave it permission to file a brief, without opposition from the commission until after the brief was filed. It is not necessary to rule on the commission's motion to strike this brief as it may be treated as an amicus curiae brief.

Amici curiae briefs have also been filed by several interested parties.

[2] *United States of America v. Western Elec. Co., Inc. and American T. & T. Co. et al.* [1956 TRADE CASES ¶ 68,246] Civil Action No. 17-49, U. S. D. C., N. J., Jan. 29, 1956.

* * *

tion. The other parties to the consent decree are of the view that this phrase merely provides that if the charges are regulated by a state commission the telephone companies are not prohibited by the decree from continuing to furnish equipment and facilities for private mobile communications systems. Pacific, as hereinabove stated, was a party to that decree and would be bound by its terms.

Insofar as we are advised no ruling has been obtained from the New Jersey federal court as to the meaning and effect of subdivision (d) of section V, and no adjudication of this issue has been made by the Federal Communications Commission. However, it has been brought to our attention that in a Memorandum Opinion and Order released November 21, 1957, in the proceedings entitled "In the Matter of American Telephone and Telegraph Company, et al., Lease and maintenance of equipment and facilities for private communications systems, Docket No. 11972," in which this issue was sought to be raised, the federal commission stated it had been unable to find any basis in the specific language of the consent decree to support the contention of the Department of Justice that it was the intent of that decree to prohibit the service, regulated or unregulated. That commission made no actual determination on this question.

[*Alleged Motive—Avoidance of Consent Decree*]

In the proceedings before the state commission some of the petitioners argued that Pacific's motive in filing the proposed tariff 108-T was to avoid the consent decree. The commission held that there was no proof to that effect; that it would not take judicial notice of good or bad intentions; that if the federal court wished to bar such activities by Pacific even though subject to regulation, it would have made such a provision, and that there was nothing in the decree to prompt it to change its ruling that this service was utility service subject to its jurisdiction. No good reason appears why the decision of the commission in this respect should be disturbed.

The order is affirmed.

We concur: GIBSON, C. J., TRAYNOR, J., and SPENCE, J.

Dissenting Opinion of Schauer, J., to Opinion by Shenk, J.

* * *

With reference to the provision of the 1956 consent decree of the United States District Court for the District of New Jersey in *United States v. Western Electric Co.* [1956 TRADE CASES ¶ 68,246], quoted in the majority opinion, pp. 20-21,[3] I would comment as follows: This provision is not a clear declaration that the charges for leasing and maintaining private communications systems are not subject to public regulation; neither is it a clear declaration that American Telephone and Telegraph Company and its subsidiaries are not enjoined from engaging in the business of leasing and maintaining facilities for private communications systems where the charges for those private communications services are subject to public regulation. In the circumstances it does not appear that the provision of the consent decree should influence the decision herein.

For the reasons above stated I would annul the order of the Public Utilities Commission.

We concur: CARTER, J., and MCCOMB, J.

[¶ 69,345] United States v. Nassau & Suffolk County Retail Hardware Association, Inc., et al.

In the United States District Court for the Eastern District of New York. Civil Action No. 17768. Filed April 24, 1959.

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* * *

[3] "The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries . . . in any business other than the furnishing of common carrier cummunications services; provided, however, that this Section V shall not apply . . . (d) for a period of five (5) years from the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment. . . ."

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Case No. 1346 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Trade Associations—Association Membership as Means of Trade Restraint—Price-Fixing—Boycotts—Exclusion from Trade—Refusal to Deal.—A retail hardware dealers' trade association and its former president were enjoined by a consent decree from entering into or enforcing any agreement to fix prices or other terms or conditions for the sale of hardware and housewares to consumers, restrict price competition between discount houses and retailers, and hinder or prevent any discount house or other person from selling to consumers. The decree also enjoined the association and its former president from advising or inducing suppliers to discontinue business relations with any discount house, hinder or prevent distributors or wholesalers from reselling to any discount house, and boycotting or refusing to deal with any manufacturer of products resold in discount houses or any supplier of such discount houses. In addition, the decree prohibited membership or participation in the activities of any trade association or other organization whose activities were inconsistent with the provisions of the judgment.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121, 2017.300.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Dissolution of Hardware Retailers' Trade Association.—The dissolution of a hardware retailers' trade association was ordered by a consent decree.

See Private Enforcement and Procedure, Vol. 2, ¶ 8301.10, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; and Baddia J. Rashid, Harry N. Burgess, Richard B. O'Donnell, Augustus A. Marchetti, Joseph T. Maioriello, Paul D. Sapienza, and Donald A. Kinkaid.

For the defendants: William E. Woods for Nassau and Suffolk Retail Hardware Assn., Inc. The decree was also signed by Murray M. Pearlstein, the individual defendant.

Final Judgment

[*Consent Decree*]

MATTHEW T. ABRUZZO, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 27, 1957, and each of the said defendants having appeared herein and the plaintiff and the defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by any party in respect of any such issue;

Now, Therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of all the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

The Court has jurisdiction of the subject matter hereof and all the parties hereto. The complaint states a claim upon which relief may be granted against the defendants and each of them under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm association, corporation or other legal entity:

(B) "Defendant association" shall mean the defendant Nassau & Suffolk County Retail Hardware Association, Inc.,:

(C) "Retailer" shall mean any person who sells for profit goods and merchandise to consumers:

(D) "Discount house" shall mean a retailer who solicits the favor of consumers chiefly on the basis of price.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant and to his officers, agents, servants, employees, members, subsidiaries, successors and assigns, and to all other persons in active concert or participation with any defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Specific Relief—Dissolution of Association*]

The defendants are ordered and directed:

(A) To institute such action as may be necessary to dissolve the defendant association under the laws of the State of New York within 90 days from the signing of this Judgment, and to complete such dissolution with 120 days from the date of the signing of this Judgment.

(B) Upon completion of such dissolution of the defendant association, to file an affidavit with this Court and with the plaintiff setting forth the fact of compliance with this Section IV.

V

[*Price-Fixing—Exclusion from Trade*]

The defendants are jointly and severally enjoined and restrained from, directly or indirectly, entering into, adhering to, enforcing, maintaining or claiming any rights under any contract, agreement, understanding, plan or program with any retailer or with any association or central agency of or for retailers:

(A) To fix, determine, establish, maintain or stabilize prices, pricing methods, discounts, mark-ups or other terms or conditions for the sale of hardware and housewares to consumers:

(B) To limit, restrict, eliminate or reduce price competition between discount houses and retailers:

(C) To hinder, restrict, limit or prevent any discount house or other person from selling hardware and housewares to consumers.

VI

[*Boycotting—Refusal to Deal*]

The defendants are jointly and severally enjoined and restrained from, directly or indirectly:

(A) Advising, suggesting or inducing or attempting to advise, suggest or induce, any or all suppliers of hardware and housewares to discontinue business relations with any discount house:

(B) Hindering, restricting, limiting or preventing or attempting to hinder, restrict or prevent distributors, jobbers or wholesalers of hardware and housewares from reselling such products to any discount house:

(C) Boycotting or refusing to deal, or attempting to boycott or refuse to deal, with any manufacturer of products resold in discount houses or with any supplier of merchandise to discount houses:

(D) Being a member of, contributing anything of value to, or participating in any of the activities of, any trade association or other organization, the activities of which are inconsistent in any manner with any of the provisions of this Final Judgment.

VII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally-recognized privilege, (A) reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and (B) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant who may have counsel present, regarding any such matters. Upon such written request said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department

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except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and punishment of violations thereof.

[¶ 69,346] **Herman Schwabe, Inc. v. United Shoe Machinery Corporation.**

In the United States District Court for the Eastern District of New York. Civil No. 17660. Dated April 24, 1959. Amended by Supplemental Opinion dated April 30, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery Under Antitrust Laws May Be Barred—Statute of Limitations—Tolling of Limitation Period During Pendency of Government Action.—A manufacturer of shoe machinery, in a private treble damage action charging it with monopolizing the market from some time prior to 1939 until the filing of the action on May 27, 1957, was granted partial summary judgment dismissing so much of the claim as accrued before May 27, 1953. Section 4B of the Clayton Act provides that such actions are barred unless commenced within four years after accrual. Section 5(b), which provides for the suspension of the running of the statute during the pendency of Government actions, also provides that, whenever the running of the statute is suspended thereunder, the action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued. In the instant case, a Government action against the manufacturer was terminated no later than June, 1954. Therefore, any cause of action which accrued more than four years prior to May 27, 1957, was barred.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275.

For the plaintiff: Sigmund Moses (James M. Malloy, of counsel).

For the defendant: Davis, Polk, Wardwell, Sunderland and Kiendl (Louis Stanton, of counsel).

[*Treble Damage Action*]

ZAVATT, District Judge [*In full text except for omissions indicated by asterisks*]: This action, which is brought pursuant to section 4 of the Clayton Act, 15 U. S. C. A. § 15, was instituted on May 27, 1957. The plaintiff seeks treble damages for alleged injury to its business by reason of alleged violations by the defendant of section 2 of the Sherman Act, 15 U. S. C. A. § 2, claimed by the plaintiff to have begun some time prior to 1939, and to have continued up to the time of the filing of the complaint. The defendant's monopolization of the shoe machinery market was the subject of a civil antitrust action commenced by the government in December, 1947. It was there found that the defendant had acquired such power as to give it effective control of the shoe machinery market in violation of the Sherman Act, and a decree was entered to dissipate the effects of the defendant's monopolization. *United States v. United Shoe Machinery Corp.* [1953 TRADE CASES ¶ 67,436], 110 F. Supp. 295 (D. Mass. 1953). The government's suit may be said to have terminated no later than June, 1954, when the District Court of Massachusetts received the mandate of the Supreme Court affirming its decree. *United Shoe Machinery Corp. v. United States* [1954 TRADE CASES ¶ 67,755], 347 U. S. 521, 74 S. Ct. 699 (1954).

[*Statute of Limitations*]

The defendant now moves (1) for partial summary judgment dismissing so much of the claim as accrued before May 27, 1953, on the ground that the same is barred by

the statute of limitations, 15 U. S. C. A. §§ 15b, 16(b); and (2) for summary judgment dismissing the complaint upon the merits. The plaintiff moves, pursuant to Rule 34 of the Federal Rules of Civil Procedure, for an order requiring the defendant to produce a number of documents for inspection and copying by the plaintiff. The motions will be disposed of as follows:

(1) The defendant's motion for partial summary judgment will be granted. Title 15, United States Code, sections 15b and 16(b), enacted July 7, 1955, effective January 7, 1955, provide as follows:

"§ 15b. Limitation of actions

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

"§ 16. Judgment in favor of Government as evidence, suspension of limitations

* * *

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Upon the authority of *Muskin Shoe Company v. United Shoe Machinery Corp.* [1958 TRADE CASES ¶ 69,179], 167 F. Supp. 106 (D. Md. 1958); *La Rouche v. United Shoe Machinery Corp.* [1959 TRADE CASES ¶ 69,317], 166 F. Supp. 633 (D. Mass. 1958); and *Solinski v. General Electric Co.* [1957 TRADE CASES ¶ 68,671], 149 F. Supp. 784 (D. N. J. 1957), the court holds that any cause of action which the plaintiff asserts which accrued more than four years prior to May 27, 1957 is barred by the statute of limitations. *Cf.*, contra, *International Shoe Machinery Corp. v. United Shoe Machinery Corp.*, 167 F. Supp. 93 (D. Mass. 1958).

[*Summary Judgment on Merits Denied*]

(2) The defendant's motion for summary judgment on the merits will be denied. In *Van Brode Milling Co. v. Kravex Manufacturing Co.*, 21 F. R. D. 246, at 249, this court had occasion to state the principle governing the determination of a motion of this nature:

> "It requires no citation of authority for the general proposition that a motion for summary judgment may be granted only upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In the absence of such a showing the motion shall be denied. Any reasonable doubt should be resolved against the movant. [Citing cases.]"

The record upon which the defendant relies in support of its motion is fairly ponderous, and it would serve no useful purpose to elaborate the points upon which the defendant has failed to adequately demonstrate that no genuine issue as to a material fact exists. The pleadings, affidavits, depositions, exhibits and answers to interrogatories before the court create serious doubt that no issue as to material fact exists, and such doubt is resolved against the defendant.

[*Production of Documents*]

(3) The plaintiff's motion for the production of documents for inspection and copying is granted as to the documents referred to in items I through V, inclusive, of the notice of motion, with the exception of the following listed memoranda, as to which the defendant's claim of the attorney-client privilege is sustained:

* * *

Except as specifically sustained, the defendants objections on the ground of privilege are disallowed. The motion for production is denied as to the documents referred in item VI of the notice of motion.

Settle order on notice within 15 days.

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[¶ 69,347] **Remington Arms Company, Inc. v. Lechmere Tire & Sales Co.**

In the Supreme Judicial Court of Massachusetts. Middlesex. No. 5813. April 30, 1959. Argued February 5, 1959.

Massachusetts Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Person Who May Maintain Suit—Foreign Corporation Engaged Solely in Interstate Commerce.—A Delaware manufacturer of firearms engaged solely in interstate commerce was not precluded from enforcing fair trade contracts in Massachusetts by its failure to comply with a Massachusetts statute requiring foreign corporations to file a copy of their charter and by-laws and a certificate of certain information before transacting business in the state or maintaining actions in the state courts. The qualification requirements of that statute did not apply to foreign corporations engaged solely in interstate commerce. The keeping of an office, a local bank account, a small number of samples, and the employment of a stenographer and salesmen were incidental instrumentalities reasonably necessary to the conduct of that interstate commerce. Similarly, the manufacturer's resort to the courts of Massachusetts and the activities of its local manager, field agents, and professional shoppers in enforcing the fair trade program were a part of its interstate business.

See Fair Trade, Vol. 1, ¶ 3330.

For the plaintiff: Lane McGovern (Parker D. Thomson with him).

For the defendant: George S. Abrams (Ruth I. Abrams with him).

[*Fair Trade Action*]

Wilkins, Chief Justice [*In full text*]: This is a suit in equity under the fair trade law, G. L. c. 93, §§ 14A-14D, to enjoin the defendant, a retail dealer, from selling the plaintiff's trade marked rifles and ammunition at prices lower than the minimum retail prices established in fair trade contracts entered into and in force between the plaintiff and various Massachusetts retail dealers. The case was referred to a master whose report has been confirmed. The case is reported without decision by a judge of the Superior Court. G. L. c. 214, § 31.

[*Parties*]

Remington is a Delaware corporation engaged in the manufacture of a sporting line of firearms and ammunition which bear its trade mark, brand, or name. By advertising it has developed a large and valuable good will.

Lechmere, a Massachusetts corporation, has a large retail establishment in East Cambridge, and is the largest discount house in New England. In its sporting goods department Remington firearms and ammunition and similar products of Remington competitors are sold at retail.

[*Fair Trade Contracts—"Non-Signer"*]

Remington for some years has "fair traded" firearms and ammunition throughout the United States where fair trade laws existed. It entered into retail fair trade contracts with numerous Massachusetts dealers, stipulating minimum retail prices for its products. In substitution for previous contracts, early in February, 1957, eighty dealers executed retail fair trade contracts governing the sale of firearms, and forty dealers executed similar contracts governing the sale of ammunition. These were executed in this Commonwealth by the dealers and at Bridgeport, Connecticut, by Remington. Lechmere did not sign such a contract although sent a blank form. Remington sells only to wholesale houses. It has no company stores in Massachusetts and does not solicit or sell to the retail trade.

[*Affirmative Defense*]

Lechmere's violation of the fair trade law is conceded. Its sole contention is that the omission of Remington, as a foreign corporation, to comply with G. L. c. 181 deprives it of the right of resort to the courts of this Commonwealth. See G. L. c. 181, § 5. Remington has not filed annual certificates of condition under G. L. c. 181, § 12 (as amended through St. 1953, c. 351), or a copy of its charter and other information under § 5, or appointed an attorney for the service of process under § 3 (as amended through St. 1955, c. 611, § 6). Remington's position is that these sections do not apply

to it. Upon this affirmative defence set up in its answer, the burden of proof is upon Lechmere. *Friedenwald Co. v. Warren,* 195 Mass. 432, 435.

[*"Transacting Business"*]

Remington's home office and principal place of business are in Bridgeport, where its ammunition is manufactured. Its rifles are manufactured at factories in Ilion, New York, and Findley, Ohio. It has no factory, plant, or warehouse in this Commonwealth, and renders no repair service here. It has maintained an office in Boston for many years. Its name is in the telephone and city directories, and appears on the building listing of tenants and on the office door. Also on the door is "Thomas F. Parker, Manager."

All the office furniture and equipment are owned by Remington. These include filing cabinets, which contain correspondence, stationery, activity reports, duplicates of orders, shipping documents pertaining to business originating in New England, and miscellaneous papers pertaining to the work of the office. The letterheads for local use bear in conspicuous type the name "Remington," a statement of its business, and the address, "Bridgeport 2, Conn." Some bear the words "District Office," others "District Sales Office," and the location in Boston. Six or seven sample guns are kept on the premises for exhibition to interested callers and for display by Parker in his field canvass of wholesale houses. With this exception, Remington does not keep or store in this Commonwealth any inventory of guns, ammunition, or spare parts. In the office there are chevrons or brassards for skeet and trap shooting which are supplied on request to gun clubs for awards to members. The only other property here is two automobiles "registered in Massachusetts with mail addresses in Boston and Bridgeport."

The office is maintained for Parker as Remington's New England district manager. He is a resident of this Commonwealth. The only person with full and regular time attendance at the office is a woman secretary. Approximately one half of Parker's time is spent on the road in the various New England States. He has the assistance of two field men, one a resident of Maine and the other of western Massachusetts. Principally engaged in soliciting the wholesale trade, the latter call at the office infrequently, and attend three or four conferences a year at which the program for soliciting business from wholesale dealers in the New England States is discussed. Parker swears to bills in equity brought against Massachusetts violators. In cases instituted against violators in the Superior Court, Suffolk County, one in 1956 and the other in 1957, venue, otherwise lacking, was had by alleging that Remington had a usual place of business in Boston.

Parker's principal activity, requiring the major part of his time, is the solicitation of orders from wholesalers throughout New England. He and his two assistants from time to time call on some of the larger retail dealers to observe the display of Remington products, feel the pulse of the trade, and check fair trade prices to be sure that they are maintained. They discuss with those dealers any sales problems, and generally endeavor to promote good will, but they do not solicit retail business or effect sales. On rare occasions Parker receives a complaint from a wholesaler concerning a late shipment or quality. He generally discusses the complaint with the one making it, and tries to straighten the matter out. In some cases he reports the matter to Bridgeport to be dealt with direct.

Every year each of Remington's wholesale customers receives a "prices and terms" sheet setting forth the terms of sale of its firearms or ammunition. Sales are effected in the following manner: The customer mails an order to Bridgeport, where all orders are accepted or rejected. There an order form is made up, a copy sent to Parker, and an acceptance sent to the customer. Shipments are made f. o. b. the factory. No deliveries are made by, from, or through the Boston office. Invoices are sent the customer from Bridgeport. All remittances are made by the customer to Bridgeport.

The field men have instructions not to accept orders. No payments are made to, and no collections are made by, the Boston office. Parker does not intervene in an effort to induce customers to pay overdue bills. Parker and the employees are paid from Bridgeport. Few customers visit the Boston office. From time to time telephone calls seek information as to where Remington products can be purchased. These inquiries are referred to its wholesale dealers in the area.

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Remington holds no meetings of stockholders or of directors in this Commonwealth. No corporate books and records are kept here. It does not advertise in Massachusetts newspapers. Its principal bank accounts are in Bridgeport. There is a $300 bank account in a Boston bank in Parker's name which is used to pay the office rent, telephone bills, postage, and petty expenditures.

[*State Statute—Compliance as Condition to Use of State Courts*]

Section 5 of c. 181 provides that "Every foreign corporation of the classes described in section three, before transacting business in this commonwealth, shall, upon payment of the fee provided by section twenty-three,[1] file . . . a copy of its charter . . . certified . . . by-laws, and a certificate" of certain information as to the corporate officers, meetings, and stock. For failure to comply with §§ 3, 5, and 12 officers are subject to fine and to joint and several liability "for all debts and contracts of the corporation, except such as relate to interstate commerce, contracted or entered into within this commonwealth or for the purpose of being performed therein, so long as such failure continues. Such failure shall not affect the validity of any contract with such corporation, but no action shall be maintained or recovery had in any of the courts of this commonwealth by any such foreign corporation so long as it fails to comply with said sections."

By § 3 (as amended through St. 1955, c. 611, § 6) "Every foreign corporation, [1] which does business in this commonwealth or [2] which has a usual place of business in this commonwealth, or [3] owns real property therein without having such a usual place of business, or [4] which is engaged therein" in certain construction work "shall, before doing business in this commonwealth," appoint the commissioner of corporations and taxation its agent for the service of process "in any action or proceeding against it." In case of noncompliance with § 3, § 3A (inserted by St. 1928, c. 98, § 1) provides that a foreign corporation "in relation to any cause of action or proceeding arising out of such business" shall be deemed to have appointed the commissioner its agent. This means business arising in this Commonwealth. *Trojan Engr. Corp. v. Green Mountain Power Corp.*, 293 Mass. 377.

Section 12 (as amended through St. 1953, c. 351), which prescribes the filing of an annual certificate of condition, applies to "every foreign corporation, other than one which is required . . . to make annual returns to the department of public utilities."

Other penalties may be visited under c. 181. For failure to comply with §§ 3 and 5 the foreign corporation may be enjoined from doing business (§ 19). For failure to file a certificate of condition under § 12, daily amounts may be forfeited to the Commonwealth (§ 21), and the corporation may be enjoined from doing business (§ 22).

[*Corporations Engaged Solely in Interstate Commerce*]

The plaintiff concedes that it might be subject to the service of process in this Commonwealth. See *Wyshak v. Anaconda Copper Mining Co.*, 328 Mass. 219; *Jet Mfg. Co. Inc. v. Sanford Ink Co.*, 330 Mass. 173. Its contentions are (1) that the qualification requirements of §§ 3, 5, and 12 do not apply to foreign corporations engaged solely in interstate commerce, and (2) that it is such a corporation.

Our cases have held most definitely in accordance with the former contention. *Attorney Gen. v. Electric Storage Battery Co.* 188 Mass. 239, 240-241 (§ 3). *Garvey v. Wesson,* 258 Mass. 48, 51-52 (§ 5). *Lever Bros. Co. v. Commonwealth,* 232 Mass. 22, 26 (§ 12). See *Pacific Wool Growers v. Commissioner of Corps. & Taxn.*, 305 Mass. 197, 208.* We have not been asked to reconsider whether in the light of subsequent decisions of the Supreme Court of the United States there should be a broadening of the scope of c. 181 on the ground that it now appears that the constitutional limitations on State legislative power could have been more narrowly construed. See *Wyshak v. Anaconda Copper Mining Co.*, 328 Mass. 219, 223. The decisions in the first three cases cited, so far as they now concern us, were rested in the main upon legislative intent. We would not be inclined at this late date to

[1] Seventy-five dollars. For filing all other certificates and statements, including the annual certificate of condition required by § 12, $25. § 23, as amended through St. 1957, c. 698, § 18.

* Accord: *Bank of America, Natl. Trust & Sav. Assn. v. Lima,* 103 F. Supp. 916 (D. C. Mass.). Cf. *Canadian Pac. Ry. v. Sullivan,* 126 F. 2d 433 (1st Cir.).

make a retroactive reinterpretation of that intent on a matter which is largely one of legislative policy. See *Pulson v. American Rolling Mill Co.*, 170 F. 2d 193 (1st Cir.).

The principal issue is whether the plaintiff is engaged exclusively in interstate commerce. Most of its activities have been held not to amount to more than interstate commerce. "The keeping of an office and a local bank account and the employment of a stenographer are incidental instrumentalities reasonably necessary to the conduct of this interstate commerce, and hence inseparable from it." *Marconi Wireless Tel. Co. of America v. Commonwealth*, 218 Mass. 558, 569. *Alpha Portland Cement Co. v. Commonwealth*, 248 Mass. 156, 159.[1] *McCall v. California*, 136 U. S. 104, 108-109. In the same category are the employment of salesmen and the presence of the six or seven sample guns. *Cheney Bros. Co. v. Commonwealth*, 246 U. S. 147, 153.[2]

[*Advertising*]

There are two novel features of the present case. One of slight import is the supply of chevrons and brassards to be donated, as we infer, to gun clubs, which were not its customers. These trifling gifts are in the nature of advertising and are insufficient in themselves and in their manner of distribution to amount to the doing of a local business.

[*Fair Trade Contracts*]

The other feature is the fair trade contracts made with Massachusetts dealers. These contracts were made in protection of the good will of the plaintiff's interstate business. *Bulova Watch Co., Inc. v. Anderson* [1955 TRADE CASES ¶ 68,036] 270 Wis. 21, 26. As we said in *General Elec. Co. v. Kimball Jewelers, Inc.* [1956 TRADE CASES ¶ 68,291] 333 Mass. 665, 669-670, "The fair trade law permits producers of trade marked commodities to protect their trade marks and good will from damage resulting from cut rate competition by fixing the prices at which their merchandise may be resold by the dealers."

[*Enforcement Methods*]

Remington's fair trade enforcement methods are set forth in the master's report. Violations are reported to the manager of products at Bridgeport. A telegram to the alleged violator calls upon him to discontinue. This is followed by a confirming letter, enclosing a copy of Remington's current price contract and a price list. At the same time a letter to the person reporting the violation advises that "it is definitely the intention of Remington to strictly enforce the maintenance of fair trade prices with every means permitted by law." In most cases the alleged violator makes denial or promises to comply. If no reply is received in thirty days, another letter is sent. In many instances Parker or one of the field men gets in touch with the alleged violator and attempts to achieve compliance. Cases where continued violations are reported are referred to Remington's legal department, which hires a professional shopper, and, upon receipt of his report, refers the matter to local counsel. From time to time suits have been brought in various States. In each of the years 1956 and 1957 three suits were brought in this Commonwealth, in some of which preliminary injunctions served the purpose. In one case a consent decree was signed, and in two the defendant signed a fair trade agreement.

The activities of Parker, the field agents, or the professional shoppers are a part of the plaintiff's interstate business and a necessary prelude to court enforcement. See *International Textbook Co. v. Pigg*, 217 U. S. 91; *Crenshaw v. Arkansas*, 227 U. S. 389. Resort to the courts similarly is not to be regarded as intrastate business. *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 202-203.

[*Injunction Granted*]

There should be a decree enjoining the defendant in accordance with the first two prayers of the bill, with costs to the plaintiff.

So ordered.

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[1] Reversed on other questions in *Alpha Portland Cement Co. v. Commonwealth*, 268 U. S. 203.

[2] Reversing the portion relating to Cheney Brothers Company in *Marconi Wireless Tel. Co. of America v. Commonwealth*, 218 Mass. 558, 569-571.

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[¶ 69,348] Wybrant System Products Corporation, et al. v. Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. No. 268—October Term, 1958. Docket No. 25302. Argued April 17, 1959. Decided May 5, 1959.

On petition to review an order of the Federal Trade Commission.

Federal Trade Commission Act

False Advertising—Medicinal or Curative Properties of Hair Preparation—Male Pattern Baldness—Dissemination of Advertising in Interstate Commerce Likely To Induce Indirect Purchase of Products for Home Use—Federal Trade Commission Jurisdiction—Expert Testimony.—A Federal Trade Commission order prohibiting respondents from disseminating any advertisement which represents that the use of their hair preparations will prevent or overcome excessive hair fall or cause new hair to grow, unless such representation is limited to cases other than those arising by reason of male pattern baldness, and the advertisement reveals the fact that the great majority of cases of excessive hair fall are the beginning and more fully developed stages of male pattern baldness and that the preparations will be of no value in such cases, was affirmed. The Federal Trade Commission's jurisdiction under Section 12(a)(1) of the Federal Trade Commission Act was sufficiently established by evidence that advertisements were placed in newspapers with interstate circulation, and that the advertisements, though designed primarily to sell hair and scalp treatments, were "likely to induce * * * indirectly the purchase of" the preparations that were also sold in substantial quantities for home use. It was not determined whether the use of the preparations in connection with an office treatment constituted a sale under Section 12 of the Act. The testimony of the Commission's several expert witnesses that the preparations and treatments cannot cure male pattern baldness provided ample basis for the conclusion that the advertisements were false. Since these witnesses freely conceded that some authorities had expressed somewhat contrary views, the refusal to receive in evidence the medical treatises that the respondents offered did not constitute reversible error.

See Unfair Practices, Vol. 2, ¶ 5087.31, 5201; False Advertising, Vol. 2, ¶ 6005.15, 6005.20, 6005.61; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.27.

For the petitioners: Edward F. Howrey, of Howrey & Simon, Washington, D. C. (John Bodner, Jr., of Howrey & Simon, on the brief).

For the respondent: Francis C. Mayer, Attorney, Federal Trade Commission, Washington, D. C. (Earl W. Kintner, General Counsel, and James E. Corkey, Assistant General Counsel, FTC, on the brief).

Affirming a Federal Trade Commission cease and desist order in Dkt. 6472.

Before: CLARK, Chief Judge, and SWAN and MOORE, Circuit Judges.

Petitioners seek review and the setting aside of an order directing them to cease and desist from certain advertising practices.

[*FTC Order affirmed*]

PER CURIAM [In full text]: Petitioner's advertisements were placed in newspapers with interstate circulation; and though designed primarily to sell their hair and scalp treatments, the material clearly was "likely to induce * * * indirectly the purchase of" the preparations that they also sold in substantial quantities for home use.[1] This is sufficient to establish the Commission's jurisdiction under § 12(a)(1) of the Federal Trade Commission Act, 15 U. S. C. A. § 52 (a)(1). *Mueller v. United States,* 5 Cir., [1958 TRADE CASES ¶ 69,219] 262 F. 2d 443. The firm testimony of the Commission's several expert witnesses that petitioners' preparations and treatments cannot cure male pattern baldness provides ample basis for the Trial Examiner's conclusion that the advertisements were false. And since these wit-

[1] Neither the Commission nor the Trial Examiner determined whether the use of preparations in connection with an office treatment constitutes a sale under § 12 of the Federal Trade Commission Act, 15 U. S. C. § 52. We construe the Commission's order—directed at advertisements by petitioners "in connection with the offering for sale, sale or distribution" of their preparations—to be similarly limited.

nesses freely conceded that some authorities had expressed somewhat contrary views, we do not think the Trial Examiner's refusal to receive in evidence the medical treatises that petitioners offered constituted reversible error. See *Dolcin Corp. v. F. T. C.*, D. C. Cir., [1954 TRADE CASES ¶ 67,791] 219 F. 2d 742, 747-749, certiorari denied 348 U. S. 981.

Affirmed.

[¶ 69,349] Elliot Knitwear, Inc., a corporation; Elliot Import Corporation, a corporation; and Herman Gross, individually, and as an officer of said corporation v. Federal Trade Commission.

In the United States Court of Appeals for the Second Circuit. No. 158—October Term, 1958. Docket No. 25239. Submitted March 13, 1959. Decided May 6, 1959.

Petition to review and set aside an order of the Federal Trade Commission to cease and desist from using a certain trade name on sweater products. Opinion below reported at 1957-58 TRADE REGULATION REPORTER [Transfer Binder] ¶ 27,199 (April 25, 1958). Reversed and remanded.

Federal Trade Commission Act

Unfair Practices—Misrepresentation of Fiber Content of Products—Use of Trade Name Implying Cashmere Content—Label's Disclosure of Actual Fiber Content—Deception—Sufficiency of Evidence—Validity of Order Prohibiting Use of Trade Name.—A Federal Trade Commission order prohibiting the use of the word "Cashmora" on all wool sweaters not made or comprised of a substantial amount of cashmere was vacated and the proceeding remanded to the Commission on the ground that the Commission's finding that the use of the trade name on labels was deceptive *per se* was not based on substantial evidence. The Commission submitted only the label into evidence, claiming that the trade name was deceptive *per se*. Under ordinary circumstances, the trade name, without more, might well be considered deceptive *per se*. However, this was not true with respect to the label in the instant case when considered in its entirety, since the label disclosed the actual fiber content of the sweaters. The specification of the fiber content of the sweaters precluded the Commission from holding the label deceptive *per se*.

On the basis of the record, the reviewing court also was of the opinion that the Commission abused its discretion in choosing a remedy, namely, the virtual excision of the trade name. However, since the case was to be remanded on the merits and further evidence adduced might have a bearing on the choice of remedy, the court made no final holding on the questions "whether the Commission made an allowable judgment in its choice of the remedy," and more specifically "whether the Commission abused its discretion in concluding that no change 'short of * * * excision' of the trade name would give adequate protection." The court, among other things, noted that complete excision may no doubt be ordered in cases in which a qualifying clause on the label would not clarify, but would only confuse the public and create a complete contradiction in terms; however, where qualifying phrases do not lead to a contradiction in terms, they may be allowed and complete excision of the trade name will not be ordered.

See Unfair Practices, Vol. 2, ¶ 5081.797, 5201.341; Wool Labeling, Vol. 2, ¶ 6525.11; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.91, 8621.635, 8621.690.

For the petitioners: Martin C. Barell and Jack Verschleiser, of Goldstein, Golenbock & Barell, New York, N. Y.

For the respondent: Earl W. Kintner, General Counsel; James E. Corkey, Assistant General Counsel; and Frederick H. Mayer, Attorney, FTC, Washington, D. C.

Reversing and remanding a Federal Trade Commission ruling in Dkt. 6637.

Before: WASHINGTON,* WATERMAN and MOORE, Circuit Judges.

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*Sitting by designation pursuant to 28 U. S. C. § 294(a).

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[*Label on Sweaters*]

WASHINGTON, Circuit Judge [*In full text*]: The issue in the present case is whether the label appended to the sweaters sold by the petitioners is a violation of Section 5(a)(1) of the Federal Trade Commission Act,[1] which declares unlawful "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce * * *"[2]

The sweaters in question contained a blend of fibers consisting of 30% Angora rabbit and 70% lambs wool. Although containing no cashmere, this blend had many of the desirable characteristics of cashmere. Petitioners' products sold for about one-third the price of cashmere sweaters. The label used displayed the word "Cashmora" in large script-like letters. Below in smaller letters were the words "By Elliot." On the bottom of the label in much smaller letters were the Wool Products Labeling Act registration number and the designation of the fiber content: "30% Angora—70% Lambs Wool."

[*FTC Findings and Order*]

The Federal Trade Commission found (1) that the sweaters contained no cashmere—a fact admitted by petitioners, (2) that the use of the name "Cashmora" served as a representation that the product so labeled contained cashmere, and (3) that, as used, the name "Cashmora" was false, misleading, and deceptive in violation of Section 5(a)(1) of the Federal Trade Commission Act. The Commission ordered the petitioners to cease and desist from using the word "Cashmora" on all wool sweater products not made or comprised of a substantial amount of cashmere. The label was allowed to be used, however, if the sweater did contain a substantial amount of cashmere, and if the label designated the actual percentage by weight of cashmere therein.

[*Issue*]

Under Section 5(c) of the Act "The findings of the Commission as to the facts * * * shall be conclusive," but only "if supported by evidence." Petitioners urge that there is no substantial evidence on the whole record to support the Commission's findings. The only testimony adduced was that of the petitioners' witnesses. The Commission submitted only the label into evidence, claiming that the name "Cashmora" was deceptive *per se*.

[*Deception*]

Under ordinary circumstances, the word "Cashmora" without more might well be considered deceptive *per se*. *Cf. C. Howard Hunt Pen Co. v. Federal Trade Commission* [1952 TRADE CASES ¶ 67,286], 197 F. 2d 273, 280 (3d Cir. 1952); *Perloff v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,337], 150 F. 2d 757, 758 (3d Cir. 1945); *Country Tweeds, Inc.*, 50 F. T. C. 470, 473 (1953). But this hardly can be said of the label in the present case when it is considered in its entirety. A label reading "Cashmora—30% Angora—70% Lambs Wool" is very different from one which does not contain a content specification. Both courts and the Commission have indicated that specifying content does much to remove a label's possibilities of deception.

In *Jacob Siegel Co. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,451], 327 U. S. 608 (1946), a fabric coat, labeled "Alpacuna," contained approximately 50% alpaca, 20% mohair, and 30% wool, but no vicuna. The Federal Trade Commission had ordered the label to be completely excised. 36 F. T. C. 563 (1943). The Third Circuit affirmed. [1944-1945 TRADE CASES ¶ 57,313] 150 F. 2d 751 (1944). The Supreme Court reversed, and remanded the case for the Commission to consider whether another remedy could be employed in order that the trade name be saved. Upon remand the Commission held that "nothing * * * shall prohibit use of the word Alpacuna to refer to respondent's garments if in immediate connection and conjunction therewith, wherever used, there appear words clearly and conspicuously designating all the constituent materials of fibers therein contained." 43 F. T. C. 256, 259-60 (1946).[3]

[1] 38 Stat. 719 (1914), as amended, 15 U. S. C. § 45 (a)(1) (1952).

[2] The complaint in this case is also brought under the Wool Products Labeling Act of 1939, §§ 3-4, 54 Stat. 1129 (1940), 15 U. S. C. §§ 68a-b (1952), and the Commission rules thereunder. Since the Commission decided that the petitioner violated the Federal Trade Commission Act, it did not reach the question of whether there is any difference in the discretion of the Commission in choosing the appropriate remedy to correct deceptive practices under the two acts. See FTC opinion in 1957-58 TRADE REGULATION REPORTER [Transfer Binder] ¶ 27,199, at 36,603 (Apr. 25, 1958).

[3] Even prior to the remand of the case, the Supreme Court observed that "Petitioner now uses labels reading 'Alpacuna Coat—contains no vicuna' and specifies the fibre content of the cloth. * * *" 327 U. S. at 613, n. 4.

[*Order Vacated*]

If the specifying of the fiber content was sufficient to cure the deception in *Jacob Siegel,* it must follow that a similar specification of the fiber content in the present case precludes the Commission from holding the label here used deceptive *per se.* Let us compare the two words: Alpacuna and Cashmora. Each of the names suggests a truth: Alpacuna contains alpaca, and Cashmora contains angora. Each also suggests a falsity: Alpacuna dos not contain vicuna, nor does Cashmora contain cashmere. But, in view of the specification of the actual contents of the product, a finding that the label as a whole is deceptive must be based on substantial evidence. Such evidence may perhaps be obtainable, but it does not appear in the present record. The order must accordingly be vacated, and the case remanded to the Commission.[4]

[*Excision of Trade Name*]

We are constrained also to comment on the form of remedy chosen by the Commission in this case, namely, the virtual excision of the trade name. In *Federal Trade Commission v. Royal Milling Co.* [1932-1939 TRADE CASES ¶ 55,022], 288 U. S. 212, 217 (1933), the Supreme Court held that the complete excision of a trade name

> "should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done * * * by requiring proper qualifying words to be used in immediate connection with the names."

This principle was reaffirmed in the *Jacob Siegel* case, *supra* at 612.

Complete excision may no doubt be ordered in cases in which a qualifying clause on the label would not clarify, but would only confuse the public and create a complete contradiction in terms. Thus, in *Federal Trade Commission v. Algoma Lumber Co.* [1932-1939 TRADE CASES ¶ 55,041], 291 U. S. 67 (1934), the product was yellow pine, but the label was "California White Pine." The Commission ordered, and the Supreme Court affirmed, the complete excision of the word "White," because presumably a qualifying phrase such as "not made of white pine" would have been completley contradictory. Similarly in *Federal Trade Commission v. Army and Navy Trading Co.* [1932-1939 TRADE CASES ¶ 55,144], 66 App. D. C. 394, 88 F. 2d 776 (1937), few of the goods sold in the store were army and navy goods. The court held that the qualifying phrase "we do not deal in army and navy goods" would have been contradictory and would have tended to contuse. Therefore it affirmed the Commission order of complete excision, with certain minor exceptions.[5]

Where, however, qualifying phrases do not lead to a contradiction of terms, they have been allowed, and complete excision

[4] Our decision in *E. F. Drew & Co. v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,408], 235 F. 2d 735 (1956), cert. denied, 352 U. S. 969 (1957), relied upon by the Commission, is not to the contrary of what we have just said. There, of course, oleomargarine was the product. The seller did his best to create a public impression that his oleomargarine was butter. Here, the seller is no doubt doing his best to persuade the public that his product could be cashmere, or at least is like it. The difference is quite clear, however. Drew advertised in ordinary English that his product was "churned to delicate, sweet creamy goodness," that it was "country-fresh," and that it had "the same day-to-day freshness which characterizes our other dairy products." The thrust of the Commission proceeding there, at least as we interpreted it, was directed to the misleading advertising in words of common English connotation. And the advertising was of the sort banned by a special act of Congress. Here the seller has thought up a label name which does not misrepresent in ordinary English words anything about his product. If the label also contains a statement of what actually is in the product, it will not necessarily mislead even "that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Florence Manufacturing Co. v. J. C. Dowd & Co.,* 178 Fed. 73, 75 (2d Cir. 1910). See also *Harsam Distributors, Inc. v. Federal Trade Commission* [1959 TRADE CASES ¶ 69,280], 263 F. 2d 396 (2d Cir., Feb. 13, 1959).

[5] See also *Gold Tone Studios, Inc. v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,665], 183 F. 2d 257 (2d Cir. 1950) (gold tone process for finishing pictures not employed by studio); *El Moro Cigar Co. v. Federal Trade Commission* [1932-1939 TRADE CASES ¶ 55,248], 107 F. 2d 429 (4th Cir. 1939) ("Havana Counts" name for cigars excised because cigars made entirely of domestic tobacco); *Marietta Manufacturing Co. v. Federal Trade Commission,* 50 F. 2d 641 (7th Cir. 1931) (name "Sani-Onyx, a Vitreous Marble" excised because product neither marble nor onyx); *Masland Duraleather Co. v. Federal Trade Commission,* 34 F. 2d 733 (3rd Cir. 1920) ("Duraleather" exercised because product not made of real leather).

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of the name has not been ordered. See *Jacob Siegel Co. v. Federal Trade Commission, supra* ("Alpacuna"; coats contained no vicuna; qualification: specifying fiber content).[6] The Commission maintains that "Cashmora" cannot be cured by qualification, since any qualification would be a flat contradiction in terms. But *Jacob Siegel* (Alpacuna) and *Country Tweeds* (Kashmoor) were similar cases in which the Commission held that qualifications would cure deception.[7] Nor can the Commission fairly maintain that Elliot did not have a vested interest in the label of sufficient value to be considered in balancing the interests of the company vis-a-vis the public. The business interest was at least as strong as in *Country Tweeds, Inc.* (the "Kashmoor" coat case). Under the circumstances, and on the present record, there seems no sufficient basis for applying the contradiction doctrine to Cashmora, as the addition to the label of the phrase "contains no cashmere" might well be a permissible and sufficient remedy, if the Commission finds that the label as presently composed is in fact deceptive.

[*Court's Power*]

Section 5(c) of the Act gives this court power "to make and enter * * * a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed * * *" See also Section 5(d). "[C]ourts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel v. Federal Trade Commission,* 327 U. S. at 613. The question is "whether the Commission made an allowable judgment in its choice of the remedy," and more specifically "whether the Commission abused its discretion in concluding that no change 'short of * * * excision' of the trade name would give adequate protection." *Id.* at 612.

[*No Final Holding*]

On the present record, we think the Commission abused its discretion in choosing a remedy. But, inasmuch as the case is to be remanded on the merits, and further evidence adduced may have a bearing on the choice of remedy, we make no final holding on either issue.

[*Remanded*]

The case will be remanded for further proceedings not inconsistent with this opinion.

So ordered.

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[6] See also *Federal Trade Commission v. Royal Milling Co., supra* ("Milling Co.," "Mill"; companies did not grind flour; qualifications: "Not a grinder of grain."); *Bear Mill Manufacturing Co. v. Federal Trade Commission* [1932-1939 TRADE CASES ¶ 55,189], 98 F. 2d 67 (2d Cir. 1938) ("Mill," "Manufacturing"; company did not manufacture; qualification: "Converters, not manufacturers of textiles"); *M. Fluegelman & Co. v. Federal Trade Commission,* 37 F. 2d 59 (2d Cir. 1930) ("Satimaid," "Satinized"; product had satin weave, but had cotton, not silk, content; qualification: "a cotton fabric," "no silk," etc.); *Country Tweeds, Inc. supra* ("Kashmoor"; coats contained no cashmere; qualification; "contains no cashmere"). See also *Federal Trade Commission v. Good-Grape Co.,* 45 F. 2d 70 (6th Cir. 1930); *Federal Trade Commission v. Casoff,* 38 F. 2d 790 (2d Cir. 1930). *Contra, Cohen Brothers Corp.,* 27 F. T. C. 923 (1938) ("Kashmoor"; Knitted dresses containing no cashmere; complete excision).

[7] As the Commission explained in *Country Tweeds, Inc., supra* at 474:

"If the trade name were 'Cashmere' itself, the absolute excision would appear to be inescapable. A complete contradiction of terms such as 'Cashmere—contains no cashmere' would not clarify the meaning, but would only tend to confuse. However, this is not true of the phrase 'Kashmoor—contains no cashmere.' While the trade name Kashmoor is a simulation of cashmere and while its use falsely implies a cashmere content in the garments so labeled, it is subject to clarification. An explanation that the garment so labeled is designed to imitate cashmere in appearance and softness, but does not contain any cashmere fibers, is not a flat contradiction of terms, but is a reasonable explanation which would remove the capacity and tendency toward deception inherent in the trade name Kashmoor used alone."

[¶ 69,350] B. B. Rogers, et al. v. The Douglas Tobacco Board of Trade, Inc., et al.

In the United States Court of Appeals for the Fifth Circuit. No. 17401. Dated May 5, 1959.

Appeal from the United States District Court for the Southern District of Georgia.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Allocation of Tobacco Auction "Selling Time"—Necessary Allegations—Interstate Commerce—Public Injury—Prejudice to Public as Part of Test of Unreasonable Restraint of Trade.—In a tobacco warehouseman's treble damage action charging that a local board of trade violated the Sherman Antitrust Act in allocating auction "selling time" among warehouses, the trial court improperly instructed the jury that the warehouseman, in order to recover, had to prove, as "ultimate facts," that a 3½ per cent limitation on yearly increases or decreases in allotted selling time (1) affected interstate or foreign commerce, (2) tended to prejudice the public, (3) constituted an unreasonable restraint of trade, and (4) damaged the warehouseman. The trial court's first "ultimate fact" was either erroneous or misleading since, as a matter of law, auction sales of tobacco are "in" interstate commerce, and the court should have so instructed the jury. Where goods are purchased in one state for transportation to another, the commerce includes the purchase as much as it does the transportation. Also, prejudice to the public is not a separate ultimate fact, but a part of the test of an unreasonable restraint of trade. Specific public injury need not be proved; however, before it can be said that the particular conduct is forbidden as unreasonably restraining trade under the Sherman Antitrust Act, it must appear that such conduct tends or is reasonably calculated to prejudice the public interest. The "rule of reason" applies to restraints like the present one and the jury, under proper instructions, must decide the reasonableness of the limitation. Upon a re-trial, the warehouseman has the burden of proving that the limitation constituted an unreasonable restraint of trade and that he suffered a private injury as a direct result of that limitation.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.315, 2005.468; Monopolies, Vol. 1, ¶ 2610; Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.600, 9014.35.

For the plaintiffs: Charles J. Alexander and Norman M. Littell, Washington, D. C.; and John G. Kopp and J. Edwin Peavy, Waycross, Ga.

For the defendants: E. Kontz Bennett, Waycross, Ga.; Harold F. Baker, Washington, D. C.; R. Glenn Key, Winston-Salem, N. C.; and Montgomery L. Preston and George E. Maddox, Douglas, Ga.

For a prior opinion of the U. S. Court of Appeals, Fifth Circuit, see 1957 Trade Cases ¶ 68,706.

Before Rives, Jones, and Wisdom, Circuit Judges.

[*Treble Damage Action—Prior Proceedings*]

Rives, Circuit Judge [*In full text*]: This action is for treble damages for alleged violations of the Sherman Anti-Trust Act[1] in the allocation of selling time among the tobacco warehouses on the Douglas, Georgia, market. Most of the facts out of which this case arises, together with a description of the tobacco auction system, are set forth in our opinion on former appeal[2] and need not be repeated at length. The original complaint had involved only the 1954 and 1955 tobacco market seasons. The first appeal was from the judgment of the district court sustaining the motions of the defendants for judgment on the pleadings. As to the year 1954, the decisive question was whether the provision for the allocation of selling time to a new warehouse was an unreasonable, and hence illegal, restraint of trade. We agreed with the district court that it was not shown to be such. In the year 1955, the plaintiff was affected for the first time by a 3½ per cent limitation pro-

[1] See 15 U. S. C. A. Sections 1, 2, and 15.

[2] *Rogers v. Douglas Board of Trade* [1957 TRADE CASES ¶ 68,706], 5th Cir. 1957, 244 F. 2d 471.

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vision on increases and decreases in selling time as that limitation was construed and applied. We reversed as to the 1955 tobacco market season and remanded the cause for further proceedings, saying:

"The 3½ per cent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system, and, if further evidence which may be taken upon remand shows that such limitation tends to prejudice the public interest,[9] it may constitute an undue and unreasonable restraint of trade and commerce.

"[9] See *Hudson Sales Corp. v. Waldrip*, 5 Cir., 211 F. 2d 268, 272; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir., 214 F. 2d 891, 894, and cases cited; *Shotkin v. General Electric Co.*, 10 Cir., 171 F. 2d 236, 238."

(*Rogers v. Douglas Tobacco Board of Trade* [1957 TRADE CASES ¶ 68,706], 244 F. 2d 471, 482-3).

[*Supplemental Complaint*]

On remand a supplemental complaint was filed covering the 1956 and 1957 tobacco market seasons. After trial before a jury and verdict and judgment for the defendants, this appeal was taken.

[*Interstate Commerce*]

On the first appeal, the question as to whether the tobacco auction sales on the Douglas Market were in interstate commerce was not argued by any of the parties, and we had assumed that they were. On remand, at the commencement of trial, the plaintiffs moved the district court to "declare, as a matter of law, that the auction sale of tobacco on the Douglas Market at Douglas, Georgia, is in interstate commerce." In response the court ruled: "That is a question of proof. I will leave that up to you as a question of proof." A considerable part of the evidence centered around that question. For example, the plaintiffs' first witness testified:

"A. Well, all of the tobacco, I believe, is eventually shipped into other states. I believe we have one concern which does some redrying on the Douglas Market, which happens to be the Douglas Tobacco Company which redries a small percentage of the tobacco there, but the most of it on the same day of sale, or the following day, is shipped by car or by truck to North Carolina or Virginia and some of it even goes into Kentucky to redrying plants and manufacturing and storage plants."

[*Effect on Interstate Commerce*]

The facts thus testified were not controverted, but the defendants sought to prove that the 3½ per cent limitation did not affect interstate commerce by inferring that at the time of the local auction sale the interstate character had not been impressed on the commerce, for example:

"Q. *Mr. Royster,* what effect does the three and a half percent limitation on the warehousemen have on the flow of tobacco through the market and into interstate commerce?

"A. It doesn't have any effect on that at all.

"Q. Will you state why you make that statement? What are your reasons for making that statement?

"A. Well, going back to the testimony already given, there are a certain number of baskets allotted to each market and it doesn't effect interstate commerce, or the flow of tobacco whether it is sold in A house or B house, two houses or six houses. As soon as the sale is completed and the market has sold its allotment of tobacco, of course, the tobacco, as soon as possible, is moved out, and from the Georgia area, there being only one redrying plant in Georgia and it a very small one it moves into principally North Carolina and to some extent into the State of Virginia for redrying and processing."

"Q. Now, *Mr. Loftis,* what effect, if any, does this three and a half percent rule have on the flow of tobacco through the Douglas Tobacco Market?

"A. None that I can see.

"Q. Why do you make that statement?

"A. Because the Douglas Tobacco Market, as it has been shown, has allocated to it 4400 baskets per day, which it may sell, and the three and a half percent has no bearing whatsoever to the amount of tobacco allotted to the market.

". . .

(On cross-examination)

"Q. *Mr. Loftis,* if one warehouse on the Douglas Tobacco Market was to get 4400 baskets of tobacco—concede that now, it is possible, is it not? (No answer.) Would that have any effect on Interstate Commerce as between those other warehouses there?

"A. If one warehouse was to get it all?

"Q. Yes, sir.

"A. And the others couldn't get it?

"Q. Yes, sir.

"A. The companies would buy every bit of it and ship it right out.

"Q. Would that affect commerce in any way?

"A. It might affect the individual, but I don't see where it would affect commerce because commerce would have it all in the trade."

[*Charge to Jury—Ultimate Facts*]

In its charge to the jury, the district court repeated five times that, in order to recover, the plaintiffs must prove by a preponderance of the evidence four ultimate facts:

"First, that the three and one-half per cent limit affects interstate or foreign commerce;

"Second, that the three and one-half per cent limit prejudices or tends to prejudice the public interest;

"Three, that the three and one-half per cent limit constitutes an unreasonable restraint of trade; and

"Four, that the plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation."

The plaintiffs' counsel objected ". . . to the continued mentioning of the four elements in the charge throughout as being prejudicial to the plaintiffs. It was a continued repetition, if Your Honor please, and it placed an undue burden on the plaintiffs." In response, the district court further instructed the jury:

"Now, gentlemen of the jury, I did not want to give undue emphasis to the four ultimate facts which I read to you. I read them to you two or three times, but I did not mean to give it any undue emphasis. I was just trying to explain the law to you as I see it, and don't give the charge as to those four ultimate facts any more emphasis than you do the balance of the charge."

[*Additional Instructions to Jury*]

After the jurors had deliberated for about two hours, they asked for additional instructions:

"The Court: Did you gentlemen want some additional instructions?

"A Juror: Yes, sir. We want a restatement of those four points, the exact wording of those four points.

". . .

"A Juror: We would like to write it down.

"The Court: All right, you can write it down, gentlemen. I charge you that in order to carry their burden of proof, the plaintiffs must prove four ultimate facts:

"(Note: The Court reads slowly while the jury writes down the instructions.)

"1. That the three and one-half per cent limit affects interstate or foreign commerce. That is No. 1.

"2. That the three and one-half per cent limit prejudices or tends to prejudice the public interest.

"3. That the three and one-half per cent limit constitutes an unreasonable restraint of trade.

"4. That plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation.

"Now, I charge you that if the public has been damaged it might be an unreasonable restraint of trade. That is a question of fact for you gentlemen to determine. Now, those four facts have to be proved. Not just three, but all four. Not one, not two, not three, but all four of them have to be proved by a preponderance of the testimony. Is that what you gentlemen wanted?

"The Jury: Yes, sir."

The jurors retired to deliberate further, but did not reach a verdict on that day. The following morning they again returned for additional instructions:

"The Court: Did you gentlemen want some additional instructions?

"The Jury: Your Honor, would you read or explain the Anti-trust Act, the part of the law that would affect interstate commerce?

"The Court: Do you want a definition of interstate commerce?

"The Jury: Yes, sir, or explain it to us.

"The Court: I will give you a definition of interstate commerce. This is from Black's Law Dictionary:

" 'Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state to points in another state. Commerce between two states is between places lying in different states.'

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"Now, I will give you another definition in another book. This is 'Words and Phrases':

"'Interstate Commerce: Commerce among the states cannot stop at the boundary line of each state but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in the state or between different parts of the same state which does not extend to affect other states. Interstate Commerce or commerce among the several states is commerce that concerns more than one state.'

"The Court: Now, is that what you gentlemen wanted?

"The Jury: Read that first definition again.

"The Court: 'Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state to points in another state.'

"Now, is that what you gentlemen wanted, or is there anything else that I might be able to help you gentlemen on?

"The Jury: No, sir."

The plaintiffs' counsel then noted the following objection:

"We except to the Court's definition in defining Interstate Commerce in not instructing the jury that the auction sale of tobacco is interstate commerce. Citing as our authority the case of *Curry v. Wallace, Secretary of Agriculture,* 301 United States."

[*Applicable Legal Principles*]

The applicable legal principles have been so long settled as to have become commonplace. For example, in *Dahnke-Walker Co. v. Bondurant,* 1921, 257 U. S. 282, 290, 291, the Supreme Court said:

"The commerce clause of the Constitution, Art. I, § 8, Cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland,* 12 Wheat. 419, 446-447; *American Steel & Wire Co. v. Speed,* 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co. v. Iowa,* 196 U. S. 133, 143. This has been recognized in many decisions construing the commerce clause."

Practically the same thoughts were repeated in *Federal Trade Commission v. Pacific Paper Ass'n.,* 1927, 273 U. S. 52, 64.

[*Tobacco Inspection Act*]

Coming more specifically to the particular transactions involved in this case, the Tobacco Inspection Act of 1935, 7 U. S. C. A. § 511, *et seq.,* and the decision of the Supreme Court upholding the constitutionality of that Act, *Currin v. Wallace,* 1939, 306 U. S. 1, are pertinent. The first section of that Act provides:

"(i) 'Commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purposes of this chapter (but not in any wise limiting the foregoing definition) a transaction in respect to tobacco shall be considered to be in commerce if such tobacco is part of that current of commerce usual in the tobacco industry whereby tobacco or products manufactured therefrom are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State or for manufacture within the State and the shipment outside the State of the products resulting from such manufacture. Tobacco normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter. For the purpose of this paragraph the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nations." 7 U. S. C. A. § 511(i).

Subject to a referendum as to the desire of the tobacco growers affected, the Secretary of Agriculture "is authorized to designate those auction markets where tobacco bought and sold thereon at auction, or the products customarily manufactured therefrom, moves in commerce." 7 U. S. C. A. § 511d. The Douglas Market is such a "designated" market where the Department of Agriculture's Grading Service inspects, certifies the weight of, and grades tobacco sold at auction.

[*Auction Sale Part of Interstate Commerce*]

In *Currin v. Wallace,* 1939, 306 U. S. 1, tobacco warehousemen and auctioneers in Oxford, North Carolina, attacked the constitutionality of the Tobacco Inspection Act. Their counsel argued:

"The transaction of offering for sale tobacco at auction on warehouse floors is not a transaction in interstate commerce.

"After the tobacco has gone through the auction sale the farmer may, and often does, reject the offered price and take his tobacco away.

"The tobacco acquires interstate character only when the sale is consummated and possession passes from grower to purchaser. Tobacco, moving from the fields to the curing barns, and from the curing barns to the warehouse floors, is no part of interstate commerce. Observe that the inspection is required prior to the offering for sale. Control over commodities up to the point of sale is reserved to the States by the Tenth Amendment." Summary of argument by petitioners, 306 U. S. 3.

In response to that argument, Mr. Chief Justice Hughes speaking for the Court said:

"Plaintiffs urge that tobacco 'is not inherently an interstate commodity'; that the auction transaction is not a sale as title is not passed until the grower accepts the price; that after the auction the grower may, and often does, reject the bid and he may take his tobacco away; that the inspection required by the Act is done prior to the offering for sale; and that until sale and delivery to the purchaser the tobacco is not in interstate commerce and its control is reserved to the State. These objections are untenable. The record shows that the sales consummated on the Oxford auction market are predominantly sales in interstate and foreign commerce. The principal purchasers are few in number and in the main are engaged in the export trade or in the manufacture of tobacco products in other States. It appears that in a given week, shortly before the beginning of this suit, approximately 2,000,000 pounds of tobacco were sold on the Oxford market, only 15.3 per cent of which were definitely destined for manufacture in North Carolina. About 14 per cent were in part for manufacture in North Carolina and in part for other States, and about 62 per cent moved directly into foreign commerce. The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *Swift & Co. v. United States,* 196 U. S. 375, 398, 399; *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 290, 291; *Lemke v. Farmers Grain Co.,* 258 U. S. 50, 54; *Stafford v. Wallace,* 258 U. S. 495, 519; *Flanagan v. Federal Coal Co.,* 267 U. S. 222, 225; *Shafer v. Farmers Grain Co.,* 268 U. S. 189, 198; *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 10."

Currin v. Wallace, supra, 306 U. S. 9, 10.

It is only because there has been so much apparent confusion over this issue in the district court that we have not disposed of it as briefly and succinctly as did the Fourth Circuit in the recent case of *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission* [1959 TRADE CASES ¶ 69,254], No. 7678, decided January 20, 1959:

"Petitioners further contend that the adoption of regulations governing 'the internal allocation of selling time, to the several warehouses is not in interstate commerce. The Commission has no jurisdiction to proscribe unfair methods of competition that merely *affect* interstate commerce; they must be *in* such commerce. *F. T. C. v. Bunte Bros.,* 312 U. S. 349; cf. *Chamber of Commerce of Minneapolis v. F. T. C.,* 8 Cir., 13 F. 2d 673, 684. Tobacco auctions are an integral and indispensable part of interstate commerce in tobacco. *Currin v. Wallace,* 306

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U. S. 1, 10, aff'g *Wallace v. Currin*, 4 Cir., 95 F. 2d 856, 859, 863. The practices of the Board and its members at issue in this case are an essential part of such commerce. *American Federation of Tobacco Growers, Inc. v. Neal*, 4 Cir., 183 F. 2d 869."

[*Question Improperly Left to Jury*]

The district court should have instructed the jury that auction sales of tobacco on the Douglas Market are a part of, in, and themselves constitute interstate commerce, and should not have left that question to plague and confuse the jury.

[*Reasonableness of Restriction*]

It is a question for the jury to decide as to whether the 3½ per cent limitation as construed and applied[3] constitutes an *unreasonable* restraint of trade or commerce within the meaning of the Sherman Anti-Trust Act. That is, of course, a mixed question of law and fact, but its resolution, under appropriate instructions, difficult as they may be, must ultimately be left to the jury. *Fleitmann v. Welsbach Co.*, 1916, 240 U. S. 27; *Thomsen v. Cayser*, 1917, 243 U. S. 66, 88, 89; *Ring v. Spina*, 2nd Cir. 1948, 166 F. 2d 546, 550; *Raytheon Mfg. Co. v. Radio Corporation of America*, 1st Cir. 1935, 76 F. 2d 943, 950, aff'd 296 U. S. 459 [1932-1939 Trade Cases ¶ 55,092]. The strong language which we used on the former appeal in describing the effect of the 3½ per cent limitation, and which has been quoted near the beginning of this opinion, should not be construed as any indication of how the jury should decide that issue, nor permitted to influence the jury's verdict.

In *Asheville Tobacco Board of Trade v. Federal Trade Commission, supra*, the Fourth Circuit sustained the Commission's condemnation of a similar 3½ per cent limit, but further observed:

". . . . There are, however, a number of reasons why it may be desirable that there be some limit on the possible gain or loss to an individual warehouse in a single year. Loss or damage to a warehouse by fire or other casualty, illness of the warehouseman, or other fortuitous circumstances, may cause an abnormal reduction in the business of a warehouse in a particular year, which should not be perpetuated by a performance rule without some limiting proviso. Again, a warehouseman with large financial resources might attempt to monopolize the market through advertising campaigns, bidding in farmers' tobacco at prices above those which his competitors can afford, and other methods, which could be used for several years until his selling time is abnormally increased, and his competitors of more limited means are driven from the market, even though they have rendered adequate service and have helped to build up the market over the years. A reasonable limitation on the percentage of gain or loss in any one year would not violate the antitrust laws."

The testimony in the present case tends to sustain the Fourth Circuit's view that some limitation on the percentage of gain or loss in any one year is reasonable, and, we think, that question, together with the reasonableness of the particular 3½ per cent limit, as construed and applied by the defendants, must be left to the jury under proper instructions.

[*Prejudice to the Public Interest*]

In our opinion on former appeal, we said that the plaintiffs upon remand must produce evidence to show that the 3½ per cent limitation tends to prejudice the public interest. In the Sherman Act Congress has determined that certain prohibited activities are injurious to the public. *Radovich v. National Football League* [1957 Trade Cases ¶ 68,628], 1957, 352 U. S. 445, 453. As to classes of restraints which from their "nature or character" are unduly restrictive, Congress has determined its own criteria of public harm. *Klor's Inc. v. Broadway-Hale Stores, Inc.* [1959 Trade Cases ¶ 69,316], U. S. No. 76, October Term 1958, decided April 6, 1959. In restraints, like the present one to which "the rule of reason" applies, while the jury should not, and cannot properly, reject the policy of the Sherman Act which has been determined by Congress, it must still decide whether the particular conduct is reasonably calculated to prejudice the public interest which that Act is designed to protect. *Wilder Mfg. Co. v. Corn Products Co.*, 1915, 236 U. S. 165, 174; *Apex Hosiery Co. v. Leader*, 1940 [1940-1943 Trade Cases ¶ 56,039], 310 U. S.

[3] There was testimony tending to prove that it was construed and applied even more restrictively than was indicated on former appeal. See 244 F. 2d at 482 [1957 TRADE CASES ¶ 67,706].

469, 493; *Mandeville Farms v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,251], 1948, 334 U. S. 219, 242, 243. That does not mean that specific public injury must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Anti-Trust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest.

Upon the former appeal we upheld, under the circumstances there disclosed, the reasonableness and validity of the new warehouse provision intended to discourage overbuilding by limiting the amount of selling time which a new warehouse might receive for its first year, and we adhere to that decision. Our holding was, however, limited to the first year, 1954, and was not intended to prevent consideration of the new warehouse provision in determining whether the 3½ per cent limitation for the years 1955 and those following is an unreasonable restraint on trade. For example, that 3½ per cent limitation might be unreasonable if, combined with the new warehouse provision, it would operate to unduly discourage desirable building operations. See *Asheville Tobacco Board of Trade v. Federal Trade Commission, supra.*

[*Reversed and Remanded*]

Number one[4] of the four so-called ultimate facts upon which the district court placed so much emphasis is either erroneous or misleading,[5] and should not be submitted to the jury, because, as a matter of law, the auction sales of tobacco are *in* interstate comerce. Number two[6] is not a separate ultimate fact, but is a part of the test of an unreasonable restraint of trade under number three.[7] On that and on number four,[8] the plaintiffs, upon a re-trial, have the burden of proof.

The judgment is reversed and the cause remanded.

Reversed and remanded.

[¶ 69,351] **Service Stages, Inc. v. The Greyhound Corporation & Greyhound Bus Depot of Atlanta, Inc.**

In the United States District Court for the Northern District of Georgia, Atlanta Division. Civil Action No. 5446. Filed January 8, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Statute of Limitations—Applicable Statute—Accrual of Action.—A Georgia four-year statute of limitations, rather than a twenty-year statute which was enacted for rights of action given to individuals by special legislative acts, was held applicable to a treble damage antitrust action brought in a Federal District Court in Georgia. The Federal four-year statute of limitations, since it was enacted after the occurrence, was not applicable. However, Federal authorities determined the question as to when the cause of action arose. The plaintiff, alleging that it was forced to sell its franchise as a common carrier for an inadequate sum by reason of the defendants' conspiracy in violation of the antitrust laws, contended that the Georgia four-year statute did not begin to run until May 25, 1952, the date when it was paid the balance of the consideration for its franchise. That date was within the four-year period preceding the filing of the complaint on December 6, 1955. However, the contract of sale was entered into on March 13, 1951, and the plaintiff discontinued operations on May 25, 1951. It might be said that the statute of limitations began to run when the plaintiff was forced to sign the contract of sale, because the overt acts of the defendants had ceased. However, there was less doubt that the cause of action accrued when the plaintiff actually surrendered its business and ceased

[4] "That the three and one-half per cent limit affects interstate or foreign commerce."
[5] It might be only misleading because "affects" might be construed to mean "burdens."
[6] "That the three and one-half per cent limit prejudices or tends to prejudice the public interest."
[7] "That the three and one-half per cent limit constitutes an unreasonable restraint of trade."
[8] "That the plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation."

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operations. It was difficult to see how any further damage could have been done to the plaintiff; certainly the mere payment of the purchase price after that date would not constitute either an overt act or the accrual of damages.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100, 9010.200.

For the plaintiff: Arnall, Golden & Gregory; Hal Lindsay; and Randolph Hayes; Atlanta, Ga.

For the defendants: Gambrell, Harlan, Russell, Moye & Richardson, Atlanta, Ga.

Order of Court

[*Corrected Opinion*]

FRANK A. HOOPER, District Judge [*In full text*]: The Opinion of this Court dated September 22, 1958 containing certain errors which have been pointed out to the Court, said Opinion is vacated and the following inserted in lieu thereof.

STATEMENT OF THE CASE

[*Statute of Limitations*]

In this action plaintiff seeks to recover from defendants damages allegedly suffered by plaintiff when it sold out its franchise as a common carrier to the defendants for a sum of money allegedly inadequate, having been forced to make such sale by reason of acts and conduct of defendants in violation of the anti-trust laws (15 U. S. C. § 15).

Defendants filed a motion for summary judgment, based upon allegations in the pleadings and affidavits. There is no substantial issue of fact between the parties, and the able counsel for each party has assisted the Court in its task by complete discovery procedures and stipulations as to the controlling facts in the case.

Plaintiff's counsel insists that the applicable statute of limitations in this case is twenty years, defense counsel contends it is four years. Plaintiff contends that even if the Court should find the applicable period to be four years, plaintiff's claim is still not barred, for the reason as alleged by plaintiff that there were overt acts together with the infliction of damages occurring within a four-year period preceding the filing of this action.

While the motion for summary judgment is also predicated upon acts of estoppel and of release, it is not necessary for the Court to pass upon the same, as the Court is ruling that plaintiff's alleged cause of action did accrue more than four years prior to the date of filing this suit, and that four years is the applicable period of limitations under Georgia law for this particular action. The pertinent acts in the record will be given in connection with the Opinion. The Court however, is overruling defendants' motion for summary judgment based on such grounds.

OPINION

(1) The Applicable Statute of Limitations Under Georgia Law is Four Years.

[*Georgia Twenty-Year Statute of Limitations*]

Plaintiff contends that the proper period of limitations to be applied in this case is based upon *Georgia Code* § 3-704, which reads as follows:

> "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action shall have accrued."

Plaintiff's counsel in their comprehensive and carefully prepared brief cite to this Court decisions from various courts in this land, also statements by the general authorities, which indicate clearly that statutes in various states quite similar to the Georgia statute just quoted have been construed by the courts to cover actions of the same nature as the one here involved. A reading of the aforesaid statute and of the cases cited by plaintiff's counsel would demand a ruling in favor of plaintiff on this question, were it not for the particular legislative history of the aforesaid Georgia law.

This Court could rest its ruling entirely upon the thoughtful opinion written by Judge William Boyd Sloan, my colleague in this District; see *William Greene v. Lam Amusement Company, et al.* [1956 TRADE CASES ¶ 68,309], 145 F. S., 346. Among other cases therein cited is the case of *Hendryx v. E. C. Atkins & Company* (5 Cir.) 79 F. 2d 508, written by the distinguished Judge Samuel H. Sibley, then of that court, in which it was pointed out that the period of limitations contained in that statute "was enacted

for rights of action given to individuals by special legislative acts, such as a statute of incorporation." There was also cited the case of *Harvey v. Booth Fisheries Company of Delaware, et al.*, 228 F. 782, at page 786, where the court pointed out that an action under the Anti-Trust Act (15 U. S. C., § 15) was based upon "an invasion of the personal rights of the plaintiff, rights which are relative and general, and embrace rights which are common with all other persons, and as a part of the public he has a right of action for injuries sustained. There is no liability to plaintiff by reason of any trespass which is expressly created in his favor, but only as it affects the public, by reason of which he suffers damages."

But counsel for plaintiff here insist that the Supreme Court of Georgia in the case of *Nixon v. Nixon,* 196 Ga., 148, has placed a different interpretation upon the statute under consideration, so that it now should be interpreted to include actions such as this.

It is true that the Georgia Supreme Court in the case just cited did overrule and explain a number of earlier decisions upon this question, and did rule that the twenty year period of limitations applies in Georgia to an action by a widow for a year's support out of the estate of her deceased husband. However, the Georgia Supreme Court still recognized that the twenty year statute still "identifies and classifies the persons upon whom the right is conferred, as distinguished from the general public," and that "the right to a year's support is conferred upon a restricted and limited class of persons." By way of contrast the court points out that the Georgia statute of distribution providing for inheritance, makes no restriction as to persons who may qualify as an heir "whether male or female, minor or adult, dependent or non-dependent."

It is now well established that this court is under a duty to interpret the Georgia statute in the same way it is interpreted by the Supreme Court of Georgia. The mere fact, if it is a fact, that the foregoing decision by the Georgia Supreme Court might indicate a more liberal construction of the code section in question does not justify this court in "second guessing" the Georgia Supreme Court by further liberalization of the statute in question. Let it be added that a period of limitation of twenty years is a long period and one granted by law in Georgia to very few situations, including special legislative acts and instruments under seal.

[*Four-Year Period*]

(2) Plaintiff's counsel, while not agreeing with the foregoing interpretation, contends that this action accrued within a period of four years prior to the filing of the same. It will therefore be necessary to give a brief outline of the pertinent dates which are involved.

It is not necessary to recount the various elements of the alleged conspiracy and the acts done pursuant to the same prior to March 13, 1951, that date being without the four year period. On that date the plaintiff entered into a contract whereby it agreed to sell to Crescent Stages, Inc. its certificates of convenience and necessity covering the route from Atlanta, Georgia to Anniston, Alabama, via Rome and Gadsden. This transfer of course was made subject to approval by the Interstate Commerce Commission and the Georgia and Alabama Commissions. On April 10, 1951 plaintiff filed with the Interstate Commerce Commission an application for authority for the purchaser to operate temporarily over the aforesaid route, and also filed an application for approval of transfer of all of plaintiff's certificates to the purchaser. The Interstate Commerce Commission by order of April 27, 1951 approved such temporary operation, and on May 25, 1951 the plaintiff ceased operation as a motor bus carrier and has not conducted such business since that date. On March 4, 1952 the Commission approved the purchase of said certificates but ordered that the balance of the purchase price be paid in full immediately rather than in installments as agreed originally between the parties. In May, 1952 the parties modified the agreement of March, 1951 in accordance with the directions by the Commission, and the balance of the purchase price was paid to plaintiff, this being within the four year period prior to filing this action, and plaintiff contends it may be considered as the beginning of the four year period.

As the plaintiff agreed to sell its lines to Crescent Stages, Inc. by contract in March of 1951, and as the plaintiff on May 25, 1951 ceased its operations and turned its business over to Crescent Stages, Inc., should either of said dates be taken as a beginning point, the action would be barred because

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each of them are outside the four year period prior to filing suit. However, should May 25, 1952 be the pertinent date (this being the date on which plaintiff was paid the balance of the $70,000.00 consideration for the sale of its lines, pursuant to approval by the Commission) plaintiff's action would have been filed within the four year period.

(2) The Statute of Limitations Began to Run No Later Than the Date Plaintiff Disposed of Its Business.

[*Accrual Date*]

Many decisions have been rendered by the courts involving the question as to when the statute of limitations begins to run in a civil suit for damages for violation of anti-trust acts. To avoid confusion one must eliminate all those decisions which differ upon their facts from the case *sub judicie.* Under some factual situations there are repeated illegal acts done by the defendant with damages following soon thereafter. There are other instances where an overt act is done from which damages flow for a considerable time.

It is important to note in the instant case that the plaintiff, allegedly on account of illegal acts of the defendants, was forced to sell and release to purchasers affiliated with defendants its franchises to operate busses over the two routes described, whereupon plaintiff discontinued operations on May 25, 1951 and filed this complaint on December 6, 1955, more than four years after the plaintiff ceased its operations.

As pointed out below, there is some confusion in the authorities as to whether the statute begins to run from the last overt act of the defendant, or from the date of the infliction of the damages caused thereby. In the opinion of this Court, however, all overt acts (within the definition of that phrase applicable to such situations) and all damages caused thereby were fixed and established not later than May 25, 1951, on which date the plaintiff ceased its operations and delivered its business over to the purchasers under terms of a contract which plaintiff has never sought to be declared invalid, fixing plaintiff's sales price at $70,000.00.

[*Rule Applicable to Antitrust Actions*]

The general rule upon the question of statute of limitations is thus stated in 54 C. J. S., § 168, p. 122:

> "Broadly speaking, an action sounding in tort accrues at, and limitations begin to run from, the date on which the tort is committed, from the date on which there is a wrongful invasion of personal or property rights, or from the time when the injured person acquires a present right to sue. In the absence of a statutory provision to the contrary or of fraudulent concealment, this rule may apply even though plaintiff was then ignorant of the injury sustained or could not ascertain with certainty the amount of his damage. The test to determine when the statute of limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself, constitute a legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right to plaintiff."

The foregoing general rule applies in cases involving violation of anti-trust statutes. The Georgia statutes of limitation apply here, this occurrence having been prior to the enactment of 15 U. S. C. § 15(b) fixing a four year statute of limitations. The federal authorities, however, determine the question as to when plaintiff's cause of action accrued.

A great deal of the confusion which exists upon this question has been dispelled by the Court of Appeals of the Ninth Judicial Circuit in the case of *Steiner v. 20th Century-Fox Film Corporation* [1956 Trade Cases ¶ 68,304], 232 F. 2d 190 (1956). The court there stated:

> "In a civil conspiracy, the statute of limitations runs from the commission of the last overt act alleged to have caused damage."

The court pointed out certain language used by the court in the case of *Suckow Borax Mines Consolidated v. Borax Consolidated* [1950-1951 Trade Cases ¶ 62,714], 185 F. 2d at p. 208, to the effect that

> ". . . private civil antitrust actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden 'overt acts' by the conspirators."

The court at page 195 stated:

> "In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck. Any further internal injury affects the

problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run."

[*Two Conspiracies Charged*]

In the instant case the original complaint alleged two separate conspiracies, the first one in point of time being clearly barred by statute of limitations. By amendment the two alleged conspiracies were set out as constituting one conspiracy which culminated in the abandonment by plaintiff on May 25, 1951 of its entire business. The instant case is therefore on its face similar to the case of *The Crummer Company, et al. v. DuPont, et al.* [1955 TRADE CASES ¶ 68,042], 223 F. 2d 238 in which the Fifth Circuit Court of Appeals points out that there was in that case "but a single cause of action which did not accrue and upon which limitation did not commence to run until every wrongful act had ceased." The Court of Appeals pointed out:

"The fact that the complaint alleges that by 1944 their business was completely destroyed and all their damages had accrued." See 223 F. 2d 238, *supra*, p. 248.

Counsel for defendants cite other cases, ruling that a plaintiff after going out of business has no further business which might suffer damages by illegal acts of the defendants.

[*Surrender of Business*]

It is alleged that certain things were done by the defendants after the plaintiff had delivered its business to the purchasers, but these acts were not illegal overt acts such as would constitute the start of the running of the statute of limitations. Subsequent to May 1951, the Interstate Commerce Commission having approved the sale by the plaintiff to Crescent Stages, Inc., the latter paid the balance of the purchase price named in the original contract between the parties dated March 13, 1951. It might even be said that the statute of limitations began to run on March 13, 1951 for the reason that on that date the alleged overt acts of defendant had ceased and the plaintiff allegedly suffering from the blows inflicted thereby, was forced to sign a contract of sale for the sum of $70,000.00. At any rate the amount of the purchase price was determined on March 13, 1951 and the contract signed subject to approval by the Interstate Commerce Commission and the Alabama and Georgia Public Service Commissions. However, there is less doubt that plaintiff's action accrued on May 25, 1951 when plaintiff actually surrendered its business to Crescent Stages, Inc. and ceased operations. It is difficult to see how any further damage could have been done to plaintiff subsequent to that date and certainly the mere payment of the purchase price after that date would not constitute either an overt act or accrual of damages.

(3) Defenses of Estoppel and Release.

[*Summary Judgment Denied*]

If the Court should be correct in the foregoing rulings it will not be necessary to pass upon the motion for summary judgment in favor of defendants based upon alleged estoppel by the plaintiff, and also based upon an alleged release executed by plaintiff.

However, should the ruling of this Court be reversed as to the statute of limitations it would be highly desirable that the merits of these two defenses urged by defendant be adjudicated on the same appeal.

After careful consideration this Court is ruling that defendants are not entitled to a summary judgment based upon Ground One (A) entitled "Estoppel" or upon Ground One (B) entitled "Release, Waiver, Accord and Satisfaction, Compromise and Settlement," each contained in defendants' motion for summary judgment filed February 14, 1958.

Counsel for defendants may submit appropriate Judgment.

[¶ 69,352] United States v. Guerlain, Inc. United States v. Parfums Corday, Inc. United States v. Lanvin Parfums, Inc.

In the United States District Court for the Southern District of New York. Civil Action Nos. 93-267, 93-268, and 93-269, respectively. Filed March 31, 1959.

Case Nos. 1195, 1196, and 1197, respectively, in the Antitrust Division of the Department of Justice.

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Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief —Government's Motion to Dismiss After Successful Prosecution in Trial Court.—The Government was granted a motion to dismiss its civil actions against three perfume companies after a trial court had found that the companies monopolized the importation into, and sale within, the United States of trade-marked toilet goods by utilizing Section 526 of the Tariff Act of 1930 to exclude potential competitors from dealing, in the United States, in the products sold abroad by their French affiliates. After successfully prosecuting the suits in the trial court, and before argument of the appeals in the United States Supreme Court, the Government moved to vacate the judgments in order that, on remand, it might move for dismissals. It was represented that previous disagreement within the Executive Branch of the Government had been reconciled, and that the public interest would be better served by an attempt to get a legislative resolution to the same effect as the decision of the trial court. The decision of the Department of Justice to abandon the suits was a policy decision within its discretion. However, since the defendants would have been deprived of an opportunity to prevail on appeal, it was only fair that the dismissals be with prejudice, a decision to which the Government consented.

See Monopolies, Vol. 1, ¶ 2510.250, 2515, 2530.10, 2540, 2580, 2610.340, 2610.550; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8229.100.

For the plaintiff: Richard B. O'Donnell, Special Assistant to Attorney General.

For the defendants: Shearman & Sterling & Wright for Guerlain, Inc.; Joseph L. Hochman for Parfums Corday, Inc.; and Paul, Weiss, Rifkind, Wharton & Garrison, for Lanvin Parfums, Inc., all of New York, N. Y.

For the remanding order of the U. S. Supreme Court, see 1958 Trade Cases ¶ 69,211. For a prior opinion of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,771.

Memorandum

EDELSTEIN, District Judge [*In full text*]: After a successful prosecution of these suits in the District Court, and before argument of the appeals in the Supreme Court, the Government moved in the Supreme Court to vacate the judgments in order that, on remand, it might move for dismissals. The basis for this unusual and perhaps unique procedure is said to be a policy decision, arrived at only during the pendency of the appeals, that the main problem involved was inappropriate for judicial resolution in antitrust litigation. It has been represented that previous disagreement within the Executive Branch has been reconciled, and that the public interest would be better served by an attempt to get a legislative resolution to the same effect as the decision of this Court.

[*Tariff Act*]

The "main problem" referred to is the meaning of § 526 of the Tariff Act of 1930 (19 U. S. C. § 1526), the Government having contended that it did not make protection available against imports of trademarked goods, where the American concern seeking such protection is affiliated with the foreign company whose legitimately marked goods it seeks to exclude. There is certainly no doubt that the attempt to resolve this issue in antitrust litigation was clumsy, particularly in view of the fact that the Government was, through the Collector of Customs, allowing the exclusion that it claimed, through the Antitrust Division, to be illegal. Further, there is certainly no doubt that this Court suggested the inappropriateness of such litigation. There is no doubt that the Government elected to proceed nevertheless, and it is hardly to be presumed without careful study and advisement, the complaints having been filed some two and a half years earlier. There is considerable doubt that anything new transpired to cause the singular and abrupt change of heart during the pendency of the appeals. At least counsel for the Government was unaware of any new factual information having come to light since the filing of the complaints. There is, finally, no doubt that the suits were prosecuted at length, with tenacity, talent and vigor. One may be forgiven a degree of perplexity in the circumstances.

The one thought that obviously suggests itself is that the Government has reconsidered the validity of the decisions. But it is not the position of the Solicitor Gen-

eral that the decisions were in error and the Government denies that it has employed a stratagem for the confession of error. There is, indeed, no reason at all why a straightforward confession of error could or should not be made if the Government believed itself and the Court to be in error.

It is the duty of the Department of Justice to enforce the antitrust laws and it is the duty of this Court to decide the issues properly presented to it for decision. If the Department of Justice in its discretion adopts a policy of enforcement, it is not within the judicial realm to interfere. The decision to abandon these suits is a decision of policy within the discretion of the Department of Justice. But the dockets of this Court are congested to the point of public expressions of concern by the Department of Justice and these proceedings have constituted an unfortunate aggravation of that condition.

[*Motion to Dismiss Granted*]

The motion to dismiss will, of course, be granted. And inasmuch as the defendants will thereby be deprived of an opportunity to prevail on appeal (an opportunity they are eager to take advantage of), it is only fair that the dismissals be with prejudice, a decision to which the Government consents.

[¶ 69,353] Revlon, Inc. v. Wagonfeld.

In the New York Supreme Court, New York County, Special and Trial Term, Part XV. 141 N. Y. L. J., No. 76, page 13.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Manufacturer's Operation of Retail Establ shment as Bar to Fair Trade Enforcement—Agreements Between Competitors—Horizontal Price Fixing.—A manufacturer of beauty products was not precluded, by its ownership and operation of a single salon in which its products were demonstrated and sold at retail prices, from enforcing its fair trade program against retailers which sold its products below established fair trade prices. The retailers contended that the manufacturer, by entering into competition with them and other retailers, had removed itself from the protection of the fair trade statutes. The manufacturer's exhibition sales salon, however, was the only place of its kind operated by the manufacturer in the United States and was operated at a substantial loss. That salon, a small incident to the major enterprise of manufacture and wholesale operations, was a part of the manufacturer's general advertising and publicity campaign. Therefore, the manufacturer was not acting as a retailer and there was no horizontal price fixing.

See Fair Trade, Vol. 1, ¶ 3100.34, 3390.34.

[*Fair Trade Action*]

EPSTEIN, Justice [*In full text*]: These are eight actions comprising identical facts and a single issue, tried simultaneously by agreement of counsel. Findings and conclusions were waived. Plaintiff, manufacturer of Revlon beauty products, sues to enjoin defendants from selling its products at less than the retail minimum selling prices fixed in its contracts with its customers. Defendants have purchased Revlon products from sources unknown to plaintiff and have sold them for less than the prices fixed by Revlon in its contracts with its retail customers. In these cases, too, preliminary injunctions were issued but no certified copies were served on defendants. Defendants were fully aware of Revlon's "fair trade" contracts and had been notified by letters to that effect by registered mail. They do not deny such knowledge nor do they deny the fact of such sales, which were also proved and not contested. There are some forty-five states where fair trade laws are in effect. Plaintiff seeks to protect its good will, symbolized by its trade marks, built up at great expense over the years. Defendants all try to evade the effect of the Fair Trade Law of New York with the defense that plaintiff engages in sales at retail in competition with defendants and is therefore outside the scope of the defenses under federal and state laws.

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[*New York Fair Trade Act*]

The New York Fair Trade Act is contained in Article XXIV-A, of the General Business Law, the applicable provision of which reads:

> "369b. *Unfair competition defined and made actionable.* Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 369-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

State enactments like the above have been sanctioned by the Congress of the United States in the Miller Tydings and McGuire Amendments to the Sherman Anti-Trust Act (50 Stat. 693, 1937; 15 U. S. C. section 45). The 1952 Amendment, known as the "McGuire Act" has been upheld in *Schwegmann Brothers Giant Super Markets v. Eli Lilly & Company* [1953 Trade Cases ¶ 67,516], (205 F. [2d] 788, certiorari denied 346 U. S. 856; *General Electric Company v. Masters, Inc.* [1954 Trade Cases ¶ 67,776], 307 N. Y. 229 [1954]).

In the instant cases plaintiff has shown extensive inquiries at considerable expense to seek out the defendants as violators of the laws by selling its products below the fixed prices. Defendants have no contracts with plaintiff and have purchased from unrevealed sources. Their books of account do not reveal the sales of such products. Testimony of plaintiff establishes loss of trade by contracting purchasers with whom defendants compete in neighborhood sales of cosmetic products; sales freely made by defendants at less than the fixed prices, sometimes at no more than one-fourth or one-half such fixed retail prices. These are generally in combined sales of other articles. Plaintiff's products are the "come-on" for such customer inducement. Defendants' purchases of Revlon products total some $18,000. No records of the specific items sold are available. Plaintiff's cost of the investigations occasioned by protests against defendants' violations of the statutes to plaintiff's damage total some $5,139.47. No contradictory evidence was presented. Counsel for defendants stipulates that counsel for plaintiff would testify that his services, required by defendants' actions, were of a value of $500 for each case, without conceding that such would be taxable damages.

[*Defense—Fair Trader Competing as Retailer*]

The defendants all rely upon the identical defense—that plaintiff, by operating and owning the Revlon Salon at No. 745 Fifth Avenue, in New York City, where one may purchase Revlon products at retail prices, has entered into competition with defendants and other retailers and thereby removed itself from the protection of the fair trade statutes.

[*Advertising*]

The facts do not support defendants' conclusion. Plaintiff Revlon's beauty salon at No. 745 Fifth Avenue is the only place of its kind operated by plaintiff in the whole United States. There its products are demonstrated for operators of beauty parlors and the public is invited and taught how to use Revlon's products. It is a business operated at a substantial loss (the single shop) and is part of the general advertising and publicity campaign of plaintiff. Similar salons on Fifth Avenue are operated by Elizabeth Arden, Helena Rubinstein, Coty and others. One may also purchase Revlon products at retail in this exhibition sales salon. It is this last fact, a fact prevailing in only this one place in the whole United States on which defendants rely. This defense has been held inadequate in a number of cases involving this and other plaintiffs similarly situated. On January 30, 1959, in two cases temporary injunctions were granted by Mr. Justice Hofstadter. In a brief opinion in *Revlon v. Modell* [1959 Trade Cases ¶ 69,271], (N. Y. L. J. January 30, 1959), he held the identical defense to be insufficient and that the salon on Fifth Avenue on the same facts herein revealed not to constitute a retail establishment in competition with the defendant. In eight other cases Mr. Justice Levey granted temporary injunctions (N. Y. L. J., March 3, 1959). A host of other cases brought by other plaintiffs, similarly placed, in the years from 1956 to 1959 evidence this court's support of plaintiff's position. The single case relied upon by defendants is *U. S. v. McKesson & Robbins, Inc.* [1956 Trade Cases ¶ 68,368], (351 U. S. 305). Study of that case and the facts there revealed show it to be wholly unrelated to

the instant cases. The vertical trade agreements were there not questioned. There it was the competition of defendant with independent wholesalers that was attacked. Revlon is not acting as a retailer and there is no horizontal price fixing by Revlon, whose salon on Fifth Avenue is a small incident to the major enterprise of manufacture and wholesale operations. Neither the facts nor the law offer defendants an escape from their flagrant violations of the statutory protection accorded plaintiff's products. Permanent injunctions will issue against each defendant. Damages are assessed against the defendants jointly in the sum of $5,139.47, and in addition thereto the defendants are severally liable in the sum of $500 for legal expense incurred by plaintiff in the prosecution of this action. Judgment accordingly.

[¶ 69,354] Ramo v. Excel Pharmacy, Inc.

In the New York Supreme Court, Nassau County. May 1, 1959. 141 N. Y. L. J., No. 8, page 16. Dated May 8, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Indirect Methods of Price Violation—Trading Stamps Issued With Sale of Fair-Traded Merchandise—Legality—Defense to Enforcement Action—Enforcement Activity or Policy.—Retail pharmacists were denied a temporary injunction to prohibit another pharmacist from issuing trading stamps in connection with the sale of so-called fair trade merchandise. Individual retailers were attacking another retailer for a method of merchandising which had been in existence, in all of the states, for many years, and had never been successfully attacked anywhere on the ground that it violated the fair trade laws. The thing which is protected by the fair trade law is the good will of the manufacturer in his brand name; the goods themselves are the absolute property of the purchaser, and he can resell them at any price he pleases. Therefore, unless the statute is to degenerate into an instrument of oppression by one individual against another, it is necessary to find a pattern of enforcement before issuing an injunction which singles out the pharmacist as the one person in the United States who cannot distribute trading stamps. The inactivity of the manufacturers, in the face of such a widespread practice, might indicate that they did not consider it detrimental to their good will. Therefore, until the question is decided by an appellate court, a temporary injunction is inappropriate.

See Fair Trade, Vol. 1, ¶ 3294.34, 3440.34.

[*Fair Trade Action*]

GULOTTA, Justice [*In full text*]: The plaintiffs are retail pharmacists operating at Farmingdale, Long Island, who have sued the defendant, who is also a pharmacist in the same community, to permanently enjoin him from issuing S. & H. Green stamps in connection with the sale of so-called Fair Trade merchandise.

[*Injunction Sought*]

The plaintiffs have applied for the temporary injunction sought on this motion, on the theory that it is needed to preserve the *status quo* and on the further theory that their case is so clear cut, that a trial will be a formality and that therefore they should have their relief, before it is held. to prevent irreparable damage.

Since the defendant has been operating the store in question under the Green Stamp method since he took it over in October, 1958, enjoining him forthwith would not be to preserve the *status quo,* but to destroy it.

Neither do I regard the plaintiffs' case as so overwhelming, that the results of a trial are to be considered a foregone conclusion.

[*Case Distinguished*]

The plaintiffs' chief reliance is upon the case of *Bristol-Myers Company v. Picker* [1950-1951 TRADE CASES ¶ 62,755] (302 N. Y. 61), which is a case that also originated in this area.

It was held there after trial, that at the suit of the manufacturer, the defendant druggist would be restrained from selling the plaintiff's products at the Fair Trade price and at the same time issuing cash register receipts redeemable in merchandise, at 2½ per cent of their face value at his

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own store, or the stores of a small group of merchants in the same community, who had joined the defendant's plan.

[*Enforcement Activity*]

The difference here is that in this case we have an individual retailer, or a few of them, attacking another retailer for a method of merchandising, which we are told has been in existence for sixty years in all states of the Union, with 65,000 licensees, 6,500 in the State of New York, including 265 drug stores and has never been successfully attacked on the ground that it violates the Fair Trade Laws anywhere in the United States.

While a retailer is given a right under the statute (sec. 369-b of the General Business Law) to maintain an enforcement action, not to be lost sight of, is the fact that the thing which is being protected, is the good will of the manufacturer in his trade brand. The goods themselves are the absolute property of the purchaser and he can resell them at any price he pleases.

Therefore unless the statute is to degenerate into an instrument of oppression by one individual against another, it is necessary to find a pattern of enforcement against the very thing which defendant is doing, before issuing an injunction, which singles him out as the one person in the nation who cannot distribute Green Stamps.

I appreciate that enforcement must start somewhere, but the inactivity of manufacturers throughout the country in this respect, in the face of such a widespread practice, may very well indicate that they do not consider it detrimental to their good will, nor harmful to their property rights in their trade names.

This question of course, was not an issue in *Bristol-Myers v. Picker (supra)*, and until it is decided by an appellate court, I do not deem a temporary injunction appropriate.

A somewhat similar question was discussed in *Automotive Electric Service Corporation v. Times Square Stores* (175 Misc. 865, 24 N. Y. S. 2d 733), and the conclusion there reached after trial, was to the effect that the plaintiff was not entitled to an injunction.

Additionally, the Special Term calendar is up to date, and plaintiffs may have a trial without any more delay than they wish.

[*Injunction Denied*]

Motion denied. Short form order signed.

[¶ 69,355] Paper Mate Manufacturing Co. v. Hess Brothers, Inc.

In the Pennsylvania Court of Common Pleas of Lehigh County, September Term, 1957, No. 18. Dated April 22, 1958.

Pennsylvania Fair Trade Act

Fair Trade—Constitutionality of Pennsylvania Fair Trade Act—Sufficiency of Act's Title—Alleged Failure to Clearly Express Subject Matter of Act in Title—Putting "Non-Signer" Upon Notice.—The Pennsylvania Fair Trade Act, entitled "An Act to protect trade-mark owners, distributors, and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand, or name," does not violate a section of the Pennsylvania Constitution providing that the subject matter of all bills must be "clearly expressed" in their titles. It was contended that the title of the Act was insufficient to put "non-signers" upon notice that the legislation was applicable to them. However, to any merchant of a "reasonably inquiring mind," it was immediately apparent that the title of the Act was applicable to any person engaged in the distribution of certain types of articles. Nonsigners could not have been misled by the title. Also, the non-signer provision was nothing more than an incidental provision which did not have to be enumerated in the title if it was germane to the legislation as a whole. The court noted, moreover, that it considered itself bound by a decision of the Pennsylvania Supreme Court sustaining the constitutionality of the Act, without discussing its title, under a Pennsylvania rule that, where an appellate court has passed

on any constitutional objection to any act, it is presumed to have passed on all constitutional objections to that act.

See Fair Trade, Vol. 1, ¶ 3085.40.

For the plaintiff: Donald E. Wieand.

For the defendant: Orrin E. Boyle.

Preliminary Objections to Complaint in Equity

[*Fair Trade Action*]

Koch, Judge [*In full text*]: Plaintiff, Paper Mate Manufacturing Company, filed a complaint in equity against defendant, Hess Brothers, Inc., which is a retail distributor of merchandise in the City of Allentown. It is alleged that on two occasions defendant advertised, offered for sale and sold writing instruments bearing plaintiff's trade-marks, brands or name at prices below the minimum retail prices stipulated therefor with other retailers in the Commonwealth of Pennsylvania in violation of the Fair Trade Act of June 5, 1935, P. L. 266, 73 PS § 7-11, as amended. Upon the filing of the complaint we issued a rule to show cause why defendant, who is a so-called nonsigner of a fair trade contract, should not be enjoined from these and other violations of this act.

[*Sufficiency of Title to Pennsylvania Fair Trade Act*]

The matter before us consists of defendant's preliminary objections and amendments to preliminary objections comprising 14 issues. However, the only contention pressed, both at oral argument and in the brief of counsel, concerns the demurrer which questions the sufficiency of the title to the Act of 1935, as amended.

[*Constitutional Provision*]

Article III, sec. 3 of the Constitution of Pennsylvania provides:

> "No bill, except general appropriation bills, shall be passed containing more than one subject which shall be clearly expressed in its title."

The title to the Act of 1935 is as follows:

> "An Act to protect trade-mark owners, distributors, and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name."

This act was amended as of June 12, 1941, P. L. 128, the title of which is:

> "An Act to amend sections one and two of the Act approved the fifth day of June, one thousand nine hundred and thirty-five (Pamphlet Laws, two hundred sixty-six), entitled, 'An Act to protect trade-mark owners, distributors and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name' by extending the provisions thereof to vending equipment used in distributing such articles, and further defining parties having a right of action for unfair competition."

A further amendment of May 25, 1956, P. L. 1756, is titled as follows:

> "An Act amending the Act of June five, one thousand nine hundred thirty-five (Pamphlet Laws 266), entitled, 'An Act to protect trade-mark owners, distributors, and the public against injuries and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name,' further regulating exceptions to contracts of sale and actions at law for unfair competition."

[*Alleged Defect in Title*]

Defendant maintains that the title of the Fair Trade Act of June 25, 1935, P. L. 266, as amended, is defective for this reason: The subject of the act is not clearly expressed in the title in that there is no reference or expression that the legislation is intended to establish an innovation in the law of contracts by binding strangers, nonsigners, to the contracts of others to which they have not in any manner agreed. It is urged that this portion of the act is in derogation of the common law, and therefore we are obliged to place a strict construction upon it: Statutory Construction Act of May 28, 1937, P. L. 1019, art. IV, sec. 58(8), 46 PS § 558(8); *Bristol-Myers Co. v. Lit Brothers, Inc.*, 33 D. & C. 52.

[*Controlling Decision*]

In spite of any legal or economic concepts which are advanced by this defendant,

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we cannot disregard the clear holding of the Supreme Court of Pennsylvania in *Burche Co. v. General Electric Company* [1955 Trade Cases ¶ 68,078], 382 Pa. 370, which sustained the constitutionality of this legislation.

While it is true that the *Burche* case contains no discussion concerning the title to this act of assembly, we agree with Judge Van Dusen's holding in *General Electric Co. v. Hess Brothers, Inc.* [1957 Trade Cases ¶ 68,807], 155 F. Supp. 57, 61:

> "The objections to the Act based on the Pennsylvania Constitution should be presented to the Pennsylvania Supreme Court in view of the decision of that court holding the Act constitutional and the Pennsylvania rule that, where an appellate court has passed on any constitutional objection to an Act of Assembly, it is presumed to have passed on all constitutional objections to that Act."

Our research has failed to disclose any case which overrules *Wheeler v. Rice,* 4 Brewster 129 (1871), which held that where an act of assembly has been decided to be constitutional, an inferior court is bound by that judgment, notwithstanding new reasons are set up against it. The presumption of law is that all the existing reasons were considered and held insufficient. See also *Swatara Township School District's Appeal,* 1 Pa. Superior Ct. 502; Black's *Constitutional Law,* 3d ed., page 61.

This act was the subject of Supreme Court decisions on other occasions and even though constitutional questions were not involved, we must accept the fact that fair trade, or price fixing as defendant chooses to designate it, is the settled law of Pennsylvania in spite of the abandonment of the policy by many well known manufacturers in recent months: *Bristol-Myers Company v. Lit Brothers, Inc.* [1932-1939 Trade Cases ¶ 55,227], 336 Pa. 81; *Lentheric, Inc. v. F. W. Woolworth Co.* [1940-1943 Trade Cases ¶ 56,033], 338 Pa. 523. Chief Justice Kephart said in *Turco Paint and Varnish Company v. Kalodner,* 320 Pa. 421, 428:

> ". . . it is fair to assume that had there been any constitutional objections such as are here being considered, they would have been raised and the court would have passed on them."

Even though we believe that we would not be obliged to delve further into the constitutional question raised, nevertheless we will present our views on the precise problem.

[*Principles*]

In construing this constitutional provision, we are governed by the well settled principles reviewed in *Boyertown Burial Casket Co. v. Commonwealth,* 366 Pa. 574, 590:

> "It is well settled by a multitude of cases that the title need not be an index nor a synopsis of the contents of the Act. On the contrary, all that is required is that the title shall contain words sufficient to cause one having a reasonably inquiring state of mind to examine the Act in order to determine whether or not he may be affected by it and that, unless a substantive matter entirely disconnected with the named legislation is included therein, the Act does not fall within the constitutional inhibition.
>
> "As said by the Supreme Court in *Commonwealth v. American Gas Company,* 352 Pa. 113, 118-9. 'In *Commonwealth v. Stofchek,* 322 Pa. 513, 185 A. 840, *Kelley v. Earle,* 325 Pa. 337, 190 A. 140, and *Gumpert's Estate,* 343 Pa. 405, 23 A. 2d 479, we had occasion to review this constitutional provision and to assert the principles governing its application. As stated in *Gumpert's Estate,* at page 407, by Mr. Justice Horace Stern: "It is unnecessary to elaborate upon the oft-repeated principle that all the Constitution requires is that the title should put persons of a reasonably inquiring state of mind on notice of the general subject matter of the act. The incidental provisions of the statute need not be enumerated or indexed in the title if they are germane to the legislation as a whole. 'Unless a substantive matter, entirely disconnected with the named legislation, is included within the folds of the bill, the act should not be declared as a violation of the Constitution by reason of its title offending Section 3 of Article III.'" ' ".

The expressed purpose of the legislature was to protect trade-mark owners and others against uneconomic distribution practices relating to articles of standard quality having a distinguishing trade-mark, brand or name: *Bristol-Myers Co. v. Lit Brothers, supra,* page 85. Defendant, however, contends that the title is insufficient to put it, a nonsigner, upon notice that the legislation is applicable to those in this category. If the title to the act made any reference to voluntary contracts, there might be merit in this position. However, to any merchant of a reasonably inquiring mind, it is immediately apparent that the title of the original act and its

amendments is applicable to any person who is engaged in the distribution of certain types of articles. Furthermore, we are of the opinion that defendant and others in his category could not be misled by the title and that it meets the test set forth in *Provident Life & Trust Company v. Hammond*, 230 Pa. 407, 411, wherein the Supreme Court held that

> ". . . the purpose was to prevent fraud and deception by requiring the title of the bill to disclose fully and clearly its subject so that all interested parties could be heard for and against the proposed legislation if they desired."

See also *Commonwealth v. Stofchek*, 322 Pa. 513, 517, where Chief Justice Kephart said:

> "The real purpose of section 3, of article III, must be considered in answering the question raised by appellant. The provision was not intended to exercise a pedantic tyranny over the grammatical efforts of legislators, nor to place them between the horns of a constructional dilemma, namely, that the title of an act must be so general or so particularized as to include all of its subject-matter, and yet not so general as to give no indication of its purpose, nor so particular as to inferentially exclude from its scope any items inadvertently omitted. As stated in *Soldiers and Sailors Memorial Bridge*, 308 Pa. 487, citing *Car v. Aetna A. & L. Co.*, 64 Pa. Superior Ct. 343, at 349, the provision is not applicable 'unless a substantive matter, entirely disconnected with the named legislation, is included within the folds of the bill.' It is intended to operate to exclude from the measure that which is secret and unrelated: *Beckett v. City of Allegheny*, 85 Pa. 191. The history of this section indicates that this is its true purpose."

[*Alleged Change in Common Law*]

Equally untenable is the position that since the act made a change in the common law, it must be specifically spelled out in the title. We might well question the soundness of the contention that this statute makes a change in the common law. The act does not make a nonsigner a party to a contract in the strict sense. All that a contract does in any given case is to serve as a foundation stone for fixing the established prices so as to prevent unfair competition. This is a legitimate and not completely new legislative objective. In any event the portion of the Act of 1935 regarding nonsigners is nothing more than an incidental provision and it need not be enumerated or indexed in the title if it is germane to the legislation as a whole: *Gumpert's Estate, supra.*

[*Decisions of Other Jurisdictions*]

Authority for the sufficiency of the title to the Pennsylvania legislation is to be found in the decisions of several States which have fair trade acts with identical titles.

In *Weco Products Co. v. Sam's Cut Rate, Inc.* [1940-1943 TRADE CASES ¶ 56,080], 296 Mich. 190, 295 N. W. 611, the constitutionality of the Michigan act was upheld upon attack by a "nonsigner" on the grounds that the title failed to confrom to this constitutional provision: "No law shall embrace more than one object which shall be expressed in the title." The title to the act is as follows: "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of standard quality under a distinguished trade-mark, brand or name." * The Michigan court said:

> "'While it (the Covert Act) contains various related provisions not directly indicated or enumerated in the title, under the construction of this constitutional requirement, as many times reviewed by this court, if the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose, the constitutional requirement is met.
>
> "'A title is but a descriptive caption, directing attention to the subject matter which follows.'
>
> "[2] A title which directs attention to the protection of trade-mark owners, etc., against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark is expressive of the purpose and scope of the enactment. Consideration of the language of the act does not show any objects which are foreign to the statement in the title and contains matter which should be expected in an act bearing such a title. We are satisfied

* The Pennsylvania act is identical except that it uses the term "injuries" instead of what we deem the more appropriate word "injurious."

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that the title of the act in question does not violate the constitutional requirement."

Defendant seeks to distinguish the *Weco* case on the ground that the Michigan Constitution uses the term "object" whereas the word "subject" appears in the Pennsylvania provision. While we appreciate the grammatical significance of this position, it is not persuasive in the light of the principle that the only requirement in this Commonwealth is that the title should put persons of a reasonably inquiring state of mind on notice of the general subject matter: *Gumpert's Estate, supra,* page 407. Defendant, therefore, is put on notice of the provisions of the act regardless of whether it deals with an object or a subject.

The title of the South Carolina act was upheld in *Miles Laboratories, Inc. v. Seignious,* 30 F. Supp. 549. There, too, the title and constitutional provisions are identical to the Pennsylvania act.

In *General Electric Company v. Wender* [1957 Trade Cases ¶ 68,718], 151 F. Supp. 621, 622, the district court considered the title to the Fair Trade Act of West Virginia which was titled as follows:

> "'An Act to protect trade-mark owners, producers, distributors and the general public against injurious and uneconomic practices in the distribution of competitive commodities bearing a distinguishing trade-mark, brand or name, *through the use of voluntary contracts* establishing minimum resale prices and providing for refusal to sell unless such minimum resale prices are observed.' W. Va. Laws 1937, c. 123."

The court held that the act insofar as it applies sanctions to nonsigners, was void as in violation of the West Virginia Constitution, the title provision of which is similar to the Pennsylvania Constitution. We cite this case for the reason that it makes reference to the fact that four States use the term "through the use of voluntary contracts" in the title and points out that a large number of States, including Michigan and Pennsylvania, do not have this phrase in the title. The court distinguished *Weco Products Co. v. Sam's Cut Rate, supra,* only because the Michigan act does not contain the restrictive words, "through the use of voluntary contracts."

[*Presumption of Constitutionality*]

The Fair Trade Act of 1935 is cloaked with a presumption of constitutionality and it has withstood the attacks of many constitutional arguments. We find no merit in the present assault through the medium of article III, sec. 3, of the Pennsylvania Constitution upon what we deem a properly drafted legislative enactment.

Order

And now, April 22, 1958, defendant's preliminary objections are overruled and it is ordered that it file an answer on the merits within 20 days after service of this order upon its counsel. Either party may apply to the court to fix a date for the hearing on the application for a preliminary injunction.

[¶ 69,356] Court Degraw Theatre, Inc. v. Loew's Incorporated, et al.

In the United States District Court for the Eastern District of New York. Civil No. 12921. Dated May 1, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Be Liable—Successor Corporation—Transferee Liability.—In a private antitrust action, a motion picture distributor was denied a summary judgment where it had contended that there was no basis for either direct or transferee liability as to any claim asserted against it. The court was not satisfied that there was no question of fact on the issue of transferee liability.

See Private Enforcement and Procedure, Vol. 2, ¶ 9006.

For the plaintiff: Sperry, Weinberg & Ruskay (Joseph A. Ruskay, of counsel).

For the moving defendant: Louis Phillips (E. Compton Timberlake, Bernard E. Kalman, and Marvin Ginsky, of counsel) for Paramount Pictures Corporation.

For prior opinions of the U. S. District Court, Eastern District of New York, see 1959 Trade Cases ¶ 69,297, 1958 Trade Cases ¶ 69,014, and 1957 Trade Cases ¶ 68,634.

Memorandum

JOSEPH C. ZAVATT, District Judge [*In full text except for omissions indicated by asterisks*]:

* * *

III

[*Transferee Liability*]

The motion of the defendant Paramount Pictures Corporation for summary judgment is denied without prejudice. The motion is grounded in part upon the fact that there is no basis for either direct or transferee liability as to any claim asserted against the defendant. The court is not satisfied that the affidavit upon which the motion is based sufficiently establishes that there is no question of fact upon the issue of transferee liability. Cf., *Gordon v. Loews, Inc.* [1956 TRADE CASES ¶ 68,573], 147 F. Supp. 398 (D. N. J. 1956). The question now presented was not passed upon in *Leonia Amusement Corp. v. Loew's, Inc.* [1953 TRADE CASES ¶ 67,592], 117 F. Supp. 747 (S. D. N. Y. 1953), upon which the defendant relies.

This is an order.

[¶ 69,357] Gilbar Pharmacy, Inc. v. Morse.

In the New York Supreme Court, Westchester County. 141 N. Y. L. J., No. 92, page 15. Dated May 13, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Enforcement Activity or Policy.—A retail pharmacy was granted a temporary injunction restraining a mail order house from selling trade-marked products at less than the prices established under the New York Fair Trade Act. In defense, it was contended that (1) other competitors were engaged in "price cutting," (2) the pharmacy was conspiring with other competitors to injure the business of the mail order house, (3) there was no allegation or proof that the manufacturers of the products were presently enforcing such minimum resale prices, and (4) the pharmacy made no showing of actual damages. Also, the mail order house requested the court to "take judicial notice of the fact that price cutting, and discounting of drug and sundry products at retail is rampant and notorious." Those assertions were extremely general, inconclusive, and, in prior cases, had been held insufficient as a matter of law.

See Fair Trade, Vol. 1, ¶ 3440.34.

[*Fair Trade Action*]

BRENNAN, Justice [*In full text*]: This is a motion for a temporary injunction in an action for a permanent injunction pursuant to the Fair Trade Law of this State, known as the Feld-Crawford Act (General Business Law, section 369-a *et seq.*). The plaintiff owns and operates a drug store in the City of Yonkers and the defendants conduct a mail order business in said city wherein they offer for sale (by the distribution of circulars, order forms and self-addressed envelopes) well advertised, trade-marked and brand named drugs, toiletries and other like articles at stated discounts. With a few exceptions, the plaintiff handles and sells the same merchandise. It appears to be clear that by the defendants' methods, they are knowingly offering the aforesaid products for sale at less than the regular, legal prices established under the Fair Trade Law.

[*General and Inconclusive Assertions*]

In this court's view the plaintiff has established a clear case for a temporary injunction. The contentions of the defendants as set forth in an opposing affidavit by one of them are to the effect that other competitors in the area have violated said law by "price cutting"; that the plaintiff is conspiring with said other competitors to injure and destroy the defendants' business so that the plaintiff and said other competitors will be free to sell the subject products at prices below the prices established pursuant to law; that the plaintiff has failed to show that any customers of

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the plaintiff or any person in the area which plaintiff services, has purchased any of the subject products from the defendants or has been solicited by the defendants; that there is no allegation or proof that the manufacturers, owners or distributors of the subject products are presently enforcing such minimum retail prices; that the court is requested to "take judicial notice of the fact that price cutting and discounting of drug and sundry products at retail is rampant and notorious"; and that plaintiff has made no showing of actual damages.

Not only are these assertions extremely general but they are inconclusive and such like assertions were made, considered and passed upon by Mr. Justice Eager in the case of *Whitaker Pharmacy, Inc. v. Pinkiert Supply Store, Inc.* [1957 TRADE CASES ¶ 68,879], (N. Y. L. J., December 9, 1957), and by Mr. Justice Fanelli, in the case of *Chester Hill Pharmacy, Inc. v. Westchester Union Drug Plan, Inc.* [1958 TRADE CASES ¶ 69,092], (N. Y. L. J., June 16, 1958), and were held to be insufficient as a matter of law.

[*Temporary Injunction Granted*]

Accordingly, the motion is granted. Settle order on notice providing for a bond in the sum of $5,000 and a direction that the plaintiff notice this case for trial for the next available term of court.

[¶ 69,358] Baldwin-Lima-Hamilton Corporation and Edward E. Simmons, Jr. v. Tatnall Measuring Systems Company and The Budd Company.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 23505. Dated December 1, 1958. Supplemental Opinion dated December 24, 1958.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Patents—Restricting Use of Patented Article After Sale—Allocation of Markets in Patented Articles—Test of Legality.—An exclusive licensee of a "strain gage," a device for measuring "strain" in materials, was barred from enforcing the patent against an infringer where the patented gages were sold to "licensees" under agreements which provided that the gages could be resold only as an element in apparatus manufactured by the "licensees." Since only one "license" was issued for each field of use, "licensees" were able to sell equipment embodying the gage in fields which were noncompetitive with each other. As to unpatented articles, agreements among competitors to allocate marketing territories are unreasonable *per se* and void under the Sherman Act. Therefore, if the gages had been unpatented, the arrangements between the licensee and its "licensees" could not have survived the Sherman Act. However, the patent laws afford no authority for a patentee to control the use to which a patented article may be put after the patentee has sold it. Hence, the restriction imposed upon the "licensees" and "purchasers" was an effort to enlarge the patent monopoly beyond the point contemplated by the patent laws and had to be tested as a matter of general contract law, rather than as an incident of the patent grant. So tested, the allocation of fields of use was illegal *per se* under the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500; Private Enforcement and Procedure, Vol. 2, ¶ 9040.05.

Exclusive Dealing Under Clayton Act, Section 3—Patent Misuse as Bar to Infringement Action—"Tying" Other Apparatus to Sale of Patented Device.—An exclusive licensee of a "strain gage," a device for measuring "strain" in materials, was barred from enforcing the patent, even though it was valid and had been infringed, because the licensee misused the patent in "tying" the use of other apparatus to the use of the patented gage. The licensee, by selling the gages to "licensees" under agreements which provided that they could resell them only as an element in apparatus manufactured by the "licensees", used the patent monopoly to further the sale of other apparatus with which the patented device could be used. Anyone who desired to use the patented gage as an element in an apparatus of the type manufactured by the licensee or its "licensees" was compelled to buy from them the other apparatus as well as the patented gage. By that marketing policy, the licensee was able to reduce or eliminate the competition that might have been

encountered in selling such other apparatus. That misuse barred the infringement action in a court of equity, regardless of whether the "tying" arrangement resulted in a violation of the antitrust laws. Furthermore, it was not material whether the "tied" apparatus was covered by other patents of the licensee. The monopoly which the patent law grants with respect to an article covered by one patent may not be utilized to aid the patentee in exploiting another article, even though it is covered by another patent.

In addition, the tied product was not a part of a patented combination and hence subject to the monopoly of the patent. Also rejected was the contention that 35 United States Code 271(d) (a section of the patent statute providing that it is not misuse for a patentee to license the doing of acts that, without his consent, would constitute "contributory infringement") barred the misuse defense. An unauthorized sale of that apparatus would not constitute "contributory infringement" because the "tied" apparatus was not "a material part of the invention."

See Exclusive Dealing, Vol. 1, ¶ 4007.275, 4007.725, 4009.600.

Exclusive Dealing Under Clayton Act, Section 3—Restrictive Trade Practices—Requirements Contracts—Effect on Competition.—An exclusive licensee of a "strain gage," a device for measuring "strain" in materials, did not violate Section 3 of the Clayton Act by including requirements provisions in "licensing" agreements. Typical of those agreements was one which granted to an aircraft company a non-exclusive right to manufacture 10 per cent of its annual gage requirements, but which required it to purchase the remainder of its requirements from the licensee. That obligation to buy exclusively from the licensee was tantamount to an agreement not to use or deal in the goods of the licensee's competitors. However, to contravene Section 3, a requirements contract must provide a potential or actual clog on competition. The "licensing" agreements, since they did not prevent "licensees" from buying gages that did not infringe the licensee's patents, were, in effect, undertakings not to infringe those patents. Since the Clayton Act has no interest in fostering illicit competition, an agreement to refrain from infringement is beyond its reach. Furthermore, competition in non-infringing gages was not restrained by the requirements provisions. The "licensees," having acquired gages from the licensee under terms which gave them no authority to resell, could not have been potential competitors of the licensee. "Purchasers" from the licensee, in theory at least, might have competed for the aircraft companies' trade if those companies had not been required to purchase their requirements from the licensee. Viewed realistically, however, those "purchasers" could not have competed unless they paid the licensee less than the aircraft companies had to pay. No such price distinction could be assumed since it would have been *prima facie* illegal under the Robinson-Patman Price Discrimination Act.

See Exclusive Dealing, Vol. 1, ¶ 4007.275, 4007.550, 4009.100, 4009.475.

For the plaintiffs: Arthur Littleton and Robert C. McAdoo (of Morgan, Lewis and Bockius), Philadelphia, Pa.; Walter J. Blenko, Sr., and Walter J. Blenko, Jr. (of Blenko, Hoopes, Leonard & Buell), Pittsburgh, Pa.; and Edward A. Hathaway, Waltham, Mass., for Baldwin-Lima-Hamilton Corp.

For the defendants: Joseph W. Swain and Thomas N. O'Neill, Jr. (of Montgomery, McCracken, Walker & Rhoads), Philadelphia, Pa.; Dexter N. Shaw and John C. Dorfman (of Howson & Howson), Philadelphia, Pa.

Opinion

[*Patent Infringement Action*]

STEEL, District Judge [*In full text except for omissions indicated by asterisks*]: Simmons, a patentee, and his licensee, Baldwin-Lima-Hamilton Corporation (hereinafter "Baldwin"), have sued The Budd Company (hereinafter "Budd") and its wholly owned subsidiary, Tatnall Measuring Systems Company (hereinafter "Tatnall"), for infringement of Claims 1, 2, 3, 4, 5, 7, 8 and 9 of Patent No. 2292549 (hereinafter "Simmons patent"). The patent relates to a gage for measuring strain in materials.

Baldwin has marketed "bonded wire strain gages" under the Simmons patent since 1940. Without license from plaintiffs, Tatnall has manufactured, used and sold "foil type" strain gages and Budd has used "foil type" strain gages manufactured by Tatnall. The "foil gages", plaintiffs charge, infringe the Simmons patent.

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[*Defenses*]

In defense the defendants have pleaded (a) noninfringement; (b) invalidity because of (i) anticipation, (ii) lack of invention and obviousness, (iii) inadequacy of patent description, and (iv) inclusion of new matter in amendment to application; and (c) unclean hands because of (i) fraud on the Patent Office, and (ii) patent misuse.

* * *

* * *

(b) Patent Misuse

[*Clayton Act, Section 3*]

1. *Requirements Licenses.* Defendants assert that Baldwin imposed a contractual obligation upon a number of its licensees which required them to purchase all or substantially all of their strain gages exclusively from Baldwin. This requirement is said to violate § 3 of the Clayton Act.[25] If this is true the patent may not be enforced. A patentee who attempts to expand the patent monopoly in derogation of the anti-trust laws is estopped to enforce it. *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.* [1944-1945 Trade Cases ¶ 57,202], 320 U. S. 680, 684 (1944).

The agreements containing the requirements provisions were entered into by Baldwin between 1944 and 1949 with a number of aircraft companies. Each of these agreements constitutes both a license and a sales contract, although it is designated a "license". The license between Baldwin and North American Aviation Company is typical. By this license Baldwin granted to North American a non-exclusive right to manufacture for specified limited uses and disposition a wire-type strain gage embodying the invention of a number of patents, including the Simmons patent. The quantity which North American was authorized to manufacture was limited to 10% of its annual requirements; North American was required to buy the remainder of its requirements from Baldwin. North American was free to manufacture gages which were not subject to Baldwin's patents. The purchase requirement pertained to patented gages only. The license ran from year to year and was subject to annual termination by either party upon notice.

Analyzing the requirements provision in the terms of § 3 of the Clayton Act, it appears that the contracts are "for sale of goods", *Radio Corporation of America v. Lord,* 28 F. 2d 257 (3d Cir. 1928); cert. den. 278 U. S. 648; that the obligation to buy exclusively from Baldwin is tantamount to an agreement "not (to) use or deal in the goods . . . of a competitor or competitors . . ." of Baldwin's, *Standard Oil Company of California v. U. S.* [1948-1949 Trade Cases ¶ 62,432], 337 U. S. 293, 297-298 (1949); and that the Clayton Act by its terms applies to both patented and unpatented articles.

[*Agreement Not to Infringe Patents*]

It is to be noted that the licenses do not prevent the licensees from buying gages of any kind, in any quantities, and from whomsoever the licensees please, so long as the gages do not infringe Baldwin's patents. In effect, the agreements are undertakings not to infringe the Baldwin patents.

[*Effect on Competition*]

To contravene § 3 of the Clayton Act a requirements contract must provide a potential or actual clog on substantial competition. *Standard Oil Company of California v. U. S., supra.* But the competition which the Clayton Act is designed to encourage is legitimate competition. It has no interest in fostering illicit competition. Yet, defendants' argument presupposes that the contrary is true and that an infringer is the object of the same Congressional solicitude as an honest trader. Since the patent laws subject an infringer to an action for an injunction and damages, an agreement to refrain from infringement is beyond the reach of the Clayton Act.

[*"Tying Clause" Cases Distinguished*]

International Business Machines Corporation v. U. S. [1932-1939 Trade Cases ¶ 55,112], 298 U. S. 131 (1936) does not point to a contrary conclusion. There, the Court held

* * *

[25] Section 3 of the Clayton Act (15 *U. S. C.* § 14) reads:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, . . . whether patented or unpatented, for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

that § 3 of the Clayton Act had been violated by a lease of a patented tabulating machine which provided that the lease should terminate if cards not manufactured by the lessor were used in the leased machine. It was assumed by the Court that the licensor owned patents which gave it a monopoly to manufacture and sell the cards separately and in combination with tabulating machines.

International Business Machines involved the validity of a tying clause; the requirements provisions of the Baldwin licenses do not. What the tying clause cases condemn is the extension of the monopoly of one patented product to create a monopoly or restraint of competition with respect to a second product not countenanced by the patent applicable to the first product. *Automatic Radio Co. v. Hazeltine* [1950-1951 TRADE CASES ¶ 62,634], 339 U. S. 827, 832 (1950); *Times-Picayune Publishing Co. v. U. S.* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, 614 (1953). Neither the *rationale* nor the doctrines involved in a tying clause case can be utilized to dispose of a case involving a requirements provision. *Times-Picayune Publishing Co. v. U. S., supra,* p. 614. This was implicitly recognized in *Steiner Sales Co. v. Schwartz Sales Co.* [1932-1939 TRADE CASES ¶ 55,187], 98 F. 2d 999, 1010-1011 (10th Cir. 1938); cert. den. 305 U. S. 662 (1939) when the Court sustained a requirements clause pertaining to the purchase of a patented article the terms of which are substantially indistinguishable from that in the Baldwin license. In the copyright field a result comparable to that in *Steiner* was arrived at in *Cardinal Films, Inc. v. Republic Pictures Corporation* [1957 TRADE CASES ¶ 68,584], 148 F. Supp. 156 (S. D. N. Y. 1957).

[*Validity of Patents*]

Defendants argue that by the requirements provisions in its licenses Baldwin has protected itself from infringement without putting the validity of its patent in hazard as it inevitably would have done if it had sued the licensee or its vendor for infringement. This contention is based upon the following statement in the *International Business Machines* opinion (p. 137):

> ". . . The only purpose or effect of the tying clause, so far as it could be effectively applied to patented articles, is either to prevent the use, by a lessee, of the product of a competitor of the lessor, where the lessor's patent, *prima facie,* embraces that product, and thus avoid judicial review of the patent, or else to compel its examination in every suit brought to set aside the tying clause, although the suit could usually result in no binding adjudication as to the validity of the patent, since infringement would not be in issue. . . ."

Regardless of what was said in the *International Business Machines* case when a tying clause was involved, later decisions make it clear that when an agreement otherwise offensive to the anti-trust laws is sought to be sustained upon the ground that its terms are consistent with the monopoly conferred by a patent to which the agreement pertains, the validity of the patent can be assailed in connection with the assault upon the agreement. *Sola Electric Co. v. Jefferson Electric Co.* [1940-1943 TRADE CASES ¶ 56,245], 317 U. S. 173 (1942); *MacGregor v. Westinghouse Electric & Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,525], 329 U. S. 402 (1947); *Katzinger Co. v. Chicago Metallic Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,524], 329 U. S. 394 (1947). Under these decisions, if Baldwin had sued under the requirements provision of its license to enjoin an aircraft company from purchasing an infringing gage, the aircraft company could have pleaded the invalidity of the Simmons patent and obtained an adjudication thereon.

[*Potential Competitors*]

At oral argument the contention was advanced for the first time that Baldwin had sold Simmons gages to "purchasers" and "licensees" other than the aircraft companies under terms which permitted their resale to the aircraft companies. These non-infringing gages, defendants assert, would have been potentially competitive with the gages which Baldwin was selling to the aircraft companies had not the competition been prevented by the requirements provisions of the aircraft company licenses.[26]

[*Competition Not Restrained*]

The "licensees" of Baldwin to which defendants refer as potential competitors with Baldwin for the business of the aircraft companies, presumably included the individuals, educational institutions, and indus-

[26] Transcript of argument, October 10, 1958, at p. 157.

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trial organizations other than the aircraft companies, to which Baldwin had issued a wide variety of licenses. Some of these licenses, such as the so-called "experimental and research" licenses, confined the use of the gages to the licensees personally and expressly prohibited resale. These licensees could not possibly have been potential competitors of Baldwin's for the business of the aircraft companies even if Baldwin's licenses with the latter had contained no requirements clauses. Other so-called "commercial licenses" granted by Baldwin contemplated the incorporation of the Simmons gage as an integral part of equipment of various kinds which the licensees were manufacturing and selling.[27] These licenses conferred no authority upon the licensees to sell strain gages *per se*. These licensees were, however, free to sell equipment embodying the Simmons gage to the aircraft companies for the requirements provisions of the aircraft companies' licenses were not applicable to equipment embodying strain gages but applied only to strain gages *per se*. Competition between Baldwin and its "commercial licensees" for the aircraft company business was therefore in no way restrained by the requirements provisions in the aircraft companies' licenses.

The "purchasers" of Baldwin gages which defendants cite as potential competitors of Baldwin for the aircraft company business acquired their gages from Baldwin accompanied by a notice which stated that the gages could be used only in a temporarily expendable manner for testing purposes. Plaintiffs and defendants both agree that the notice did not prevent a resale of the gage to anyone—including the aircraft companies—provided the gages were used within the limitations of the notice.[28] Most of the aircraft company gage useage was within the area of use authorized by the notice. So that in theory at least purchasers under notice might have competed with Baldwin for the aircraft companies' strain gage trade had the aircraft companies not been burdened by the provision in their licenses requiring them to make all purchases of patented gages from Baldwin. The record, however, does not reveal the price which the purchasers under notice or the aircraft companies paid Baldwin for their gages. Viewed realistically, unless the purchasers under notice paid Baldwin less than the aircraft companies paid it, they could not have been potentially competitive with Baldwin. Certainly a price differential in favor of notice purchasers as against the price paid by the aircraft companies cannot be assumed, especially in view of 15 U. S. C. § 13 which would have made such a price distinction *prima facie* illegal.

2. *Restrictions on Use of Gages after Sale.* Baldwin was an exclusive licensee of the Simmons patent with the right to sublicense. Nevertheless, Baldwin chose to exploit the patent primarily by manufacturing and selling the gages. The gages were subject to two general categories of use: first, in the field of structural testing or stress analysis when the gage was used in a temporary expendable manner; and second, as a part of some other machine or apparatus in which the gage performed a permanent operating, controlling or service function.

[*Allocation of Markets*]

Baldwin sold the Simmons gages accompanied by notices and under "licenses". Vendees of gages sold with notices were prohibited from using the gages except in a temporary expendable way for testing or stress analysis purposes. By the notices Baldwin reserved to itself all fields in which the gages could be permanently used as an operating, controlling or service function as part of a machine, apparatus or device. Some of the reserved fields were exploited

[27] Examples of commercial licenses granted pursuant to these policies are as follows: Byron Jackson Company (D-311)—restricted to the field of oil field tools and equipment; Waugh Equipment Company (D-277)—restricted to the field of weighing airplanes by permanently applying the gauge to the surface of a normally existing structural element; Brown & Sharpe Mfg. Co. (D-312)—restricted to certain machine tools and dimensional measuring tools; Cox and Stevens Aircraft Corporation (D-319)—restricted to compression cells for aircraft weighing and platform scales; Industrial Electronics (D-323)—restricted to certain torsional vibration pickups, linear vibration pickups, and fluid pressure sensitive units; Polyphase Instrument Company (D-346)—restricted to the field of spark plugs for internal combustion engines; Instron Engineering Corporation (D-347)—restricted to certain enumerated equipment to be sold only for use in testing textiles and other non-metallic fibrous material; the Foxboro Company (D-351)—restricted to the field of fluid pressure measuring devices of the diaphragm type; Fredric Flader, Inc. (D-365)—restricted to the field of accelerometers and fluid pressure pickups of the sylphon bellows type.

[28] Transcript of argument, October 10, 1958, pp. 157, 180.

by Baldwin by the manufacture and sale of equipment and devices which utilized the Simmons gage to perform an operating, controlling or service function. Fields not so exploited by Baldwin were the subject of so-called "commercial licenses" which Baldwin granted to other manufacturing concerns. While these licenses were non-exclusive, Baldwin's policy was to issue only one of these licenses for each field of use. (See footnote 27, p. 65, *supra*). Under each license Baldwin sold gages to the licensee but with a provision that the gages could be resold only as an element in apparatus manufactured by the licensee. The result was that Baldwin was able to manufacture and sell devices embodying the Simmons gage as an operating, controlling or service element without competition from others, and its commercial licensees were able to sell equipment embodying the Simmons gage as a permanent element in fields which were non-competitive with each other.

[*Patent "Status" Lost*]

Agreements among competitors to allocate or divide marketing territories for unpatented articles are unreasonable *per se* and void under the Sherman Act. *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211 (1899). The arrangements between Baldwin and its vendees could not survive the Sherman Act if the gages had been unpatented. Defendants say that although the Simmons gages were patented, the monopoly of the patent was exhausted by the sale of the gages, and that thereafter they had the status of unpatented articles of commerce. The validity of this argument depends upon whether under the patent laws a patentee who sells a patented article may validly restrict the use which the vendee may make of it.

The Supreme Court has said on many occasions that the monopoly of a patentee remains so long as he retains ownership of the patented article, but that the monopoly ends with the sale of the article and that the patentee may not thereafter, by virtue of his patent, control the use of the article. The statement in *U. S. v. Univis Lens Co.* [1940-1943 Trade Cases ¶ 56,208], 316 U. S. 241, 250-252 (1942) is typical:

". . . His monopoly remains so long as he retains the ownership of the patented article and the patentee may not thereafter, by virtue of his patent, control the use or disposition of the article. *Bloomer v. Mcquewan*, 14 How. 539, 549-50; *Adams v. Burke*, 17 Wall. 453; *Hobbie v. Jennison*, 149 U. S. 355. . . ."

". . . The first vending of any article manufactured under a patent puts the article beyond the reach of the monopoly which that patent confers. . . ."

Equally terse statements to the same effect are found in *U. S. v. General Electric Company*, 272 U. S. 476, 489 (1926); *U. S. v. Masonite Corporation* [1940-1943 Trade Cases ¶ 56,209], 316 U. S. 265, 277-278 (1942); *Bauer & Cie v. O'Donnell*, 229 U. S. 1, 17 (1913); and *Keeler v. Standard Folding Bed Company*, 157 U. S. 659, 666 (1895).

It is true that these statements were made either in cases such as *Keeler v. Standard Folding Bed Company, supra*, which involved a sale without a restraint on use, or in cases such as *Bauer & Cie v. O'Donnell, supra; U. S. v. General Electric Company, supra; U. S. v. Univis Lens Co., supra;* and *U. S. v. Masonite Corporation, supra*, in which patentees attempted to fix the resale price of patented articles; and that cases in each of these groups may possibly be distinguished from that at bar wherein a limitation on use is sought to be imposed in connection with an initial sale by a patentee. Nevertheless, the consistency with which the Supreme Court has asserted for over half a century that the patent laws afford no authority for a patentee to control the use to which a patented article may be put after the patentee has sold it, and the failure of the Supreme Court to qualify in any way the reach of this principle make me disinclined to write exceptions into the principle at odds with its inherent comprehensiveness.

[*Allocation Illegal Per Se*]

So that what the Supreme Court has said on the subject ends the matter. The restrictions which Baldwin imposed upon its licensees and purchasers under notice find no support in the patent laws and constitute an effort by Baldwin to enlarge the patent monopoly beyond the point contemplated by the patent laws. The validity of the restraint on use to which Baldwin's vendees were subjected must be upheld, if at all, not as an incident of the patent grant, but as a matter of general contract law. So tested, the allocation of fields of use are illegal *per se* under the principle enunciated in *Addyston Pipe & Steel Co. v. U. S., supra*, in construing the Sherman Act.

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[*"Tying" Apparatus to Patented Article*]

Furthermore, Baldwin's policy of limiting the use of its gages after their sale had a more basic vice. Baldwin realized from the beginning that profits on the sale of Simmons gages *per se* would be minimal and that if it was to secure a reasonable return it would have to be obtained from the sale, either by itself or by its licensees, of apparatus in which the Simmons gage was embodied as a permanent, operating, controlling, or service element. Accordingly Baldwin established a policy for the marketing of its gages which compelled anyone who desired to use a Simmons gage as an element in an apparatus of a type manufactured by Baldwin or by its licensees, to buy the apparatus from Baldwin or its licensees, regardless of whether similar apparatus could be obtained from other manufacturers. To illustrate, if anyone desired to use a Simmons gage as an element in a load cell (a device for weighing airplanes) he could do so only by purchasing both the load cell and the gage from Baldwin. Similarly, if anyone desired to use a Simmons gage as an element in a weight indicator, tong torque indicator, or drilling fluid pressure indicator for use in connection with oil field tools or equipment, he could do so only by purchasing both the indicator and the gage from Byron-Jackson, one of Baldwin's commercial licensees.[29] Had Baldwin not restricted the use which could be made of the gages which it sold, the buyer of the gages could have purchased load cells or indicators from any supplier of his choice and used the gages in connection with them.

When Baldwin himself was the seller, as in the case of the load cells, the competitive benefit which it received in the restraint on the use of its gages is obvious. But Baldwin obtained additional rewards from the enhanced competitive position which some of its licensees obtained by virtue of the use restriction. Thus, Baldwin not only made a profit when it sold strain gages to Byron-Jackson, but when Byron-Jackson sold weight indicators embodying the gage as an element, Byron-Jackson was required to pay Baldwin a royalty on all "attachments" and "measuring and/or recording instruments" which it sold for use with the indicators.[30]

[*Patent Misused*]

By thus conditioning the right to use Simmons gages as a permanent element solely with equipment purchased from Baldwin or its licensees, Baldwin has used the monopoly of the Simmons patent to further the sale of apparatus with which the gages can be used. The Simmons patent was issued as a reward to Simmons for disclosing his strain gage discovery to the public. The monopoly which Simmons received from the Patent Office for this disclosure was the full recompense which the patent laws contemplated he should have. Baldwin has, however, utilized the patent so as to obtain a benefit beyond the purview of the patent statute. By its marketing policy of the gages Baldwin has been able to reduce or eliminate the competition which it and its licensees might otherwise have encoutered in selling devices such as load cells and weight indicators not covered by the Simmons patent. Under the *rationale* of *Morton Salt Co. v G. S. Suppiger Co.* [1940-1943 Trade Cases ¶ 56,176], 314 U. S. 488 (1942) and *International Business Machines Corp. v. U. S., supra,* the manner in which Baldwin has "tied" the use of the Simmons gage to the use of apparatus not covered by the Simmons patent sold by it and by its licensees, constituted a misuse of the Simmons patent. That misuse bars the enforcement of the patent against the defendant in a court of equity regardless of whether the "tying" practices resulted in a violation of the antitrust laws. *Morton Salt Co. v. G. S. Suppiger Co., supra,* p. 494; see also *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.,* [1946-1947 Trade Cases ¶ 57,532], 329 U. S. 637, 641 (1947).

[*Status of "Tied" Products*]

The record is not clear whether all of the products to which the Simmons gages were "tied" were covered by other Baldwin patents. This, however, is not material. The monopoly which the patent law grants with respect to an article covered by one patent may not be utilized to aid the patentee

[29] See footnote 27 at p. 65, *supra,* for a list of other licensees which received similar competitive benefits from Baldwin's marketing policy.

[30] The license between Byron-Jackson and Baldwin is typical of the commercial licenses listed in footnote 27, p. 65. Under each the licensee was required to pay royalties to Baldwin based on the licensee's sales price of the machine embodying the Simmons gage or the instrumentation sold for use with the Simmons gage or upon the embodying machinery and the instrumentation.

to exploit another article even though it is covered by another patent. *Ethyl Gasoline Corporation v. U. S.* [1940-1943 TRADE CASES ¶ 56,013], 309 U. S. 436, 459 (1940). Compare *U. S. v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 157 (1948); *Automatic Radio Manufacturing Co., Inc. v. Hazeltine Research, Inc.* [1950-1951 TRADE CASES ¶ 62,634], 339 U. S. 827, 831 (1950).

35 *U. S. C.* § 271 is not inconsistent with the foregoing views.

[*Action Dismissed*]

The action must therefore be dismissed notwithstanding the fact that the Simmons patent is valid and infringed.

The statements herein are intended to serve as findings of fact and conclusions of law under Rule 52.

Let an order be submitted accordingly.

Supplemental Opinion *Sur* Petition for Reargument

[*Patent Misuse*]

STEEL, District Judge [*In full text*]: A few supplemental observations appear warranted in view of the arguments made by plaintiffs in their petition for reargument.

[*"Tied" Product—Alleged Part of Patent "Combination"*]

In contending that Baldwin has not misused the Simmons patent by tying the gage *per se* to the various types of strain sensitive apparatus which it and its licensees sell, plaintiffs assert that the apparatus is part of the patented combination and hence the entire structure—apparatus and gage—is subject to the monopoly of the patent. Plaintiffs point out that at p. 2 [*not reproduced*] of the opinion filed on December 1, 1958 the test body is found to be an element of claim 5 of the patent. This finding is now retracted. A closer reading of claim 5 discloses that the test body is not an element of Simmons' invention. While claim 5 mentions the test body, the reference is simply to explain what strain the gage measures and to describe the bonding of the filament. This reference to the test body does not, without more, make it an element in the claim. Compare *Williams Manufacturing Co. v. United Shoe Machinery Corp.*, 316 U. S. 364, 369 (1942).

The distinction between a patent which merely covers a gage *per se* and combination patents which cover a gage *per se* and the apparatus with which the gage is used, is disclosed by comparing the patent in suit with other patents of Simmons' under which Baldwin grants licenses. The patent in suit states that it is "directed to my improved type of strain gage *per se*". Divided out of the application for this patent are patents covering the combination of a strain gage *per se* and specific types of apparatus with which the gage *per se* is used as a component. These divisional patents cover the combination of the gage *per se* when used in conjunction with a dynamometer (Patent 2,316,203), with an explosion pressure gage (Patent 2,327,935), and with a torque measuring apparatus (Patent 2,350,072). In each of the latter three patents the specific type of apparatus with which the gage *per se* is used is an element of the combination patent. In the patent in suit the "test body" with which the gage *per se* is used is not.

[*Patent Statute—Bar to "Misuse Defense"*]

Plaintiffs contend that because of the limitations on use which are expressly imposed when Baldwin sells its gages, Baldwin's relationship with its purchasers under notice and its commercial licensees is legally no different than if the arrangement involved a license. Accordingly it is asserted that 35 *U. S. C.* § 271(d) is a bar to the misuse defense.

[*Contributory Infringer*]

Conceding *arguendo* that a sale with a restriction on use is indistinguishable from a license limiting use, still 35 *U. S. C.* § 271(d) will not sustain Baldwin's tying policy against the charge of misuse. Section 271 (d) does not define the elements of misuse. It simply states what is *not* misuse. It says that it is not misuse for a patent owner, otherwise entitled to relief for infringement or contributory infringement, to derive revenue either from acts or from licensing others to perform acts which, if performed without the patentee's consent, would constitute contributory infringement. Plaintiffs argue that an unauthorized sale of apparatus to be used with the gage which Baldwin has sold under the notice restriction would constitute contributory infringement; hence, plaintiffs assert, by the terms

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of § 271(d) the tying of the apparatus to the gage cannot be a misuse of the patent.

The premise of this argument will not withstand analysis. Section 271(c) defines a contributory infringer. Under its definition one is a contributory infringer only if a combination of several factors exists. To be liable for contributory infringement under the statute (1) a person must sell a component of a patented combination, (2) the component must constitute a material part of the invention, (3) the seller must know that the component has been especially made or especially adapted for use in an infringement of the patent, and (4) the component must not be a staple article or commodity of commerce suitable for substantial non-infringing use. Assuming that in the case of an unauthorized sale of apparatus for use with the Simmons gage factors (1), (3) and (4) were proven, the seller still would not be a contributory infringer because the apparatus would not be "a material part of the invention". The divisional action in the Patent Office supports the view that the combination of the strain gage *per se* and specific types of strain sensitive apparatus constitute inventions distinct and independent from the invention of the strain gage *per se*. 35 U. S. C. § 121. Furthermore, in paragraph 54 of plaintiffs' proposed findings of fact it is stated that "the gage element manufactured and sold by Baldwin, and built by others under license, is the heart of the Simmons invention . . .". And at page 3 of plaintiffs' brief dated September 20, 1958 plaintiffs say that the "gage in all its forms, as sold, is . . . a special device constituting the heart of the patented combination". The evidence supports these statements, and forecloses a finding that the apparatus sold by Baldwin and by its licensees, even though they be deemed to be components of the patented combination, are material parts of the invention.

Since then an unauthorized sale of a strain sensitive apparatus for use with a strain gage *per se* would not constitute contributory infringement, § 271(d) does not require a denial of the misuse defense.

In view of the finding that "the test body" in the Simmons patent is not a component of the patent, or, if it is, that it is not a material part of Simmons' invention, *Hunt v. Armour & Co.*, 90 F. Supp. 767 (N. D. Ill.); aff'd 185 F. 2d 722 (7th Cir. 1950), relied upon by plaintiffs, is inapposite.

[*Effect on Competition*]

Plaintiffs argue that the record contains no evidence to support the statement which is found at page 74 of the December 1 opinion:

> "* * * By its marketing policy of the gages Baldwin has been able to reduce or eliminate the competition which it and its licensees might otherwise have encountered in selling devices such as load cells and weight indicators not covered by the Simmons patent. . . ."

While there may be no direct evidence to support this statement, it is a fair inference to be drawn from all the evidence. Moreover, the record leaves no room to doubt that for years it has been Baldwin's policy to refuse to sell its gages *per se* to persons who might desire to use them with strain sensitive apparatus of a type manufactured by Baldwin or by its licensees unless the persons bought both the gages *per se* and the apparatus from Baldwin or its licensees. This policy was enforced regardless of whether the buyers were in a position to manufacture the apparatus themselves or to buy it from others. The enforcement of this policy constituted an illegal expansion of the monopoly conferred by the Simmons patent on the gage *per se* beyond that contemplated by the patent grant. This misuse is a bar to the enforcement of the patent against the defendants regardless of whether plaintiffs' activities constituted a violation of the antitrust laws.

The foregoing shall constitute supplemental findings of fact and conclusions of law in accordance with Rule 52.

[*Order*]

An order will be entered denying the petition of plaintiffs for a reargument.

[¶ 69,359] **Baldwin-Lima-Hamilton Corporation and Edward E. Simmons, Jr. v. Tatnall Measuring Systems Company and The Budd Company.**

In the United States Court of Appeals for the Third Circuit. No. 12,846. Argued May 7, 1959. Filed May 20, 1959.

Appeal from the United States District Court for the Eastern District of Pennsylvania. STEEL, District Judge.

Sherman and Clayton Antitrust Acts

Exclusive Dealing Under Clayton Act, Section 3—Patent Misuse as Bar to Infringement Action—"Tying" Other Apparatus to Sale of Patented Device.—A ruling that an exclusive licensee of a patented device for measuring "strain" in materials had "misused" the patent and was, therefore, barred from enforcing it against an infringer was affirmed upon the opinion, and particularly upon the supplemental opinion, of the trial judge. In those opinions, the trial court found that the licensee refused to sell its patented device to prospective purchasers desirous of using it with apparatus of a type manufactured by the licensee or its "licensees" unless the purchase included such other apparatus. The trial court was clearly right in holding that such misuse constituted an illegal expansion of the patent grant and was a bar to the enforcement of the patent, regardless of whether it violated the antitrust laws.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500; Exclusive Dealing, Vol. 1, ¶ 4007.275, 4007.550, 4007.725, 4009.100, 4009.475, 4009.600; Private Enforcement and Procedure, Vol. 2, ¶ 9040.05.

For the appellant: Walter J. Blenko, Pittsburgh, Pa.

For the appellee: Joseph W. Swain, Jr., Philadelphia, Pa.

Affirming a decision of the U. S. District Court, Eastern District of Pennsylvania, 1959 Trade Cases ¶ 69,358.

Before MCLAUGHLIN, KALODNER and STALEY, Circuit Judges.

Opinion of the Court

[*Patent Misuse Ruling Affirmed*]

PER CURIAM [*In full text*]: Plaintiff appeals from the finding of misuse of the suit patent.

We agree with the district court that the test body is not an element of the patent which is for a gage per se.

The limitation on use of the gage imposed by appellant, as found by the district court, consists of a flat refusal to sell it to prospective purchasers desirous of using it with strain sensitive apparatus of a type manufactured by Baldwin or its licensees unless the purchase included such apparatus from Baldwin or its licensees. The district court was clearly right in holding: "The enforcement of this policy constituted an illegal expansion of the monopoly conferred by the Simmons patent on the gage per se beyond that contemplated by the patent grant. This misuse is a bar to the enforcement of the patent against the defendants regardless of whether plaintiffs' activities constituted a violation of the antitrust laws."

The judgment of the district court will be affirmed upon the opinion and particularly the supplemental opinion of Judge Steel.

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[¶ 69,360] Beacon Theatres, Inc. v. The Hon. Harry C. Westover, Judge of the United States District Court of the Southern District of California, Central Division, et al.

In the Supreme Court of the United States. No. 45—October Term, 1958. Dated May 25, 1959.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Declaratory Judgment and Equitable Relief—Counterclaim for Treble Damages Under Antitrust Laws—Separate Trials—Right to Jury Trial on Antitrust Issues.—A trial court improperly denied an antitrust treble damage counterclaimant the right to a jury trial by ordering, in advance of a jury trial of the issues raised by the counterclaim, a separate trial to the court, without a jury, of a motion picture exhibitor's complaint in which it sought (1) a declaratory judgment sustaining the reasonableness, under the antitrust laws, of its "clearances," and (2) an injunction prohibiting a competing exhibitor, the counterclaimant, from instituting an action under the antitrust laws. The counterclaim charged the exhibitor with conspiring to restrain trade and monopolize "first-run" pictures in violation of the antitrust laws. A common issue of both causes was the "reasonableness" of the clearances granted to the exhibitor. Thus, by way of *res judicata* or collateral estoppel, the court's prior determination of the equitable cause might limit the counterclaimant's opportunity to try, in a later trial to a jury, every issue which had a bearing upon its treble damage suit. Assuming that the pleadings could be construed to support a request for an injunction against threats of lawsuits, and assuming additionally that the complaint could be read as alleging the kind of harassment by a multiplicity of lawsuits which would traditionally have justified equity to take jurisdiction and settle the case in one lawsuit, under the Declaratory Judgment Act and the Federal Rules of Civil Procedure, neither claim could justify denying the counterclaimant a trial by jury of all the issues in the antitrust controversy.

Under the Federal rules, the same court may try both legal and equitable causes in the same action. Thus, while giving the counterclaimant a full jury trial on the antitrust issues, a temporary injunction could be issued to protect the exhibitor from any irreparable harm. If, however, there should be cases where such protection could not be given while a legal cause was being afforded a jury trial, the trial court would have to use its discretion in deciding whether to try the legal or equitable cause first. The right to a jury trial, however, is a constitutional one; hence, that discretion is very narrowly limited and must, where possible, be exercised to preserve jury trial. Only under the most imperative circumstances can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

See Private Enforcement and Procedure, Vol. 2, ¶ 9046.40, 9048, 9048.275, 9060.

For the petitioner: Jack Corinblit, Fred A. Weller, and Elwood S. Kendrick, Los Angeles, Cal.

For the respondent: Frank R. Johnston and Hudson B. Cox, Los Angeles, Cal.

Reversing a judgment of the U. S. Court of Appeals, Ninth Circuit, 1958 Trade Cases ¶ 68,923.

[*Right to Jury Trial*]

Mr. Justice Black delivered the opinion of the Court [*In full text*]: Petitioner, Beacon Theatres, Inc., sought by mandamus to require a district judge in the Southern District of California to vacate certain orders alleged to deprive it of a jury trial of issues arising in a suit brought against it by Fox West Coast Theatres, Inc. The Court of Appeals for the Ninth Circuit refused the writ, holding that the trial judge had acted within his proper discretion in denying peti-

tioner's request for a jury. 252 F. 2d 864 [1958 TRADE CASES ¶ 68,923]. We granted certiorari, 356 U. S. 956, because

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U. S. 474, 486.

[*Prior Proceedings*]

Fox had asked for declaratory relief against Beacon alleging a controversy arising under the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, and under the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which authorizes suits for treble damages against Sherman Act violators. According to the complaint Fox operates a movie theatre in San Bernardino, California, and has long been exhibiting films under contracts with movie distributors. These contracts grant it the exclusive right to show "first run" pictures in the "San Bernardino competitive area" and provide for "clearance"—a period of time during which no other theatre can exhibit the same pictures. After building a drive-in theatre about 11 miles from San Bernardino, Beacon notified Fox that it considered contracts barring simultaneous exhibitions of first-run films in the two theatres to be overt acts in violation of the antitrust laws.[1] Fox's complaint alleged that this notification, together with threats of treble damage suits against Fox and its distributors, gave rise to "duress and coercion" which deprived Fox of a valuable property right, the right to negotiate for exclusive first-run contracts. Unless Beacon was restrained, the complaint continued, irreparable harm would result. Accordingly, while its pleading was styled a "Complaint for Declaratory Relief," Fox prayed both for a declaration that a grant of clearance between the Fox and Beacon theatres is reasonable and not in violation of the antitrust laws, and for an injunction, pending final resolution of the litigation, to prevent Beacon from instituting any action under the antitrust laws against Fox and its distributors arising out of the controversy alleged in the complaint.[2] Beacon filed an answer, a counterclaim against Fox, and a cross-claim against an exhibitor who had intervened. These denied the threats and asserted that there was no substantial competition between the two theatres, that the clearances granted were therefore unreasonable, and that a conspiracy existed between Fox and its distributors to manipulate contracts and clearances so as to restrain trade and monopolize first-run pictures in violation of the antitrust laws. Treble damages were asked.

[*Common Issue*]

Beacon demanded a jury trial of the factual issues in the case as provided by Federal Rule of Civil Procedure 38(b). The District Court, however, viewed the issues raised by the "Complaint for Declaratory Relief," including the question of competition between the two theatres, as essentially equitable. Acting under the purported authority of Rules 42(b) and 57, it directed that these issues be tried to the court before jury determination of the validity of the charges of antitrust violations made in the counterclaim and cross-claim.[3] A common issue of the "Complaint for Declaratory Relief," the counterclaim, and the cross-claim was the reasonableness of the clearances granted to Fox, which depended, in part, on the existence of competition between the two theatres. Thus the effect of the action of the District Court could be, as the Court of Appeals believed, "to limit the petitioner's opportunity fully to try to a jury

[1] Beacon allegedly stated that the clearances granted violated both the antitrust laws and the decrees issued in *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 [1946-1947 TRADE CASES ¶ 57,470], 70 F. Supp. 53 [1946-1947 TRADE CASES ¶ 57,526], affirmed in part and reversed in part, 334 U. S. 131 [1948-1949 TRADE CASES ¶ 62,244], subsequent proceedings in the District Court, 85 F. Supp. 881 [1948-1949 TRADE CASES ¶ 62,473]. The decrees in that case set limits on what clearances could be given when theatres were in competition with each other and held that there should be no clearances between theatres not in substantial competition. Neither Beacon nor Fox, however, appears to have been a party to those decrees. Their relevance, therefore, seems to be only that of significant precedents.

[2] Other prayers, aside from the general equitable plea for "such further relief as the court deems proper" added nothing material to those set out.

[3] Fed. Rules Civ. Proc., 42(b) reads: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number or claims, cross-claims, counterclaims, third-party claims, or issues." Rule 57 reads in part: "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

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every issue which has a bearing upon its treble damage suit," for determination of the issue of clearances by the judge might "operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim." 252 F. 2d, at 874.

[*Jury Questions*]

The District Court's finding that the Complaint for Declaratory Relief presented basically equitable issues draws no support from the Declaratory Judgment Act, 28 U. S. C. §§ 2201, 2202; Fed. Rules Civ. Proc., 57. See also 48 Stat. 955, 28 U. S. C. (1940 ed.) § 400. That statute, while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties.[4] It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first. Since the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, see *Fleitmann v. Welsbach Street Lighting Co.*, 240 U. S. 27, 29, the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions.

[*Plea for Injunction*]

Nevertheless the Court of Appeals refused to upset the order of the district judge. It held that the question of whether a right to jury trial existed was to be judged by Fox's complaint read as a whole. In addition to seeking a declaratory judgment, the court said, Fox's complaint can be read as making out a valid plea for injunctive relief, thus stating a claim traditionally cognizable in equity. A party who is entitled to maintain a suit in equity for an injunction, said the court, may have all the issues in his suit determined by the judge without a jury regardless of whether legal rights are involved. The court then rejected the argument that equitable relief, traditionally available only when legal remedies are inadequate, was rendered unnecessary in this case by the filing of the counterclaim and cross-claim which presented all the issues necessary to a determination of the right to injunctive relief. Relying on *American Life Ins. Co. v. Stewart*, 300 U. S. 203, 215, decided before the enactment of the Federal Rules of Civil Procedure, it invoked the principle that a court sitting in equity could retain jurisdiction even though later a legal remedy became available. In such instances the equity court had discretion to enjoin the later lawsuit in order to allow the whole dispute to be determined in one case in one court.[5] Reasoning by analogy, the Court of Appeals held it was not an abuse of discretion for the district judge, acting under Federal Rule of Civil Procedure 42(b), to try the equitable cause first even though this might, through collateral estoppel, prevent a full jury trial of the counterclaim and cross-claim which were as effectively stopped as by an equity injunction.[6]

Beacon takes issue with the holding of the Court of Appeals that the complaint stated a claim upon which equitable relief could be granted. As initially filed the complaint alleged that threats of lawsuits by petitioner against Fox and its distributors were causing irreparable harm to Fox's business relationships. The prayer for relief, however, made no mention of the threats but asked only that pending litigation of the claim for declaratory judgment, Beacon be enjoined from beginning any lawsuits under the antitrust laws against Fox and its distributors arising out of the controversy alleged in the complaint. Evidently of the opinion that this prayer did not state a good claim for equitable relief, the Court of

[4] See, *e.g.*, *(American) Lumbermen's Mut. Cas. Co. v. Timms & Howard, Inc.*, 108 F. 2d 497; *Hargrove v. American Cent. Ins. Co.*, 125 F. 2d 225; *Johnson v. Fidelity & Casualty Co.*, 238 F. 2d 322. See Fed. Rules Civ. Proc., 57, 38, 39.

[5] Compare *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, with *American Life Ins. Co. v. Stewart*, 300 U. S. 203. See also *City of Morgantown v. Royal Ins. Co.*, 337 U. S. 254; *Peake v. Lincoln Nat. Life Ins. Co.*, 15 F. 2d 303.

[6] 252 F. 2d, at 874. In *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, 192, this Court recognized that orders enabling equitable causes to be tried before legal ones had the same effect as injunctions. In *City of Morgantown v. Royal Ins. Co.*, 337 U. S. 254, the Court denied at least some such orders the status of injunctions for the purposes of appealability. It did not, of course, imply that when the orders came to be reviewed they would be examined any less strictly than injunctions. 337 U. S., at 258.

Appeals construed it to include a request for an injunction against threats of lawsuits. This liberal construction of a pleading is in line with Rule 8 of the Federal Rules of Civil Procedure. See *Conley v. Gibson,* 355 U. S. 41, 47-48. But this fact does not solve our problem. Assuming that the pleadings can be construed to support such a request and assuming additionally that the complaint can be read as alleging the kind of harassment by a multiplicity of lawsuits which would *traditionally* have justified equity to take jurisdiction and settle the case in one suit,[7] we are nevertheless of the opinion that, under the Declaratory Judgment Act and the Federal Rules of Civil Procedure, neither claim can justify denying Beacon a trial by jury of all the issues in the antitrust controversy.

[*Adequacy of Legal Remedies*]

The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.[8] At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims. And it is immaterial, in judging if that discretion is properly employed, that before the Federal Rules and the Declaratory Judgment Act were passed, courts of equity, exercising a jurisdiction separate from courts of law, were, in some cases, allowed to enjoin subsequent legal actions between the same parties involving the same controversy. This was because the subsequent legal action, though providing an opportunity to try the case to a jury, might not protect the right of the equity plaintiff to a fair and orderly adjudication of the controversy. See, *e. g., New York Life Ins. Co. v. Seymour,* 45 F. 2d 47. Under such circumstances the legal remedy could quite naturally be deemed inadequate. Inadequacy of remedy and irreparable harm are practical terms, however. As such their existence today must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules.[9]

Viewed in this manner, the use of discretion by the trial court under Rule 42(b) to deprive Beacon of a full jury trial on its counterclaim and cross-claim, as well as on Fox's plea for declaratory relief, cannot be justified. Under the Federal Rules the same court may try both legal and equitable causes in the same action. Fed. Rules Civ. Proc., 1, 2, 18. Thus any defenses, equitable or legal, Fox may have to charges of antitrust violations can be raised either in its suit for declaratory relief or in answer to Beacon's counterclaim. On proper showing, harassment by threats of other suits, or other suits actually brought, involving the issues being tried in this case, could be temporarily enjoined pending the outcome of this litigation. Whatever permanent injunctive relief Fox might be entitled to on the basis of the decision in this case could, of course, be given by the court after the jury renders its verdict. In this way the issues between these parties could be settled in one suit giving Beacon a full jury trial of every antitrust issue. Cf. *Ring v. Spina,* 166 F. 2d 546. By contrast, the holding of the court below while granting Fox no additional protection unless the avoidance of jury trial be considered as such, would compel Beacon to split his antitrust case, trying part to a judge and part to a jury.[10] Such a result, which involves the postponement and subordination of Fox's own legal claim for declaratory relief as well as of

[7] See, *e.g., Smyth v. Ames,* 169 U. S. 466, 515; *Detroit v. Detroit Citizens' Street R. Co.,* 184 U. S. 368, 378-382; cf. *Matthews v. Rodgers,* 284 U. S. 521.

[8] *E.g., Pennsylvania v. Wheeling & Belmont Bridge Co.,* 13 How. 518, 561; *Parker v. Winnipiseogee Lake Cotton & Woollen Co.,* 2 Black 545, 551; *Enelow v. New York Life Ins. Co.,* 293 U. S. 379.

[9] See, *e. g.,* Cook, Cases on Equity (4th ed.), 18; 4 Pomeroy, Equity Jurisprudence (5th ed.), § 1370; 5 Moore, Federal Practice, 154-158; Morris, Jury Trial Under the Federal Fusion of Law and Equity, 20 Tex. L. Rev. 427, 441-443. Cf. *Maryland Theater Corp. v. Brennan,* 180 Md. 377, 389, 24 A. 2d 911; *Hasselbring v. Koepke,* 263 Mich. 466, 248 N. W. 869. But cf. 1 Pomeroy, Equity Jurisprudence (5th ed), §§ 182, 183. Significantly the Court of Appeals itself relied on the procedural changes brought about by the Federal Rules when it found the plea for charitable relief valid, for it did so by relying on *Conley v. Gibson,* 355 U. S. 41, which emphasized the liberal construction policies of the Rules.

[10] Since the issue of violation of the antitrust laws often turns on the reasonableness of a restraint on trade in the light of all the facts, see, *e.g., Standard Oil Co. v. United States,* 221 U. S. 1, 60, it is particularly undesirable to have some of the relevant considerations tried by one fact finder and some by another.

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the counterclaim which Beacon was compelled by the Federal Rules to bring,[11] is not permissible.

[*Constitutional Guarantee*]

Our decision is consistent with the plan of the Federal Rules and the Declaratory Judgment Act to effect substantial procedural reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged.[12] Since in the federal courts equity has always acted only when legal remedies were inadequate,[13] the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be reevaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action.[14] Similarly the need for, and therefore, the availability of such equitable remedies as Bills of Peace, *Quia Timet* and Injunction must be reconsidered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules.[15] This is not only in accord with the spirit of the Rules and the Act but is required by the provision in the Rules that "[t]he right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved . . . inviolate." [16]

[*Limited Discretion*]

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court,[17] that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in *Scott v. Neely*, 140 U. S. 106, 109-110:

> "In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." [18]

This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate,[19] can the

[11] Fed. Rules Civ. Proc., 13(a).

[12] See 28 U. S. C. § 2072; Fed. Rules Civ. Proc., 39(a), 57. See also *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 382, n. 26; *United States v. Yellow Cab Co.*, 340 U. S. 543, 555-556.

[13] See 36 Stat. 1163, derived from Act of Sept. 24, 1789, § 16, 1 Stat. 82. This provision, which antedates the Seventh Amendment, is discussed in 5 Moore, Federal Practice, 32. See, *e.g., Hipp v. Babin*, 19 How. 271, 277-278; *Insurance Co. v. Bailey*, 13 Wall. 616, 620-621; *Grand Chute v. Winegar*, 15 Wall. 373; *Buzard v. Houston*, 119 U. S. 347, 351-352.

[14] See Fed. Rules Civ. Proc., 1, 2, 18. Cf. *Prudential Ins. Co. v. Saxe*, 134 F. 2d 16, 31-34; Morris, Jury Trial Under the Federal Fusion of Law and Equity, 20 Tex. L. Rev. 427, 441-443.

[15] See 1 Pomeroy, (Equity Jurisprudence (5th ed.), §§ 251¾, 254, 264(b); 5 Moore, Federal Practice, 32; but cf. *id.*, 209-211. See also, Note, The Joinder Rules and Equity Jurisdiction in the Avoidance of a Multiplicity of Suits, 12 Md. L. Rev. 88. Of course, unless there is an issue of a right to jury trial or of other rights which depend on whether the cause is a "legal" or "equitable" one, the question of adequacy of legal remedies is purely academic and need not arise.

[16] Fed. Rules Civ. Proc., 38(a). In delegating to the Supreme Court responsibility for drawing up rules, Congress declared that: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U. S. C. § 2072. The Seventh Amendment reads: "In suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[17] See *Hurwitz v. Hurwitz*, 78 U. S. App. D. C. 66, 136 F. 2d 796, 798-799; cf. *The Genesee Chief v. Fitzhugh*, 12 How. 443, 459-460.

[18] This Court has long emphasized the importance of the jury trial. See *Parsons v. Bedford*, 3 Pet. 433, 446. See also *Galloway v. United States*, 319 U. S. 372. *Id.*, at 396 (dissenting opinion).

[19] For an example of the flexible procedures available under the Federal Rules, see *Ring v. Spina* [1948-1949 TRADE CASES ¶ 62,224], 166 F. 2d 546, 550.

right to a jury trial of legal issues be lost through prior determination of equitable claims. See *Leimer v. Woods*, 196 F. 2d 828, 833-836. As we have shown, this is far from being such a case.

[*Mandamus Granted*]

Respondent claims mandamus is not available under the All Writs Act, 28 U. S. C. § 1651. Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled.[20]

The judgment of the Court of Appeals is *Reversed.*

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

[Dissenting Opinion]

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER concur, dissenting. [*In full text*]: There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial. But there was no denial of such a right here. The district judge simply exercised his inherent discretion, now explicitly confirmed by the Federal Rules of Civil Procedure, to schedule the trial of an equitable claim in advance of an action at law. Even an abuse of such discretion could not, I think, be attacked by the extraordinary writ of mandamus.[1] In any event no abuse of discretion is apparent in this case.

[*Equity Claim*]

The complaint filed by Fox stated a claim traditionally cognizable in equity. That claim, in brief, was that Beacon had wrongfully interfered with the right of Fox to compete freely with Beacon and other distributors for the licensing of films for first-run exhibition in the San Bernardino area. The complaint alleged that the plaintiff was without an adequate remedy at law and would be irreparably harmed unless the defendant were restrained from continuing to interfere—by coercion and threats of litigation—with the plaintiff's lawful business relationships.

[*Jury Trial of Equitable Issues Sought*]

The Court of Appeals found that the complaint, although inartistically drawn, contained allegations entitling the petitioner to equitable relief.[2] That finding is accepted in the prevailing opinion today. If the complaint had been answered simply by a general denial, therefore, the issues would under traditional principles have been triable as a proceeding in equity. Instead of just putting in issue the allegations of the complaint, however, Beacon filed pleadings which affirmatively alleged the existence of a broad conspiracy among the plaintiff and other theatre owners to monopolize the first-run exhibition of films in the San Bernardino area, to refrain from competing among themselves, and to discriminate against Beacon in granting film licenses. Based upon these allegations, Beacon asked damages in the amount of $300,000. Clearly these conspiracy allegations stated a cause of action triable as of right by a jury. What was demanded by Beacon, however, was a jury trial not only of this cause of action, but also of the issues presented by the original complaint.

[*Trial Court's Order*]

Upon motion of Fox the trial judge ordered the original action for declaratory and equitable relief to be tried separately to the court and in advance of the trial of the defendant's counterclaim and cross-claim for damages. The court's order, which carefully preserved the right to trial by jury upon the conspiracy and damage issues raised by the counterclaim and cross-claim, was in conformity with the specific provisions of the Federal Rules of Civil Procedure.[3] Yet it is decided today that

[20] *E.g., Ex parte Simons*, 247 U. S. 231, 239-240; *Ex parte Peterson*, 253 U. S. 300, 305-306; *Bereslavsky v. Caffey*, 161 F. 2d 499 (C. A. 2d Cir.); *Canister Co. v. Leahy*, 191 F. 2d 255 (C. A. 3d Cir.); *Black v. Boyd*, 248 F. 2d 156, 160-161 (C. A. 6th Cir.). Cf. *Bruckman v. Hollzer*, 152 F. 2d 730 (C. A. 9th Cir.). But cf. *In re Chappell & Co.*, 201 F. 2d 343 (C. A. 1st Cir.). See also *La Buy v. Howes Leather Co.* [1957 TRADE CASES ¶ 68,585], 352 U. S. 249.

[1] Compare *Black v. Boyd*, 248 F. 2d 156, with *Black v. Boyd*, 251 F. 2d 843.

[2] Cf. *De Groot v. Peters*, 124 Cal. 406; *California G. C. Bd. v. California P. Corp.*, 4 Cal. App. 2d 242, 244, 40 P. 2d 846. Compare *Kessler v. Eldred*, 206 U. S. 285; *International News Serv. v. Associated Press*, 248 U. S. 215, 236; *Truax v. Raich*, 239 U. S. 33, 38.

[3] Rule 42(b) provides: "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any

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the Court of Appeals must compel the district judge to rescind it.

[*Common Issue*]

Assuming the existence of a factual issue common both to the plaintiff's original action and the defendant's counterclaim for damages, I cannot agree that the District Court must be compelled to try the counterclaim first.[4] It is, of course, a matter of no great moment in what order the issues between the parties in the present litigation are tried. What is disturbing is the process by which the Court arrives at its decision—a process which appears to disregard the historic relationship between equity and law.

I.

[*Exclusively Equitable Issues*]

The Court suggests that "the expansion of adequate legal remedies provided by the Declaratory Judgment Act . . . necessarily affects the scope of equity." Does the Court mean to say that the mere availability of an action for a declaratory judgment operates to furnish "an adequate remedy at law" so as to deprive a court of equity of the power to act? That novel line of reasoning is at least implied in the Court's opinion. But the Declaratory Judgment Act did not "expand" the substantive law. That Act merely provided a new statutory remedy, neither legal nor equitable, but available in the areas of both equity and law. When declaratory relief is sought, the right to trial by jury depends upon the basic context in which the issues are presented. See Moore's *Federal Practice* (2d ed.) §§ 38.29, 57.30; Borchard, *Declaratory Judgments* (2d ed.), 399-404. If the basic issues in an action for declaratory relief are of a kind traditionally cognizable in equity, *e. g.*, a suit for cancellation of a written instrument, the declaratory judgment is not a "remedy at law."[5] If, on the other hand, the issues arise in a context traditionally cognizable at common law, the right to a jury trial of course remains unimpaired, even though the only relief demanded is a declaratory judgment.[6]

Thus, if in this case the complaint had asked merely for a judgment declaring that the plaintiff's specified manner of business dealings with distributors and other exhibitors did not render it liable to Beacon under the anti-trust laws, this would have been simply a "juxtaposition of parties" case in which Beacon could have demanded a jury trial.[7] But the complaint in the

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number of claims, cross-claims, counterclaims, third-party claims, or issues."

The Note to Rule 39 of the Advisory Committee on Rules states that, "When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried." This language was at one time contained in a draft of the Rules, but was deleted because "the power is adequately given by Rule 42(b). . . ." Moore's *Federal Practice* (2d ed.) § 39.12, n. 8.

See also, Rule 57, which provides, *inter alia*, that, "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

[4] It is not altogether clear at this stage of the proceedings whether the existence of substantial competition between Fox and Beacon is actually a material issue of fact common to both the equitable claim and the counterclaim for damages. The respondent ingeniously argues that determination in the equitable suit of the issue of competition between the theatres would be determinative of little or nothing in the counterclaim for damages. "The fact issue in the action for equitable and declaratory relief is whether the Fox West Coast California Theatre and the Petitioner's drive-in are substantially competitive with each other. The fact issue in the counterclaim is whether the cross-defendants and co-conspirators therein named conspired together in restraint of trade and to monopolize in the manner alleged in the counterclaim. Absent conspiracy, whether or not the distributors licensed a single first run picture to Petitioner's drive-in, be it in substantial competition or not in substantial competition with other first run theatres in the San Bernardino area, Petitioner will not have made out a case on its counterclaim. . . . If Petitioner on its counterclaim should fail to prove conspiracy the issue of competition between the theatres is meaningless. If Petitioner on the other hand succeeds in proving the allegations of its counterclaim, the conspiracy to monopolize first run and to discriminate against the new drive-in, the existence or non-existence of competition between the theatres would exculpate none of the alleged wrongdoers, although if there was an absence of competition between the drive-in and the other first run theatres, as Petitioner contended in its answer to the complaint, it might have some difficulty proving injury to its business."

[5] *State Farm Mut. Auto. Ins. Co. v. Mossey*, 195 F. 2d 56; *Connecticut General Life Ins. Co. v. Candimat Co.*, 83 F. Supp. 1.

[6] *Dickinson v. General Accident F. & L. Assur. Corp.*, 147 F. 2d 396; *Hargrove v. American Cent. Ins. Co.*, 125 F. 2d 225; *Pacific Indemnity Co. v. McDonald*, 107 F. 2d 446.

[7] Moore's Federal Practice (2d ed.) § 57.31[2]. "Transposition of parties" would perhaps be a more accurate description. A typical such case is one in which a plaintiff uses the declaratory judgment procedure to seek a determination of nonliability to a legal claim asserted by the defendant. The defendant in such a case is, of course, entitled to a jury trial.

present case, as the Court recognizes, presented issues of exclusively equitable cognizance, going well beyond a mere defense to any subsequent action at law. Fox sought from the court protection against Beacon's allegedly unlawful interference with its business relationships—protection which this Court seems to recognize might not have been afforded by a declaratory judgment, unsupplemented by equitable relief. The availability of a declaratory judgment did not, therefore, operate to confer upon Beacon the right to trial by jury with respect to the issues raised by the complaint.

II.

[*Adequacy of Legal Remedy*]

The Court's opinion does not, of course, hold or even suggest that a court of equity may never determine "legal rights." For indeed it is precisely such rights which the Chancellor, when his jurisdiction has been properly invoked, has often been called upon to decide. Issues of fact are rarely either "legal" or "equitable." All depends upon the context in which they arise. The examples cited by Chief Judge Pope in his thorough opinion in the Court of Appeals in this case are illustrative:

> ". . . [I]n a suit by one in possession of real property to quiet title, or to remove a cloud on title, the court of equity may determine the legal title. In a suit for specific performance of a contract, the court may determine the making, validity and the terms of the contract involved. In a suit for an injunction against trespass to real property the court may determine the legal right of the plaintiff to the possession of that property. Cf. Pomeroy, Equity Jurisprudence, 5th ed., §§ 138-221, 221a, 221b, 221d, 250." 252 F. 2d 864, 874.

Though apparently not disputing these principles, the Court holds, quite apart from its reliance upon the Declaratory Judgment Act, that Beacon by filing its counterclaim and cross-claim acquired a right to trial by jury of issues which otherwise would have been properly triable to the court. Support for this position is found in the principle that, "in the federal courts equity has always acted only when legal remedies were inadequate. . . ." Yet that principle is not employed in its traditional sense as a limitation upon the exercise of power by a court of equity. This is apparent in the Court's recognition that the allegations of the complaint entitled Fox to equitable relief—relief to which Fox would not have been entitled if it had had an adequate remedy at law. Instead, the principle is employed today to mean that because it is possible under the counterclaim to have a jury trial of the factual issue of substantial competition, that issue must be tried by a jury, even though the issue was primarily presented in the original claim for equitable relief. This is a marked departure from long-settled principles.

It has been an established rule "that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter."[8] *American Life Ins. Co. v. Stewart*, 300 U. S. 203, 215. See *Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, 296. It has also been long settled that the District Court in its discretion may order the trial of a suit in equity in advance of an action at law between the same parties, even if there is a factual issue common to both. In the words of Mr. Justice Cardozo, writing for a unanimous Court in *American Life Ins. Co. v. Stewart, supra:*

> "A court has control over its own docket. . . . In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. . . . If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. . . . There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against

[8] The suggestion by the Court that "This was because the subsequent legal action, though providing an opportunity to try the case to a jury, might not protect the right of the equity plaintiff to a fair and orderly adjudication of the controversy" is plainly inconsistent with many of the cases in which the rule has been applied. See, *e. g., Beedle v. Bennett*, 122 U. S. 71; *Clark v. Wooster*, 119 U. S. 322.

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the other, and a balance ascertained." 300 U. S. 203, 215-216.[9]

III.

[*Expansion of Legal Remedies*]

The Court today sweeps away these basic principles as "precedents decided under discarded procedures." It suggests that the Federal Rules of Civil Procedure have somehow worked an "expansion of adequate legal remedies" so as to oust the District Courts of equitable jurisdiction, as well as to deprive them of their traditional power to control their own dockets. But obviously the Federal Rules could not and did not "expand" the substantive law one whit.[10]

Like the Declaratory Judgment Act, the Federal Rules preserve inviolate the right to trial by jury in actions historically cognizable at common law, as under the Constitution they must.[11] They do not create a right of trial by jury where that right "does not exist under the Constitution or statutes of the United States." Rule 39(a). Since Beacon's counterclaim was compulsory under the Rules, see Rule 13(a), it is apparent that by filing it Beacon could not be held to have waived its jury rights.[12] Compare *American Mills Co. v. American Surety Co.*, 260 U. S. 360. But neither can the counterclaim be held to have transformed Fox's original complaint into an action at law.[13] See *Bendix Aviation Corp. v. Glass*, 81 F. Supp. 645.

The Rules make possible the trial of legal and equitable claims in the same proceeding, but they expressly affirm the power of a trial judge to determine the order in which claims shall be heard. Rule 42(b). Certainly the Federal Rules were not intended to undermine the basic structure of equity jurisprudence, developed over the centuries and explicitly recognized in the United States Constitution.[14]

For these reasons I think the petition for a writ of mandamus should have been dismissed.

[¶ 69,361] Federal Trade Commission v. Simplicity Pattern Co., Inc.; Simplicity Pattern Co., Inc. v. Federal Trade Commission.

In the Supreme Court of the United States. October Term, 1958. Nos. 406 and 447, respectively. Dated June 8, 1959.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Robinson-Patman Price Discrimination Act

Price Discrimination—Furnishing of Services or Facilities to Customers—Cost Justification or Absence of Competitive Injury as Defense to Section 2(e), Clayton Act, Violation.—Given competition between two classes of customers, neither the absence of competitive injury nor the presence of "cost justification" defeats the enforcement of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act; therefore, a Federal Trade Commission finding that a dress pattern manufacturer violated the section by supplying free catalogues and display or storage cabinets to its larger customers

[9] It is arguable that if a case factually similar to *American Life Ins. Co. v. Stewart* were to arise under the Declaratory Judgment Act, the defendant would be entitled to a jury trial. See footnote 7. But cf. 5 Moore's *Federal Practice* (2d ed.), p. 158.

[10] Congressional authorization of the Rules expressly provided that "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." 48 Stat. 1064. See 28 U. S. C. § 2072.

[11] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U. S. Const., Amend. VII. See Rules 38, 39, Fed. Rules Civ. Proc.

[12] This is not, of course, to suggest that the filing of a permissive "legal" counterclaim to an "equitable" complaint would amount to a waiver of jury rights on the issues raised by the counterclaim.

[13] Determination of whether a claim stated by the complaint is triable by the court or by a jury will normally not be dependent upon the "legal" or "equitable" character of the counterclaim. See Borchard, *Declaratory Judgments* (2d ed.), p. 404. There are situations, however, such as a case in which the plaintiff seeks a declaration of invalidity or noninfringement of a patent, in which the relief sought by the counterclaim will determine the nature of the entire case. See Moore's *Federal Practice* (2d ed.) § 38.29.

[14] "The judicial Power shall extend to all Cases, in Law and Equity. . . ." Art. III, § 2.

(department and variety stores) while requiring its smaller customers (fabric stores) to buy or rent the same or similar items was affirmed. Variety and fabric stores, operating in the same cities and in the same shopping areas, often side by side, were competitors, purchasing at the same price and then at like prices retailing the identical product to substantially the same segment of the public. The existence of competition does not depend on motives, and the failure to show specific injury to competition in patterns was not inconsistent with a finding that competition existed.

The language of the amended Clayton Act, when considered in its entirety, does not support the contention that the absence of competitive injury or the showing of "cost justification" constitutes a defense to a Section 2(e) violation. Section 2(a) prohibits price discriminations, with qualifications. Section 2(e) as well as Sections 2(c) and 2(d), on the other hand, make unlawful certain business practices other than price discriminations. These proscriptions are absolute, and unlike Section 2(a), none of them requires a showing of an injurious or destructive effect on competition or has any built-in defensive matter. The exculpatory provisions which Congress has made expressly applicable only to price discriminations are not included as "justifications" for discriminations in services or facilities. The key word in Section 2(b) of the Act, "justification," can be read no more broadly than to allow rebuttal of the respective offenses in one of the ways expressly made available by Congress. Therefore, a discrimination in price may be rebutted by a showing under any of the Section 2(a) provisos, or under the Section 2(b) proviso—all of which by their terms apply to price discriminations. However, the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the Section 2(b) proviso. The competitive injury and cost-differential clauses of Section 2(a) cannot be read directly into Section 2(e).

See Price Discrimination, Vol. 1, ¶ 3510.100, 3515.150, 3515.165, 3524, 3524.120, 3524.200, 3524.252, 3524.282, 3524.320, 3524.343, 3524.601, 3524.671; Unfair Practices, Vol. 2, ¶ 5053.31, 5201.565.

For the petitioner: J. Lee Rankin, Solicitor General; Victor R. Hansen, Assistant Attorney General; Earl W. Kintner; James E. Corkey; and Charles H. Weston, Attorney, Department of Justice, Washington, D. C.

For the respondent: Robert L. Wald, David Vorhaus, Sidney Greenman, and William Simon, Washington, D. C.

Reversing in part and affirming in part a decision of the U. S. Court of Appeals, District of Columbia Circuit, 1958 Trade Cases ¶ 69,047, in Federal Trade Commission Dkt. 6221.

[*FTC Ruling*]

Mr. Justice Clark delivered the opinion of the Court [*In full text*]:

This case presents, for the first time in this Court, issues relating to the availability of certain defenses to a *prima facie* violation of § 2(e) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526.[1] The Federal Trade Commission has found that Simplicity Pattern Co., Inc., one of the Nation's largest dress pat-

[1] The complaint was in two counts, the first being under the Federal Trade Commission Act. This count was dismissed. The second count, which is the only one before us, involves certain subsections of § 2 of the Clayton Act, 15 U. S. C. § 13. For ready reference we quote § 2 in its entirety:

"(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly

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tern manufacturers, discriminated in favor of its larger customers by furnishing to them services and facilities not accorded to competing smaller customers on proportionally equal terms. The Commission held that neither the presence of "cost justification" nor the absence of competitive injury may constitute a defense to a § 2(e) violation.

[*Court of Appeals Ruling*]

The Court of Appeals found that competition existed between the larger and smaller customers of Simplicity and, with one judge dissenting, held that an absence of competitive injury would not constitute a "justification" rebutting a *prima facie* showing of a § 2(e) violation. Through a different majority,[2] however, it remanded the case on the "cost justification" defense under § 2(b), holding that Simplicity might rebut the *prima facie* case by showing that the discriminations in services and facilities were justified by differences in Simplicity's costs in dealing with the two classes of customers. 103 U. S. App. D. C. 373, 258 F. 2d 673 [1958 TRADE CASES ¶ 69,047]. The Commission, in No. 406, and Simplicity, in No. 447, filed cross-petitions for certiorari which we consider together. We granted both petitions because of the fundamental significance of these issues in the application of an important Act of Congress. 358 U. S. 897. We have concluded that, given competition between the two classes of customers, neither absence of competitive injury nor the presence of "cost justification" defeats enforcement of the provisions of § 2(e) of the Act. The action of the Commission in issuing the cease-and-desist order is, therefore, affirmed.

[*Dress Pattern Business*]

Simplicity manufactures and sells tissue patterns which are used in the home for making women's and children's wearing apparel. Its volume of pattern sales, in terms of sales units, is greater than that

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discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[2] Judge Washington dissented on the "cost-justification" issue, while Judge Burger was in dissent on the competitive injury question.

resulting from the combined effort of all other major producers.[3] The patterns are sold to some 12,300 retailers, with 17,200 outlets. For present purposes, these customers can be divided roughly into two categories. One, consisting largely of department and variety stores, comprises only 18% of the total number of customers, but accounts for 70% of the total sales volume. The remaining 82% of the customers are small stores whose primary business is the sale of yard-good fabrics.

About 600 different patterns are made available to Simplicity's customers. New patterns are added at the rate of 40 per month, while three times annually the obsolete designs are discontinued so as to maintain the number of designs at a relatively constant level. The different designs are displayed in a catalogue which is changed monthly in order to reflect the changes in available designs. The patterns themselves are stored and displayed in steel cabinets. The catalogues and storage cabinets are both furnished by Simplicity.

[*Customers*]

The variety stores handle and sell a multitude of relatively low-priced articles. Each article, including dress patterns, is sold for the purpose of returning a profit and would be dropped if it failed to do so. The fabric stores, on the other hand, are primarily interested in selling yard goods; they handle patterns at no profit or even at a loss as an accommodation to their fabric customers and for the purpose of stimulating fabric sales. These differences in motive are reflected in the manner in which each type of store handles its patterns. The variety stores devote the minimum amount of display space consistent with adequate merchandising—consisting usually of nothing more than a place on the counter for the catalogues, with the patterns themselves stored underneath the counter in the steel cabinets furnished by Simplicity. In contrast, the fabric stores usually provide tables and chairs where the customers may peruse the catalogues in comfort and at their leisure.

[*Services and Facilities Furnished*]

The retail prices of Simplicity patterns are uniform at 25¢, 35¢, or 50¢. Similarly, Simplicity charges a uniform price, to all its customers, of 60% of the retail price. However, in the furnishing of certain services and facilities Simplicity does not follow this uniformity. It furnishes patterns to the variety stores on a consignment basis, requiring payment only as and when patterns are sold—thus affording them an investment-free inventory. The fabric stores are required to pay cash for their patterns in regular course. In addition, the cabinets and the catalogues are furnished to variety stores free while the fabric stores are charged therefor, the catalogues averaging from $2 to $3 each. Finally, all transportation costs in connection with its business with variety stores are paid by Simplicity but none is paid on fabric-store transactions.

The free services and facilities thus furnished variety store chains are substantial in value. As to four variety store chains, the catalogues which Simplicity furnished free in 1954 were valued at $128,904; the cabinets furnished free which those stores had on hand at the end of 1954 were valued at over $500,000; and their inventory of Simplicity's patterns at the end of 1954 was valued at more than $1,775,000, each of these values being based on Simplicity's usual sales price. Simplicity's president testified that it would cost over $2,000,000 annually to give its other customers the free transportation, free catalogues, and free cabinets furnished to variety stores.[4]

[3] In dollar volume, Simplicity's percentage-of-industry total is somewhat lower, due to the fact that its prices are among the lowest in the industry.

[4] It should be noted that Simplicity has apparently acted entirely in good faith. While the services and facilities described in the body of the opinion are admittedly furnished free only to the variety stores, Simplicity asserts that other services and facilities are furnished only to the smaller customers. These claimed services include: A staff of 12 young ladies travels throughout the country giving fashion shows and sewing demonstrations in schools, 4-H Clubs and the like. These demonstrations are coordinated through the local fabric stores to assist the latter in pushing sales both of patterns and of fabrics. Large promotional posters, portraying fabrics and fashion trends, are furnished monthly to the fabric stores. "Flyers," or brochures, designed, printed and distributed by Simplicity solely for the small merchant, tell him (in the words of Simplicity's president), "what the proper sources of supply are in New York, what the trends are, how to trim his windows, how to run certain aspects of his department and a great deal of other material." A monthly publication called the "Simplicity Pattern Book" is sold through fabric stores at an annual loss to Simplicity of over $100,000. The publication is designed to "glamorize and dramatize for the consumer and for

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[*Contentions*]

Simplicity does not dispute these findings. Assuming that the existence of competition between purchasers is a necessary element in a § 2(e) prosecution, it insists that no real competition in patterns exists between the variety and the fabric stores. It also contends that even if competition is present its conduct may be justified by a showing that no competitive injury resulted or, alternatively, that the discriminations are not unlawful if it could be shown that the differential treatment was only reflective of the differences in its costs in dealing with the two types of customers.

1. Existence of Competition.

[*Competition Between Customers*]

The unanimous conclusion of the Examiner, the Commission, and the Court of Appeals on this point was, as stated by the Court of Appeals, that the variety and fabric stores, "operating in the same cities and in the same shopping area, often side by side, were competitors, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public." 103 U. S. App. D. C., at 377, 258 F. 2d, at 677. Simplicity argues that "motivation" controls and that since the variety store sells for a profit and the fabric store for accommodation that the competition is minuscule. But the existence of competition does not depend on such motives. Regardless of the necessity the fabric stores find in the handling of patterns it does not remove their incentive to sell those on hand, especially when cash is tied up in keeping patterns on the shelves. The discriminatory terms under which they are obliged to handle them increases their losses. Furthermore, Simplicity not only takes advantage of the captive nature of the fabric stores in not granting them these advantages but compounds the damage by creating a sales outlet in the variety stores through the granting of these substantial incentives to engage in the pattern business. Without such partial subsidization the variety stores might not enter into the pattern trade at all.

[*Injury to Competition*]

Nor does it follow that the failure here to show specific injury to competition in patterns is inconsistent with a finding that competition in fact exists.[5] It may be, as Simplicity argues, that the sale of patterns is minuscule in the over-all business of a variety store, but the same is true of thousands of other items. While the giving of discriminatory concessions to a variety store on any one isolated item might cause no injury to competition with a fabric store in its over-all operation, that fact does not render nonexistent the actual competition between them in patterns. It remains, and, because of the discriminatory concessions, causes further losses to the fabric store. As this Court said in *Federal Trade Comm'n v. Morton Salt Co.* [1948-1949 Trade Cases ¶ 62,247], 334 U. S. 37, 49 (1948),

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no

the merchant the textiles and trends throughout the country."

These services and facilities are apparently available to the variety stores, but are not used by them because of their method of doing business. Thus, Simplicity claims that the fabric stores receive services and facilities, valued by Simplicity at more than $1,000,000 annually, which in fact if not in law are not used by the variety stores. The parties did not explore, before the Commission, the possibility that this tailoring of services and facilities to meet the different needs of two classes of customers in fact constituted "proportionally equal terms." And, of course, this point was not raised in the Court of Appeals or in this Court. We note in passing, however, that the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under §§ 2(d) and 2(e). See *Lever Brothers Co.*, 50 F. T. C. 494, 512 (1953). ("[§ 2(d)] does not prohibit a seller from paying for services of various types." A "plan providing payment for promotional services and facilities . . . must be honest in its purpose and fair and reasonable in its application.") See also *Procter & Gamble Distributing Co.*, 50 F. T. C. 513 (1953); *Colgate-Palmolive-Peet Co.*, 50 F. T. C. 525 (1953); Report of the Attorney General's National Committee to Study the Antitrust Laws 189-190 (1955). Since the issue is not properly before us, we of course do not pass on it.

[5] Simplicity argues that the Examiner "affirmatively found an absence of competitive injury." This view was apparently adopted by the Court of Appeals. 103 U. S. App. D. C., at 378, 258 F. 2d, at 678. We do not so read the record, however. What the Examiner said was that "there is *no showing* of competitive injury." (Italics added.)

possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

2. Application of the Justification Defenses of § 2(b).

[*Contentions*]

Simplicity contends that an absence of competitive injury constitutes a defense under the justification provisions of § 2(b) and further that it should have been permitted, under that subsection, to dispel its discrimination in services and facilities by a showing of lower costs in its transactions with the variety stores. We agree with the Commission that the language of the Act, when considered in its entirety, will not support this construction.

[*Section 2(a), Clayton Act*]

Section 2(a) makes unlawful price discriminations

> "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . . ."

This price discrimination provision is hedged with qualifications. An exception is made for price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery." Care was taken that price changes are not outlawed where made in response to changing market conditions. Finally, § 2(a) codifies the rule of *United States v. Colgate & Co.*, 250 U. S. 300 (1919), protecting the right of a person in commerce to select his "own customers in bona fide transactions and not in restraint of trade."

[*Absolute Prohibitions*]

Subsections (c), (d), and (e), on the other hand, unqualifiedly make unlawful certain business practices other than price discriminations.[6] Subsection (c) applies to the payment or receipt of commissions or brokerage allowances "except for services rendered." Subsection (d) prohibits the payment by a seller to a customer for any services or facilities furnished by the latter, unless "such payment . . . is available on proportionally equal terms to all other [competing] customers." Subsection (e), which as noted is the provision applicable in this case, makes it unlawful for a seller

> "to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale . . . by . . . furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a *prima facie* violation, a showing that the illicit practice has had an injurious or destructive effect on competition.[7] Similarly, none has any built-in defensive matter, as does § 2(a). Simplicity's contentions boil down to an argument that the exculpatory provisions which Congress has made expressly applicable only to price discriminations are somehow included as "justifications" for discriminations in services or facilities by § 2(b),[8] which provides that

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made *by showing justification* shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or

[6] Subsection (f) is a corollary to § 2(a), making it unlawful "knowingly to induce or receive" a price discrimination barred by the latter. See *Automatic Canteen Co. v. Federal Trade Comm'n* [1953 TRADE CASES ¶ 67,503], 346 U. S. 61 (1953).

[7] Simplicity concedes this, in effect, but argues that it should be allowed under § 2(b) to "justify" the § 2(e) violation by making an affirmative showing of *absence* of competitive injury.

[8] In allowing a showing of "cost-justification" under § 2(b), the Court of Appeals negated any inference that it was thereby importing "§ 2(a) criteria as matters of defense to a Section 2(e) charge." Rather, it held that "the justification to be shown under the first clause of § 2(b) as to a § 2(e) charge of discrimination in 'facilities furnished' to various *customers*, [would] depend upon the facts in a particular case." 103 U. S. App. D. C., at 381, 258 F. 2d, at 681. (Italics in the original.) On this theory, the limits of the justification which could be shown would be established by litigation, on a case-to-case basis.

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facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (Emphasis added.)

[*Scope of Section 2(b), Clayton Act*]

We hold that the key word "justification" can be read no more broadly than to allow rebuttal of the respective offenses in one of the ways expressly made available by Congress. Thus, a discrimination in prices may be rebutted by a showing under any of the § 2(a) provisos, or under the § 2(b) proviso[9] —all of which by their terms apply to price discriminations. On the other hand, the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) proviso. We cannot supply what Congress has studiously omitted.[10]

Simplicity's arguments to the contrary are based essentially on the ground that it would be "bad law and bad economics" to make discriminations unlawful even where they may be accounted for by cost differentials or where there is no competitive injury.[11] Entirely aside from the fact that this Court is not in a position to review the economic wisdom of Congress, we cannot say that the legislative decision to treat price and other discriminations differently is without a rational basis. In allowing a "cost justification" for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings.[12] *Biddle Purchasing Co. v. Federal Trade Comm'n* [1932-1939 Trade Cases ¶ 55,180], 96 F. 2d 687, 692 (C. A. 2d Cir. 1938). And, with respect to the absence of competitive injury requirements, it suffices to say that the antitrust laws are not strangers to the policy of nipping potentially destructive practices before they reach full bloom. Cf. *Klor's, Inc., v. Broadway-Hale Stores* [1959 Trade Cases ¶ 69,316], 359 U. S. 207 (1959).[13]

[*Historical Setting*]

Our conclusions are further confirmed by the historical setting of the Robinson-Patman amendments to § 2 of the Clayton Act. As originally worded in 1914 (38 Stat. 730), § 2 applied only to price discriminations, and then only where the effect of such discrimination was "to substantially lessen competition or tend to create a monopoly in any line of commerce."[14] Furthermore, a

[9] See *Standard Oil Co. v. Federal Trade Comm'n* [1950-1951 TRADE CASES ¶ 62,746], 340 U. S. 231 (1951).

[10] The Courts of Appeals, prior to this case, had uniformly rejected the argument that § 2(e) violations were subject to a cost-justification defense or required a showing of adverse effect on competition. *Elizabeth Arden, Inc., v. Federal Trade Comm'n* [1946-1947 TRADE CASES ¶ 57,467], 156 F. 2d 132 (C. A. 2d Cir. 1946) (competitive injury); *Corn Products Refining Co. v. Federal Trade Comm'n* [1944-1945 TRADE CASES ¶ 57,263], 144 F. 2d 211, 219 (C. A. 7th Cir. 1944), aff'd on other grounds 324 U. S. 726 [1944-1945 TRADE CASES ¶ 57,363] (competitive injury); *Southgate Brokerage Co. v. Federal Trade Comm'n* [1944-1945 TRADE CASES ¶ 57,396], 150 F. 2d 607, 610 (C. A. 4th Cir. 1945) (dictum as to competitive injury); *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n* [1932-1939 TRADE CASES ¶ 55,242], 106 F. 2d 667 (C. A. 3d Cir. 1939) (dictum as to cost-justification); *Oliver Bros., Inc., v. Federal Trade Comm'n* [1932-1939 TRADE CASES ¶ 55,212], 102 F. 2d 763, 767 (C. A. 4th Cir. 1939) (dictum as to competitive injury). It does not appear that any Court of Appeals had previously been asked to decide whether an absence of competitive injury could constitute a "justification" under § 2(b).

[11] Compare the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955). The Committee recognized that as of that date subsections (c), (d) and (e) had been uniformly interpreted as not requiring a showing of competitive injury, and as not allowing a cost-justification defense. Pp. 187-193. It expressed disagreement with the desirability of this result, in view of what it deemed the "broader antitrust objectives," and recommended that § 2(c) be changed by legislation and § 2(d) and (e) by "interpretive reform." P. 193.

[12] During congressional debates on the bill, there were continual references to the subsection (c), (d) and (e) practices as "secret" discriminations. See, *e. g.*, 80 Cong. Rec. 8126, 8127, 8132, 8135, 8137, 8226.

[13] Compare *Northern Pacific R. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1 (1958); *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150 (1940), which contain examples of *per se* violations under the Sherman Act. It is not without significance that earlier versions of both the House and Senate bills would have outlawed even *price* discriminations without regard to their effect upon competition. H. R. 8442, 74th Cong., 1st Sess.; S. 3154, 74th Cong., 1st Sess.

[14] This language was retained in § 2(a) under the Robinson-Patman Act amendment, and the following was added, "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

proviso excepted price discriminations based on "differences in the . . . quantity of the commodity sold," regardless of whether the differences in quantity resulted in corresponding cost differentials.

A lengthy investigation conducted in the 1930's by the Federal Trade Commission disclosed that several large chain buyers were effectively avoiding § 2 by taking advantage of gaps in its coverage. Because of their enormous purchasing power, these chains were able to exact price concessions, based on differences in quantity, which far exceeded any related cost savings to the seller. Consequently, the seller was forced to raise prices even further on smaller quantity lots in order to cover the concessions made to the large purchasers. Comparable competitive advantages were obtained by the large purchasers in several ways other than direct price concessions. Rebates were induced for "brokerage fees," even though no brokerage services had been performed. "Advertising allowances" were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers. Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage.[15]

The Robinson-Patman amendments were enacted to eliminate these inequities. The exception to price discriminations based on quantitative differences was limited to those making "only due allowance for differences in . . . cost." As noted above, false brokerage allowances and the paying for or furnishing of nonproportional services or facilities were banned outright. The portion of § 2(b) preceding the proviso, on which Simplicity relies, was inserted in the House bill for the sole purpose of laying down "directions with reference to procedure including a statement with respect to burden of proof."[16] It was clearly not intended to have any independent substantive weight of its own.[17]

[*Ruling*]

We hold, therefore, that neither "cost-justification" nor an absence of competitive injury may constitute "justification" of a *prima facie* § 2(e) violation.[18] The judgment of the Court of Appeals must accordingly be reversed insofar as it set aside and remanded the Commission's order and affirmed as to the remainder.

It is so ordered.

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[15] Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess.

[16] H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 16.

[17] As reported out of Committee, the equivalent of § 2(b) (which was § 2(e) in the House bill) applied only to price discriminations. During the floor debate, Congressman McLaughlin introduced an amendment which would add "or services or facilities furnished" at appropriate places in the subsection. He said, "Mr. Chairman, this is a committee amendment agreed to unanimously by the committee. . . . It simply allows a seller to meet not only competition in price of other competitors but also competition in services and facilities furnished." 80 Cong. Rec. 8225. The amendment was adopted without further comment. Throughout the debate, what reference there was to this subsection (other than to the proviso) was to the effect that it was a "procedural" or "burden of proof" provision. See, *e. g.*, 80 Cong. Rec. 8110, 9414, 9418. Congressman Patman, referring to it as a "burden of proof" provision, said "Let me analyze that for you. What does that mean? It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference." 80 Cong. Rec. 8231. This statement, coming from one of the authors of the bill, makes it clear beyond peradventure that the provision in question was not intended to operate as a source of substantive defenses. See also *Automatic Canteen Co. v. Federal Trade Comm'n, supra*, 346 U. S., at 78.

The history of the Senate bill is not helpful. As reported out of Committee, it contained neither a provision comparable to § 2(b) nor one comparable to § 2(e). S. Rep. No. 1502, 74th Cong., 2d Sess. A provision identical to § 2(b) was adopted as a floor amendment at a time when the bill did not in terms even cover the furnishing of services and facilities. 80 Cong. Rec. 6435-6436. The short debate on the amendment is not enlightening.

[18] While both of these questions have been presented to us in terms of the "justification" clause of § 2(b), we are equally convinced that the competitive injury and cost-differential clauses of § 2(a) cannot be read *directly* into § 2(e). *Elizabeth Arden, Inc., v. Federal Trade Comm'n, supra*, note 10; *Corn Products Refining Co. v. Federal Trade Comm'n, supra*, note 10; *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n, supra*, note 10. It is true that, in reference to the cost-differential clause, we have said, "Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes." *Automatic Canteen Co. v. Federal Trade Comm'n, supra*, 346 U. S., at 72. But the contexts of the statements referred to show that the benefits were to be made available in *price* differentials or not at all. See, *e. g.*, 80 Cong. Rec. 8106-8107, 8111-8112, 8114, 8127-8128, 8137, 9415; H. R. Rep. No. 2287, 74th Cong., 2d Sess. See also notes 12 and 13, *supra*.

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[¶ 69,362] The Upjohn Company v. Liberty Drug Co., Inc.

In the United States District Court for the Southern District of New York. Civil 140-96. Filed May 12, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Lack of Enforcement Activity—Meeting Competitors' Prices.—A manufacturer of drug products was granted a preliminary injunction prohibiting a retail drug store from selling the manufacturer's trademarked products below fair trade prices. In defense, it was asserted that the manufacturer, by its own indifferent conduct, had encouraged and acquiesced in the wide-spread selling of its products at competitive prices, that there had been a general collapse of its fair trade price structure, and that the drug store had sold below the fair trade prices in order to meet the prevailing price of competitors. It was found, however, that the manufacturer had made reasonable and diligent efforts to enforce its fair trade price structure and that, despite certain violations, there had been no general breakdown of that structure.

See Fair Trade, Vol. 1, ¶ 3440.34, 3448.34.

Fair Trade—Fair Trade Agreements Between Competitors—Fair Trader's Sales at Retail Level as Bar to Enforcement Action—Sale of Drug Products to Dispensaries.—A retail drug store's contention that a manufacturer of drug products was barred from enforcing its fair trade prices because it had sold its products to industrial and public utility corporation dispensaries, at wholesale, thereby competing with the drug store at the retail level, was patently without merit. Each of those dispensaries employed a full-time pharmacist, a registered nurse, or a full or part-time physician, and each was engaged in servicing the health needs of company employees. There was no indication that those dispensaries were subterfuges for the sale of the manufacturer's products to ultimate consumers at less than fair trade prices, or that any such sales had, in fact, occurred.

See Fair Trade, Vol. 1, ¶ 3100.

For the plaintiff: Rogers, Hoge & Hills, New York, N. Y. (George M. Chapman and John A. Keeffe, of counsel).

For the defendant: Friedman, Lipsig, Bernstein & Friedman, New York, N. Y. (David Kaplan, of counsel).

Opinion

[*Fair Trade Action*]

LEVET, District Judge [*In full text*]: This is a motion for a preliminary injunction to enjoin the defendant from advertising, offering for sale or selling at retail merchandise bearing plaintiff's trademarks or brand names for prices less than those stipulated in plaintiff's fair trade contracts in effect with certain retailers in the State of New York.

[*Parties*]

The plaintiff is a manufacturer of ethical pharmaceuticals and other drug products, all of which bear the trademark, "Upjohn," together with individual product marks, including "Unicap," "Zymacap," "Zymadrops," "Kaopectate," "Cheracol" and "Cebenase."

The defendant is a retail drug store located at 126 Liberty Street, New York City. Though it has purchased substantial quantities of plaintiff's products in the past and is apparently continuing to do so, it has not signed a fair trade contract with the plaintiff.

[*Allegations*]

In support of its motion, plaintiff alleges:

1. That for many years it has been engaged in an extensive advertising program, promoting its products to physicians, pharmacists and indirectly to ultimate consumers, as a result of which plaintiff has developed a vast good will.

2. That in the course of plaintiff's development and maintenance of its good will and system of distribution, it has established, wherever permitted by law, a fair

trade structure under which uniform prices have been established for its products.

3. That such a fair trade structure was first established in the State of New York subsequent to the enactment of the New York Fair Trade Act in 1937.

4. That in order to assure itself that retailers are complying with its established resale prices, plaintiff investigates every infraction reported to or discovered by it and explains its fair trade program to retailers accused of violations thereof.

5. That plaintiff has an established policy of sending warning letters to retailers who persist in violations and of bringing suit where the retailers, after such warning, still refuse to stop their illegal conduct.

6. That in furtherance of its policy of enforcing its established minimum prices, plaintiff, in the past two years, has shopped every retailer in the Boroughs of Manhattan and Brooklyn who carried its products and that extensive investigations have also been conducted in the Bronx, Queens and Nassau Counties.

7. That more than thirty suits have been filed against retailers who have persisted in their unlawful price cutting and more than twenty permanent injunctions have been obtained.

8. That a warning against price violations was sent to the defendant on August 6, 1958, to no avail, and on November 19, 1958, action was commenced against the defendant seeking to enjoin its price cutting on plaintiff's products; however, defendant's price cutting is continuing.

9. That the defendant is a large retail drug establishment servicing the Wall Street area and employing at least thirty full-time employees; that its customers come from all over the City of New York and from the outlying suburban counties in both New York State and New Jersey, and consequently the defendant is competing with local retail druggists throughout the city and the surrounding suburban communities.

10. That the defendant's continued price cutting threatens to undermine plaintiff's fair trade price structure and is causing immediate and irreparable harm both to the good will and business of the plaintiff and to the good will and business of retailers who sell plaintiff's products at the fair trade price.

[*Defense—Lack of Enforcement*]

Defendant, in opposition to this motion, asserts that the plaintiff, by its own indifferent conduct, has encouraged and acquiesced in the wide-spread selling of its products at a competitive price; that plaintiff has neglected to take steps to prevent wide-spread price cutting of its products, and that as a result there has been a general collapse of plaintiff's fair trade price structure. In support of this contention, defendant has submitted affidavits indicating twelve instances of sales of plaintiff's products below the fair trade price by retail druggists in Manhattan, Brooklyn and The Bronx. Eight of the sales took place in Manhattan; three in Brooklyn and one in The Bronx; five occurred in April 1959, five in February 1959 and two in January 1959.

[*Meeting Competitors' Prices*]

The defendant further asserts that plaintiff has suffered no irreparable harm to its good will; that it has sold plaintiff's products below the fair trade price out of compelling economic necessity in order to meet the prevailing price of competitors; and that the granting of a preliminary injunction would cast a stigma on defendant's business reputation and give the plaintiff all of the relief to which it would be entitled only after prevailing at a trial of the disputed issues in this case.

[*Fair Trade Agreements Between Competitors*]

As another basis for the denial of the relief here sought, the defendant contends that plaintiff is precluded from enforcing its fair trade price structure by reason of its sale at wholesale to the dispensaries of various industrial and public utility corporations. It appears that each of the dispensaries in question employs a full-time pharmacist, a registered nurse or a full or part-time physician and that each is engaged in servicing the health needs of company employees. There is not the slightest indication that these dispensaries are a mere subterfuge for the sale of plaintiff's products to ultimate consumers at less than the fair trade price or, indeed, that any such sales in fact occur.

Accordingly, the defendant's contention that the plaintiff is competing with it on the retail level is patently without merit.

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The case of *United States v. McKesson & Robbins, Inc.* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305 (1956), relied upon by defendant, has no applicability under the circumstances here presented.

[*Preliminary Injunction Granted*]

After carefully considering the pleadings, plaintiff's motion papers and brief, defendant's opposing affidavits, the exhibits submitted on this motion and after hearing the oral argument of counsel, I have concluded that:

1. Plaintiff has made and is continuing to make reasonable and diligent efforts to enforce its fair trade price structure.

2. Despite certain violations, there has been no general breakdown of plaintiff's system of fair trade prices.

3. Defendant has and is continuing to sell plaintiff's products below the fair trade price in violation of Section 369-b of the New York General Business Law.

4. Defendant's continued disregard for plaintiff's rights under the New York Fair Trade Law is undermining plaintiff's fair trade price structure and unless restrained pending trial such conduct may lead to the destruction of plaintiff's fair trade system and the impairment of its good will.

5. The relief here sought against the defendant is for the sole purpose of enforcing plaintiff's fair trade rights.

6. There is no reason why a preliminary injunction should not be granted.

7. The plaintiff has established its right to a preliminary injunction since the defendant's acts are in clear violation of Section 369-b of the New York General Business Law, and unless restrained pending trial, such conduct will result in irreparable injury to plaintiff and may lead to the destruction of its fair trade structure and the impairment of its good will.

[*Order*]

Settle order on notice which shall recite the facts as found herein and which shall provide that said order is conditioned upon plaintiff's furnishing a bond to the satisfaction of the court in the amount of $5,000.00.

[¶ 69,363] Wisconsin Liquor Co. v. Park & Tilford Distillers Corporation and Affiliated Distillers Brands Corp.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1958—April Session, 1959. No. 12491. Dated May 21, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—Elements and Proof of Unlawful Conspiracy—Absence of Common Scheme or Purpose—Variance Between Allegations and Proof—Merger—Absence of Adverse Effects on Competition.—In a liquor distributor's treble damage action charging two suppliers with conspiring to deprive the distributor of its franchise and to monopolize the distribution of certain products by supplying a competing distributor at discriminatorily low prices and granting it unlawful rebates and allowances, the trial court properly directed a verdict for the suppliers since there was no evidence requiring that the conspiracy question be sent to a jury. While proof of a formal or specific agreement is not necessary to establish the existence of a conspiracy, there was, in this case, a complete absence of proof of the existence of any common scheme or purpose knowingly participated in by the alleged conspirators. In presenting its case, the distributor departed from its original allegations and sought to establish the existence of a conspiracy in which a distiller acquired 90 per cent of the stock of the distributor's supplier and effected a statutory merger for the purpose of restraining trade and creating a monopoly in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. There was no evidence that the distributor, which had terminated its distributorship with the supplier more than two and one-half years before the supplier merged with the distiller, was ever refused the supplier's products. That supplier continued to compete with other suppliers and to supply its distributors long after the dis-

tiller acquired its stock. Also, there was a complete lack of evidence of any course of conduct or dealing on the part of the alleged conspirators which resulted in adverse effects on competition in the market area involved.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.395; Monopolies, Vol. 1, ¶ 2520.30; Acquisitions of Stock or Assets, Vol. 1, ¶ 4205.410, 4207.800.

For the appellant: Thomas C. McConnell, Philip J. Curtis, and Francis J. McConnell.

For the appellees: Louis M. Mantynband, Irwin I. Zatz, and Henry J. Shames.

Before SCHNACKENBERG, HASTINGS and KNOCH, Circuit Judges.

[*Treble Damage Action*]

HASTINGS, Circuit Judge [*In full text except for omissions indicated by asterisks*]: Appellant, Wisconsin Liquor Co., brought this suit in three counts to recover treble damages for injuries due to alleged antitrust violations and also for damages arising from an alleged breach of contract.

[*Conspiracy—Price Discrimination*]

Count I of the original amended complaint named Park & Tilford Distillers Corporation (Park & Tilford) and Affiliated Distillers Brands Corporation (Affiliated) as defendants and alleged that they had entered into an illegal agreement and conspiracy in January of 1955 in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. §§ 1, 2 to deprive appellant of its distributorship and to monopolize the distribution of Affiliated and Park & Tilford products in the Milwaukee trade area by supplying Bonded Spirits Corporation (Bonded Spirits) with Park & Tilford products at discriminatorily low prices and by granting Bonded Spirits unlawful rebates and allowances to the injury of appellant in its relations with its customers and accounts. Park & Tilford was named as sole defendant in Counts II and III. Count II charged a breach of a contract designating appellant exclusive distributor of Park & Tilford products in four counties in the Milwaukee area. Count III set forth that Park & Tilford had violated Sections 2 and 3 of the Robinson-Patman Act, 15 U. S. C. A. §§ 13, 13a, by selling its liquors to Bonded Spirits, a distributor in competition with appellant, at discriminatorily low prices and by granting it unlawful rebates, discounts and allowances with the intent and purpose of destroying appellant as a distributor of Park & Tilford products.

[*Supplemental Complaint—Merger*]

Shortly before the trial, appellant sought leave to file a so-called supplemental complaint alleging that in March, 1958, pursuant to the continuing conspiracy charged in the original complaint, Schenley Industries, Inc. (Schenley) having acquired 90% of the stock of Park & Tilford, effected a statutory merger with Park & Tilford and that the purpose of the acquisition of the stock and merger was to restrain trade and create a monopoly in violation of Sections 1, 2 of the Sherman Act, *supra*, and Section 7 of the Clayton Act, 15 U. S. C. A. § 18. It was alleged that Schenley sought to eliminate Park & Tilford as an independent company and competitor, to place distributors of Schenley at a competitive advantage over Park & Tilford distributors, thus depriving the latter's distributors, including appellant, of the business of selling Park & Tilford products and to lose (purposely) valuable franchises owned by Park & Tilford for the distribution of certain named imports to the injury of Park & Tilford and its distributors.

[*Variance*]

Appellees objected to the filing of this supplemental complaint as representing such a variance from the original complaint that they would be prejudiced in the preparation of their case for trial. Leave to file was denied by the trial judge who indicated his reluctance to try Schenley for a Section 7 violation under a complaint charging a general conspiracy with Schenley as one of the conspirators but not named as a party defendant.

At the close of its case, appellant asked leave to amend its complaint to conform to the evidence. The amendment named Park & Tilford and Affiliated as co-conspirators along with Schenley and Bonded Spirits in the continuing conspiracy described above. The trial court denied such leave indicating that it would not thus "put its stamp of approval that the evidence" conformed to such an amendment. It did,

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however, grant leave to file the amendment "without any provision that it does conform to the evidence."

[*Judgment in Trial Court*]

Subsequently, on motion by appellees made at the close of appellant's evidence, the trial court directed a verdict as to Count I on the ground that there was no substantial evidence of a conspiracy. Park & Tilford also moved for a directed verdict as to Count III and this was acceded to by appellant. Count III was thereupon dismissed with prejudice and is not involved in this appeal. The trial court overruled a similar motion by Park & Tilford on Count II and the case went to the jury on the breach of contract question. The jury returned a verdict on this count in favor of appellant and assessed damages at $100,000. Park & Tilford then moved for judgment notwithstanding the verdict and in the alternative for a new trial. The trial court granted the motion for judgment n.o.v. on the ground that there was no substantial evidence of any loss suffered by appellant through the breach of contract; and, in the alternative, granted the motion for a new trial.

[*No Evidence of Conspiracy*]

We have carefully considered the record and, having view the evidence on the antitrust issue raised in Count I in the light most favorable to appellant as we must,[1] have been unable to find any evidence of a conspiracy which would have required the trial judge to send this question to the jury. In presenting its case, appellant departed completely from its original allegations charging a conspiracy on the part of Affiliated and Park & Tilford to sell to Bonded Spirits at discriminatory prices and to grant it rebates, discounts and allowances; and, instead, sought to establish the existence of a conspiracy, of which Schenley was allegedly the guiding light, to put an end to Park & Tilford as an independent company and competitor of Schenley, and to accord Schenley distributors a competitive advantage over the then existing Park & Tilford distributors.

[*Facts*]

There was testimony to the effect that in the fall of 1954 Schenley opened negotiations with Arthur D. Schulte, president of Park & Tilford, for the purchase of his holdings in that company. On June 15 of that year, appellant had entered into the contract as exclusive distributor for Park & Tilford in the Milwaukee area, replacing Bonded Spirits as such distributor. Appellant's sales manager testified that one of the chief reasons for appellant's acceptance of the distributorship contract was the fact that Park & Tilford had a franchise to distribute a number of well-known foreign brands which it claimed was a tremendous sales stimulant. The Schulte holdings in Park & Tilford were sold to Schenley on December 31, 1954 and constituted a controlling stock interest in that company. Schulte testified that just prior to the sale he had expressed doubts to Ralph Heymsfeld, vice president of Schenley, whether Distillers Company Limited, the owner of Vat 69, one of imports referred to above, would agree to continue the franchise with Park & Tilford if the sale were made because of "DCL policy * * * not to permit more than one of its major brands to be distributed by the same importer * * *." Heymsfeld testified that Schulte had informed him that "he [Schulte] would give no representations and made no warranties that foreign sellers would continue those contracts in effect after they had terminated." The record shows that, after the purchase of Schulte's holdings by Schenley, the imports were eventually terminated as follows: Vat 69 and Booth's Gin on December 31, 1955, Harvey's Wines on December 31, 1956 and Heidsieck Champagnes on October 15, 1956.

The record further shows that Schenley appointed one Stanley L. Brown president of Park & Tilford shortly after it acquired the controlling interest in that company. Brown was under contract directly to Schenley. It is also apparent that from the time Schenley acquired its controlling interest in Park & Tilford the possibility of a merger was considered.

[1] "It is well settled that on a motion for a directed verdict or on motion for judgment n.o.v. based on such motion, the evidence must be considered in the light most favorable to the party against whom the directed verdict or judgment n.o.v. is asked, that any conflict in evidence must be resolved in his favor and that every conclusion or inference that can be legitimately drawn therefrom in his behalf must be drawn." *Burcham v. J. P. Stevens Company*, 4 Cir., 209 F. 2d 35, 37 (1954). See also *American Cyanamid Co. v. Fields*, 4 Cir., 204 F. 2d 151, 153 (1953).

During 1956, Park & Tilford experienced losses of over $3,000,000. Brown, in the annual report of the stockholders, indicated that "the loss of our [Park & Tilford's] import distributorships has been the main cause of the serious drop in sales volume. Also relating to the loss of our imports was its subsequent effect in weakening our distributor relationships."

Appellant had terminated its distributorship contract with Park & Tilford in August of 1955. The reasons later voiced for such termination were the fact that part of its exclusive territory had been granted to Bonded Spirits and that it was becoming increasingly clear that Park & Tilford would lose its import distributorships.

Park & Tilford was merged with Schenley in April of 1958, which was more than two and one-half years after appellant terminated its distributorship arrangement and almost two years after the filing of the original complaint in this suit.

[*Lack of "Common Scheme"*]

There was no evidence that appellant was ever refused Park & Tilford products, including the imports, under its distributorship agreement. Park & Tilford continued to compete with other sellers of alcoholic beverages and to supply its distributors with domestic whiskies and imported brands long after Schenley's acquisition of the Schulte shares. There was a complete lack of evidence of any course of conduct or dealing on the part of the alleged conspirators resulting in adverse effect on competition in the market area involved. We are, of course, mindful that proof of a formal or specific agreement is not necessary to establish the existence of a conspiracy. *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 809-810 (1945); *Interstate Circuit, Inc. v. United States* [1932-1939 TRADE CASES ¶ 55,205], 306 U. S. 208, 226 (1939). However, we are further impressed in this case with the complete absence of proof of the existence of any common scheme or purpose knowingly participated in by the alleged conspirators, and we hold that the trial court properly directed a verdict on Count I in favor of appellees (defendants) at the close of plaintiff's case.

* * *

[¶ 69,364] **United States v. Frozen Food Distributors Association of Greater New York; Global Frozen Foods, Inc.; Nassau Suffolk Frozen Food Co., Inc.; Reliable Food Distributors, Inc.; Snow-Kist Frozen Foods Corp.; Flagstaff Frozen Food Associates, Inc.; McRoberts Bros., Inc.; Leonard Rapoport; Morris Bahar; Michael Goldfarb; Jack Karger; and Walter Greenspan.**

In the United States District Court for the Southern District of New York. Civil Action No. 135-141. Dated May 15, 1959.

Case No. 1404 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Price Fixing—Prices Fixed by Agreements Between Competitors—Coercion.—Distributors of frozen food specialties were prohibited by a consent decree from agreeing (1) to fix the prices at which such frozen food specialties are sold to third persons or (2) to coerce or persuade a distributor to increase, change, or maintain the price of such products. Also, the distributors were prohibited from suggesting prices to other distributors.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.091, 2011.181.

Combinations and Conspiracies—Consent Decree—Practices Prohibited—Boycotts—Refusal to Deal—Coercion.—Distributors of frozen food specialties were prohibited by a consent decree from agreeing (1) to boycott or refuse to deal with a packer, (2) to coerce or persuade a packer to boycott or otherwise refuse to deal with any distributor, or (3) to coerce or persuade a distributor to boycott or otherwise refuse to deal with any packer. The distributors were also enjoined from inducing or coercing other distributors to refuse to purchase from any packer or class of packers, and coercing or compelling any packer to refuse to sell to any other distributor. However, exclusive distribution contracts between packers and distributors were not prohibited.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533, 2005.575, 2005.785.

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Combinations and Conspiracies—Consent Decree—Trade Association Membership as Means of Trade Restraint.—Distributors of frozen food specialties were prohibited by a consent decree from knowingly becoming members of or participating in the activities of any trade association or other organization whose purposes or functions relate to the distribution or sale of frozen food specialties and are contrary to a section of the decree prohibiting certain agreements.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121, 2017.300.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Dissolution of Trade Association.—Distributors of frozen food specialties were ordered by a consent decree to dissolve their association at the earliest possible date.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Fair Trade Laws.—A consent decree provided that nothing in the decree should prevent the defendants, distributors of frozen food specialties, from availing themselves of the benefits, if any, permitted under state laws, the Miller-Tydings Act, and the McGuire Act.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.38, 8321.39, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; W. D. Kilgore, Jr., Charles T. Whittinghill, Richard B. O'Donnell, John D. Swartz, William J. Elkins, Joseph T. Maioriello, Edward F. Corcoran, and Agnes T. Leen, Attorneys, Department of Justice.

For the defendants: Laporte & Meyers, by Ernest S. Meyers, for Frozen Food Distributors Assn. of Greater New York; Sidney R. Schwartzreich for Nassau Suffolk Frozen Food Co., Inc., and Morris Bahar; Jacob Rapoport for Global Frozen Foods, Inc., and Leonard Rapoport; Charles N. Kors for McRoberts Bros., Inc.; Jaffe & Wachtell, by Herbert M. Wachtell, for Reliable Food Distributors, Inc.; Matthew H. Bradenburg for Snow-Kist Frozen Foods Corp., Michael Goldfarb, and Jack Karger; Benjamin Weiner for Walter Greenspan and Flagstaff Frozen Food Associates, Inc.

Final Judgment

[*Consent Decree*]

RICHARD H. LEVET, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 30, 1958; each of the defendants having appeared and filed their respective answers to such complaint, denying the substantive allegations thereof; and the parties hereto, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party hereto with respect to any such issue;

Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, and this Court being advised and having considered the matter, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means any individual, partnership, corporation or other business or legal entity;

(B) "New York Metropolitan area" means the Counties of New York, Kings, Queens, Bronx, Richmond, Nassau, Suffolk and Westchester in the State of New York and those

counties within the State of New Jersey lying north of Mercer and Monmouth Counties;

(C) "Frozen food specialties" means frozen foods that are prepared and precooked before freezing, such as pastry cakes, fish sticks, crab meat cakes, meat pies, fruit pies, egg rolls, blintzes, various complete dinners, pizzas and ravioli. "Frozen food specialties," as used herein, shall not include frozen vegetables, fruits or juices therefrom, or frozen raw meats, fish and poultry;

(D) "Packers" means persons engaged in the business of producing frozen food specialties;

(E) "Distributors" means persons who are engaged within the New York Metropolitan area in the business of purchasing frozen food specialties from packers for resale to retailers;

(F) "Retailers" means persons within the New York Metropolitan area who purchase frozen food specialties from distributors for resale to consumers;

(G) "Defendant association" means Frozen Food Distributors Association of Greater New York;

(H) "Distributor defendants" means all defendants except Frozen Food Distributors Association of Greater New York.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its officers, agents, employees, servants, subsidiaries, successors and assigns and to all other persons in active concert or participation with any defendant who receive actual notice of this Final Judgment by personal service or otherwise; provided, however, that the provisions of this Final Judgment shall not apply to transactions between a defendant and a company which wholly owns such defendant or is wholly owned by such defendant, or between a defendant and any other company when both are wholly owned and operated by the same person or persons.

IV

[*Price Fixing—Boycotts—Refusal to Deal*]

The distributor defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan or program among themselves or with any association of distributors or any other person:

(A) To fix, determine, maintain, establish or stabilize prices at which any frozen food specialties are sold to any third person;

(B) To coerce or persuade a distributor to increase, change or maintain the price of any frozen food specialties;

(C) To coerce or persuade a packer to boycott or otherwise refuse to deal with any distributor;

(D) To coerce or persuade a distributor to boycott or otherwise refuse to deal with any packer;

(E) To boycott or refuse to deal with a packer.

V

[*Coercion*]

Each of the distributor defendants is enjoined and restrained from:

(A) Urging upon or suggesting to any other distributor the price or prices to be charged for any frozen food specialties by that other distributor;

(B) Inducing, persuading or coercing, or attempting to induce, persuade or coerce, any other distributor to refuse to purchase, or threaten to refuse to purchase, any frozen food specialties from any packer or class of packers;

(C) Coercing or compelling, or attempting to coerce or compel, any packer to refuse to sell, or threaten to refuse to sell, any frozen food specialties to any other distributor; provided, however, that nothing in this provision shall be deemed to apply to an exclusive distribution contract between a packer and a distributor.

VI

The defendant association is ordered and directed to furnish to each of its members a copy of this Final Judgment and to file an affidavit with this Court and with plaintiff herein setting forth the fact of its compliance with this Section.

VII

[*Specific Relief—Dissolution*]

Defendants are ordered and directed:

(A) To institute such action as may be necessary to dissolve the defendant association at the earliest possible date;

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(B) Upon the completion of such dissolution of the defendant association, to file an affidavit with this Court and with plaintiff herein setting forth the fact of compliance with this Section.

VIII

[*Trade Association Membership*]

Each distributor defendant is enjoined and restrained from knowingly becoming a member of, participating in the activities of or organizing, directly or indirectly, any trade association or other organization the purposes or functions of which relate to the distribution or sale of frozen food specialties and are contrary to any of the provisions of Section IV of this Final Judgment.

IX

[*Permissive Provision*]

Nothing contained in this Final Judgment shall prevent the defendants from availing themselves of the benefits, if any, permitted and lawful under State Law, of the Act of Congress of August 17, 1937, commonly known as the Miller-Tydings Act, and of the Act of Congress of July 14, 1952, commonly known as the McGuire Act.

X

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its principal office, be permitted, subject to any legally recognized privilege (A) access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment; (B) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview its officers and employees, who may have counsel present, regarding any such matters. Upon such request, such defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary to the enforcement of this Final Judgment. No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 69,365] S. Kriete Osborn v. Sinclair Refining Co.

In the United States District Court for the District of Maryland. Civil No. 9769. Filed February 24, 1959.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—Practices—Refusal to Deal—Cancellation of Lease—Using Monopoly in Own Brand-Name Products to Invade Another Field —Legality.—A service station dealer, in a treble damage action charging that a refiner of petroleum products cancelled its lease and sales agreement in furtherance of an attempt to monopolize the sale of automobile accessories to the refiner's own dealers and/or a conspiracy between the refiner and a manufacturer of automobile accessories to restrain trade in such products, failed to show a violation of the antitrust laws. It was contended that the refiner, which received commissions on sales of accessories to its dealers by the

manufacturer, used its natural monopoly of its own brand-name petroleum products to invade the field of automobile accessories. While the refiner's dissatisfaction with the dealer's sales of the manufacturer's accessories contributed to the cancellation of the dealer's lease, the refiner, acting independently, had the right to exercise its independent discretion as to the parties with whom it would deal. Although the right to refuse to deal is lost if the refusal is in furtherance of a conspiracy in restraint of trade or an attempt to monopolize, there was no evidence of either in the instant case. Many other brands of accessories were available and, in practice, the refiner's dealers sold the products of other manufacturers. The mere fact that the refiner and the accessories manufacturer had a marketing agreement did not, *per se,* restrict the refiner's right to terminate the dealer's lease for any reason it saw fit. The agreements contained no provisions which, in and of themselves, violated the antitrust laws. Also, none of the agreements were made upon the condition that the dealer refrain from dealing in the products of other manufacturers.

The refiner was not using its economic position as a refiner and distributor of petroleum products to invade and dominate the accessory business; it had no dominant position in the petroleum field in Maryland or elsewhere; and it had a valid interest in seeing that its dealers carried a full line of such products. Further, its dealers benefited from the arrangement.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

Combinations and Conspiracies—Monopolies—Restraint of Trade and Attempt to Monopolize—Relevant Market.—In a service station dealer's treble damage action charging that a petroleum refiner attempted to monopolize the sale of automobile accessories to its own dealers and/or conspired with a manufacturer of such accessories to restrain trade therein, the relevant market that had to be considered was the general market for such accessories in Maryland, rather than the market for those accessories among the refiner's own dealers in that area. While the refiner had some 300 service station dealers in Maryland, the total number of stations was over 2,300. Also, there were about 200 other sellers of automobile accessories in the state. Fourteen competitive brands of gasoline, sixteen brands of tires and tubes, and numerous other brands of various accessory items were sold in the area.

See Combinations and Conspiracies, Vol. 1, ¶ 2005; Monopolies, Vol. 1, ¶ 2540.

Private Enforcement and Procedure—Suit for Civil Damages—Elements Which Must Be Established—Injury to Public.—A service station dealer, in a treble damage action charging a refiner with attempting to monopolize the sale of automobile accessories to its own dealers and/or conspiring with a manufacturer of such accessories to restrain trade therein, failed to show that the public was injured by marketing agreements between the refiner and the manufacturer. Under those agreements, the refiner received commissions on accessories sold to its service station dealers by the manufacturer. However, that arrangment resulted in no increase in the wholesale prices charged to dealers and no increase in the retail prices charged to the public. There was no evidence of horizontal price fixing or "price leadership" with respect to the sale of accessories. The manufacturer's products competed with those of other manufacturers and distributors on the basis of price, quality, and other relevant factors. Since the refiner's dealers were not required to deal exclusively in the manufacturer's products, the public had a choice of brands at the service stations operated by the refiner's dealers. In addition, the public was free to buy any of the competing brands sold at service stations operated by companies other than the refiner, and at various other retail outlets.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

For the plaintiff: Calhoun Bond of Cable and McDaniel, Baltimore, Md.

For the defendant: William D. Macmillan and David R. Owen, Baltimore, Md.

[*Treble Damage Action*]

THOMSEN, Chief Judge [*In full text*]: This is a private antitrust suit under 15 U. S. C. A. 15. Plaintiff claims that his service station lease and dealer's sales agreement were cancelled by defendant (Sinclair) in fur-

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therance of an attempt by Sinclair to monopolize the sale of tires, batteries and accessories (TBA) to its service station dealers in Maryland and/or a combination or conspiracy between Sinclair and Goodyear Tire and Rubber Company (Goodyear) to restrain trade in those products.

Facts

[*Parties*]

Sinclair is a refiner and distributor of petroleum products in interstate commerce.

Sherwood Bros., Inc. (Sherwood), which had originally been an independent distributor of petroleum products in Maryland, became a wholly owned subsidiary of Sinclair in 1935. Thereafter it sold Sinclair petroleum products in most of Maryland and in small areas of adjacent states until the end of 1955, when Sherwood was merged into Sinclair. Since January 1, 1956, Sinclair has conducted, through its Sherwood Division, the business which had previously been conducted by Sherwood. The term Sherwood will be used herein to include both Sherwood Bros., Inc., and the Sherwood Division of Sinclair unless the context otherwise requires.

Before it became a subsidiary of Sinclair, Sherwood had operated service stations with its own employees. About 1936, as a result of the enactment of the Wage and Hour and Social Security laws by Congress and of laws imposing "chain store taxes" in many states, Sinclair and Sherwood changed to a policy of leasing service stations to dealers. Thereafter Sinclair and Sherwood sought to avoid such control over their service station operations as would make them liable under those statutes.

Plaintiff was employed by Sherwood in 1932 as an attendant, and later as manager of its service station in Reisterstown, Baltimore County, Maryland, at the point where the Westminster and Hanover Roads join to form Reisterstown Road. In 1936 plaintiff leased the station from Sherwood; that lease was cancelled in 1948, and a new lease was executed, which continued on a year to year basis until May 31, 1956, when it was cancelled by Sherwood.

Goodyear is a manufacturer of tires and other products and a distributor of a full TBA line, which includes, besides tires and batteries, all sorts of car and home merchandise, from spark plugs to spotlights and from children's toys to motor boats and room coolers. Practically all Goodyear TBA sold in Maryland is manufactured outside the state.

[*Market Area*]

Total sales of gasoline in Maryland were 638,000,000 gallons in 1952, 817,000,000 gallons in 1956. During the same period Sherwood's tax paid sales in Maryland increased from 77,000,000 to 87,000,000. Fourteen competitive brands of gasoline were sold in Maryland, sixteen of tires and tubes, fourteen of batteries, and numerous brands of oil filters, fan belts, spark plugs, and other TBA items.

In 1954-56 there were over 2,300 service station dealers in Maryland, including 1,000 in the metropolitan Baltimore marketing area, who were primarily engaged in selling gasoline, but also sold TBA. There were about 200 other TBA dealers in the state, half of them in the Baltimore area. There were some 300 service station dealers in Maryland selling Sinclair products, including some 200 in the metropolitan Baltimore district. About 300 other outlets—stores, garages, etc.—sold Sinclair petroleum products.

In 1956 there were 28 establishments selling gasoline in Reisterstown and the surrounding area, of which 22 sold various brands of TBA; there was one automotive supply store. On the Reisterstown Road, in Reisterstown proper, there were two Sinclair stations, two Esso stations, one Sunoco station, and a third large Sinclair outlet.

[*"Sales-Commission" Plan*]

Goodyear sold TBA to a large number of contract dealers, such as tire stores and service stations, which had a sufficient volume of business to qualify for the various discounts allowed to dealers. All such dealers were billed by Goodyear at the list price less the applicable discount based on the volume of the dealer's purchases, except that in some cases a greater discount was allowed to meet competition. In addition, Goodyear paid bonuses (really additional discounts) based on total annual purchases. The contract dealers sold retail to consumers and wholesale to smaller service station dealers, tire dealers, truck operators and commercial consumers. Goodyear itself operated stores, which sold wholesale and retail.

While Sherwood operated service stations with its own employes it sold Firestone TBA through those stations. After the stations were leased to dealers Sherwood had an oral arrangement with Firestone under which it received a commission from Firestone in connection with promotion and sale of Firestone products through its lessee-dealers. Sinclair had similar oral arrangements with Goodyear. Some time after Sherwood had become a subsidiary of Sinclair, Sherwood terminated its arrangement with Firestone and made a similar oral arrangement with Goodyear.

In 1944 the Sherwood-Goodyear agreement was reduced to writing in the form of a letter from Goodyear to Sherwood, which read in part as follows:

> "We now confirm discussions with you relative to services to be rendered by you during the balance of the year 1944, and thereafter from month to month unless cancelled by either party on thirty (30) days' written notice to the other, in promoting the sale of Goodyear tires (casings and tubes), batteries and merchandise listed in Sections I, II and III of our Car and Home Supply Catalog as supplemented from time to time (referred to herein as car and home merchandise), through such independent resale outlets as are otherwise engaged in or propose to engage in the sale of your products and as are agreed upon in writing with you from time to time.
>
> "During the period mentioned it is understood that you will actively assist us in selling and in promoting the sale of the above merchandise to such customers, and at our request from time to time you will have your field representatives call upon these customers in company with our salesmen and otherwise, and will cooperate and assist us in our efforts to promote and encourage the sale of such merchandise by the customers to whom such sales shall be made by us. The right to accept or reject any order received from any customer shall at all times rest with us.
>
> "You will see that your field offices work energetically with us with the view to assisting us to the fullest practicable extent in perfecting arrangements with all such customers. You will at all times maintain adequate, qualified personnel to render the services called for hereunder regularly and efficiently."

The agreement provided that Goodyear should pay Sherwood a 10% commission on tires and batteries sold to Sherwood dealer outlets, a 7½% commission on such products sold to Sherwood distributors, and commissions of 5% to 10% on car and home merchandise. Sherwood was prohibited from paying any part of these commissions to its customers.

Also in 1944 the first written agreements were entered into between Sinclair and Goodyear. A "tire and battery letter" provided for the sale of Goodyear to Sinclair of tires, tubes and batteries for resale to Sinclair TBA franchise holders[2] who maintained an inventory of Goodyear merchandise. Sinclair never had physical possession or risk of loss of such merchandise or more than instantaneous title thereto. Orders were sent directly to Goodyear by the franchise holders and the merchandise was shipped by Goodyear to them. Service station dealers gave orders for Goodyear merchandise to Sinclair salesmen and to Goodyear salesmen, as well as to salesmen for the franchise holders. These salesmen transmitted all orders to the franchise holders. Under this purchase-and-resale plan Sinclair promoted the sale of Goodyear merchandise in much the same way as Sherwood did under the sales-promotion plan. In addition, Sinclair and its franchise holders handled all adjustments for defective merchandise, and Sinclair handled billing, crediting and collecting, and bore the credit risk.

It is obvious that the arrangement embodied in the tire and battery letter could not be successful, and Sinclair would not get any benefit therefrom, if Goodyear sold many tires, tubes and batteries directly to Sinclair service stations. There was always, however, active competition between Sinclair's franchise holders and other Goodyear distributors.

A "car and home letter" similar to the 1944 Sherwood-Goodyear letter agreement, provided for the payment of commissions by Goodyear to Sinclair on sales of car and home merchandise by Goodyear to resellers of Sinclair petroleum products. The car and home merchandise which was marketed by Goodyear was generally sold under the trade name of some other well known manufacturer, and was almost always available from other sources.

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[2] The letter also covered the resale of such merchandise by Sinclair through its company-operated outlets, but none of these are involved in this case.

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[*Exclusive Dealing Not Required*]

There was no contractual or other legal obligation on any Sherwood or Sinclair lessee dealer to purchase Goodyear TBA or to refrain from purchasing other TBA products. The dealers could obtain the benefits of volume purchases from other tire manufacturers and TBA marketers. In practice the Sherwood dealers purchased various types, brands and quantities of competitive TBA products from other suppliers. Sinclair and Goodyear agreed:

> "* * * that under its policy Sinclair does not undertake to, and will not in fact, exercise or attempt to exercise any control or authority, directly, indirectly, by coercion or otherwise, over a dealer or any phase of the conduct of his business, regardless of whether or not Sinclair may own in fee or hold under lease the site or other station facilities occupied and operated by the dealer as an independent contractor and merchant in his own right; and that Sinclair specifically requests that Goodyear not ask or expect that such control or authority be exercised; and that Goodyear will not permit its salesmen or other field or office representatives to undertake to exercise such control or authority in connection with any phase of the agreement."

This policy was incorporated in Sinclair's operating manuals, used by Sherwood.

Neither Sherwood nor Sinclair sold or promoted the sale of Goodyear TBA products to persons other than Sherwood or Sinclair dealers. The various agreements with Goodyear contemplated only the promotion of TBA sales to existing or prospective retail distributors of Sinclair petroleum products and the purchase by Sinclair[2] of tires and batteries for resale to such retail distributors. The principal purpose of Sherwood and Sinclair in effecting these agreements was to supply a full line of TBA products to the service stations handling Sinclair petroleum products. The parties are agreed that it is desirable for a dealer to be able to furnish one-stop service to the motoring public and that the availability of a complete line of TBA at a service station attracts customers for gasoline, oil and the other services the dealer offers. Under the agreement which Sherwood and Sinclair had with Goodyear, there was available to their dealers a convenient source of supply of TBA products nationally advertised under well-known brand names. The dealer could expect prompt deliveries and therefore did not need to carry excessive inventories. He could sell Goodyear tires, tubes, batteries and some other Goodyear TBA products on Sinclair credit cards without extending credit himself. The Sherwood-Sinclair service station dealers derived certain benefits from the agreements between Sherwood-Sinclair and Goodyear, although they could have obtained most of the benefits from handling other nationally advertised brands of TBA.

The 1944 Sherwood-Goodyear agreement was in effect when Sherwood became a division of Sinclair on January 1, 1956. Thereupon, the Sinclair-Goodyear "tire and battery" and "car and home" letter agreements became applicable to the Sherwood Division. The change made very little difference in net earnings to Sherwood, and had no effect upon the prices which Sherwood dealers paid for Goodyear TBA.

Before January 1, 1956, Goodyear had solicited direct purchases of tires, tubes and batteries by Sherwood service station dealers, and had paid Sherwood a commission on all such sales. After January 1, 1956, Brooks-Huff Tire Company, which had been a Goodyear tire and battery dealer in Baltimore, gave up its Goodyear franchise and became a Sinclair franchise holder. Thereafter Goodyear did not solicit direct purchases of tires, tubes and batteries by Sherwood dealers in the metropolitan Baltimore area. Such sales were made either by Brooks-Huff or by another Sinclair franchise holder, except in those isolated instances where a service station dealer preferred to buy direct from Goodyear. After January 1, 1956, Sherwood received a profit on all sales made by it to Brooks-Huff, but received no profit or commissions on any sales of tires, tubes and batteries made by Goodyear direct. Before 1956 plaintiff had purchased Goodyear TBA direct from Goodyear. Shortly after January 1, 1956, a Sherwood sales representative told plaintiff that he was no longer a Goodyear distributor and that he should purchase Goodyear tires, tubes and batteries from Brooks-Huff. About the same time a Goodyear salesman said that he would no longer accept orders from plaintiff for such merchandise. However, plaintiff could purchase Goodyear tires, tubes, and batteries from

[2] And by Sherwood after January 1, 1956.

Brooks-Huff on the same terms and discounts that he had purchased them directly from Goodyear prior to January 1, 1956, and plaintiff could and did purchase Goodyear car and home products directly from Goodyear both before and after January 1, 1956.

Other Goodyear distributors in Baltimore and elsewhere continued to compete for the TBA business of the Sherwood dealers, and plaintiff also continued to purchase all kinds of TBA products from wholesale houses in Baltimore, Reisterstown, Westminster, or wherever he chose.

[*Use of Competing Products*]

Sherwood regarded Goodyear TBA in its entirety as one of the Sherwood lines, and was not pleased when its dealers carried a large stock of other TBA products. Sherwood and Sinclair believed that both they and their dealers would benefit if the dealers handled an appropriate quantity of TBA and they naturally preferred that the dealers carry the Goodyear line.

The purchase of Goodyear TBA was discussed by Sherwood with prospective lessees. They were told that there was a general identity between the names of Sinclair and Goodyear across the country and that Sherwood liked to see those names held together so far as its service to the motoring public was concerned. The normal procedure was to sign the lease and dealer sales agreement and to secure the initial TBA order simultaneously. Sherwood impressed on its sales personnel the desirability of dealers carrying 100% Goodyear TBA products. They, in turn, used their best efforts to persuade the dealers to purchase Goodyear TBA in preference to other lines.

It was not the practice of Sherwood or Sinclair to prohibit their dealers from displaying on the leased premises signs advertising TBA products other than Goodyear TBA. They frequently requested dealers to remove such signs but they did not force the dealers to remove them and many Sherwood stations displayed signs advertising other brands of TBA.

Sherwood established annually TBA quotas for each of the territories covered by its sales representatives, but did not ordinarily assign quotas to each individual service station dealer. The sales representatives usually discussed with their dealers the level of Goodyear TBA sales which they thought such dealers should reach. Sherwood distributed through its sales representatives blank forms to be used by a dealer in calculating his potential and actual TBA business, but did not require that all dealers use them. Field employees prepared reports showing what brands of TBA were displayed for sale by the several dealers. Nearly all of them handled some Goodyear TBA but no dealer handled Goodyear TBA exclusively.

[*Threat to Terminate Leases*]

Sherwood held a sales meeting each spring, at which the dealers were exhorted to greater efforts by John R. Sherwood, president of the company. The principal emphasis was on gasoline gallonage, but he made it clear year after year that he was dissatisfied with the TBA sales. There is a conflict in the testimony as to what was said at a particular meeting in or about 1949. It is difficult for anyone to remember exactly what was said on such an occasion ten years ago, but I find that the dealers understood and Sherwood intended them to understand that unless they purchased more Goodyear TBA some of the leases would be terminated.[3] Around 1950 Sherwood set a goal of a million dollars of TBA sales, which was not reached until 1958. Sinclair had calculated that $35 of TBA sales per 1,000 gallons of gasoline sales was a reasonable quota, and the Sherwood service station dealers as a whole were buying only about one-half of that amount. Of course, some dealers were buying at much higher levels than others. The tire companies had figured the service station potential at $135 of TBA retail sales per 1,000 gallons of gasoline; that would have meant $90 wholesale per 1,000 gallons, so the Sherwood quota of $35 per 1,000 gallons does not appear unreasonable.

Sherwood kept records of the purchases of Goodyear TBA by its dealers and considered this item along with others in de-

[3] The testimony dealing with the conversations among the dealers immediately following Mr. Sherwood's speech is admissible to show their understanding of what he had said, and by inference therefrom what he had intended them to understand. So is plaintiff's testimony as to what he had understood Mr. Sherwood's statements to mean. *Linden v. United States*, 4 Cir., 254 F. 2d 560; *Hard v. United States*, 9 Cir., 157 F. 2d 630; *Wigmore on Evidence*, § 1790.

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termining whether to renew or terminate a dealer's lease at the end of each year. The final decision was made on the basis of the dealer's overall performance. The most important factor considered was the total gallonage of gasoline sold by the dealer. Besides TBA, other factors considered included cleanliness of the station, hours of operation, quality of service offered the public, personal interest and attentiveness of the dealer to the operation of the station, and the increase or decrease in the volume of sales from year to year.

[*Cancellation of Lease—Causes*]

In addition to being the lessee of a Sherwood service station in Reisterstown, plaintiff operated a Firestone TBA business in connection therewith and was the sole stockholder of a corporation which operated a Firestone store in Westminster.[4] During the period that plaintiff was a Sherwood dealer, he sold much larger quantities of Firestone than Goodyear TBA. He told Sherwood that Firestone would remain his major line, but that he would also carry Goodyear and let the public choose between them.

His first lease was cancelled by Sherwood in 1948 because of the decline in the gasoline gallonage and because plaintiff was not handling enough Goodyear TBA products. Following a conference, at which plaintiff had agreed to place an order for over $1,000 worth of Goodyear TBA, Sherwood's sales manager decided to give him another chance, and signed a new lease. Plaintiff thereafter bought some Goodyear TBA, but he continued to buy more than than ten times as much Firestone TBA.

Although Sherwood's sales representatives told plaintiff over the years that he ought to buy more Goodyear TBA products, they neither stated explicitly nor implied clearly that he had to do so in order to keep his lease.

The second lease provided for a rental equal to 1½¢ per gallon of gasoline and motor fuels delivered to the station, with a minimum of $400 per month. However, in accordance with its general custom, Sherwood waived the minimum rent and accepted lower amounts per gallon over a period of several years before and during the rebuilding and enlargement of the station in 1953-54. The lease and the dealer sales agreement which supplemented it contained provisions for termination by either party at the end of the original term or any successive yearly term, on thirty days' notice.

The service station leased to plaintiff occupied the best location in the Reisterstown area. This was an important factor in inducing Sherwood to rebuild and enlarge the station in 1953. In 1954, after the station had been rebuilt, a Sherwood representative (DeHuff) asked plaintiff what he intended to do about Goodyear TBA. Plaintiff replied that he intended to carry and display Goodyear along with Firestone, but that he could not economically get rid of his Firestone franchise. DeHuff said that one way Sherwood expected to recover the expenses of the rebuilding was by plaintiff handling more Goodyear TBA.

The fact that plaintiff carried so much more Firestone TBA than Goodyear TBA was one of the factors, along with others affecting the complete operation of the station, considered by the sales representative each year in making up his mind whether to recommend to his superiors that plaintiff's lease be renewed or terminated, and by the sales manager in making the final decision.

When the responsible individuals at Sherwood considered whether to renew or terminate plaintiff's lease in the spring of 1956, they thought that his gallonage had not increased in 1955 to the extent that it should have increased, considering the recent expenditure of $31,000 for the enlarged station.

I find that those two factors—gasoline gallonage and TBA problems—substantially contributed to Sherwood's decision to cancel the lease in 1956. I do not find that either of the two factors was predominant.[5]

[*Damages*]

Plaintiff suffered damage as a result of the cancellation, but it was agreed at a pre-

[4] Plaintiff was also the owner of a 437-acre farm in Carroll County.

[5] This, however, would not be fatal to plaintiff's claim for damages sustained as a result of the cancellation if he had shown a combination in restraint of trade or an attempt to monopolize in violation of the Sherman Act, and that such illegal motive substantially contributed to the decision to cancel. *Momand v. Universal Film Exchanges, Inc.* [1948-1949 TRADE CASES ¶ 62,360], 1 Cir., 172 F. 2d 37. See also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555.

trial conference that no proof of the amount of such damage should be offered until after it has been determined whether there was any violation of the antitrust laws. Plaintiff did not prove that he suffered any other damage as a result of the alleged violations.

DISCUSSION

[*Refusal to Deal*]

It is a settled principle of law that in the absence of a purpose to create or maintain a monopoly a manufacturer or a distributor has the right freely to exercise his independent discretion as to the parties with whom he will deal. *United States v. Colgate & Co.*, 250 U. S. 300, 307; *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, 625; *Schwing Motor Co. v. Hudson Sales Corp.* [1956 TRADE CASES ¶ 68,292], D. Md., 138 F. Supp. 899, 902, aff'd [1956 TRADE CASES ¶ 68,564], 4 Cir., 239 F. 2d 176, cert. den. 355 U. S. 823; *Miller Motors Inc. v. Ford Motor Co.* [1958 TRADE CASES ¶ 68,937], 4 Cir., 252 F. 2d 441, 451; *Nelligan v. Ford Motor Co.* [1959 TRADE CASES ¶ 69,238], 4 Cir., — F. 2d —; *Hudson Sales Corp. v. Waldrip* [1954 TRADE CASES ¶ 67,694], 5 Cir., 211 F. 2d 268, 274, cert. den. 348 U. S. 821; *Nelson Radio and Supply Co. v. Motorola* [1952 TRADE CASES ¶ 67,386], 5 Cir., 200 F. 2d 911, 915, cert. den. 345 U. S. 925. Sinclair has the right, acting independently, to refuse to renew a service station lease for the reason that the dealer has failed to sell Goodyear TBA, or to sell it in sufficient quantities, or to sell it exclusively. Furthermore, Sinclair can announce such requirements in advance of entering into a lease or in advance of a renewal date.

On the other hand, a manufacturer or distributor loses his right to refuse to deal if such refusal is in furtherance of a conspiracy in restraint of trade under sec. 1 or of an attempt to monopolize under sec. 2 of the Sherman Act. But the mere fact that Goodyear and Sinclair have entered into marketing agreements does not *per se* restrict Sinclair's right to terminate its leases for any reasons it sees fit.

[*No "Tying" Arrangements*]

Since the marketing agreements do not contain any provisions which in and of themselves violate the antitrust laws, we must consider whether they were used to violate those laws.

Plaintiff concedes that he has not proved a tying arrangement which violates sec. 3 of the Clayton Act, 15 U. S. C. A. 14. Neither the lease nor the dealer agreement was made upon any condition, agreement or understanding that plaintiff refrain from buying or selling TBA products other than Goodyear's. Plaintiff must show that Sinclair's conduct violated the Sherman Act by imposing or attempting to impose an unreasonable restraint on interstate commerce. *Northern Pacific Railway Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1; *Radovich v. National Football League* [1957 TRADE CASES ¶ 68,628], 352 U. S. 445; *Times-Picayune Publishing Co. v. United States, supra; Chicago Board of Trade v. United States*, 246 U. S. 231; *Klor's, Inc. v. Broadway-Hale Stores, Inc.* [1958 TRADE CASES ¶ 69,007], 9 Cir., 255 F. 2d 214.

Plaintiff does not contend that every restraint on interstate commerce involves a violation of the antitrust laws, even though the restraint may involve a substantial amount of commerce; he does contend that if he proves an unreasonable restraint of a not insubstantial amount of interstate commerce, such unreasonable restraint is presumed to be a public injury.

[*Relevant Market—Intent*]

Plaintiff contends that the relevant market is the market for TBA products among Sinclair lessee dealers in the Sherwood division. If there were such a restraint of trade or attempt to monopolize as existed in *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, *Standard Oil Company of California v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, and *Northern Pacific Railway Co. v. United States, supra*, the volume of TBA purchases by the Sinclair dealers in the Sherwood division would constitute a not insubstantial amount of commerce. In those three cases, however, there was a clear restraint of trade or attempt to monopolize, apparent from the provisions of the written contracts themselves. No such *per se* violation is apparent in the present case, for neither the letter-contracts between Sherwood-Sinclair and Goodyear nor the agreements between Sherwood and its dealers contain any similar provisions. Any possible intent to monopolize or to unreasonably restrain trade in this case must be gleaned from the way in which the agreements were

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used. In deciding whether an illegal intent existed, the general market for TBA products in the metropolitan Baltimore area and elsewhere in Maryland must be considered; the same market must also be considered in deciding whether there was any actual monopoly or restraint of trade. *United States v. duPont & Co.*, [1956 Trade Cases ¶ 68,369], 351 U. S. 377; *Times-Picayune Publishing Co. v. United States, supra; Klor's, Inc. v. Broadway-Hale Stores, Inc., supra.*

[*Earlier Case Distinguished*]

Plaintiff relies strongly on the *GMAC* case, *United States v. General Motors Corporation* [1940-1943 Trade Cases ¶ 56,120], 7 Cir., 121 F. 2d 376, cert. den. 314 U. S. 618, reh. den. 314 U. S. 710, to support his contention that Sinclair was using its natural monopoly of its own brand-name petroleum products to invade the TBA field. The instant case, however, is very different from the *General Motors* case: (1) General Motors required dealers to promise to use GMAC financing exclusively. Sinclair did not require its dealers to use Goodyear TBA exclusively or to promise to use it exclusively. (2) The scheme to require GMAC financing bore no relation to the good will of General Motors or to its line of cars. It is conceded that Sinclair had a valid interest in seeing that its dealers carried a full line of high quality TBA, and I have found as a fact that the dealers, as well as Sinclair, derived certain benefits from the TBA arrangements with Goodyear. The predominant motive which Sherwood and Sinclair had for entering into the agreements with Goodyear was a legitimate business motive. *Times-Picayune Publishing Co. v. United States,* 345 U. S. at 622; *Chicago Board of Trade v. United States,* 246 U. S. at 238. (3) General Motors dominated the automotive field. Sinclair has no such dominant position in the petroleum field in Maryland or elsewhere.[6] (4) Sinclair was not using its economic position as a refiner and distributor of petroleum products to invade and dominate the TBA business. *Times-Picayune Publishing Co. v. United States, supra; Miller Motors v. Ford Motor Co., supra; Klors', Inc. v. Broadway-Hale Stores, Inc., supra.* The evidence does not support plaintiff's contention that Sherwood or Sinclair had either the intent or the purpose to monopolize the TBA market. There are many brands of TBA merchandise available to service station dealers and to consumers. Plaintiff and the other Sherwood-Sinclair dealers whom he called as witnesses showed that in practice Sinclair dealers carry other brands of TBA as well as Goodyear.

[*Conspiracy*]

Nor is there any evidence of a conspiracy between Sherwood-Sinclair and Goodyear to restrain trade in the TBA market. It has been noted that every contract is to some extent a restraint of trade, but not every contract amounts to a conspiracy in violation of the Sherman Act. *Chicago Board of Trade v. United States,* 246 U. S. at 238. "It is not sufficient for the plaintiff to prove a cooperative effort between [Sinclair and Goodyear], but it must be shown that the combination had the objectionable features which the Act is designed to prevent." *Miller Motors, Inc. v. Ford Motor Co.*, 242 F. 2d at 446.

[*Public Injury*]

The TBA agreements between Sinclair-Sherwood and Goodyear have not resulted in any increase in the wholesale prices charged to dealers or retail prices charged to the public. Goodyear TBA products compete with those of Firestone, Goodrich and other manufacturers and distributors on the basis of price, quality and other relevant factors.

Since there was no *per se* violation of the antitrust laws, plaintiff had to prove facts which show public injury from the alleged attempt to monopolize. *Apex Hosiery Co. v. Leader* [1940-1943 Trade Cases ¶ 56,039], 310 U. S. 469; *Times-Picayune Publishing Co. v. United States,* 345 U. S. at 614; *Radovich v. National Football League,* 352 U. S. at 453; *Glenn Coal Co. v. Dickinson Fuel Co.* [1932-1939 Trade Cases ¶ 55,062], 4 Cir., 72 F. 2d 885; *Schwing Motor Co. v. Hudson Sales Co., supra; Miller Motors, Inc. v. Ford Motor Co., supra; Klor's, Inc. v. Broadway-Hale Stores, Inc., supra.* The keen competition between suppliers for the service station business prevents control of wholesale prices by the Sinclair-Goodyear arrangement. There is no evidence in this case

[6] Although this fact might not be important if there were clear restraints in the agreements themselves, as there were in *International Salt, Standard Stations* and *Northern Pacific,* it should be considered in determining whether there was any unreasonable restraint of trade.

of any horizontal price fixing agreements between any of the tire companies or any of the oil companies with respect to TBA. Nor is there any suggestion of "price leadership" in the TBA business in Maryland. The public has a choice of brands at Sinclair stations, and is free to buy any of the competing brands at service stations operated by other companies and at all sorts of other retail outlets. The Goodyear TBA products compete with those of other manufacturers and distributors on the basis of price, quality and all other relevant factors. Plaintiff has failed to prove any injury to the public from the Sinclair-Goodyear marketing arrangement.

No violation of the antitrust laws has been shown. Let judgment be entered in favor of the defendant, with costs.

[¶ 69,366] **Englander Motors, Inc. v. Ford Motor Company.**

In the United States Court of Appeals for the Sixth Circuit. No. 13,567. Filed May 26, 1959. Petition for rehearing denied August 10, 1959.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Restraint of Trade Under Sherman Act, Section 1—Exclusive Dealing—Automobile Dealership Conditioned Upon Dealers' Not Dealing in Competitors' Products—Protecting Good Will—Rule of Reason.—An automobile dealer, in a complaint charging that an automobile manufacturer's franchise agreements with its dealers required them to deal exclusively in the manufacturer's cars, parts, and accessories, sufficiently alleged an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The trial court had dismissed the action on the ground that the dealer could not have been injured, so that the case was not one for treble damages under the antitrust laws and was not entitled to the jurisdiction of the court. Reversing and remanding the cause for trial, the reviewing court noted that while causes are often dismissed as frivolous, the instant case was not of that sort. The "rule of reason" has been applied to the interpretation of the Sherman Act. However, the soundness of the manufacturer's contention that its restraints were reasonable as a matter of law because it had good will to protect and had to insure that its dealers would have sufficient resources to adequately promote its products could only be determined after proofs and not on a motion to dismiss. Jurisdiction is determined by the allegations of the bill; usually, if the bill makes a claim that, if well founded, is within the court's jurisdiction, it is within that jurisdiction whether well founded or not.

See Combinations and Conspiracies, ¶ 2005.285, 2005.690, 2005.825.

Monopolies—Relevant Market—Market Encompassed by Automobile Manufacturer's Own Dealers—Unlawful Effect on Prices or Competition.—An automobile dealer, in a complaint charging that an automobile manufacturer's franchise agreements with its dealers required them to deal exclusively in the manufacturer's cars, parts, and accessories, alleged a violation of Section 2 of the Sherman Act by claiming that the manufacturer had such control of the operation of its dealers' businesses that it was able to fix prices on many specific products and services in the commerce encompassed by its dealers. A determination of the existence of monopoly, which is the power to fix prices or exclude competition, required that the market area be defined. The dealer charged a violation of Section 2 by alleging that the relevant market was that encompassed by the manufacturer's dealers and that the manufacturer was able to fix prices, but the charge was so broadly stated that the court was unable to determine if the dealer intended to prove that price or competition had been unlawfully affected in all of the products or services in the dealers' commerce, or only in some one of more of such products or services. Therefore, the manufacturer should have the opportunity for a more definite statement of claim if it deems itself prejudiced in preparing a defense to the monopoly charge.

See Monopolies, Vol. 1, ¶ 2540.

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Exclusive Dealing Under Clayton Act, Section 3—Automobile Dealership Conditioned Upon Dealers' Not Dealing in Competitors' Products—Effect on Competition.—An automobile dealer, in a complaint charging that an automobile manufacturer, by express or implied agreement, required all of its franchise dealers to deal exclusively in its cars, parts, and accessories, sufficiently alleged a violation of Section 3 of the Clayton Act. It was clear that the dealership agreement was conditioned upon the dealers not dealing in competitors' goods. However, that prohibition was limited to the selling of competing parts in places of business displaying a sign or other indication that it was one of the manufacturer's authorized dealers. Also, the agreement excepted cases where the manufacturer was unable to supply its parts, or where the purchaser had specifically requested the dealer to use some other part. It was not clear, from the complaint, that sales of unauthorized parts were made under such restricted conditions. That could only be determined by a trial.

The trial court assumed that the allegations of public injury were true, in that manufacturers of competing parts were foreclosed from the market by the manufacturer's dealer chain and that the general public could not obtain competitors' products through the manufacturer's dealers, without specifically requesting them. Accepting that assumption, the allegations of the complaint showed that competition might be substantially lessened. In *Standard Oil Co. of Cal. v. United States,* 1948-1949 TRADE CASES ¶ 62,432, it was held that such a showing was made by proof of exclusive dealing contracts covering gasoline, oil, parts, and accessories which bound independent dealers selling 6.7 per cent of the market for gasoline in a seven-state area.

See Exclusive Dealing, Vol. 1, ¶ 4005.175, 4007.275, 4007.400, 4009.050, 4009.100.

Private Enforcement and Procedure—Suit for Civil Damages—Exclusive Dealing Under Sherman Act, Sections 1 and 2, and Clayton Act, Section 3—Injury to Plaintiff—Causation.—An automobile dealer, in a complaint charging that an automobile manufacturer required its dealers to deal exclusively in its cars, parts, and accessories, in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, sufficiently alleged damages to its business or property by claiming that it was forced to sell its business as a result of the manufacturer's threats to cancel its dealership. The dealer contended that the manufacturer, under franchise agreements with its dealers, was permitted to cancel dealerships on sixty days' notice; that the manufacturer's use of that provision caused injury to the dealer; and that the cancellation provision was a violation of law. The trial court had dismissed the action on the ground that the dealer could not have been injured, so that the case was not one for treble damages under the antitrust laws and was not entitled to the jurisdiction of the court. Reversing that ruling and remanding the case for trial, the reviewing court held that jurisdiction is determined by the allegations. The use of a short term cancellation provision for the purpose of violating the law is itself a violation of the antitrust laws. There was nothing intrinsically wrong with the short notice cancellation provision unless, by its exercise, the manufacturer was able to coerce violations and had forced the dealer to sell its business.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690, 2005.785, 2005.825; Monopolies, Vol. 1, ¶ 2610.300, 2610.720; Exclusive Dealing, Vol. 1, ¶ 4009.050; Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.350, 9009.900.

For the appellant: Argued by Myron N. Krotinger, Cleveland, Ohio (M. Alfred Roemisch, Herbert A. Rosenthal, and Mendelsohn, Krotinger and Lane, all of Cleveland, Ohio, on the brief).

For the appellee: Argued by Charles W. Sellers, Cleveland, Ohio (Andrew C. Hartzell and Thompson, Hine and Flory, all of Cleveland, Ohio, on the brief).

Before SIMONS and ALLEN, Circuit Judges, and KENT, United States District Judge.

[*Treble Damage Action*]

SIMONS, Circuit Judge [*In full text*]: The appellant, hereinafter known as Englander, was at the time the controversy arose, a franchise dealer selling Ford cars, replacement parts and accessories under writ-

ten contract with the Ford Motor Company. It brought a private antitrust action under Section 4 of the Clayton Act, 15 U. S. C. 15 for alleged injuries to its business and property because of Ford's violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U. S. C. 1, 2 and 14, charging that Ford by express or implied agreement with all of its dealers requires that they deal exclusively in Ford cars and Ford made or approved parts and accessories for such vehicles, complaining that the agreements gave Ford a monopoly on a line of commerce in violation of Sec. 2 of the Sherman Act and that they are conditioned upon the dealers refraining from dealing in the goods of Ford's competitors, so as to substantially lessen competition contrary to Sec. 3 of the Clayton Act. It charges that the agreements constitute unreasonable restraint of trade in violation of Sec. 1 of the Sherman Act. It further charges that the agreements permit Ford to cancel its franchise arrangement with its dealers, including Englander, by giving sixty days' notice of franchise cancellation, and that by the use of this provision, it can enforce antitrust law violations by its dealers. The public is alleged to be injured because it must pay higher prices for parts and accessories purchased from Ford dealers since it is limited in obtaining such parts and accessories by Ford's power to fix prices for goods and services and because it can control the dealers' operations, including personnel, finances, stocks of goods and equipment. It charges that it was injured because defendant became dissatisfied with its performance with regard to the sale of parts and accessories and by threats of cancellation caused it to obtain leases for the benefit of others than itself and to sell its business to a designee of Ford. It further charges that the leases had a value in excess of rent and impliedly that the forced sale of its business was at less than real value.

[*Prior Proceedings—Appeal*]

In another cause of action, Englander seeks an accounting for moneys given to Ford by it and other Ford dealers for advertising purposes. Upon alternative motions for dismissal or to make more definite the statement as to the anti-trust action and for dismissal or severance as to the action for accounting, the district judge granted motions to dismiss, and Englander has appealed. The district court assuming, for the purpose of the claim for antitrust relief, that the allegations of public injury are true in that manufacturers of competing Ford replacement parts are foreclosed from the market for their products by the Ford authorized dealer chain and that the general public cannot obtain without specific request these competing products through authorized Ford dealers, ruled that Englander must further show that he was injured through the operation of the system, and concluded Englander could not be so injured so that the case is not one for treble damages under the antitrust law, nor is it one entitled to the jurisdiction of the court. Since the accounting action is not a true class action because the pleadings show that the interests of the members of the class are not undivided and it did not appear that Englander's share of that fund exceeds $3,000.00, therefore the trial court summarily granted the motions to dismiss.

[*Clayton Act, Section 3*]

Our first excursion into the allegations of the complaint is to determine if its allegations claim a violation of Sec. 3 of the Clayton Act, which provides that it shall be unlawful for any person engaged in commerce to make a contract for the sale of goods for resale within the United States on the condition, agreement, or understanding, that the purchaser shall not use or deal in the goods of a competitor where the effect of such contract for sale or such condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

It would seem clear from the terms of the agreement that it is conditioned upon the dealers not dealing in competitors' goods. That is, however, limited to the selling of competing replacement parts in any place of business upon which the dealer displays the Ford Company's trademarks or tradename or any sign or indication that such place of business is that of an authorized Ford dealer or service station, except in cases where the company is unable to supply them or the purchaser has specifically requested the dealer to use some other part. The complaint is not clear that sales of unauthorized parts or accessories were made

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under such restricted conditions, or if so to what extent. This may only be determined by trial.

[*Lessening of Competition*]

Accepting the court's assumption, it still remains to determine whether the allegations of the complaint show that competition may be substantially lessened. In *Standard Oil Company of California, et al. v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, it was held that the requirement of Section 3 of the Clayton Act of a showing that the effect of contracts may be to substantially lessen competition was made by proof of exclusive dealing contracts covering gasoline, oil and automobile parts and accessories which bound independent dealers selling 6.7% of the market for gasoline in a 7-state area. To the same effect is *Richfield Oil Company v. United States* [1950-1951 TRADE CASES ¶ 62,878], 99 Fed. Supp. 280, in respect to Section 3 of the Clayton Act and Section 1 of the Sherman Act. This case was affirmed *per curiam* on the basis of the *Standard Oil* case, 343 U. S. 922 [1952 TRADE CASES ¶ 67,262]. *Dictograph Products v. Federal Trade Commission* [1955 TRADE CASES ¶ 67,932], 217 F. 2d 821 (C. A. 2), *certiorari denied,* 349 U. S. 940, and *Anchor Serum Company v. Federal Trade Commission* [1954 TRADE CASES ¶ 67,921], 217 F. 2d 867 (C. A. 7), reached like conclusions. We, therefore, conclude that Englander has sufficiently alleged violation of Sec. 3 of the Clayton Act.

[*Rule of Reason*]

In *Standard Oil Company of New Jersey v. United States,* 221 U. S. 1, the rule of reason has been applied to the interpretation of the Sherman Act. It is Ford's contention that its restraints are reasonable as a matter of law because it has a good will and a guaranty to protect and that it must insure that its dealers would have sufficient resources to adequately promote Ford's products. It may well be that the proofs would fail to show that Ford's concern for its good will and the protection of its guaranties is soundly based but this may only be determined after proofs and not upon a motion to dismiss. Jurisdiction is determined by the allegations of the bill and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the court, it is within that jurisdiction whether well founded or not. *Hart v. Keith Exchange,* opinion by Mr. Justice Holmes, 262 U. S. 271, and cases therein cited. While causes are often dismissed as frivolous, this is not that sort of case.

[*Monopoly—Relevant Market*]

Section 2 of the Sherman Act makes it a misdemeanor to monopolize or attempt to monopolize any part of trade or commerce in the several States. Monopoly for the purpose of Sec. 2 has been determined to be the power to fix prices or to exclude competition. *United States v. duPont* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377. In order for a determination of the power to fix prices or to exclude competition, or attempts to do so, it is necessary to have the market area defined. Englander has alleged the market to be that encompassed by the commerce of Ford dealers. It is charged that Ford has such control of the operation of the dealers' business that it is able to fix prices on many specific products and services in commerce. While this charges a violation of Sec. 2, it is so broadly stated that we are unable to tell if Englander intended to prove that prices or competition has been unlawfully affected in all of the products or services in the dealers' commerce or only in some one or more of such products or services. Ford should be forewarned by the complaint and, if so, should have the opportunity for a more definite statement of claim under Rule 12(e) of the Federal Rules of Civil Procedure, if it deems itself prejudiced in preparing a defense to the monopoly charge.

[*Refusal to Deal—Legality of Purpose*]

In order that Englander may have a cause of action under Section 4 of the Clayton Act, it must show that it was damaged in its business or property by a violation of the antitrust laws. Englander contended that its damage was a result of Ford's use of the cancellation provision of the franchise and that this provision was a violation of law. There is nothing intrinsically wrong with a short notice cancellation provision unless by its exercise Ford was able to coerce violations, and by its use had forced Englander to sell its business. Moreover, in *Standard*

Oil of New Jersey v. United States, supra, it was held that there is nothing intrinsically wrong with Standard owning stock in other corporations but if it owns such stock for the purpose of violating the antitrust laws, ownership itself is a violation of such laws and by the same measure the use of a short term cancellation provision for the purpose of violating the law is itself a violation of the antitrust law.

[*Remanded for Trial*]

We conclude upon this phase of the case that it must be returned to the district court for answer and trial and for findings of fact in support of, or in conflict with, such findings. Fact issues will include findings that competition may or may not be substantially lessened because of the exclusive agreement and a conclusion as to whether Englander has brought itself within the scope of *Standard Oil Company of California v. United States, supra,* by the facts as found.

[*Accounting Suit*]

The suit for an accounting is brought as a class action. From the pleadings, however, it is evident that the interest of the alleged members of the class are not undivided and for purposes of jurisdiction they may not be cumulated. In order to come within the jurisdiction by an amount in controversy in diversity cases, jurisdiction is determined by the value of the individual claim apart from that of the other members of the class. *Sturgeon v. Great Lakes Steel Corporation,* 143 F. 2d 819 (C. A. 6). We remand this phase of the case to the trial court to allow Englander to amend its pleadings if it can show a jurisdictional interest in a unified fund. If the amended pleadings show that the plaintiff's individual interest exceeds the jurisdictional amount, there is jurisdiction. If not, this cause of action should be dismissed.

The decree is reversed and the cause remanded for trial consistent with this opinion.

[¶ 69,367] California League of Independent Insurance Producers, et al. v. Aetna Casualty & Surety Company, et al.

In the United States District Court for the Northern District of California, Southern Division. Civil No. 37934. Filed May 20, 1959.

Sherman Antitrust Act, California Antitrust (Cartwright) Act, and McCarran-Ferguson Act

Combinations and Conspiracies—Concerted Agreement to Decrease Rates of Commission Paid to Automobile Insurance Agents—Exemptions from Federal Antitrust Laws—Insurance Under McCarran-Ferguson Act—California Antitrust Law.—A complaint charging insurance companies with conspiring to restrain and monopolize trade by agreeing to decrease the rate of commission paid to automobile insurance agents was dismissed on the ground that the action, as pleaded, was precluded by the McCarran-Ferguson Act. That statute provides that the Sherman Act is "applicable to the business of insurance to the extent that such business is not regulated by State law." A state is regulating the business of insurance when it has generally authorized or permitted certain standards of conduct. The California Insurance Code expressly authorized cooperation between insurers "with respect to any matters pertaining to the making of rates and rating systems," and set forth a comprehensive scheme for ratemaking. Also, it was common knowledge that the rate of commission paid to agents was a vital factor in the ratemaking structure. Thus, it was apparent that the insurance companies were alleged to have violated the Sherman Act in matters generally authorized or permitted by the State of California. In addition, the McCarran-Ferguson Act precluded the suit because the charges in the complaint were covered by the California Antitrust (Cartwright) Act.

However, the McCarran-Ferguson Act permits a Sherman Act suit against insurance companies for "boycott, coercion or intimidation," even though a state is regulating the particular conduct involved. Therefore, the plaintiffs were granted leave to file an amended complaint for the sole purpose of showing such a violation.

See Combinations and Conspiracies, Vol. 1, ¶ 2263, 2375.

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Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable —Sufficiency of Allegations—Damages "Presently Unknown."—A complaint charging insurance companies with conspiring to restrain and monopolize trade by agreeing, in concert, to decrease the rate of commission paid to insurance agents failed to state a claim because, among other things, it alleged that the amount of damages suffered by each agent was "presently unknown." Each undoubtedly had his own book of accounts containing the necessary information to compute the damage, if any. Therefore, if an amended complaint should be filed, each of the agents would be required to state the amount of his damage and the theory upon which it was computed.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.200.

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit —Parties Plaintiff—Agent or Assignee for Collection.—It was impossible to ascertain, from a complaint in which a "league" of insurance producers alleged that it was "a plaintiff in this case by virtue of the fact that it holds assignments for purposes of litigation" from certain of its members, if the "league" was a real party in interest. If it were a mere agent for collection, then it was not a real party in interest and the action would have to be dismisssd as to it. On the other hand, if it were an assignee for collection, it could maintain the action as a real party in interest. Therefore, any amended complaint should clearly set forth the league's true status.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.

For the plaintiffs: Joseph L. Alioto, San Francisco, Cal.

For the defendants: Walker W. Lowry of McCutchen, Doyle, Brown & Enersen, for Great American Indemnity and Travelers Indemnity; Christopher M. Jenks of Orrick, Dahlquist, Herrington & Sutcliffe, for Fireman's Fund; Frank D. Tatum, Jr., of Cooley, Crowley, Gaither, Godward, Castro & Huddleson, for Pacific Indemnity; and James Michael of Pillsbury, Madison & Sutro, for United Pacific Insurance, all of San Francisco, Cal.

Order Granting Motions to Dismiss the Complaint with Leave to Amend

[*Treble Damage Action*]

ALBERT C. WOLLENBERG, District Judge [*In full text*]: The sufficiency of the complaint in this treble damage antitrust action has been attacked by motion under Rule 12 (b)(6) and 12(e). The complaint charges a conspiracy to restrain and monopolize trade in violation of the Sherman Antitrust Act (15 U. S. C. A. 1, 2) whereby the defendants, acting in concert, agreed "to decrease the rate of commission paid to automobile insurance agents, * * * (and) they thereafter, in fact did decrease the said rate of commission and persuade substantially all companies writing automobile insurance to join them in the plan." The complaint further charges that the said conspiracy resulted in (a) destruction of the insurance agents' previously existing right to seek their rate of commission by free and private negotiation with the defendants, (b) impairment of competition among the insurance companies for the services of plaintiffs, and (c) loss of profits to the plaintiffs. The amount of damages suffered by each defendant [plaintiff] is alleged to be presently unknown and therefore leave to amend is prayed after completion of discovery proceedings.

[*Motion to Dismiss*]

Each defendant presented a motion to dismiss for failure to state a claim upon which relief can be granted (FRCP 12 (b)(6)). The motions were based upon (a) the insufficiency of the damage allegation, and (b) Section 2(b) of the McCarran Act (15 U. S. C. A. 1012(b)).

[*McCarran Act*]

The last stated ground, Section 2(b) of the McCarran Act, presents an interesting and unusual question.[1] The McCarran Act (15 U. S. C. A. 1011-1014), in so far as applicable herein, provides that the federal antitrust statutes are applicable to the business of insurance *only* (1) to the extent such business is not regulated by state law

[1] See text of Footnote 2, *infra*.

(15 U. S. C. A. 1012(b)), or (2) to any act of boycott, coercion or intimidation. 15 U. S. C. A. 1013(b). Each defendant previously presented a motion to dismiss for lack of jurisdiction (FRCP 12(b)(1)) to the Honorable Fred L. Wham, visiting Judge from the Eastern District of Illinois. Judge Wham, in orally denying these motions, stated that after investigating the California statutes and regulations he "failed to find that the field of agents' commissions is dealt with at all by the statutes or by the regulations. True enough, there is some provision that rates of insurance may be agreed upon, provided there is no agreement to adhere to those rates and it says in arriving at the rates, the expenses, of which all agreed commissions, constitute a considerable portion, may be considered." (Transcript, p. 4.) Judge Wham then went on to state that he was not ruling on coercion as a basis for jurisdiction.

In view of this ruling on the question of jurisdiction, the present motions ordinarily would be addressed solely to the *sufficiency of the pleadings* under the Sherman Act. However, the Court now finds itself in the position of disagreeing with the basis upon which the order upholding jurisdiction under the Sherman Act was made.[2] For the reasons set forth below the motions will be granted with leave to the plaintiff to file an amended complaint within *thirty* days.[3]

[*State Regulation of Insurance*]

In enacting the McCarran Act "Congress' purpose was broadly to give support to existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin,* 328 U. S. 408, 429-430 (1946); 15 U. S. C. A. 1011. To give effect to this policy Congress specifically provided that the Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U. S. C. A. 1012(b). This Court is of the opinion that a State regulates the business of insurance within the meaning of § 1012(b) when a State statute generally proscribes (*F. T. C. v. National Cas. Co.* [1958 TRADE CASES ¶ 69,059], 357 U. S. 560 (1958)) or permits or authorizes certain conduct on the part of the insurance companies. In *F. T. C. v. National Cas. Co., supra,* the Court held that there was State regulation within the meaning of § 1012(b) when a State act generally prohibited "certain standards of conduct." (357 U. S. at 564.) From the above case it would seem to follow that if a State has generally authorized or permitted certain standards of conduct, it is regulating the business of insurance under the McCarran Act.

[*Cooperation Between Insurers*]

The State of California expressly "authorize(s) cooperation between insurers in ratemaking and other related matters" (Cal. Ins. Code § 1850) "with respect to any matters pertaining to the making of rates and rating systems" (Cal. Ins. Code § 1853) provided, however, that said insurance companies "shall not agree with each other or rating organizations to adhere thereto." Cal. Ins. Code § 1853.6. See Chapter 9 of Division 1, Part 2, of the California Insurance Code setting forth an elaborate and comprehensive scheme for ratemaking. It is common knowledge that the rate of commission paid to agents is a vital factor in the ratemaking structure. See *O'Groman & Young, Inc. v. Hartford F. Ins. Co.,* 282 U. S. 251 (1931); *State Comp. Ins. Fund v. McConnell,* 46 C. 2d 660 (1956). From what has been said it is apparent that the defendants are alleged to have violated the Sherman Act in matters generally authorized or permitted by the State of California. Plaintiffs' remedy is under State, not Federal, law.

[*State Antitrust Act*]

There is a further reason supporting the Court's conclusion that the complaint fails to state a claim. Since the State Antitrust

[2] This Court is aware of the rule that "judges of co-ordinate jurisdiction, sitting in the same court and in the same case should not overrule the decisions of each other." *Commercial Union of America v. Anglo-South American Bank,* 10 F. 2d 937, 941 (2nd Cir. 1925). While the rule originally was considered as an absolute denial of judicial authority, the modern trend appears to regard the rule as one of restraint on the exercise of judicial discretion. *Carnegie National Bank v. City of Wolf Point,* 110 F. 2d 569, (9th Cir., 1940).

[3] However, even though not entirely clear, it appears that Judge Wham envisaged the present ruling when he stated "If you want to get this thing to the Court of Appeals, the quickest way possible would be to to ahead and let some court pass on your motions to dismiss on the ground that the complaint doesn't state a cause of action." (Transcript, p. 11).

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Act (Bus. & Prof. Code §§ 16700-16758) applies to insurance companies (*Speegle v. Board of Fire Underwriters* [1946-1947 Trade Cases ¶ 57,493], 29 C. 2d 34 (1946), § 1012 (b) of the McCarran Act precludes a Sherman Act suit if the charges alleged in the complaint are covered by said State act. *Professional and Businessmen's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274 (D. C. Mont., 1958). The Court concludes that the charges in the complaint are so covered.

[*Damages*]

A third reason appears why this complaint fails to state a claim. The case involves a large number of plaintiffs. The complaint alleges that the amount of damage suffered by each is presently unknown. The Court has difficulty understanding why each plaintiff is not able to determine the amount of his damages. Each undoubtedly has his own book of accounts containing the necessary information to compute the damage, if any. Thus, should plaintiffs deem it advisable to file an amended complaint, each will be required to state therein the amount of his damage and the theory upon which it was computed. *Louisiana Farmers Protective Union v. Great A. & P. Co.* [1940-1943 Trade Cases ¶ 56,239], 131 F. 2d 419 (8th Cir., 1942); *Hess v. Anderson, Clayton & Co.* [1957 Trade Cases ¶ 68,728], 20 F. R. D. 466 (S. D. Cal., 1957).

[*"Boycott, Coercion, or Intimidation"*]

While the McCarran Act permits a Sherman Act suit against insurance companies for "boycott, coercion or intimidation" even though the State is regulating the particular conduct involved (15 U. S. C. A. 1013(b)), the Court is of the opinion that the complaint, as presently constituted, fails to allege a claim for boycott, coercion or intimidation. Since the plaintiff argued coercion as a basis of jurisdiction before Judge Wham, who declined to rule thereon, plaintiffs are granted leave to file an amended complaint, solely for the purpose of showing, if they can, a claim allowable by § 1013(b).

[*Real Party in Interest*]

At this point it is appropriate to note that the allegation concerning the status of the plaintiff California League of Independent Insurance Producers (hereinafter called "Producers") is ambiguous. F. R. C. P. 12(e). The complaint alleges that Producers is "a plaintiff in this case by virtue of the fact that it holds assignments for purposes of litigation" from certain of its members. If Producers is a mere agent for collection, then it is not a real party in interest and the action must be dismissed as to it. F. R. C. P. 17(a); *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (D. C. La., 1953). On the other hand, if Producers is an assignee for collection it may maintain the action as a real party in interest. *Rosenblum v. Dingfelder*, 111 F. 2d 406 (2nd Cir., 1940). It is impossible to ascertain from the complaint if Producers is a real party in interest. Thus, any amended complaint filed herein should clearly set forth Producers' true status.

[*Dismissed with Leave to Amend*]

Therefore, in accordance with the above opinion, each defendant's motion to dismiss the complaint for failure to state a claim is hereby granted with leave to plaintiff to file an amended complaint conforming to the above opinion within thirty days.

[¶ 69,368] P. Lorillard Company v. Federal Trade Commission. General Foods Corporation v. Federal Trade Commission.

In the United States Court of Appeals for the Third Circuit. No. 12,665 and 12,709, respectively. Argued February 6, 1959. Filed June 4, 1959.

On Petition to Review and Set Aside Orders of the Federal Trade Commission.

Robinson-Patman Price Discrimination Act

Price Discrimination—Payments for Services or Facilities Furnished by Customers—Contracts with Third Parties "for the Benefit of" Customers—Broadcasting Time—In-store Promotions.—Federal Trade Commission orders prohibiting manufacturers from paying allowances to, or for the benefit of, any customer unless they offer, or otherwise make available, allowances to all competing customers on proportionally equal terms were

affirmed where it was found that (1) broadcasting companies negotiated contracts with certain grocery chains whereby the chains agreed to conduct in-store promotional displays of products for free radio or TV time, (2) the broadcasting companies then solicited the manufacturers to buy radio or TV time, offering as an added inducement the in-store promotion of their products already contracted for with the grocery chains, and (3) the manufacturers entered into contracts for the purchase of broadcasting time. The manufacturers each contended that since it was not a party to the contracts between the broadcasting companies and the grocery chains and that since they preceded its contracts with the broadcasting companies, there was nothing illegal or violative of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Each denied that it paid anything to or contracted with the broadcasting companies "for the benefit of" a customer within the meaning of the section, and asserted that a payment to or contract with a third person is not made for the benefit of a customer unless the seller makes it with the intention of benefiting the customer or has reason to know that some direct benefit to the customer will proximately result therefrom.

The section of the law does not concern itself with motive or intention; it is only concerned with the consequences which flow from the act. If those consequences eventuate, the act from which they result is forbidden. Furthermore, the manufacturers knew, or should have known, when they entered into the plans, that they, in adopting the plans, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers. The broadcasting companies were not eleemosynary institutions, and the grant of free broadcasting time to the grocery chains was part of the total transaction for which the manufacturers paid. The fact that the charge for the whole transaction was attributed to a particular item, that is, the manufacturers' advertising time, was not determinative. The payments made by the manufacturers to the broadcasting companies inured to the benefit not only of the manufacturers but also of the favored chains as compensation or in consideration for in-store promotions afforded the manufacturers' products.

See Price Discrimination, Vol. 1, ¶ 3522, 3522.520, 3522.770.

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibitions Against Price Discrimination—Scope of FTC Order Under Section 2(d) of Clayton Act, as Amended by Robinson-Patman Act.—Federal Trade Commission orders framed in the language of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, were upheld on the authority of cases upholding orders issued in the language of Section 2(a) of the Act. The fact that such cases involved Section 2(a) of the Act was not important since Section 2(d) is much narrower in scope and therefore orders framed in its language are well within the permissible ambit of the Commission's discretion.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.850.

Federal Trade Commission Enforcement and Procedure—Enforcement of Prohibitions Against Price Discrimination—Court Review—Weight of Administrative Interpretations.—In reviewing a Federal Trade Commission decision concerning Section 2(d) of the amended Clayton Act, the court noted that it is appropriate to keep in mind that administrative interpretations of statutes by agencies charged by Congress with their execution are recognized as having peculiar persuasiveness and weight. Ordinarily, such constructions should be accepted unless they cannot be reasonably or soundly made under the terms of the statute. The agency's interpretation, however, must be consistent with the purposes of the statute.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

For the petitioners: Cyrus Austin, New York, N. Y.

For the respondents: Frederick H. Mayer, Federal Trade Commission, Washington, D. C.

Amicus curiae: Malcolm A. Hoffman, New York, N. Y., for Columbia Broadcasting System, Inc.

Affirming Federal Trade Commission cease and desist orders in Dkts. 6596 and 6600.

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Before KALODNER and STALEY, Circuit Judges, and STEEL, District Judge.

Opinion of the Court

[*Review—FTC Orders*]

By STALEY, Circuit Judge [*In full text*]: We are asked by these petitions pursuant to Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. § 21, to review and set aside two substantially identical cease and desist orders issued by the Federal Trade Commission. The orders to be reviewed were issued by the Commission against General Foods Corporation and P. Lorillard Company,[1] the petitioners, at the conclusion of proceedings upon complaints which charged them with violations of Section 2(d) of the Clayton Act, as amended.[2] These proceedings were had before the hearing examiner upon stipulated records with annexed exhibits. The initial decisions of the hearing examiner, which include cease and desist orders, were adopted by the Commission without further opinion.[3]

[*FTC Complaints*]

The complaints charged the petitioners with having made payments to certain broadcasting companies[4] for the benefit of chain-store customers of petitioners, thus providing broadcasting time "to the favored customers for said customers' own advertising purposes." The payments thus effected were alleged to have been made as compensation or in consideration for services or facilities furnished by these favored customers in connection with the offering for sale and the sale of petitioners' products. Further, it is averred that the benefits so conferred on some of petitioners' customers were not made available on proportionately equal terms to petitioners' other customers, in violation of Section 2(d) of the Clayton Act, as amended.

[*Promotional Plans*]

The stipulated facts may be summarized as follows: In 1950 and 1951 the sale of broadcasting time had become difficult, and the broadcasting companies each developed promotional schemes to enable them to sell time to manufacturers and sellers of grocery products. Although the companies devised their plans independently they are substantially similar in content, providing for in-store promotions as an inducement to purchase radio and television time. The broadcasting companies negotiated contracts with certain grocery chains whereby they covenanted to provide the chains with specified amounts of radio or television time each week during the term of the contracts. The contracts provided that the broadcasting time would be used by the chains only for their own advertising. In exchange therefor the chain stores agreed to conduct a specified number of week-long promotional displays in their stores of products sold therein. The products and dates were not specified in the contracts but rather it was provided that they were to be agreed upon by the parties, the broadcasting companies proffering suggestions, subject to the right of the chains to decline to promote products not deemed by them to be suitable for promotion in their stores. These contracts were made without any prior commitment or agreement involving anyone other than the grocery chains and the broadcasting companies. Following negotiations of this series of contracts, the broadcasting companies solicited petitioners and other manufacturers

[1] Additional and similar complaints had been filed against the following companies: Groveton Papers Company, FTC Docket 6592 (order issued May 7, 1958); Pepsi-Cola Company, FTC Docket 6593 (dismissed on other grounds); Coca-Cola Bottling Company of New York, FTC Docket 6594 (dismissed on other grounds); Sunkist Growers, Inc. FTC Docket 6595 (consent order issued); Sunshine Biscuits, Inc., FTC Docket 6597 (order issued May 7, 1958); Piel Bros., Inc., FTC Docket 6598 (order issued May 7, 1958); Hudson Pulp & Paper Corp., FTC Docket 6599 (order issued May 7, 1958).

[2] "(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities." 49 Stat. 1526, 15 U. S. C. § 13.

[3] These cases involve common questions of law and fact. Inasmuch as they were briefed and argued together, we see no necessity for separate opinions.

[4] The "broadcasting companies" referred to were American Broadcasting Company (ABC), National Broadcasting Company, Inc. (NBC), and Columbia Broadcasting System, Inc. (CBS), the latter having submitted a brief in this court as *amicus curiae*.

and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotions of petitioners' products in the chain stores under contract. These promotional plans were variously named "Supermarketing," "Chain Lightning," "Mass Merchandising," and "Sell-A-Vision" and were promoted by means of brochures and circulars stating the details of the offers. The leaflets indicated that purchasers of a minimum amount of radio or television time would be provided, at no extra cost, with a specific number of in-store promotions of their products. The broadcasting companies stated in their brochures that they were able to offer the displays as a result of the firm contractual commitments which they had previously negotiated with specified chain stores. The circulars also emphasized the size of the chains under contract, their annual volume, and the percentage of the retail market that they controlled.

Petitioners entered into contracts for the purchase of broadcasting time, and, although the contracts contained no mention of the in-store promotions and specifically negatived any agreement other than that contained in the written contract,[5] they received the benefits of the plans as specifically set forth in the brochures. In fact, in many instances, after notification of the proposed date of a promotion, petitioners contacted the designated chain store for the purpose of arranging the details of the in-store promotional displays. Without exception, those of petitioners' customers who received radio or television advertising time, pursuant to the contracts described herein, were grocery chains in competition in the resale of petitioners' products with other grocery chains and independent customers of petitioners in the same market areas. The latter customers did not receive nor were they offered broadcasting time or anything of value in lieu thereof.

[*Contentions*]

Petitioners deny that they paid anything to or contracted with the broadcasting companies "for the benefit of" a customer within the meaning of Section 2(d) of the Clayton Act. Further, they deny having paid for or supported the furnishing of broadcasting time to the chains and, lastly, deny having adopted or having become a party to the broadcasting companies' sales promotions. It is readily apparent that the arguments overlap and that their determination depends largely upon the Commission's interpretation of Section 2(d) and the stipulated facts.

[*Agency Interpretations*]

It is appropriate to keep in mind that administrative interpretations of statutes by agencies charged by Congress with their execution are recognized as having peculiar persuasiveness and weight. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111 (1944); *American Airlines, Inc. v. Civil Aeronautics Board*, 178 F. 2d 903 (C. A. 7, 1949); *Miller Hatcheries, Inc. v. Boyer*, 131 F. 2d 283 (C. A. 8, 1942). As we recently stated in *St. Marys Sewer Pipe Co. v. Director of the U. S. Bureau of Mines*, 262 F. 2d 378, 381 (C. A. 3, 1959), "Ordinarily, such constructions should be accepted by the courts unless they could not be reasonably or soundly made under the terms of the statute." The agency's interpretation, however, must be consistent with the purposes of the statute for, as Justice Frankfurter states in the recent case of *United States v. Shirey*, — U. S. — (decided April 20, 1959),

> "Statutes, including penal enactments are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.' *United States v. Whitridge*, 197 U. S. 135, 143. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words. See *United States v. Wurzbach*, 280 U. S. 396, 399. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see *United States v. Johnson*, 221 U. S. 488, 496, or, as Judge Learned Hand has some-

[5] The following clause appears in both the ABC and CBS contracts:

"This contract contains the entire agreement between the parties and is not subject to oral modification."

The NBC clause reads as follows:

"This contract constitutes the entire agreement between the parties relating to the subject matter hereof and may not be changed, modified, renewed or extended except by an agreement in writing signed by the party against whom enforcement of the change, modification, renewal or extension is sought."

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where put it, the art of interpretation is 'the proliferation of purpose.'"

[*Purpose of Prohibition*]

The purpose of the section here involved was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods. This is made clear by the statement of Congressman Utterback, chairman of the House conferees, in explaining Sections 2(d) and (e), as follows:

> "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere, in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities, whether furnished 'in connection with the processing, handling, sale, or offering for sale' of the products concerned." 80 Cong. Rec. 9418.

[*Contract Law Not Applicable*]

Petitioners' argument when analyzed and stripped to its essentials is basically a plea for reliance upon technical rules of contract law. It asserts, in effect, that since it was not a party to the contracts between the broadcasting companies and the chain stores and that since they preceded its contracts with the broadcasting companies, there is nothing illegal or violative of Section 2(d) in the transactions. On the other hand the Commission refuses to wear blinders and insists that the series of contracts be viewed as a whole. Substance is lent to the Commission's analysis by the presence in this case of a number of brochures or circulars which were utilized by the broadcasting companies. Although it is true that the petitioners' contracts with the broadcasting companies contained no mention of the in-store promotions, they were prominently mentioned in the brochures. These promotions were not only held out as inducements for the purchase of broadcasting time by the petitioners, but were sought and utilized by them.

The petitioners' position is bottomed on the assumption that in deciding whether a violation of the statute has occurred the Commission must restrict itself to an assessment of the consequences which flow from a written contract by the application of formal principles which a court would be required to apply in an action between the contracting parties. If, however, we keep in focus the real question involved, that is, whether the petitioners have made payments to someone which actually are of benefit to their customers and not whether they have bound themselves to do so by a legally enforceable contract, it is readily apparent that petitioners' position is untenable. Certainly, the legal effect of the contracts involved may be relevant to the resolution of the real issue before the Commission, but it does not follow that the Commission must give to those contracts the effect for which the parties to them contend nor that it cannot view them in the setting of all the other evidence relevant to the issue before the Commission.

Petitioners contend here as they did before the Commission that they did not pay or contract to pay to any third person anything of value for the benefit of a customer. In support of this position, petitioners assert that a payment to or contract with a third person is not made for the benefit of a customer within the meaning of Section 2(d) unless the seller makes it with the intention of benefiting the customer or has reason to know that some direct benefit to the customer will proximately result therefrom. No authority for the former proposition is cited, and in fact it conflicts with the statement of counsel for the petitioners, Cyrus Austin, in his monograph entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, wherein it is stated at page 116:

> "It is no defense for a seller charged with a violation of either of these sections [§§ 2(d) and 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination."

In accord, *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.* [1958 TRADE CASES ¶ 69,089], 258 F. 2d 831, 837 (C. A. 7, 1958), cert. denied, *sub nom. General Foods Corp. v. State Wholesale Grocers,* 358 U. S. 947 (1959). This section of the Act does not concern itself with motive or intention. It is only concerned with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden. The Commission, however, went further than required and found that "the responsible officials of Respondent [petitioners] knew, or should have known, when they entered into the plan presented to Respondent by the broadcasting company, that Respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors." This finding is amply supported by the record.

[*Financial Support of Plans*]

A substantial portion of petitioners' argument is directed to refuting the Commission's finding that they were the "sole financial support" of the promotional plan. Reliance is placed upon one case—*State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.* [1957 TRADE CASES ¶ 68,772], 154 F. Supp. 471 (N. D. Ill. 1957), affirmed in part and reversed in part [1958 TRADE CASES ¶ 69,089], 258 F. 2d 831 (C. A. 7, 1958), cert. denied *sub nom. General Foods Corp. v. State Wholesale Grocers,* 358 U. S. 947 (1959). In that case A&P and three grocery product manufacturers were charged with violation of Sections 2(d) and 2(e) by purchasing substantial advertising in *Woman's Day* magazine, a wholly-owned subsidiary of A&P. The court of appeals affirmed the dismissal of the 2(e) charge but found that the payments for advertising of defendants' products in *Woman's Day* violated Section 2(d). The rationale underlying the dismissal in that case is founded on the conclusion that the payments for advertising could not be held to represent a furnishing of a service to A&P. In addition to the obvious factual differences between the two cases, it is worthy of note that the court failed to cite or distinguish the line of cases beginning with *Herbert v. The Shanley Co.,* 242 U. S. 591 (1917), where Justice Holmes held that a single payment may indeed cover the cost of more than one object. Also see *Pittsburgh Athletic Co. v. KQV Broadcasting Co.,* 24 F. Supp. 490 (W. D. Pa., 1938); *M. Witmark & Sons v. L. Bamberger & Co.,* 291 Fed. 776 (D. C. N. J., 1923). The broadcasting companies are not eleemosynary institutions and the Commission could well find from the record that the grant of "free" broadcasting time[6] to the chain stores was part of the total transaction for which the petitioners paid. The fact that the charge for the whole transaction was attributed to a particular item, to wit, petitioners' advertising time, is not determinative. The Commission's conclusion that the payments made by the petitioners to the broadcasting companies inured to the benefit not only of petitioners, but also of the favored chains as compensation or in consideration for the in-store promotions afforded petitioners' products has warrant in the record and a reasonable basis in the law, and this court must accept it. *National Labor Relations Board v. Hearst Publications,* 322 U. S. 111 (1944).

[*Scope of Order*]

Petitioners' last objection relates to the "sweeping" nature of the cease and desist orders issued by the Commission. Clearly, the orders in the instant cases go no further than that issued against the Ruberoid Company and specifically approved by the Supreme Court in *Federal Trade Commission v. Ruberoid Co.* [1952 TRADE CASES ¶ 67,279], 343 U. S. 470 (1952). Also see *Moog Industries v. Federal Trade Commission* [1958 TRADE CASES ¶ 68,918], 355 U. S. 411 (1958), affirming *Moog Industries v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,527], 238 F. 2d 43 (C. A. 8, 1956). The fact that these cases involved orders issued in the language of Section 2(a) of the amended Clayton Act should give us little pause, for Section 2(d) is much narrower in scope and therefore orders framed in its language would be well within the permissible ambit of the Commission's discretion.

[*Affirmed*]

The orders of the Commission will be affirmed.

[6] We agree with petitioners' counsel that "nothing here turns upon the fact that the consideration which the broadcasting companies gave to the chains in return for in-store promotions was in broadcast time rather than in money."

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[Dissenting Opinion]

STEEL, D. J., dissenting: Had petitioner[1] paid for the broadcasting time of the chains, either directly by payments to the chains, or indirectly by payments to the broadcasting companies independently of the purchase by petitioner of its own broadcast time, the payments clearly would have been for the "benefit" of the chains within the meaning of § 2(d). The petitioner did not do either of these things. But the Commission and a majority of the court hold that an identical significance must be attributed to the payments which petitioner made to the broadcasting companies in purchasing air time for itself.

[*Elements of Violation*]

A violation of § 2(d) of the Clayton Act entails, among other things, the following elements: (1) a discriminatory payment by a vendor for the benefit of a customer, (2) in consideration for services or facilities furnished by the customer to the vendor in connection with the sale of a commodity of the vendor. Without both elements of benefit there can be no § 2(d) violation. The finding of the Commission that the in-store promotions offered by the broadcasting companies induced petitioner to enter into its contracts with the broadcasting companies implies that petitioner anticipated the receipt of a benefit by way of in-store promotions. This finding relates solely to the second element of a § 2(d) offense. The present point of inquiry is directed to the existence of the first element of a § 2(d) violation, viz., whether petitioner made a payment for the benefit of the chains.

[*"Benefit"*]

In determining whether the petitioner's payments to the broadcasting companies were for the "benefit" of the chains within the meaning of § 2(d), it is easy to become bogged down in a semantic morass. The word "benefit" has various meanings depending upon the context of its use. In a sense, every dollar which the broadcasting companies took into their coffers during the time when air time was being granted to the chains was for the benefit of the chains regardless of the source of the income. Revenue was the life blood of the broadcasting companies upon which their very existence depended and without which the chains would have had no air media over which to advertise. The Clayton Act, of course, is not concerned with this type of benefit. It is aimed at discriminatory advantages which a vendor by virtue of his own conduct confers upon a vendee, or, under certain sections of the Act, reciprocal advantages which a vendor and vendee confer upon each other by virtue of their own respective acts. Whether petitioner's payments to the broadcasting companies were for the benefit of the chains must be gauged from this standpoint.

[*Independent Transactions*]

The contracts between the broadcasting companies and the chains under which the chains received air time antedated the contracts between the broadcasting companies and petitioner. The execution of the agreements by petitioner was not a contingency upon which the right of the chains to air time depended. That right had theretofore accrued; it was fixed, immediate and unqualified. Nothing was required by petitioner or anyone else to bring into fruition the right of the chains to air time save the performance by the broadcasting companies of their contracts with the chains. Petitioner was in no way responsible for this. So that on the face of the matter, the advertising which the chains become entitled to receive the moment they put pen to paper with the broadcasting companies was not the result of any payment by petitioner.

The Commission and a majority of the Court assert, however, that the separate elements of the sales promotional plan initiated by the broadcasting companies, i. e., the two sets of contracts, the brochures of solicitation, and the designation of products for in-store promotions, cannot properly be given fragmentary evaluation, but that each must be treated as an integral part of the whole. This approach would be understandable if the broadcasting companies were defendants and their activities were charged to be violative of the law. The broadcasting companies stand at the hub of the transaction. It was their correlating activities which gave to the plan whatever cohesiveness and interdependence was inherent in it. It was their efforts

[1] General Foods will be treated as if it were the sole petitioner, for unless otherwise indicated the petitioner Lorillard stands in no different position.

which were responsible for obtaining the in-store sales promotional rights from the chains. It was they who chose the chains from which petitioner might make its selection for in-store promotions. All this was done by the broadcasting companies without any prior commitment, authorization, agreement, or understanding with petitioner. This is a stipulated fact. So that no basis exists for the Commission's finding that the broadcasting companies occupied an "agency" relationship to petitioner through which petitioner in effect channeled payments to the chains in the modified form of broadcasting time.

[*Remote Benefit*]

The conclusion of the Commission that the actions of petitioner were of discriminatory benefit to the chains within § 2(d) intentment is not aided by theorizing that the broadcasting companies would not have renewed their contracts with the chains unless the sales promotion plan had been sufficiently supported by the totality of suppliers, including petitioner, who purchased broadcast time.[2] This approach makes petitioner's violation of the Act depend not only upon the contemporaneous actions of other suppliers but also upon the subsequent actions of the broadcasting companies in renewing their contracts with the chains when, so far as the record reveals, neither the suppliers nor the broadcasting companies were subject to control by petitioner. Whatever benefit the chains may have derived from this combination of events, is from petitioner's standpoint, too vicarious and casually remote to enmesh petitioner in the Act.

[*Reciprocal Benefits*]

In the light of the peripheral relationship which petitioner bore to the plan, the statement of the Commission that petitioner became a "party" to and "adopted" the plan is meaningless. All petitioner did was to accept what the broadcasting companies offered. Yet, under the Commission's concept of "benefit", petitioner would be culpable under the Clayton Act even if it had not designated any of its products for promotion by the chains. For under the Commission's view, it was petitioner's payments to the broadcasting companies which constituted payment for the air time allotted to the chains. The amount of petitioner's payments did not depend upon whether it designated products for in-store promotions. Petitioner's payments were the same in either case. The failure of petitioner to designate products for in-store displays would have exculpated petitioner from liability under § 2(d), for the furnishing of services or facilities by a customer is a *sine qua non* to a § 2(d) violation.[3] However, without the designation of products for in-store promotion, petitioner's payments to the broadcasting companies, under the Commission's reasoning, would clearly have rendered petitioner liable under § 2(e)[4] for furnishing advertising discriminately to the chains, and under § 2(a)[5] for indirect price

[2] The Commission "assumed" that without the support of *either* petitioner the plan of the broadcasting companies would have been unprofitable and of short duration. This assumption is based upon the Commission's finding that *each* petitioner provided the "sole" financial support of the plan. This finding is unsupported by any evidence and is untenable on its face. Actually, the plan was availed of by eight other companies in addition to petitioner. (Fn. 1, Opinion of the Court). ABC sold an aggregate of advertising under its plan of $2,173,514.19, of which General Foods bought $157,211.01; CBS sold $1,057,470.03, of which General Foods bought $182,497.12; and NBC sold $1,247,468, of which General Foods bought $81,520.

[3] If the mere right to designate products for in-store promotions (as distinct from the actual designation) is deemed to be a service or facility furnished by the chains to petitioner, then, under the Commission's interpretation of the Act, the failure of petitioner to designate products would not have exonerated petitioner from a § 2(d) violation.

[4] Section 2(e) of the Clayton Act, 15 U. S. C. § 13(e), reads:

"(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[5] Section 2(a) of the Clayton Act, 15 U. S. C. § 13(a) reads in part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create

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discrimination in favor of the chains if the effect had been monopolistic or destructive of competition. For unlike § 2(d) which is aimed at reciprocal vendor-vendee benefits, §§ 2(a) and 2(e) are directed solely against unilateral discriminations by a vendor.

If the Commission's conception of "benefit" is adhered to, the only way in which the petitioner could have escaped the toils of the Clayton Act during the period when the broadcasting companies were offering in-store promotions would have been either to forego completely advertising over the air through the broadcasting companies offering the promotions, or to buy air time for all of petitioner's customers on a basis proportionately equal to that on which the broadcasting companies had allotted air time to the chains. Petitioner would have found itself in this unhappy plight solely because of the contracts which the broadcasting companies made with the chains for which the petitioner was in no way responsible.

[*Result of FTC's Decision*]

Carried to its logical limit, the decision of the Commission means that if a common supplier of a vendor and vendee, without pre-arrangement with the vendor, grants the vendee terms more favorable than the supplier has granted other customers of the vendor, the vendor must stop dealing with the supplier, give proportionately equal "benefits" to all of its other customers, or be adjudged guilty of Clayton Act discrimination. This result would follow regardless of how vital the commodities or services furnished by the supplier might be to the vendor. A construction of § 2(d) which carries within itself the seeds of consequences so harsh, unreasonable and oppressive should not be reached unless required by a clear Congressional mandate. This I am unable to discern.

The foregoing views are not at variance with the cases which the majority of the Court has cited. *Herbert v. Shanley Co.*, 242 U. S. 591 (1917), and *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923) involved constructions of the Copyright Act. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938) was concerned with principles of unfair competition and the Communication Act of 1934 in their relationship to interference with a contractual right to broadcast baseball games. These decisions are scarcely pertinent to a determination whether petitioner's payments to the broadcasting companies were a "benefit" to the chains within the purview of the Clayton Act. To the extent that *State Wholesale Grocers v. Great Atlantic & Pacific Tea Company* [1958 TRADE CASES ¶ 69,089], 258 F. 2d 831 (7th Cir. 1958) may have application, it tends to refute rather than to support the decision of the Commission.

It may be that the sales promotional plan of the broadcasting companies is economically undesirable and that the broadcasting companies which sponsored it are beyond the reach of the present law. But this is no reason for making a whipping boy out of petitioner by affirming the far-fetched conception of Clayton Act "benefit" which the Commission has adopted.

[*Judicial Responsibility*]

Judicial responsibility requires that a Court which sits in review of an administrative order shall interpret the applicable statute and hold unlawful and set aside any agency action not in accordance with law, 5 U. S. C. § 1009(e). In the fulfillment of that responsibility, I would set aside the order of the Commission in each case and direct a dismissal of the complaints.

[¶ 69,369] Hamilton Cosco, Inc. v. Nelson's Kiddie City Plymouth Valley, Inc.; Nelson's Kiddie City Roslyn, Inc.; Kiddie City Elmwood, Inc.; Nelson's Kiddie City Collingdale, Inc.; and Kiddie City, Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action Nos. 26113, 26114, 26115, 26116, and 26117, respectively. Filed May 25, 1959.

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a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *"

Pennsylvania Fair Trade Act

Fair Trade—Defenses to Enforcement Action—Non-Enforcement Defense Under Pennsylvania Fair Trade Act—General Defense of Lack of Enforcement.—Retailers which sold a household furniture manufacturer's products at less than fair trade prices were allowed to introduce evidence showing that their representatives purchased such products at less than fair trade prices at other retail establishments. The defense of non-enforcement provided for by a 1956 amendment to the Pennsylvania Fair Trade Act was not available to the retailers because they had not notified the manufacturer of those violations by their competitors at least seven days prior to the filing of the suit, as required by the statute. However, the testimony was admissible by way of a general defense of lack of enforcement of the manufacturer's fair trade prices, although such a defense was not established. It was found that the manufacturer enforced its fair trade prices with reasonable diligence and effectiveness, and was entitled to an injunction against the retailers.

See Fair Trade, Vol. 1, ¶ 3440.40.

For the plaintiff: Robert M. Landis of Barnes, Dechert, Price, Myers & Rhoads, Philadelphia, Pa.

For the defendants: Edward M. Snyder, Philadelphia, Pa.

Opinion

[*Fair Trade Action*]

KRAFT, District Judge [*In full text*]: These suits are brought by a manufacturer of household and juvenile furniture under its registered trade-mark to enforce by injunction the Pennsylvania Fair Trade Act against five retailers in metropolitan Philadelphia, who have offered for sale and sold plaintiff's fair-traded products at less than the established fair trade prices.

[*Prior Proceedings*]

Hearings were held on April 13 and 24, 1959, on plaintiff's motion for a preliminary injunction. The parties in each case have stipulated that the evidence then received shall comprise the record upon which final judgment may be entered.

Counsel have submitted requests for findings of fact, conclusions of law, and supporting briefs. From the evidence we make the following:

FINDINGS OF FACT

[*Parties*]

1. Plaintiff is an Indiana corporation with its principal office and place of business in Columbus, Indiana. Prior to December 31, 1958 its corporate name was Hamilton Manufacturing Company.

2. Defendant, Nelson's Kiddie City Plymouth Valley, Inc., is a Pennsylvania corporation engaged in the retail merchandise business at 811 Germantown Pike, Plymouth Valley, Pennsylvania.

3. Defendant, Nelson's Kiddie City of Roslyn, Inc., is a Pennsylvania corporation engaged in the retail merchandise business at 1180 Easton Road, Roslyn, Pennsylvania.

4. Defendant, Kiddie City Elmwood, Inc., is a Pennsylvania corporation engaged in the retail merchandise business at 7124 Elmwood Avenue, Philadelphia, Pennsylvania.

5. Defendant, Nelson's Kiddie City Collingdale, Inc., is a Pennsylvania corporation engaged in the retail merchandise business at 1011 MacDade Boulevard, Collingdale, Pennsylvania.

6. Defendant, Kiddie City, Inc., is a Pennsylvania corporation engaged in the retail merchandise business at 7951 Oxford Avenue, Philadelphia, Pennsylvania.

7. Plaintiff is the manufacturer and vendor of certain household and juvenile furniture which it makes and sells under its own duly registered trademark "Cosco" and which is in fair and open competition in Pennsylvania and elsewhere with commodities of the same general class produced and distributed by others.

[*Goodwill*]

8. Plaintiff has expended large sums of money in promoting and advertising its furniture and has established a valuable reputation and goodwill for such furniture and the trade-mark under which it is produced and sold.

9. Plaintiff's advertising program consists of national consumer advertising in magazines, such as *The Saturday Evening Post, Good Housekeeping* and *Better Homes*

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and Gardens and national trade advertising in trade journals such as *Home Furnishings Review, Juvenile Merchandising,* and *Hardware Age.* Plaintiff also conducts a dealer cooperative advertising program in local newspapers of general circulation under which it pays 50% of the cost of dealers' advertisements of its products.

10. "Cosco" household furniture is among the widely advertised products in this line on a national basis.

11. In 1958 the sale of "Cosco" household furniture in the United States amounted to $9,949,284.00.

12. In 1958 the sale of "Cosco" household furniture in the states east of the Mississippi River amounted to $4,993,515.00.

13. In 1958 the sales of "Cosco" household furniture in the Philadelphia area totalled $722,235.00.

14. In 1958 the plaintiff expended $843,378.00 in advertising "Cosco" household furniture.

15. The value of plaintiff's goodwill is substantially in excess of $50,000.00 and the amount in controversy in each action is in excess of $10,000.00.

16. The sale of "Cosco" products by the defendants below their established fair trade price will materially and adversely affect plaintiff's goodwill.

[*Fair Trade Agreements*]

17. Pursuant to the Pennsylvania Fair Trade Act, Act of June 5, 1935, P. L. 266, as amended, 73 P. S. Sections 7-11, plaintiff has entered into agreements with retail dealers in Pennsylvania under which plaintiff established minimum retail prices for its household and juvenile furniture.

18. On or about February 10, 1959 plaintiff notified each defendant of the existence of such fair trade contracts.

19. On or about February 10, 1959 plaintiff notified each defendant of plaintiff's minimum retail prices for its household and juvenile furniture which it had established under the provisions of the Pennsylvania Fair Trade Act.

[*Violations by Defendants*]

20. Each of the defendants maintained a policy of selling all merchandise, whether fair-traded or not, at a discount from the manufacturer's list price.

21. The defendants have been selling "Cosco" products at less than the fair trade price since June, 1958, and there is no persuasive evidence that the institution of this price policy at this time was a response to price cutting by their competitors.

22. On February 27, and March 10, 1959 each defendant offered for sale and sold at retail, juvenile furniture manufactured and sold by plaintiff, at less than the price established by the plaintiff in its fair trade agreements.

23. Each of the defendants displayed signs on items of "Cosco" furniture in its store showing the advertised fair trade price and the store's selling price which in each instance was from $1.00 to more than $3.00 less than the established fair trade price.

[*Violations by Others*]

24. About three weeks after these suits were filed, employees of these defendants and the wife of one of their store managers shopped at nine different retail stores. At each of these stores a single purchase of "Cosco" furniture at less than the fair trade price was made.

25. None of the defendants notified Hamilton Cosco of these price violations or of one other price violation, by two of the same stores, of which defendants' president learned before Christmas, 1958.

[*Enforcement Activity*]

26. Two days after plaintiff learned of these violations from the testimony of defendants' witnesses at the first hearing on April 13, 1959, plaintiff's counsel sent warning letters to each of the nine stores.

27. A week after the first hearing plaintiff's district sales representative visited all nine of the stores, restored the fair trade prices in two stores which were not then observing them, and obtained signed fair trade contracts from eight of the nine stores. A price survey that was made several days later showed that each of the nine stores was maintaining Cosco's fair trade prices.

28. Plaintiff enforces its fair trade prices with reasonable diligence and effectiveness, including the use of legal proceedings where necessary.

DISCUSSION

The foregoing findings of fact, most of which are not in dispute, are supported by clear and credible evidence.

[*Defense—Lack of Enforcement*]

The Pennsylvania Fair Trade Act (Act of June 5, 1935, P. L. 266), as amended, 73 P. S. 7-11, provides in Section 2 as follows:

"Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer or purchaser of such commodity. It shall, however, be a complete defense to such an action for the defendant to prove that the party stipulating such price, after at least seven days' written notice given by the defendant prior to the commencement of such action, has failed to take reasonable and diligent steps to prevent the continuation of such advertising, offering for sale or selling, by those in competition with the defendant, who were specified in such notice."

Defendants introduced evidence to show that their representatives had made a single purchase of a piece of "Cosco" furniture at less than the fair trade price at nine retail establishments. These purchases were made three weeks after the commencement of the instant actions. Defendants' president, Nelson, testified that on one occasion before Christmas, 1958, he had also stopped in two of these same stores and found them selling "Cosco" products at less than the fair trade price. Nelson admitted that none of the defendants had ever notified plaintiff of any of these occurrences. Plaintiff moved to strike this testimony because defendants had failed to comply with the provisions of the Act, above quoted.

We think plaintiff's motion must be denied. Defendants, it is true, wholly failed to comply with the mandate of the Act, but we think the testimony was admissible by way of a general defense of lack of enforcement of plaintiff's fair trade prices. We have concluded, however, that defendants have failed to establish that defense.

The evidence clearly establishes that defendants have engaged in unfair competition, and, accordingly, plaintiff is entitled to the relief prayed for in the complaint. *Lentheric, Inc. v. F. W. Woolworth Co.* [1940-1943 Trade Cases ¶56,033], 338 Pa. 523 (1940); *Olin Mathieson Chemical Corporation v. L. & H. Stores, Inc.* [1958 Trade Cases ¶68,981], 392 Pa. 225 (1958).

Conclusions of Law

1. This Court has jurisdiction over the parties to and the subject matter of each action.

2. Each defendant has wilfully and knowingly offered for sale and sold "Cosco" products in violation of the provisions of the Pennsylvania Fair Trade Act.

3. The aforesaid actions of each defendant constitute unfair competition under the Pennsylvania Fair Trade Act.

4. The continued violation by each defendant of the Pennsylvania Fair Trade Act threatens irreparable injury to plaintiff's goodwill in its "Cosco" products.

5. Under the Pennsylvania Fair Trade Act a defendant which seeks to invoke the defense of non-enforcement provided by the 1956 amendment is obliged to notify the fair trade manufacturer of other price violations by its own competitors at least seven days prior to the filing of suit. Since none of the defendants in these cases gave such notice to the plaintiff, this defense is unavailable to each defendant.

6. Plaintiff has no adequate remedy at law.

7. Plaintiff is entitled to final judgment against each defendant with costs.

Order

[*Injunction Granted*]

The actions of each defendant having caused, and threatening to continue to cause, irreparable injury to plaintiff's goodwill in its "Cosco" products,

It is ordered and decreed that each defendant, its officers, agents and employees be and are restrained and enjoined from advertising, offering for sale or selling at retail within the Commonwealth of Pennsylvania any products manufactured by plaintiff and bearing its "Cosco" trade-mark at less than the stipulated minimum retail resale prices established therefor by the plaintiff, pursuant to agreements with retailers of plaintiff's products in said Commonwealth under the provisions of the Pennsylvania Fair Trade Act of June 5, 1935, P. L. 266, as amended.

This injunction shall continue while said Fair Trade Act remains in effect.

Judgment, with costs, is entered in each action in favor of the plaintiff and against the defendant therein.

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[¶ 69,370] Hub Auto Supply, Inc. v. Automatic Radio Mfg. Co., Inc.

In the United States District Court for the District of Massachusetts. Civil Action No. 57-1000-F. Dated May 22, 1959.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Refusal to Deal—Manufacturer's Refusal to Sell New Automobile Radios to Distributor—Conspiracy Between Manufacturer and Distributor's Competitors.—A distributor of automotive accessories, in an action charging that a manufacturer of automobile radios conspired with two of the distributor's principal competitors to prevent it from servicing customers it had acquired over a period of years, and refused to honor the distributor's orders for new models of automobile radios, sufficiently stated a cause of action under the antitrust laws. The manufacturer, arguing that it had a right to select the parties with whom it would deal, moved for a judgment on the pleadings. The right to select one's customers, however, is not an absolute one; its use as an instrument in furtherance of a conspiracy denounced by the antitrust laws brings it within the ban of those laws. The manufacturer could not avoid the charge that it had conspired to restrict competition by saying that what it did in furtherance of the conspiracy was something which, apart from the conspiracy, it might have been free to do.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments—Injury to Public—Absence of Such Injury as Would Affect Economy as a Whole.—A distributor of automotive accessories, in an action charging that a manufacturer of automobile radios conspired with the distributor's competitors to prevent it from servicing customers and refused to honor its orders for new models of automobile radios, sufficiently stated a claim under the antitrust laws even though there might have been no public injury in the sense that the destruction of the distributor's business might make little difference to the economy as a whole. It was enough that the distributor charged a conspiracy for one of the purposes denounced by the law, namely, the restraint of trade by a restriction of the distributor's ability to offer its customers the manufacturer's products. It was argued that the distributor could still sell other manufacturer's radios, and that there was no basis for an inference that the acts charged would reduce the supply of radios available to the public, increase the price of radios, or otherwise work to the detriment of the public. The conspiracy alleged was similar in nature to the one involved in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 1959 Trade Cases ¶ 69,316. While the effects of the conspiracy in the instant case might not be so severe, its tendency was the same; it destroyed the distributor's ability to compete for customers for the manufacturer's products, thus driving it out of business as a dealer in those products.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

For the plaintiff: Louis Winer, Boston, Mass.

For the defendant: Jackson J. Holtz, Boston, Mass.

Memorandum of Decision on Defendant's Motion for Judgment on the Pleadings

[*Conspiracy Charged*]

Ford, District Judge [*In full text*]: This is an antitrust action brought under the provisions of the Sherman and Clayton Antitrust Acts, 15 U. S. C. A. §§ 1, 2 and 15, in which defendant has moved for judgment on the pleadings.

The complaint alleges that plaintiff is a corporation engaged in the business of distributing automotive accessories, shipping merchandise to every state in the Union, and defendant a corporation which manufactures radios for automobiles. It is alleged that plaintiff was a distributor of automobile radios manufactured by defendant from 1950 until 1957, when defendant informed plaintiff that its new line of radios (but not the existing models) would not be available to plaintiff as a distributor, and that defendant has since refused to honor plaintiff's orders for new models of radios. It further alleges that defendant has joined, conspired and combined with Arnco Auto Supply Co.

and Ellis, Inc., plaintiff's principal competitors, to prevent plaintiff from servicing customers it has acquired over a period of years, and that the principal objective of the combination is to restrict plaintiff in its trade and competition with others.

[*Refusal to Deal*]

Defendant argues that because defendant has a right to select the parties with whom he will deal, *United States v. Colgate & Co.*, 250 U. S. 300, or even to grant an exclusive distributorship, *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418, the allegations of the complaint do not state any cause of action under the antitrust laws. However, the complaint alleges not merely a refusal to deal with plaintiff, but also that that refusal was in furtherance of a conspiracy between defendant and plaintiff's competitors to restrict competition by plaintiff. As the *Colgate* case itself points out, the right to select one's customers is not an absolute right. Its use as an instrument in the furtherance of a conspiracy denounced by the antitrust laws brings it within the ban of those laws. *Lorain Journal Co. v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143, 155. The charge here is that defendant conspired to restrict competition by plaintiff. Defendant cannot avoid the charge by saying that what it did in furtherance of the conspiracy was something which apart from the conspiracy it might have been free to do.

[*Public Injury*]

Defendant points out numerous violations of the antitrust laws which the complaint does not allege. It is enough that it charges a combination or conspiracy for one of the purposes denounced by the law, the restraint of trade by the restriction of plaintiff's ability to compete in the automobile radio market by continuing to offer its customers defendant's products. Defendant argues that plaintiff can still sell radios of other manufacturers, that the automobile radio business is a highly competitive one, and there is no basis for any inference that the action of defendant and its alleged coconspirators would reduce the supply of radios available to the public, increase the price of radios, or otherwise work to the detriment of the public. In the light of the decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.* [1959 TRADE CASES ¶ 69,316], — U. S. —, decided April 6, 1959, this argument must be rejected. There several manufacturers and distributors conspired with a single competitor of plaintiff either not to sell to plaintiff or to sell only on unfavorable terms. The conspiracy alleged here is similar in nature. It may not be so severe in its effects since it involves only a single manufacturer and two competitors of plaintiff, but its tendency is the same. It destroys plaintiff's ability to compete for customers for defendant's products, and thus drives it out of business as a dealer in these products, at least as to current models. Hence it tends to interfere with the natural flow of interstate commerce and violates the act even though there may be no public injury in the sense that destruction of plaintiff's business may make little difference to the economy as a whole.

[*Motion Denied*]

It cannot be held that the present complaint fails to state any claim under the antitrust laws, and defendant's motion for judgment on the pleadings must be denied.

[¶ 69,371] Crane Distributing Company v. Glenmore Distilleries.

In the United States Court of Appeals for the Sixth Circuit. No. 13,606. Filed June 2, 1959.

Appeal from the United States District Court for the Eastern District of Kentucky, Lexington Division.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Refusal to Deal—Distiller's Termination of Distribution Agreement after Distributor Refused to Grant Rebates to Retailers—Resale Price Fixing.—A liquor distributor sufficiently alleged a violation of the antitrust laws by claiming that a distiller, pursuant to a conspiracy with another distributor and others, terminated its distribution agreement with the distributor after it had refused to give

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rebates to retailers to whom it sold the manufacturer's products. The distributor alleged that, if it had given such rebates, it would have been selling below a prescribed minimum price fixed by contract between the distiller and its distributors and sanctioned by the Kentucky "fair trade" law. Both parties agreed that the case did not involve "any immunity bath granted by the Miller-Tydings Act or the McGuire Act." In the absence of some immunity, all price fixing is illegal, if within the purview of the Federal antitrust laws, regardless of whether the prices fixed are wholesale or retail, or maximum or minimum.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Resale Price Fixing, Vol. 1, ¶ 3015.70.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments—Conspiracy to Restrain Trade and Create Monopoly—Interstate Commerce—Public Injury—Injury to Plaintiff.—A trial court improperly granted summary judgment dismissing a liquor distributor's charges that a distiller, pursuant to a conspiracy with another distributor and others, terminated a distribution agreement with the distributor after it refused to give rebates to retailers to whom it resold the manufacturer's products. The distiller contended that only local trade was affected since the distributor was doing business solely in Kentucky; that the charge added up to nothing more than one trader's refusal to sell to another; and that no economic injury to the public was shown. Each of those contentions was answered in *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 1959 TRADE CASES ¶ 69,316. In that case, the United States Supreme Court held that a local retailer's allegations that interstate manufacturers and distributors conspired among themselves and with a local chain of department stores not to sell to the retailer, or to sell to it only at discriminatory prices, showed a type of trade restraint and public harm that is forbidden by the Sherman Act. In the instant case, however, the complaint, although charging a conspiracy to create a monopoly as well as an illegal restraint of trade, did not allege facts which would serve as "fair notice" of any claim for damages to the distributor's trade or business proximately resulting from any monopoly or attempt at monopoly.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.475, 9009.600.

For the appellant: Argued by William Meller, Louisville, Ky. (William Meller, Louisville, Ky., John Y. Brown, Miller & Griffin, Lexington, Ky., on the brief).

For the appellee: Argued by J. H. Gold, Louisville, Ky. (J. H. Gold, Louisville, Ky., and Charles I. Dawson of Bullitt, Dawson & Tarrant, Louisville, Ky., on the brief).

Before: MARTIN, Chief Judge, MCALLISTER, Circuit Judge, and MATHES, District Judge.

[*Treble Damage Action*]

MATHES, District Judge [*In full text*]: This appeal is from a summary judgment dismissing on the merits, for failure to state a claim upon which relief can be granted, an asserted cause of action under the Federal anti-trust laws. [Fed. R. Civ. P. 12 (b)(6), 56(b).]

The claim in question for threefold damages [15 U. S. C. § 15], based upon asserted violations of 15 U. S. C. §§ 1 and 2, is set forth in Count I of appellant's five-count complaint. The remaining four counts present alleged causes of action arising under Kentucky law and are not before us upon this appeal, the District Judge having made an "express determination that there is no just reason for delay", and having directed entry of final judgment of dismissal as to Count I only, as permitted by Rule 54(b).

[*Conspiracy—Refusal to Deal*]

From Count I of the complaint, as supplemented by appellant's answers to interrogatories relied upon by appellee in support of the motion for summary judgment, it appears that the claim asserted under the Federal antitrust laws, briefly put, is: (1) that appellant, doing business solely in Kentucky, was one of the distributors to retailers in Kentucky of appellee's products, including "the Yellowstone line" and Glenmore's Kentucky Tavern whiskey, which are produced and distilled only in Kentucky, but are exported and sold by appellee "for beverage purposes throughout the United States"; (2) that Gross Distributing Com-

pany is "a distributor of alcoholic beverages in interstate commerce, with its principal office . . . at Lexington, Kentucky"; (3) that "Glenmore [appellee], Gross and others . . . conspired to create . . . a monopoly and illegal restraint of trade and commerce in the liquor industry among the several states, including Kentucky, to the detriment of the public"; (4) that pursuant to and in furtherance of this conspiracy, appellee "informed plaintiff [appellant] that plaintiff would not be allowed to keep the Yellowstone line . . . unless plaintiff, on its resale of Kentucky Tavern whiskey to retailers . . . gave rebates to such retailers and thereby sold to the retailers Kentucky Tavern whiskey at a maximum price below the prescribed minimum" fixed by the contract between Glenmore and its distributors, including appellant, and sanctioned by Kentucky's "fair trade" law [K. R. S. §§ 244.380, 244.390 *et seq.*]; (5) that appellant in turn notified Glenmore that "it would not give rebates and would not sell Kentucky Tavern whiskey to retailers at a price below the minimum price fixed by the fair trade contract"; (6) that appellee thereupon "terminated the Yellowstone agreement with plaintiff and placed such lines with Gross . . . and, at the direction of Glenmore, plaintiff did deliver to Gross all whiskeys in the Glenmore line that the plaintiff had in his warehouse which was paid for by Glenmore by its check, and not by Gross."

[*Price Fixing*]

Both parties agree that the case does not involve "any immunity bath granted by the Miller-Tydings Act or the McGuire Act." [See *Schwegmann Bros. v. Calvert Distillers Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384 (1951).] But absent some "immunity bath" all price fixing is illegal, if within the purview of the Federal anti-trust laws, regardless of whether the prices fixed be wholesale or retail, maxima or minima. [*Kiefer-Stewart Co. v. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211 (1951); *United States v. Bausch & Lomb Co.* [1944-1945 TRADE CASES ¶ 57,224], 321 U. S. 707, 721-722 (1944); *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 405 (1911).]

[*Public Injury*]

Appellee insists, however, that the claimed conspiracy is not within the coverage of the Federal antitrust laws because any alleged restraint upon commerce and attempt at monopoly could affect at most only local trade; that appellant's charges add up to nothing more than the refusal of one trader to sell to another; and that in all events no economic injury to the public is shown.

Each of these contentions is answered in the recent opinion of the Supreme Court in *Klor's, Inc. v. Broadway-Hale Stores, Inc.* [1959 TRADE CASES ¶ 69,316], — U. S. —, 27 Law Week 4253 (4/6/59); and see *Moore v. Mead's Fine Bread Co.* [1954 TRADE CASES ¶ 67,906], 348 U. S. 115, 118-120 (1954). No useful purpose would be served in repeating here what is so forcefully said there, and which calls for reversal of the judgment in the instant case.

[*Monopoly Charge—Damages*]

We are prompted to add the observation that, although appellant alleges appellee and others "conspired to create . . . a monopoly" in violation of 15 U. S. C. § 2, as well as "an illegal restraint of trade" in violation of 15 U. S. C. § 1, facts are not alleged in the complaint which would serve as "fair notice" of any claim for damages to appellant's trade or business proximately resulting from any monopoly or attempt thereat. [*Cf: Conley v. Gibson*, 355 U. S. 41, 47-48 (1957); *Nagler v. Admiral Corp.* [1957 TRADE CASES ¶ 68,839], 248 F. 2d 319 (2d Cir. 1957).] If appellant seriously asserts a claim based upon an alleged violation of 15 U. S. C. § 2, the complaint should be amended to allege it separately. [Fed. R. Civ. P. 10(b).]

[*Reversed and Remanded*]

The summary judgment dismissing Count I of appellant's complaint will be reversed and the cause remanded to the District Court for further proceedings not inconsistent with this opinion.

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[¶ 69,372] State of Kansas ex rel. John Anderson, Jr., Attorney General of the State of Kansas v. The Fleming Company, Inc.; Beatrice Foods Company; Foremost Food and Chemical Company; Adams Dairy Company; Fairmount Foods Company; and Edward G. Johnston.

In the Kansas Supreme Court. No. 41,304. Filed May 16, 1959.

Appeal from Shawnee District Court, Division No. 1. Beryl R. Johnson, Judge. Affirmed as modified.

Kansas Dairy Products Unfair Trade Practices Law

Sales Below Cost and Price Discrimination—Kansas Statute Applicable to Dairy Products—Constitutionality—Failure to Require Criminal Intent—Failure to Define Offense and Exceptions with Exactness—Due Process.—Provisions of a Kansas law which prohibited wholesalers, processors, and distributors of dairy products from (1) selling dairy products and expendable dairy supplies below cost, and (2) granting to retailers any secret discount or rebate, or permitting deviations from the price at which dairy products are furnished to retailers in the same area (Sections 50-503(*l*) and (*m*), 1957 Supplement to General Statutes of Kansas, 1949) violated the Fourteenth Amendment to the United States Constitution and the Bill of Rights of the Kansas Constitution. A criminal statute which fails to require a criminal intent in doing the proscribed act, fails to define with exactness the act forbidden, and is indefinite as to exceptions as to liability, denies due process to one against whom the statute is asserted. The statute left unanswered the question of whether "cost" at the point of delivery was to be determined as of a particular shipment, or based upon business for a week, a month, six months, or a year, and was totally silent as to what expenses were to be included in arriving at that "cost." Also, the statute excepted from its prohibitions "sales made in good faith to meet existing lawful competition." The terms "good faith" and "lawful" presented difficulties since, as a practical proposition, resort to a competitor's books and records is required in determining whether his price is below cost. However, the trial court's order holding the entire statute unconstitutional was too broad. Only two sections were in issue, and the Act specifies that the invalidity of any section shall not render the entire act invalid.

See Price Discrimination, Vol. 1, ¶ 3903, 3929; Sales Below Cost, Vol. 2, ¶ 7111.18, 7141, 7151, 7161.18.

For the appellant: George B. Powers and Gerald Sawatzky, Special Assistant Attorneys General, both of Wichita, Kan., and John Anderson, Jr., Attorney General, and Charles N. Heuson, Jr., Assistant Attorney General, were with them on the briefs.

For the appellees: John J. Hasburgh, Jr., Kansas City, Mo., and James W. Porter, Topeka, Kan., Melvin J. Spencer and Robert I. Donnellan, both of Kansas City, Mo., were with him on the briefs for Adams Dairy Company; Charles F. Lamkin, Jr., Kansas City, Mo., and Lester M. Goodell, of Topeka, Kan., and Norman E. Greene, of Kansas City, Mo., were with him on the brief for Foremost Food and Chemical Company; Jacob A. Dickinson, of Topeka, Kan., Roy P. Swanson and Robert M. Duboc, both of Kansas City, Mo., and E. R. Schaberg, of Omaha, Neb., of counsel, were on the brief for Fairmount Foods Company; Robert L. Webb, Ralph W. Oman, Robert A. McClure, Philip E. Buzick, and James D. Waugh, all of Topeka, Kan., were on the brief for The Fleming Company, Inc.; Clayton E. Kline, M. F. Cosgrove, Robert E. Russell, Willard N. Van Slyck, Jr., William B. McElhenny, O. R. Stites, Jr., and James L. Grimes, Jr., all of Topeka, Kan., were on the brief for Beatrice Foods Company; W. A. Kahrs, of Wichita, Kan., for Kansas Ice Cream and Milk Institute, Steffens Dairy Foods Company, Inc., Hyde Park Dairies, Inc., and Armstrong Creamery Company, as *amicus curiae;* Richard L. Becker and Morris D. Hildreth, both of Coffeyville, Kan., for Bennett Ice Cream Company, Gardiner Dairy and Ice Cream Company, Hoch Dairy, Lawrence Sanitary Milk and Ice Cream Company, Inc., and The Page Milk Company, as *amici curiae.*

Syllabus by the Court

1. In a suit to enjoin defendants from violating the provisions of G. S. 1957 Supp. 50-503(l) and (m) in selling milk at less than cost at the point of delivery, the subsections involved are examined and it is *held:* A criminal statute, which neither requires a criminal intent in doing the proscribed act or defines with exactness the act forbidden, and further is indefinite as to exceptions as to liability, denies due process to one against whom the statute is asserted; and this is true although the statute be attempted to be enforced in a suit for injunction and not in a criminal action.

2. Where a statute contains a provision that the invalidity of any section shall not render the entire act invalid and only parts of one section of the statute are involved in the suit before the court and found to be unconstitutional, the court erred in holding the entire statute invalid.

[*Sales Below Cost—Dairy Products*]

The opinion of the court was delivered by JACKSON, Justice [*In full text*]: This is an appeal involving an injunction suit brought by the attorney general under the provisions of G. S. 1957 Supp., Chapter 50, Article 5, against the defendant-appellees. The aforementioned article 5 constitutes the provisions of Laws of 1957, Chapter 309, in which the legislature attempted to make a number of things unlawful when done by a distributor, processor, or wholesaler of dairy products. In a certain sense, the act is an unfair trade practice act (cf. G. S. 1949, ch. 50, art. 4) dealing only with dairy products and the sale thereof. The district court held the new act entirely unconstitutional and the plaintiff has appealed.

[*Prior Proceedings*]

In the suit below, appellant filed his petition against the appellees alleging that each of them had violated the provisions of G. S. 1957 Supp. 50-503(l) and (m). Without detailing the amendments of the petition, it will be sufficient to state that certain defendants named in the original petition who were retailers were dropped from the pleading, and we are now concerned with the second amended petition. This pleading charges that all of the appellees sold milk to certain grocery stores at fourteen and one-half cents per half gallon and in the case of Adams Dairy Company at the price of thirteen and one-half cents per half gallon; that such conduct constituted a violation of the statute and appellant sought an injunction against the appellees (see section 50-505). The appellees demurred to the second amended petition and after due consideration by the trial court, the demurrers were sustained on the ground that the statute was unconstitutional.

Other matters in the trial court need not be noted here and we shall proceed to consider the constitutionality of the new act attempting to regulate the dairy industry.

[*Purposes of Act*]

It will be noted first that the act begins in section 50-501 with a statement that certain practices are current in the dairy industry and adversely affect the stable economy of the state. This section constitutes a statement of the purposes of the act and reads as follows:

> "The practices being conducted by many dairy processors, wholesalers, and distributors in Kansas of selling below cost and in the subsidization of retail dealers through secret discounts, gifts, loans and other means and the furnishing of equipment, adversely affect the stable economy of Kansas. Such trade conduct causes unfair price discrimination, destructive and predatory trade practices, tends to reduce the price paid to the dairy farmer, increases the price paid by the consumer, and misleads the public as to the true value of dairy products, and is detrimental to the public health and welfare."

[*Definitions*]

Section 50-502 of the act contains definitions. The most important in this case are the definitions of "distributor," "processor," and "wholesaler." It may be noted in passing that under these definitions, a dairyman owning a herd of milk cows and a pasteurizing plant and delivering most of his milk to his own customers at their homes would still fall within the terms "distributor," "processor," and "wholesaler" if he at the same time sold some of his milk to the corner grocery store for resale. The court takes notice that there are some such dairies even in Shawnee County.

In section 50-503, the first paragraph reads as follows:

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"It shall be unlawful for any person engaged in business as a wholesaler, processor, or distributor, individually or through or by affiliates, subsidiaries, associates, agents or stockholders, directly or indirectly, to do or cause to be done any of the following acts:"

[*Prohibited Acts*]

Following this are enumerated a great number of prohibited acts, most of which seem to forbid the granting of concessions to retailers. Only the two subparagraphs hereinafter set out are involved in this suit and they read as follows:

"(l) Sell any products, unit or combination thereof, for less than cost to the wholesaler, processor or distributor at the point of delivery; or sell to any retail dealer any expendable supplies for less than cost to any such wholesaler, processor or distributor at the point of delivery plus a markup of six percent (6%) of such cost as a proportionate share of the cost of doing business; except a person may sell either such dairy products or expendable supplies at prices made in good faith to meet existing lawful competition. Competent evidence of the prevailing cost to other such wholesalers, processors, or distributors engaged in selling dairy products on the same market shall constitute prima facie evidence of the cost to any person charged with violation of this provision.

"(m) Grant, either directly or indirectly, to any retail dealer any secret discount, make any rebate, or permit any deviation from the price at which he furnishes dairy products of the same quality, brand and quantity to other retail dealers in the same city, unincorporated town, or immediate vicinity thereof, except that deviations from such prices may be given when made in good faith to meet existing lawful competition: *Provided, however,* that bids, deviating from such prices, made pursuant to invitations issued by federal institutions or installations, may be filled, and contracts entered into, and fulfilled, without being deemed in violation of the provisions of this subsection. The terms 'made in good faith' and 'lawful' as used in this and the preceding subsection shall mean 'in conformity with and not in conflict with nor contrary to, any law of this state or of the United States of America.' "

We need not refer to the other sections of the statute at this time.

[*Constitutional Objections*]

In the lower court and here, the appellees contend that the statute under consideration is unconstitutional under the Fourteenth Amendment to the Constitution of the United States and Sections 1, 10 and 18 of the Bill of Rights of the Constitution of Kansas. The trial court in the finding that the above quoted sections were unconstitutional seems to have held that the legislature would patently not have enacted the statute without those sections and that therefore, the entire statute was unconstitutional.

[*Legislative Power*]

It must be established beyond question that the legislature has power to regulate and provide for the accomplishment of the purposes set forth in section 50-501. Not only have monopolies and trusts been the subject of legislation for more than half a century, but the dairy industry has been regulated for the purpose of protecting the public health and welfare more completely than any other industry. We shall not pause to cite cases upon this proposition. The real question here, we believe, comes down to the matter well stated by the Supreme Court of the United States in the case of *Nebbia v. New York,* 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, in which the court said:

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. *They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process.* And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." (Italics supplied.)

The appellant seems to place considerable emphasis on the *Nebbia* case, but as said by the Supreme Court of the United States, each case must depend upon its own relevant facts. While the *Nebbia* case is an

important case, the facts there were that the state of New York set up a complete regulation of the dairy industry during a time of crisis. The industry was placed under the regulation of an administrative body which had the power to fix both minimum and maximum prices and regulate the industry in other ways. The purposes of the act were to protect the public health, insure the supply of milk and encourage its production and possibly to prevent monopoly. Objections could be made to the administrative authority from which appeal to the courts could be made by *certiorari*. We are told that many states after the decision of the *Nebbia* case enacted laws establishing similar regulations. Be that as it may, it must be agreed that decisions concerning such statutes are not in point in the present case.

Counsel advise that although similar acts to the one now before the court have been enacted in other states, no judicial consideration of them as been found, and our independent search has likewise been unavailing.

Nearest to the present type of statute are the general unfair practice acts of the various states. The Kansas act appearing as G. S. 1949, Chapter 50, Article 4, has been recently under consideration in this court. (See *State v. Consumers Warehouse Market* [1958 Trade Cases ¶ 69,133], 183 Kan. 502, — P. 2d —.)

[*Principal Grounds of Attack*]

The appellees attack the application of the dairy act on three principal grounds. First, that no criminal intent is required under the statute, but that the sale of any dairy products for less than cost to the wholesaler, processor or distributor is made to constitute a criminal act. Second, that no definition of "cost at the point of delivery" is contained in the act. They also point out the exception providing "a person may sell either such dairy products or expendable supplies at prices made in good faith to meet existing *lawful* competition." We shall dispose of these questions before taking up any other matters in the appeal.

[*Criminal Intent*]

In starting this discussion, it may be noted that as the appellant in effect states, the act under consideration is no model of the scrivener's art. However, appellant points to the fact that certain acts may be made criminal without including the element of *mens rea*. The following cases are cited to substantiate that position: *State v. Beam*, 175 Kan. 814, 267 P. 2d 509 (giving a worthless check); *State v. Merrifield*, 180 Kan. 267, 303 P. 2d 155 (driving without a license); and the cases cited in the opinions.

The case of *May's Drug Stores v. State Tax Comm.* [1950-1951 Trade Cases ¶ 62,741], 242 Iowa 319, 45 N. W. 2d 245, is cited as showing a decision by the Supreme Court of Iowa upholding a statute making illegal the sale of cigarettes at less than cost by a wholesaler or retailer. In the Iowa statute, it seems no criminal intent was required.

The appellees point out that most of the general unfair practice acts contain provisions requiring a criminal intent and that those which do not, have been usually held to be invalid. In *State v. Consumers Warehouse Market, supra,* this court at page 511 took pains to stress that our act required that the sale below cost be made with the intent to unfairly divert trade and otherwise injure a competitor, and see *State v. Packard-Bamberger & Co., Inc.* [1932-1939 Trade Cases ¶ 55,240], 123 N. J. L. 180, 8 A. 2d 291; *Commonwealth, Appellant, v. Zasloff* [1940-1943 Trade Cases ¶ 56,034], 338 Pa. 457, 13 A. 2d 67, 128 A. L. R. 1120.

A pertinent case is *Fairmont Co. v. Minnesota*, 274 U. S. 1, 47 S. Ct. 506, 71 L. Ed. 893, 52 A. L. R. 163. This case involved a statute forbidding, under penalty, creameries to purchase cream at higher prices in one locality than in other localities, after allowance for the difference in cost of transportation. The Supreme Court of the United States reversed the holding of the Supreme Court of Minnesota and held that the statute was unconstitutional as denying due process of law because the statute made illegal an otherwise lawful act without the necessity of a criminal intent. The court said:

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> "As the inhibition of the statute applies irrespective of motive, we have an obvi-

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ous attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce, but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. Enforcement of the statute would amount to fixing the price at which plaitniff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

"The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

That the element of intent was thought to be most important may be seen from the fact that the court had previously held constitutional a statute of South Dakota which forbade discrimination in the price of goods in different localities *for the purpose* of destroying competition and the creation of a monopoly. (See *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 57 L. Ed. 164, 33 S. Ct. 66.) It may be noted that the *Central Lumber Co.* case is cited in a footnote in the *Nebbia* case and there is nothing to indicate that the *Nebbia* case overruled or made obsolete the *Fairmont* case. Before giving a final answer to this question of an intent in the statute, we would like to turn to the question of the definition of cost.

[*Definition of "Cost"*]

It will be seen that no attempt is made to define cost in the statute. It only states a wholesaler, processor or distributor must not sell products "for less than cost . . . at the point of delivery." It is argued that in this day and age, everyone in business has the services of accountants, but it will be seen that the statute leaves unanswered the question of whether the cost is to be determined as of a particular shipment or based upon business for a week, a month, six months or a year. The statute is totally silent as to what expenses are to be included in arriving at the cost at the point of delivery.

The appellant would read the statute to simply provide that the appellees should keep books in good faith. But we cannot feel that the interpretation of the statute is so simple. In *Dikeou v. Food Ass'n* [1940-1943 TRADE CASES ¶ 56,069], 107 Colo. 38, 108 P. 2d 529, defendant was being prosecuted for selling cigarettes at $1.12 per carton, which was claimed to be below the cost to him as proscribed by the Colorado statute. Defendant's accountant testified that under his own breakdown of the business, defendant was realizing a profit of $.0062 on each sale at the stated price, and that the statute had not been violated. On the other hand, plaintiffs contended that defendant's costs were not as stated but amounted to $1.14 per carton. It must be remembered that this dispute arose under a statute which specified that a criminal intent must exist and that the manner of arriving at the cost of the seller was rather carefully defined. We are hardly as hopeful of the practical operation of a statute which requires no specific intent and makes no attempt to define the elements to be taken into consideration as to the cost to the seller.

Notice also the provisions at the close of subsection (l) in relation to evidence of prevailing costs of others engaged in selling dairy products. Attention is also directed to the holding of this court in *State v. Consumers Warehouse Market, supra,* at pages 511-512 in regard to G. S. 1949, 50-401(e).

[*Meeting "Lawful Competition"*]

The objections made to the exception as to sales "made in good faith to meet existing lawful competition" were mentioned at the beginning of the opinion. The appellant in his petition alleges that none of the defendants was selling milk in good faith to meet existing lawful competition.

It is argued that one need not decide at his peril whether his competitor's price is lawful. The great difficulty with the argument is the definitions of "good faith" and "lawful" as found in subsection (m) and made to apply to this very exception. Un-

der a different statute such cases as *State, By Clark, v. Wolkoff* [1957 TRADE CASES ¶ 68,826], 250 Minn. 504, 85 N. W. 2d 401, might be of considerable weight. The Minnesota statute, contrary to the statute now under consideration, required a criminal intent as an element of the crime proscribed. In *State, ex rel., v. Commercial Candy Co.* [1948-1949 TRADE CASES ¶ 62,358], 166 Kan. 432, 201 P. 2d 1034, this court in construing the general unfair practices act said:

> "We are unable to find any evidence in this record upon which the trial court could base its conclusion of fact No. 13 and its conclusion of law No. 5, in which it found that the defendants did not make the sales in good faith and to meet the price of the Poehler company, their competitor, and that the sales in question were made below cost with the intent or effect of injuring competitors and destroying competition. It may be that the sales by the defendants resulted in injury to other competitors and tended to destroy competition, but by the very terms of the act (50-402) such sales must be made with the intent to bring about those results enumerated by the statute in order to constitute a violation of the act. The act (50-405) further provides that a wholesaler may sell for less than cost where the price of merchandise is made in good faith to meet the price of a competitor in the same locality.
>
> "The trial court may have reached its conclusions on account of the fact the record shows that the defendants made no effort to ascertain whether or not the Poehler Company was selling below cost, and that, therefore, the defendants were guilty of bad faith and thus made the sales in question with the intent to bring about the results prohibited by the statute. However, we are of the opinion that this would be an erroneous and unreasonable construction of the burden of proof portion of the exemption provision. As a practical proposition, how could the defendants have ascertained whether or not the price of $1.59 per carton was below cost to the Poehler company unless resort be made to the books and records of such competitor?" (pp. 437-438)

[*Due Process Denied*]

It must be evident that a criminal statute, which neither requires a criminal intent in doing the proscribed act or defines with exactness the act forbidden, and further is indefinite as to exceptions as to liability, must be considered to deny due process to one against whom the statute is asserted.

[*Indefiniteness*]

It is elemental that a criminal statute must be definite, (*State v. Ashton,* 175 Kan. 164, Syl. ¶ 1, 262 P. 2d 123). Neither does the fact that this is a civil suit and not a criminal action help the statute enough to make it valid. We would read this statute as a whole.

In the *May's Drug Stores* case, *supra,* which is stressed by appellant, the Supreme Court of Iowa did find that in that case no criminal intent was required by the statute, but it may be noted that the elements of the cost of the defendant were very accurately set out in the statute. The court said:

> "The Act in question defines cost to a wholesaler or retailer as the 'basic cost of cigarettes' to the wholesaler or retailer plus his 'cost of doing business.' 'Basic cost' is either invoice or replacement cost, whichever is lower. And 'cost of doing business' is presumed to be four per cent of the basic cost of the cigarettes for a wholesaler and eight per cent of such cost for the retailer 'in the absence of proof of a lesser or higher cost.'" (p. 336)

In the case of *Commonwealth, Appellant, v. Zasloff, supra,* no intent was required and no definition of the elements of the cost was provided, and the Supreme Court of Pennsylvania found the statute unconstitutional. Likewise, the New Jersey statute of similar import was declared invalid in *State v. Packard-Bamberger & Co., Inc., supra.* We have pointed out that the Supreme Court of the United States in *Fairmont Co. v. Minnesota, supra,* held that the lack of a criminal purpose in doing the proscribed act made the statute under consideration invalid as a denial of due process. The Minnesota statute like the Kansas statute now under consideration dealt with dairy products, and had been passed for the same declared purpose.

From all of the foregoing, the court is convinced that the provisions of subsections (l) and (m) of section 50-503, G. S. 1957 Supp. deny due process of law to the appellees in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of the Bill of Rights § 18, of the constitution of Kansas.

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[*Separability of Valid and Invalid Sections*]

The trial court issued an order holding the entire act of the legislature invalid although only the two subsections discussed and set out above were at issue in this case. Only sales of milk at a price below the appellees' cost at point of delivery were charged in the petition. The act contains a section specifying that the invalidity of any section shall not render the entire act invalid. Moreover, this court only considers constitutional questions when the complaining party is affected by the statute complained of. In *Marks v. Frantz,* 179 Kan. 638, 298 P. 2d 316, the court said:

"Before taking up appellant's contentions, we take note of established principles applicable where constitutionality of a statute is to be determined. Constitutionality of a statute is presumed, doubts as to constitutionality are resolved in favor of legality, and before the statute may be stricken down, it must clearly appear the statute offends. (See *e. g., Carolene Products Co. v. Mohler,* 152 Kan. 2, 102 P. 2d 1044; *Board of County Comm'rs v. Robb,* 166 Kan. 122, 199 P. 2d 530; *State, ex rel., v. Board of Regents,* 167 Kan. 587, 207 P. 2d 373, and cases cited therein.) In determining constitutionality of a statute the court's duty is to uphold the legislation rather than defeat it and if there is any reasonable way to construe the legislation as constitutionally valid that should be done. (See *e. g., Mizer v. Kansas Bostwick Irrigation District,* 172 Kan. 157, 239 P. 2d 370.) It is further to be noted that constitutionality of legislation will be considered only where necessarily involved and such a determination required (See, *e. g., State, ex rel., v. School District,* 163 Kan. 650, 185 P. 2d 677), and that constitutionality may not be questioned by one not affected by its operation. (See, *e. g., Kansas Utilities Co. v. City of Burlington,* 141 Kan. 926, 931, 44 P. 2d 223; *Stone v. City of Wichita,* 145 Kan. 377, 65 P. 2d 595.) With respect to the last rule, it may be observed that under the complaint filed with the board, the appellant is charged with certain acts. Insofar as they are concerned he may question constitutionality of the statute involved—but under that rule he has no standing to attack the act as an entirety and respecting those phases of it which are not involved in the charges against him and by way of illustration we mention attendance at the educational programs as outlined in his petition." (p. 643)

Certain other matters are mentioned in the briefs of some of the parties, but the court is of the opinion they require no notice in this opinion.

[*Order Modified*]

The order of the district court was too broad in holding all of Laws of 1957, Chapter 309 (G. S. 1957 Supp. 50-501 *et seq.*) invalid. The district court did not err in finding subsections (l) and (m) of section 50-503 denied due process to the appellees. As so modified, the order of the trial court should be affirmed. It is so ordered.

[¶ 69,373] Howard Industries, Inc. v. Rae Motor Corp.

In the United States Court of Appeals for the Seventh Circuit. September Term 1958—April Session 1959. No. 12568. Dated May 27, 1959.

Appeal from the United States District Court for the Eastern District of Wisconsin. GRUBB, District Judge.

Sherman and Wisconsin Antitrust Acts

Combinations and Conspiracies—Monopolies—Contract to "House" Motors in Casing Different from That Used by Competitor—Legality—Alleged Illegality as Defense to Action on Contract.—A trial court properly granted an injunction enforcing a written contract whereby a manufacturer of fractional horsepower motors, for a valuable consideration, agreed that it would use a motor casing different in design from that used by a competitor. The manufacturer contended that the contract, which was a "settlement agreement" entered into after the competitor had instituted a patent infringement action against the manufacturer, as well as the injunction founded upon the contract, unlawfully extended the competitor's patent monopoly on a motor brush assembly in violation of the Sherman Act and of the Wisconsin antitrust statute. The settlement agreement could not be

construed to extend the patent because the patent involved only a motor brush assembly and did not cover or affect the casing which housed the motor. Furthermore, there was no misuse of the patent by "tying" arrangements or the conditioning of a license so as to control the conduct of a licensee. The contract in suit did not license the manufacturer, and did not require it to use the competitor's casing. Thus, the injunction did not prohibit the manufacturer from competing fairly, and the contract in suit did not restrain trade or tend to create a monopoly.

See Combinations and Conspiracies, Vol. 1, ¶ 2013, 2407; Monopolies, Vol. 1, ¶ 2610; Private Enforcement and Procedure, Vol. 2, ¶ 9040.

For the plaintiff-appellee: Carroll R. Heft and Glenn R. Coates.

For the defendant-appellant: Jerome F. Foley, Rex Capwell, and George J. Kuehnl.

Before Duffy, Chief Judge, Schnackenberg and Parkinson, Circuit Judges.

[*Contract Action—Antitrust Violations as Defense*]

Parkinson, Circuit Judge [*In full text*]: Plaintiff-appellee Howard Industries, Inc. (Howard) filed this action in the District Court to enjoin the defendant-appellant Rae Motor Corporation (Rae) from manufacturing, using or marketing its electric motors in a motor casing confusingly similar in appearance to that of Howard, and for damages.

[*Prior Proceedings*]

The District Court, by pre-trial conference order, separated the issues on liability and damages and, following a bench trial on the question of liability, filed findings of fact and conclusions of law and entered an injunctive order and judgment in accordance therewith in favor of Howard. This appeal followed.

[*Facts*]

The relevant undisputed facts are that in 1945 Howard purchased the assets of Electric Motor Corporation, a manufacturer of fractional horsepower motors, which included Patent No. 2,032,084. Shortly thereafter certain personnel formerly of Electric Motor Corporation left Howard and organized Rae. By early spring of 1946 Rae was manufacturing and selling fractional horsepower motors, which infringed Howard's patent, housed in a motor casing identical to that of Howard, except the brushes within the Rae casing were welded thereto while in the Howard casing they were attached by crimping.

[*Earlier Action—Settlement Agreement*]

Thereupon Howard filed a patent infringement action against Rae and one Dunham. Prior to trial the parties entered into a settlement agreement and the infringement suit was dismissed. The settlement agreement is as follows:

"This agreement made and entered into this 15th day of August, by and between Howard Industries, a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal place of business in Chicago, Illinois, party of the first part and hereinafter referred to as Howard; Rae Motor Corporation, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, having its principal place of business in Racine, Wisconsin hereinafter referred to as Rae, and Irvie H. Dunham, an individual of the City of Racine, Racine County, Wisconsin hereinafter referred to as Dunham.

Witnesseth:

"Whereas, there is pending in the United States District Court for the Eastern District of Wisconsin, an action in which Howard, as plaintiff, charges infringement of its patent #2032084 by Rae and Dunham, Defendants, said action being identified as Civil Action No. 4554, wherein issue has been joined; and

"Whereas, apart from any cause of action pleaded in said litigation, Howard complains that the shells or casings of motors made by Rae too closely resemble in appearance those previously made by Howard.

"Now, Therefore, in consideration of the agreement of the parties hereinafter set forth, it is agreed as follows:

"First: Rae and Dunham covenant and agree:

"1. That the brush holder and the contact slip of the electric motor first manufactured and sold by Rae are acknowledged to have infringed the patent in suit No. 2,032,084.

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"Second: Rae Covenants and agrees:

"That as soon as its present stock of motor shells or casings is used up it will adopt a different shell or casing for its motor either like Exhibit A attached hereto or some other casing design which is not confusingly similar in appearance to the casing design now embodied in the E. M. C. motor. The present stock of Rae's motor casings being not in excess of 3500.

"Third: Howard covenants and agrees:

"1. That Howard waives any claim or right it might have or make now or in the future based upon infringement by the motor currently manufactured by Rae upon Patent No. 2,032,084.

"2. That it does hereby acknowledge the receipt of Thirty-five Hundred ($3500.00) dollars to it paid by Rae.

"3. That in consideration of the said Thirty-five Hundred ($3500.00) dollars to it paid by Rae and of the agreement of Rae and Dunham herein set forth it does for itself, its successors and assigns hereby remise, release and forever discharge Dunham and Rae of and from all claims, controversies and demands accruing to the date hereof, jointly or severally against Dunham or Rae or either of them and based upon matters set forth in the complaint of this action or upon alleged simulation of casing design.

"4. That a shell or motor casing design, of the type indicated by the attached print marked "Exhibit A" is adequately differentiated in appearance from the motor shell or casing design of Howard.

"Fourth: It is mutually covenanted and agreed by and between the parties hereto that the aforesaid Civil Action No. 4554 shall be dismissed without costs to either party or parties, upon the written stipulation of the parties or their counsel being filed in the United States District Court of the Eastern District of Wisconsin.

"In Witness Whereof, the Plaintiff, Howard Industries, Inc., has caused this agreement to be executed by its President and Secretary and its corporate seal to be affixed hereto, this 15th day of August, 1949; the Defendant, Rae Motor Corporation has caused this agreement to be executed by its President and Secretary and its corporate seal to be affixed hereto this 15th day of August, 1949; and the Defendant, Irvie H. Dunham, has hereunto set his hand and seal this 15th day of August, 1949."

It is clear from a reading of this contract that it accomplished two distinct results, (1) it compromised and settled the patent infringement suit and, completely separate and apart from the patent infringement, it (2) obligated Rae to rectify the complaint of Howard that the motor casings used by Rae too closely resembled those of Howard by adopting a different casing for its motors either like the exhibit attached to the contract, which was adequately differentiated in appearance, or some other casing design which was not confusingly similar in appearance.

[*Trial Court's Finding*]

Rae relies upon two grounds for a reversal of the judgment. The first is that the "finding of the District Court that [Rae's] motor casings are confusingly similar in appearance to [Howard's] motor casings is contrary to law and is not supported by the evidence."

The District Court found that Rae breached the contract by adopting for use a motor casing confusingly similar in appearance to the motor casing used by Howard. Although the evidence on this issue was in conflict there is unequivocal testimony of confusing similarity in appearance and that Rae's customers had mistakenly returned Rae's casings to Howard for repair. It was for the District Court to determine the credibility of the witnesses, to weigh the evidence and resolve any conflicts therein. As this finding was supported by substantial evidence it most certainly is neither clearly erroneous nor contrary to law and thus is not vulnerable to attack on appeal. *United States v. Chicago, R. I. & P. Ry. Co.,* 10 Cir., 1948, 171 F. 2d 377, 380; *Graver Mfg. Co. v. Linde Co.,* 1950, 339 U. S. 605, 609-610; *International Bureau v. Bethlehem Steel Co.,* 2 Cir., 1951, 192 F. 2d 304, 306; *Milgram v. Loew's, Inc.* [1950-1951 TRADE CASES ¶62,938], 3 Cir., 1951, 192 F. 2d 579, 584; *The Sirius Star v. Sturgeon Bay Shipbuild. & Dry Dock Co.,* 7 Cir., 1952, 196 F. 2d 479, 481-482; *Overman v. Loesser,* 9 Cir., 1953, 205 F. 2d 521, 524; *Judd v. Wasie,* 8 Cir., 1954, 211 F. 2d 826, 831; *American Transit Lines v. Smith,* 6 Cir., 1957, 246 F. 2d 86, 88. The fact that the District Court also found that Rae's motor casing was "not adequately differentiated in appearance" from that of Howard is surplusage if it does, as contended by Rae, have a different meaning than "confusingly similar in appearance." However, Rae's contention that the two phrases are not syn-

onymous is clearly specious, being founded neither on logic nor semantics.

[*Alleged Patent Monopoly*]

Rae's remaining ground for reversal is that the "injunction of the District Court, and the patent litigation Settlement Agreement on which it is founded, unlawfully extend [Howard's] patent monopoly beyond the scope of the patent and beyond the life of the patent in violation of the policy of the Sherman Act and of Section 133.01(1) of the Wisconsin Statutes."

Aside from the fact that Rae failed to plead illegality as a defense which, in itself, renders this ground inefficacious, *Charm Tred Mills v. Erle P. Halliburton, Inc.*, 7 Cir., 1953, 202 F. 2d 294, 297; *Morr v. United States*, 6 Cir., 1957, 243 F. 2d 913, 914, Patent No. 2,032,084 involves only a motor brush assembly. The parties agreed that it does not include any claims for the motor casing and neither the shape nor design of the casing to house the motor was covered or affected in any manner by the patent. Thus the settlement agreement cannot be construed to extend the patent either beyond its scope or the life thereof.

[*No Patent Misuse*]

Nor is this a case of misuse of a patent by Howard to force Rae to purchase or use Howard's unpatented product either by conditioning a patent license so as to tie to the use of the patented device the use of another device lying outside the monopoly of the patent licensed, or by conditioning a license so as to control the conduct by the licensee not embraced in the patent monopoly or upon the maintenance of resale prices by the purchaser of the patented article, or otherwise. The contract in suit does not license Rae nor does it require Rae to use Howard's casing. In complete contrariety this is an action on a written contract whereby Rae, for a valuable consideration, agreed that it would adopt for its use a motor casing of a design different in appearance from Howard's. None of the cases cited by Rae holds that such a contract, which would not prohibit Rae from continuing to make fractional horsepower motors and house them in a casing not confusingly similar in appearance to Howard's, is in restraint of trade or violative of the Sherman or Wisconsin Anti-Trust Acts.

The District Court having found that Rae could make a fractional horsepower motor and house it in a motor casing not confusingly similar in appearance to Howard's motor casing and such finding being supported by substantial evidence, we hold that the injunction does not prohibit Rae from competing fairly and that the contract in suit is not in restraint of trade nor does it tend to create a monopoly.

The judgment is Affirmed.

[¶ 69,374] Dr. W. S. McClymonds, et al. v. John W. Brandle, et al.

In the United States District Court for the Eastern District of Missouri, Eastern Division. No. 58 C 502 (3). Filed March 17, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Jurisdiction of Federal Courts—Unfair Competition Action in State Court—Federal Antitrust Counterclaim—Jurisdiction Established by Complaint.—A Federal district court remanded an unfair competition action to the state court in which the complaint was originally filed because that complaint did not, on its face, invoke or establish federal jurisdiction. Rejecting the defendants' argument that the cause should be removed to the federal court because the state court did not have jurisdiction of the federal patent and antitrust matters raised in their counterclaim, the court noted that they were not barred from instituting an original action in the federal courts if they had claims against the plaintiffs that could only be heard there.

See Private Enforcement and Procedure, Vol. 2, ¶ 9007.

For the plaintiff: John H. Lashly and Paul B. Rava, both of Lashly, Lashly & Miller, St. Louis, Mo.

For the defendant: Donald F. Flint, Clayton, Mo.; and Sutherland, Polster & Taylor, St. Louis, Mo.

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Opinion

[*Jurisdiction*]

WEBER, District Judge [*In full text*]: This cause presents the same basic issue as presented in *Hall v. Bowman,* — F. Supp. —, in which an Opinion has been written and filed this same date.

However, while the basic issue and the law is the same, the facts are dissimilar and the Court shall set forth those facts, but shall reach the same ultimate conclusion.

[*Antitrust Counterclaim in State Court*]

In this case plaintiff filed his Petition in the Circuit Court of the City of St. Louis to recover damages for unfair competition under the laws of the State of Missouri. After some delay defendant filed a Counterclaim asserting claims under Title 28, U. S. C. A., Section 1338 (giving original jurisdiction to federal courts upon patent matters), Title 35, U. S. C. A., Section 292 (establishing federal jurisdiction for wrongful use of word "patent" and allowing a penalty recovery), and Title 15, U. S. C. A., Section 1, *et seq.* (Sherman and Clayton Acts, wherein damages may be claimed for unlawful restraint of trades.)

[*Removal Petition*]

After filing this Counterclaim in the state court, defendants then filed their Removal Petition generally based upon the theory that inasmuch as the state court does not have jurisdiction of matters raised in their counterclaim, federal court jurisdiction can be invoked.

[*Jurisdiction Established by Complaint*]

One of the arguments advanced by defendants upon a hearing on Motion to Remand is that they will be hindered in the state court if they cannot assert their Counterclaim.

If the defendants have claims against these plaintiffs which can only be heard in the federal courts, certainly they are not barred from instituting an original suit here; but just as certainly, they are barred from a Removal of a Complaint in a state court, which Complaint on its face does not invoke or establish federal court jurisdiction.

[*Remanded to State Court*]

In order to not further burden the record and for the reasons set forth in *Hall v. Bowman, supra,* and the cases cited therein, the Court shall sustain the Motion to Remand.

[*Other Motions*]

There are other motions pending before this Court, namely, Plaintiffs' Motion to Dismiss the Counterclaims and Defendants' Motion to Strike Plaintiffs' Motion to Dismiss Counterclaims. If this Court does not have jurisdiction to try this lawsuit, it does not have jurisdiction to act upon these motions. Furthermore, they will be matters which can be properly presented to the state court and therefore there is no need, nor jurisdiction, for this Court to rule thereon. The matter can be handled conclusively as far as this Court is concerned upon sustaining the Motion to Remand and an Order shall be so entered.

[¶ 69,375] Independent Productions Corporation and IPC Distributors, Inc. v. Loew's Incorporated, et al.

In the United States District Court for the Southern District of New York. Civil No. 110-304. Dated May 20, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Conspiracy—Pretrial Procedures—Depositions—Former Officers and Directors as "Managing Agents" of Corporate Plaintiffs.—Two corporations, the producer and the distributor, respectively, of a motion picture film, in an antitrust action charging motion picture producers with conspiring against the production and distribution of that film, were required to submit to the taking of their depositions through two individuals who were formerly officers and

directors of the corporations. Those individuals, although they had formally resigned from their corporate positions prior to the institution of the action, continued to participate in the corporations' affairs to an extent that, for all practical purposes, made them "managing agents" under Rule 26 of the Federal Rules of Civil Procedure. While the courts have given nominal approval to the proposition that a corporate party may be examined only through one who was its agent at the time of the deposition, the purpose of Rule 26 is to protect a party from the admissions of a disgruntled former employee. In the instant case, the individuals had a well founded expectation of participating in any recovery in the litigation and stood ready to serve the corporations if their talents should be required. In addition, the individuals had unique knowledge of relevant matters.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.775.

For the plaintiffs: Rosston, Hort & Brussel, New York, N. Y., for Independent Productions Corp.; and George Brussel, Jr., New York, N. Y., for IPC Distributors, Inc.

For the defendants: Schwartz & Frohlich for Columbia Pictures Corp. and Columbia Pictures International Corp. (Myles J. Lane and Bernard R. Sorkin, of counsel); Sidney Schreiber for Motion Picture Assn. of America, Inc. (Georgiana Koenig, of counsel); Spivak & Kantor, for Richard F. Walsh and John J. Francavilla; Dwight, Royall, Harris, Koegel & Caskey for Twentieth Century-Fox Film Corp. (Del.), Twentieth Century-Fox International Corp., and Twentieth Century-Fox Inter-America, Inc.; Benjamin Melniker for Loew's, Inc., and Loew's International Corp.; Meyer H. Lavenstein for Republic Pictures Corp., Republic Pictures International Corp., and Republic Productions, Inc.; Robert W. Perkins for Warner Bros. Pictures, Inc. (1953) (Del.), Warner Bros. Pictures International Corp., and Warner Bros. Pictures Distributing Corp.; Louis Phillips for Paramount Pictures Corp., Paramount International Films, Inc., and Paramount Film Distributing Corp.; Adolph Schimel for Universal Pictures Co., Inc., Universal Film Exchanges, Inc., and Universal International Films, Inc.; J. Miller Walker for RKO Teleradio Pictures, Inc. (formerly known as RKO Radio Pictures, Inc.); Phillips, Nizer, Benjamin & Krim for United Artists Corp., Eagle Lion Classics, Inc., National Screen Service Corp., Comedia Enterprises, Inc., and City Entertainment Corp.; Michael F. Mayer for Arthur Mayer and Council of Motion Picture Organizations, Inc.; Simpson Thacher & Bartlett for Atlas Corp. (successor by merger to RKO Pictures Corp.); Cahill, Gordon, Reindel & Ohl for Radio Corporation of America; and William B. Jaffe for Allied Artists Pictures Corp., Allied Artists Distributing Corp., and Allied Artists International Corp., all of New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 69,056, 68,980, and 1957 Trade Cases ¶ 68,843, 68,615.

Opinion

[*Treble Damage Action*]

SUGARMAN, District Judge [*In full text*]: Plaintiffs, Independent Productions Corporation and IPC Distributors, Inc., are the producer and distributor, respectively, of a motion picture film entitled "Salt of the Earth".

[*Conspiracy Charged*]

On June 21, 1956, the complaint herein was filed charging defendants with participation in a conspiracy directed against the plaintiffs' production and distribution of the above-named film. Substantial damages under the Clayton and Sherman Acts are sought.

Plaintiffs contend that defendants embarked upon a two-phased conspiracy. In their brief on this motion they state:

"The first phase began in 1947 with the openly declared and widely publicized industry wide boycott of the Hollywood Ten in 1947.

"On November 25, 1947, the major motion picture producers joined as defendants herein, represented by their industry association, defendant Motion Picture Association of America, publicly announced that, although their action was not authorized by law, the industry would discharge and would not re-employ the ten screen writers and directors who had been cited for contempt of the House of Representatives for refusal to testify before the un-American Activities Committee. This announcement came to be known as 'The Waldorf Declaration' because the industry meeting at which it was approved took place at the Waldorf-Astoria Hotel in New York City. The Declaration

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was promptly published in the New York Times, all of the motion picture industry trade publications and in other periodicals and newspapers throughout the country. Its text appears in Exhibit G annexed to plaintiffs' moving papers.

"Among the 'Ten' was Herbert Biberman, well-known motion picture and stage director who subsequently directed 'Salt of the Earth'. This admitted and industry-sponsored boycott was extended to other motion picture industry personnel as they declined to testify. Among this group was Paul Jarrico who produced 'Salt of the Earth, and Michael Wilson who wrote the screen play. Messrs. Jarrico and Wilson are well-known screen writers who had written or co-authored successful screen plays for several of the major studio defendants. . . .

"The second phase of the conspiracy began in 1952 when it became known that plaintiff Independent Productions Corporation ('Independent'), utilizing the services of Messrs. Biberman and Jarrico and other blacklisted personnel who had been unable to secure any industry employment, had set about the production of 'Salt of the Earth' as an independent producer. When it became known that blacklisted personnel were helping Independent to make the picture, the 1947 conspiracy was extended to Independent and to its motion picture. When IPC attempted to distribute the picture in 1954, the conspiracy was further extended to include distribution and exhibition of the film.

"During this second phase those defendants who are processors of sound film joined the conspiracy the object of which then became (1953) to make the production of the film, if plaintiffs were to succeed in producing it, as difficult and expensive as possible . . . Associated in this phase were representatives of International Alliance of Electrical and Stage Employees (IATSE) who refused to furnish the skilled labor required for production and exhibition.

"The Chicago Case

"As a result of the refusal of IATSE to furnish projectionists an action was brought by IPC against a Chicago IATSE local union and others who had interfered with a contract between IPC and a Chicago exhibitor for the showing of 'Salt of the Earth'. When that action was instituted in 1955 Biberman and Jarrico were, respectively, President and Secretary-Treasurer of Independent and of IPC, and were in general charge of their affairs.

"In March 1956, two months after present counsel were retained to prosecute this action and three months before it was commenced, Biberman refused to answer as irrelevant certain interrogatories propounded by the defendants in that action . . . Because of that refusal the complaint was dismissed.

"At the time this occurred plaintiffs' counsel were drafting the complaint in this action. When consulted about implications of the dismissal of the Chicago case, they advised against the institution of this action until all officers of both plaintiffs who might be unwilling to testify in this action had disassociated as officers or managing agents of the plaintiffs. . . . In turn, plaintiffs' counsel were advised that this would create no problem because all of the then officers of the plaintiffs were anxious to resign for personal and family reasons and that others were available to succeed them. . . .

"Accordingly, plaintiffs' counsel prepared the resignations of plaintiffs' officers and directors and personally witnessed Biberman's . . . Biberman resigned as President and director of Independent on May 17, 1956 and as President and director of IPC on May 6, 1956; and Jarrico as director and Secretary-Treasurer of both plaintiffs on May 31, 1956. . . . All four resignations were acknowledged before notaries public and the regularity of their execution is not challenged."

* * * *

[*Depositions—Former Corporate Officers*]

The papers in support of this motion by plaintiffs to vacate defendants' notices to take plaintiffs' depositions by Biberman and Jarrico portray the following background. Independent is a California corporation organized in 1952. IPC is a New York corporation organized in 1954 to distribute the film "Salt of the Earth". Herbert Biberman became president of Independent in 1953. Although he is not and never was a stockholder of record of Independent, he has some well founded expectation of participation to the extent of 10 per cent in the division of such assets, if any, as Independent shall ever acquire. It appears that the only present prospect of Independent's acquisition of assets of any real value lies in the possibility of recovery in the instant action.

[*Background of Plaintiff Corporation*]

It is asserted that in 1951 Biberman had conceived the idea of organizing an independent motion picture producing corpora-

tion which, among other things, would afford employment opportunities on the basis of talent and ability to those blacklisted industry employees who, like himself, were unable to secure employment in the industry as a result of the "Waldorf Declaration" and the continued industry boycott which followed its promulgation. He succeeded in interesting one Simon Lazarus and others in advancing the initial funds and they, their friends and Jarrico borrowed the balance of the amount initially deemed necessary to produce "Salt of the Earth". Lazarus became the first president of Independent.

None of the persons actively associated with the writing, production and direction of the film had drawn personal salaries or other compensation up to the time of the effort to exhibit the film. All of them had been unemployable in the motion picture industry as a result of the 1947 boycott and the events which followed. Because of the long periods of unemployment and of nonproductivity, Biberman's personal resources had been exhausted and he required an independent source of income to provide for his family. From 1954 on he earnestly desired to terminate his responsibility to Independent and to IPC, but because of his sense of obligation to Independent's loan obligees, he subordinated his desire further to be relieved of officer-employee responsibility to Independent, to what he considered to be his moral obligation to the many persons who had advanced large sums in reliance upon his and his associates' professional skills and the expectation of the completion and distribution of the film.

Throughout 1954 and 1955 Biberman was told by Wilson and Jarrico that they both had similar problems and felt the same responsibility. The result was that throughout 1954 and 1955 all of Independent's executives (Jarrico, Wilson and Biberman) carried on their duties and withheld the resignations each of them desired to submit. By the end of 1955, by which time it had become clear that the film could not be successful until the alleged conspiracy was either abandoned or enjoined, each of them had become sorely pressed to find remunerative employment to provide for their basic family living requirements.

[*Resignations*]

In January 1956, before the complaint in the Chicago action was dismissed, Biberman retained the firm of Rosston, Hort and Brussel to institute this action on behalf of both plaintiffs. However, for this purpose, funds had to be secured and a complaint drafted and while efforts along these lines were being carried on the complaint in the Chicago action was dismissed.

Biberman was then advised that his refusal to respond to the interrogatories he had considered irrelevant in the Chicago action had impaired his usefulness to the plaintiff corporation since a similar situation might arise in this action. Under these circumstances he decided that his obligation and those of the other officers and directors now permitted and, indeed, required them to resign and to sever all connections with the plaintiffs. He believed that their resignations would be beneficial rather than damaging to the plaintiffs particularly from the standpoint of minimizing the legal and technical obstacles which might otherwise stand in the way of securing a determination in this action upon the merits with respect to plaintiffs' claims for damages and injunctive relief through which they might realize on their only asset, the motion picture "Salt of the Earth". He discussed the matter with Jarrico and wrote Wilson about it. Both agreed and tendered their resignations.

At the time he resigned there was relatively little business being carried on by either plaintiff. Independent had completed the production of "Salt of the Earth" and was planning no other productions until this action (then in contemplation) was brought to trial. IPC was negotiating with some foreign distributors and renting the film to various public and private groups in the United States, an activity which he knew Lazarus could handle with a minimum of assistance from him during a short transition period.

On May 17, 1956, Biberman resigned from all offices in Independent and on May 6, 1956 he resigned all offices in IPC.

Jarrico who had been a director and secretary-treasurer of Independent from March 31, 1953 and a director and secretary-treasurer of IPC from February 25, 1954 resigned all of those offices on May 31, 1956. Approximately one year prior to his resignation, Jarrico's activities on plaintiffs' behalf had almost ceased. During that year he did continue to maintain their financial records and to handle correspondence with some of their creditors. At various times

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during 1955 and early in 1956 when Biberman declared his unwillingness to continue as an officer of both plaintiffs Jarrico, although he had continued to remain an officer of both corporations and was aware of their status, felt no inclination to succeed Biberman. Simon Lazarus, who as above stated had been the first president of Independent Productions Corporation, had several times expressed a willingness to resume his former position. Biberman and Jarrico felt that since Lazarus was an experienced and astute business man with considerable knowledge of the business and had been kept informed of its activities through the years, he would be the best choice to take over management of the companies.

During May 1956, when Biberman was about to relinquish his position as president, Ben Margolis, an attorney, advised Biberman, Jarrico and others that they might have to testify as officers and directors of the plaintiff companies in this action (then in contemplation). He further advised them that their refusal to testify about their political beliefs might be harmful to the plaintiff corporations in the suit and that if they were to invoke the Fifth Amendment in this action the corporations' instant complaint might be dismissed as in the Chicago suit.

They then agreed that they would resign their offices in both companies at once. As far as the actual operation of both corporations was concerned this decision it is said meant very little because Biberman and Jarrico were otherwise gainfully employed elsewhere and performed little or no functions for the plaintiffs.

Except for some casual and sporadic consultation by Lazarus, it is asserted that Biberman and Jarrico at no time since they resigned in May 1956 have determined corporate policies or been consulted with respect thereto, administered or managed corporate business or signed any checks of either corporation.

[*Financial Interest in Litigation*]

It appears that Jarrico like Biberman will share in any recovery realized from the instant litigation. Jarrico's interest is 5 per cent thereof.

* * *

[*Motion*]

Based on the foregoing asserted facts plaintiffs now move for an order "pursuant to § 30(b) of the Federal Rules of Civil Procedure debarring defendants from taking the depositions of the plaintiffs by Herbert Biberman and Paul Jarrico and vacating all notices of depositions heretofore served upon the attorneys for the plaintiffs by the defendants or any of them to the extent that such notices seek the depositions of the plaintiffs by and through Herbert Biberman and Paul Jarrico as officers, directors or managing agents of the plaintiffs."

[*"Managing Agents"*]

There can be no dispute that neither Biberman nor Jarrico is now an officer or director of plaintiffs. The parties agree (as plaintiffs state in their brief) that there is left "for this court's determination a single question *viz*: Are Biberman or Jarrico managing agents within the meaning of the Federal Rules?

The approach to the question of who is a managing agent must be pragmatic.[1]

The rules read in pertinent part:

F. R. Civ. P. 26:

"a. When Depositions May be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. . . .

. . .

"d. Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

. . .

"(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose."

Basically plaintiffs' argument is that the plain meaning of the rules precludes taking

[1] 4 Moore's *Fed. Prac.* (2d ed.) p. 1192; *Bernstein v. Nederlandsche-Amerikaansche, etc.*, 15 F. R. D. 37 (S. D. N. Y. 1953).

the deposition of a corporate party by a witness unless the witness be a "managing agent" of the examined party at the time of the taking of the deposition. The weaknesses of the "plain meaning rule" have been so well and so thoroughly explained as to require no elaboration here.[2] It will suffice to observe that the courts have approached the problem of determining who is a "managing agent" within the purview of the rules on an *ad hoc* basis, giving nominal approval to the proposition that a corporate party may be examined only through one who at the time of the deposition is its agent.[3] The instant motion will be considered against the background of these decisions.

In *Newark Insurance Co. v. Sartain*[4] Judge Halbert reviewed the authorities on the meaning of the term "managing agent" as used in F. R. Civ. P. 26(d)(2). He mentioned the absence of any guidance from appellate courts for the district courts to follow in concluding whether witnesses were to be deemed managing agents of other persons.

However, Judge Halbert ruled that given other basic factors, *viz.*, knowledge by the witness of relevant facts and status of the witness as a person other than a common employee, i. e., with at least a consciousness of the problems of management and an incentive to promote the interests of management, the paramount test to be applied is "Can [the witness] be expected to identify himself with the interests of his principal rather than those of the other party?" In this ruling I am in complete accord.

The purpose of Rule 26(d)(2) is to protect a party from the admissions of a disgruntled former employee.[5] In *Curry v. States Marine Corporation of Delaware, supra,* note 3, Judge Walsh was presented with a motion to vacate the notice to examine the defendant corporation through the person who at the time of occurrence of an accident was master of one of its vessels. At the time of the ruling, the witness was an employee recognized by Judge Walsh as not occupying the conventional status of "managing agent". In denying the motion, Judge Walsh noted the absence of any danger that the witness might through animus make admissions against the moving defendant. He concluded that the witness would identify defendant's interests with his own because the witness was still in defendant's employ as chief mate. He found that the witness was defendant's managing agent at the time of the accident; "he should be the person to explain the defendant's position now, unless defendant has a basis for withholding the confidence it previously placed in him."

Judge Palmieri attained the same result on similar facts in *Klop v. United Fruit Company.*[6]

On a similar theory, Judge Swaim writing for a majority of the panel in *O'Shea v. Jewel Tea Co.*[7] affirmed the trial court's holding in effect that a former employee of the defendant was its "managing agent" within the meaning of F. R. Civ. P. 43(b). The witness, one Carlson, was the manager of the defendant's store where the accident occurred. Prior to the trial, the witness left the service of the defendant and at once started working for another company. However, it was obvious at the trial that Carlson "still considered himself a member of the defendant's camp" and the trial court properly found him to be defendant's managing agent and examinable as an adverse (not merely hostile) witness.

Judge Weinfeld has said in a leading case on this subject:[8]

> "A managing agent, as distinguished from one who is merely 'an employee' is a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporate matters; he does not act 'in an inferior capacity' under close supervision or direction of 'superior authority.' He must be a person who has 'the interests of the corporation so close to his heart that he could be depended upon to carry out his employer's direction to give testimony at the demand of a party engaged in litigation with the employer.'
>
> "Each situation is governed by its own facts. . . ."

With that realistic and practical backdrop, Biberman and Jarrico are in a very real sense even now in the "employ" of the

[2] *Cf. Massachusetts Bonding Co. v. United States,* 352 U. S. 128, 138.
[3] See *Curry v. States Marine Corporation of Delaware,* 16 F. R. D. 376 (S. D. N. Y. 1954).
[4] 20 F. R. D. 583 (D. C. N. D. Cal. 1957).
[5] 4 Moore's *Fed. Prac.* (2d ed.) pp. 1190-1191.
[6] 18 F. R. D. 310 (S. D. N. Y. 1955).
[7] 233 F. 2d 530 (7th Cir. 1956).
[8] *Krauss v. Erie R. Co.,* 16 F. R. D. 126 (S. D. N. Y. 1954). See also *Warren v. United States,* 17 F. R. D. 389 (S. D. N. Y. 1955).

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plaintiffs although formal ties are broken. It cannot be denied that they stand ready to serve the plaintiffs should the plaintiffs require their talents. After his resignation as an officer of plaintiffs in May 1956 Biberman actually did so down to as late as February 6, 1957.[9] It is inconceivable on the evidence presented that if a situation arose requiring action by Biberman and Jarrico in furtherance of plaintiffs' interests, they would not gladly take such action. They have unique knowledge of relevant matters. At the time of the acts complained of, they were officers, directors and managing agents of the plaintiff corporations. Plaintiffs cannot now relieve themselves of whatever liabilities accrue through Biberman's and Jarrico's past and present relationships with the corporate entities. To the extent that the plaintiffs' affairs required management since Biberman's and Jarrico's resignations I am satisfied that they participated therein to an extent that for all practical purposes made them "managing agents" of the plaintiffs.

[*Order*]

The motion is denied.

Settle an order setting a time and place mutually agreeable to counsel for the depositions to proceed.

[¶ 69,376] Affiliated Music Enterprises, Inc. v. Sesac, Inc.

In the United States Court of Appeals for the Second Circuit. No. 245—October Term, 1958. Docket No. 25148. Argued April 14, 1959. Decided June 8, 1959.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, Judge.

Sherman and Clayton Antitrust Acts

Monopolies — Monopolization — Relevant Market — Performance Rights in Gospel Music.—In a treble damage action charging a company engaged in the business of acquiring and licensing performance rights in musical compositions with monopolizing the market for the acquisition of performance rights in "gospel music," and purposely driving out of the industry a firm which sought to enter the field, the trial court properly concluded that the relevant market was the performance rights in such "gospel music." That music was found to be distinct from other popular music and without substitutes which would equally satisfy its devotees.

See Monopolies, Vol. 1, ¶ 2540.

Monopolies—Monopolization—Power to Control Prices and Exclude Competition—Percentage of Control of Market.—A treble damage action charging a company with monopolizing the licensing of performance rights in "gospel music" was properly dismissed. The plaintiff, a firm which had sought to enter the field by acquiring rights which it intended to exploit by licensing such rights to other licensing organizations, rather than by licensing them directly to users, claimed that it had been purposely driven from the industry. However, the instant litigation was financed by a licensing organization that was even larger than the alleged monopolist. The plaintiff was but the alter ego of a substantial publishing house which was, in turn, affiliated with that larger licensing organization. Against that background of fierce competition, the charges of antitrust violations fell of their own weight. There was no showing that the company had that power over price, or to exclude a competitor, which is the essence of the violations charged. Further, there was a lack of evidence as to the company's position in the market it was alleged to have monopolized. While the performance rights in "gospel music" was properly found to be the relevant market, the popularity of the typical gospel tune is quite short-lived and its performance rights are of value only for a small portion of the copyright term. Thus, there was no evidence of the proportion of currently valuable performance rights owned by the company at any time relevant to the litigation. Also, the company's practices of "pooling" performance rights and offering broadcasters only

[9] The notices sought to be vacated originally set the examination dates as July 25, August 13 and October 26, 1956 and March 13 and 15, 1957.

"conglomerate" licenses authorizing the performance of all the compositions it controlled did not, of themselves, tend to prove that it had monopoly power in the field of gospel music because such music comprised only a small portion of the company's "pool."

See Monopolies, Vol. 1, ¶ 2530.10, 2530.40.

Combinations and Conspiracies—Pooling of Copyrights and Sharing of Revenues—Blanket Licensing—Legality.—In a treble damage action charging a company with monopolizing the licensing of performance rights in "gospel music," its practices of "pooling" performance rights assigned to it by publishing houses and offering to broadcasters only "conglomerate" licenses authorizing the performance of all the compositions it controlled had no relevance to the litigation. Those practices did not tend to prove that the company had monopoly power in the field of gospel music, and there was no showing that they operated to the injury of the plaintiff or otherwise restrained its competition with the company. The validity of those practices, in the abstract and apart from their effect on the plaintiff, was not before the court. Therefore, the court expressed no opinion as to whether those practices might be held lawful or unlawful in a suit by the Government or some other private plaintiff.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.880.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable—Sufficiency of Proof of Damages.—In a treble damage action charging a company with monopolizing the licensing of performance rights in "gospel music," the plaintiff, a firm which claimed that it had been purposely driven from the field, suggested no manner in which it had been injured or its competition with the company restrained by the company's practices. The company's "pooling" of performance rights assigned to it by publishing houses and its offering to broadcasters only "conglomerate" licenses authorizing the performance of all the compositions it controlled played no part in the company's winning back of a number of publishers who had left it and signed contracts with the plaintiff. Those publishers elected to cancel those contracts and remain with the company as a result of its fair and open salesmanship and its outbidding of the plaintiff's offer. As far as the court could see, the company's practices presented no hindrance to the plaintiff's acquisition and marketing of performance rights in gospel music.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.450, 9011.250, 9011.565, 9041.

For the plaintiff-appellant and appellee: Irving Lemov (Michael Halperin and A. Halsey Cowan of Halperin, Morris, Granett & Cowan, on the brief), all of New York, N. Y.

For the defendant-appellee and appellant: Thomas F. Daly of Lord, Day and Lord (Saul L. Sherman of Lord, Day & Lord, on the brief), all of New York, N. Y.

Affirming a decision of the U. S. District Court, Southern District of New York, 1958 Trade Cases ¶ 68,938; for a prior decision of the District Court, see 1955 Trade Cases ¶ 68,060.

Before: CLARK, Chief Judge, and SWAN and MOORE, Circuit Judges.

Affiliated Music Enterprises, Inc., and Sesac, Inc., each appeal from a decision, D. C. S. D. N. Y. [1958 TRADE CASES ¶ 68,938], 160 F. Supp. 865, dismissing the former's claim for treble damages and injunctive relief for violations of the antitrust laws and the latter's counterclaim for unfair competition. Affirmed.

[*Treble Damage Action*]

CLARK, Chief Judge [*In full text*]: In the court below Affiliated Music Enterprises, Inc., charged defendant, Sesac, Inc., with violations of §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act, 15 U. S. C. §§ 1, 2, 14, and Sesac charged AME with several instances of unfair competition. From Judge Ryan's decision [1958 TRADE CASES ¶ 68,938], D. C. S. D. N. Y., 160 F. Supp. 865, dismissing the claims of each against the other, both parties appeal.

[*"Gospel Music" Trade*]

Sesac is a family corporation owned and controlled by Paul and Ruth Heinecke. It is one of three major licensing organizations for music performance rights in this country. The others, each larger than Sesac, are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast

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Music Incorporated (BMI). These companies acquire exclusive performance rights to copyrighted music from owners of copyrights, police infringements of these rights, and license others to perform the music. In the case of Sesac, at least, these licenses are sold principally to radio and television broadcasters; and it generally offers them only blanket or conglomerate licenses authorizing the performance of all works it controls. The copyright owners are paid royalties out of these licensing proceeds computed on a rather complex allocation system.

AME, the plaintiff below, was organized in 1953; it sought to enter the performing rights field by acquiring rights which it intended to exploit not by direct licensing to users as do Sesac, ASCAP, and BMI, but by exclusive licensing to one of these three organizations. Half its stock is owned by Jean and Julian Aberbach, and the remainder by Kurt A. Jadassohn. The Aberbach brothers are owners of Hill & Range Songs, Inc., a large music publisher; and Jadassohn is a former officer of Sesac.

While with Sesac, Jadassohn initiated an extensive campaign of acquiring performance rights to "gospel music." This is a type of music which is apparently quite popular in the South and in rural areas throughout the country. It is characterized by lyrics dealing with spiritual and religious subjects in a personal, homely vein sung to distinctly secular rhythms and tunes. By 1953 Sesac held rights of more than a score of gospel music publishers under contracts terminable at ten-year intervals. Many of these publishers had personally dealt only with Jadassohn in their business relations with Sesac. In AME's sole effort to break into the performing rights industry Jadassohn canvassed a number of them, and on promises of increasing their royalties and various representations about Sesac's financial condition he succeeded in acquiring blanket assignments of performing rights from fifteen of seventeen publishers he solicited. In fact, the publishers would soon have received increased royalties in any event, since, as Jadassohn knew, Sesac had just negotiated a license agreement with the television industry, which had theretofore been carried along gratis by all three performing rights organizations. When word reached defendant of AME's activities it, too, sent representatives into the field. Ultimately, after a meeting between representatives of the publishers, Jadassohn, and a Sesac representative, all but one of the fifteen who had signed with AME elected to cancel those contracts and remain with Sesac.

[*Alleged Monopoly—Exclusion from Trade*]

In the court below and on this appeal plaintiff's principal contention is that Sesac monopolized the market for the acquisition of rights for the performance of gospel music and purposely drove AME out of the industry to maintain its position of monopoly and to restrain competition in that market in violation of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2. It also charges that Sesac's pooling of its performance rights and its practice of granting broadcasters only conglomerate licenses covering all rights its owns are prohibited by the Sherman and Clayton Act, 15 U. S. C. §§ 1, 14.

[*Competitive Struggle*]

Far from showing a restraint of trade or a monopolization, however, the evidence adduced below reveals only a noteworthy competitive struggle between two giants in the performing rights industry. Judge Ryan found that AME was but the alter ego of the Aberbach brothers' substantial publishing house Hill & Range Songs, Inc., which was in turn closely affiliated with BMI. This finding is amply supported by the evidence. AME was financed wholly by loans from Hill & Range and had only $100 of paid-in capital, while its office was a desk in the Hill & Range office. While soliciting performance rights for AME, Jadassohn also signed up publication rights for Hill & Range. Moreover, under the Hill & Range-BMI contract in force from 1949 to 1955, Hill & Range and the Aberbachs personally covenanted that all performance rights they might acquire would be assigned to BMI unless previously assigned to another performing rights organization. And BMI itself has financed this litigation.

[*Absence of Monopoly Power*]

Against this background of fierce competition between BMI and Sesac, AME's charges of antitrust violations must fall of their own weight. There is a complete absence of any showing that Sesac has that power over price or to exclude a competitor which is the essence of the violations

charged. *United States v. E. I. du Pont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 391; *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100, 107; *United States v. United Shoe Machinery Corp.* [1953 TRADE CASES ¶ 67,436], D. C. Mass., 110 F. Supp. 295, 297, 342, affirmed *United Shoe Machinery Corp. v. United States* [1954 TRADE CASES ¶ 67,755], 347 U. S. 521. The temporary success of AME's raid on Sesac's publishers suggests that these publishers do not feel closely tied to defendant on a permanent basis; and Sesac's ultimate thwarting of AME's efforts was accomplished not by the force of its existing contracts or by economic coercion, but by fair and open salesmanship and an outbidding of plaintiff's offers to the publishers.

It is significant that AME was able to retain the largest of the publishers it initially signed up, despite the power it asserts defendant has; and it retained this publisher simply by offering it favorable terms, including a guarantee of the AME contract by the financially sound Hill & Range Songs, Inc., which it did not make available to the smaller firms.

[*Relevant Market*]

The record below similarly lacks evidence even as to Sesac's position in the market that it is alleged to have monopolized. Judge Ryan's findings do seem to support the conclusion that performance rights in gospel music constitute the relevant market for purposes of this case. Thus he found the music distinct from other popular music, and without substitutes which will equally satisfy its devotees. But the popularity of the typical gospel tune is quite short-lived, and its performance rights of value only for a small portion of the copyright term. There is no evidence of the proportion of currently valuable performance rights Sesac owned at any time relevant to this litigation.

[*"Pooling" of Performance Rights*]

Moreover, Sesac's pooling of the performance rights assigned to it and its offering to broadcasters of only conglomerate licenses authorizing the performance of all works it controls, which AME attacks as *per se* violations of the Sherman and Clayton Acts, have, we feel, no relevance at all to this litigation. As Sesac's pool of performance rights includes all its acquisitions, of which rights to gospel music comprise only a small portion of the total, these practices do not by themselves tend to prove that Sesac has monopoly power in the field of gospel music. And AME has not suggested any manner in which they operated to its injury or otherwise restrained its competition with Sesac. Clearly they played no part in Sesac's successful winning back of the fourteen publishers AME temporarily acquired. AME's own proposal to the publishers was that it would affiliate them with the even bigger performance-rights pools of ASCAP or BMI. So far as we can see, they present no present hindrance to the acquisition or marketing of performance rights by AME. The validity of Sesac's pooling of performance rights and conglomerate licensing practices in the abstract and apart from their effect on AME is not before us; we express no opinion as to whether in a suit by the Government or some other private plaintiff they might be held lawful or unlawful.

[*Counterclaim—Unfair Competition*]

Finally, we think the court below correctly dismissed Sesac's counterclaim for unfair competition. It was shown below that Jadassohn made use of his knowledge of Sesac's method of allocating royalties to publishers and of the names of those publishers. The trial judge also found that Poklitar, Jadassohn's successor at Sesac, kept AME informed of defendant's efforts to forestall the AME publisher raid. None of the information Jadassohn carried away with him, however, partakes of the nature of a trade secret. The publisher's names are a matter of public record in the files of the copyright office; and as the 1950 consent decree against ASCAP indicates, a policy of effective competition favors broad knowledge throughout the industry of the terms and systems of allocation of royalties to publishers followed by the performance-rights organizations. *United States v. American Society of Composers, Authors and Publishers,* Civ. No. 13-95, D. C. S. D. N. Y., 1950-1951 CCH TRADE CASES ¶ 62,595, § XIII B. See Timberg, *The Antitrust Aspects of Merchandising Modern Music,* 19 Law & Contemp. Prob. 294, 311-315. Finally, Sesac has shown no damages from Poklitar's activities.

Affirmed.

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[¶ 69,377] Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., et al.

In the United States Court of Appeals for the Second Circuit. No. 200—October Term, 1958. Docket No. 25379. Argued March 11, 1959. Decided June 8, 1959.

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, THOMAS F. MURPHY, Judge, dismissing the complaint for triple damages and an injunction in an action brought under the antitrust laws. Findings of fact and conclusions of law below not reported. Affirmed.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—Competitive Bidding for Exhibition of Motion Pictures—Legality—Sufficiency as Termination of Conspiracy.—A motion picture exhibitor, in a treble damage action charging a competing exhibitor and seven major distributors with conspiring to monopolize and with monopolizing the exhibition of films in Peekskill, New York, by withholding from the exhibitor and awarding to the competing exhibitor the bulk of the more desirable films, failed to sustain its burden of proving the continuance of a conspiracy that was found to have existed for less than a month in 1950. The exhibitor, seeking damages for a later period, contended that the trial court erred in holding that the conspiracy was terminated when the exhibitor "demanded and was accorded the right to bid competitively" for pictures. The reviewing court noted that the exhibitor could not be heard to condemn a system of competitive bidding as a *per se* violation of law. Not only was competitive bidding available to the exhibitor, but that bidding "was truly competitive and neither exhibitor knew the offers made by the other exhibitor." Such a system of competitive bidding, although it might tend to raise the costs of all competitors and place a premium on experience, judgment, and financial resources, was clearly valid so long as each theatre could bid in an atmosphere of free and open competition and the films were sold at a fair and reasonable rental. The courts could not be required to place the exhibitor in a preferred or privileged position, superior to that of its competitors.

See Combinations and Conspiracies, Vol. 1, ¶ 2005, 2005.503, 2005.548; Monopolies, Vol. 1, ¶ 2520, 2610.

Combinations and Conspiracies—Monopolies—Conspiracy to Withhold More Desirable Motion Pictures from Exhibitor—Lack of "Demand" as Defense to Damage Action.—A motion picture exhibitor's failure to demand from distributors more desirable films was fatal to its claim that the distributors and a competing exhibitor had conspired to monopolize the exhibition of pictures by withholding such films from the exhibitor while awarding them to its competitor. As the reviewing court had stated in a previous case: "[P]laintiffs cannot recover damages on account of any failure to obtain feature pictures for first-run exhibition unless they made demand for that of which they now claim they were deprived by the conspiracy." In the instant case, the distributors had, at the exhibitor's request, inaugurated, withdrawn, re-instated, and again terminated competitive bidding for the first-run exhibition of films. It was found that the exhibitor, despite the opportunity for competitive bidding, had avoided such an arrangement when it thought it could get pictures in any other way. Its failure to make any demand of any distributor which was ever refused indicated that the exhibitor was satisfied with the arrangements it had voluntarily made. Also, a clear demand for more desirable films—presumably accompanied by a demand for competitive bidding—was required by the fact that the exhibitor's competitor had larger daily gross earnings and a distributor, in placing in the exhibitor's theatre a top-grade picture (normally rented on a basis which included a percentage of gross earnings), would be giving up a monetary advantage.

See Combination and Conspiracies, Vol. 1, ¶ 2005; Monopolies, Vol. 1, ¶ 2520.

For the appellant: Francis T. Anderson of Gray, Schaffer & Malloy (Cormac J. Malloy of Gray, Schaffer & Malloy, on the brief), all of Philadelphia, Pa.

For the appellees: Albert C. Bickford of Simpson, Thacher & Bartlett; Frederick W. R. Pride of Royall, Koegel, Harris & Caskey; E. Compton Timberlake and Myles J. Lane of Schwartz & Frohlich (Whitney North Seymour, Jr., of Simpson, Thacher & Bartlett; John F. Caskey and Leonard Stecher of Royall, Koegel, Harris & Caskey; Bernard E. Kalman and Louis Phillips; and Everett A. Frohlich and Bernard R. Sorkin of Schwartz & Frohlich, on the brief), all of New York, N. Y.

Before: WASHINGTON,* WATERMAN and MOORE, Circuit Judges.

[*Treble Damage Action*]

WASHINGTON, Circuit Judge [*In full text*]: This is an action brought under Sections 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U. S. C. §§ 1, 2 (1952). Plaintiff-appellant sought treble damages and an injunction under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737 (1914), 15 U. S. C. 15, 26 (1952).

[*Monopoly Charged*]

Plaintiff-appellant is the operator of a motion picture theatre in Peekskill, New York, known as the Peekskill. Defendants-appellees are (1) American Broadcasting-Paramount Theatres, Inc. (AB-PT), the operator of the Paramount motion picture theatre in Peekskill and a competitor of the plaintiff, and (2) seven major motion picture distributors—Paramount, Warner Brothers, Fox, Loew's, RKO, Columbia, and United Artists. Plaintiff alleged that defendants had conspired to monopolize and in fact had actually monopolized the motion picture exhibition business in Peekskill by having wrongfully withheld from plaintiff and having awarded to plaintiff's competitor the great bulk of the more desirable motion pictures.

[*Judgment of Trial Court*]

The case was tried before the court without a jury. At the close of plaintiff's case, defendants moved for a dismissal of the complaint and entry of judgment for defendants under Fed. R. Civ. P. 41(b). The judge made findings of facts and conclusions of law and entered a formal order dismissing the complaint and entering judgment for the defendants. This appeal followed.

[*Facts*]

Briefly, the basic findings of the trial court were as follows:

April 1950-September 30, 1950: On April 5, 1950, AB-PT, pursuant to the divestment decree in a civil antitrust action involving Paramount Pictures,[1] sold the Peekskill Theatre. Plaintiff was the purchaser. Previously, AB-PT had owned both the Paramount and Peekskill Theatres in Peekskill. The Paramount Theatre had always been a top-class theatre and had always shown top quality films. Prior to April 6, the Peekskill had been in a state of disrepair and had generally exhibited slough pictures, reissues, repeats, and C-grade films. Following the purchase of the Peekskill, plaintiff began to repair and renovate it.

The trial court found that from April 17, 1950, until May 15, 1950, the defendants-appellees "agreed and conspired with each other to withhold from plaintiff's Peekskill Theatre a fair and reasonable supply of pictures," the purpose and effect of the conspiracy being "to prevent plaintiff's theatre from competing effectively with the Paramount Theatre * * * during such period." It may be noted parenthetically, however, that plaintiff seeks damages only for a later period, namely, from September 30, 1950, to August 4, 1954, the date this suit was commenced.

On May 15, 1950, plaintiff retained an agent to license and book its motion pictures. The agent booked various pictures for the plaintiff during the summer of 1950. A few days prior to September 15, 1950, plaintiff and its agent advised AB-PT that it wanted a share of "A" films, and that if it did not get an "A" product it was going to ask the distributors for competitive bidding. On September 15, 1950, the agent

* Sitting by designation pursuant to 28 U. S. C. § 294(a).

[1] *United States v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,473], 85 F. Supp. 881 (S. D. N. Y. 1949), *on remand from Supreme Court* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948), *affirming in part* 66 F. Supp. 323 [1946-1947 TRADE CASES ¶ 57,470] and 70 F. Supp. 53 [1946-1947 TRADE CASES ¶ 57,526] (S. D. N. Y. 1946).

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wrote letters to several of the distributor defendants requesting either a split of product or competitive bidding. The distributors thereupon inaugurated competitive bidding and offers were solicited from plaintiff and AB-PT on some pictures. On September 30, 1950, plaintiff finally completed renovating the Peekskill.

October 1, 1950-December 1951: In October 1950, the plaintiff and its agent met with AB-PT and agreed that the Peekskill Theatre would try out an arrangement to split the film product, under which the plaintiff would negotiate for the pictures which had played or would play at the Stratford Theatre (owned by AB-PT) in Poughkeepsie. Because of this arrangement, plaintiff shortly thereafter withdrew its requests to the distributors for competitive bidding. For the next six months, plaintiff was quite happy with the film-split arrangement. It requested no different product for the Peekskill Theatre.

In April 1951, AB-PT advised plaintiff that the Paramount Theatre in Peekskill needed more pictures and would start taking some from the Stratford product. The arrangement was therefore terminated.[2]

December 1951-October 1952: In December 1951 and January 1952, plaintiff again wrote to the various distributor-defendants requesting competitive bidding. Each distributor afforded plaintiff an opportunity to bid competitively for each picture for first-run exhibition in Peekskill. For several months the bidding continued. There was no evidence that AB-PT ever overbid for any picture.

In April 1952, plaintiff again approached AB-PT in order to work out some "split" arrangement whereby competitive bidding would once more be eliminated. AB-PT and plaintiff again agreed to a split of product, and shortly thereafter plaintiff notified the distributor defendants that it wished to terminate competitive bidding. By this time plaintiff's economic position had become extremely difficult, partly because of the increase of television sets in the Peekskill area during the period of plaintiff's operation, partly because of a number of changes in the competitive situation in Peekskill such as the opening of new drive-in theatres, and partly because of the increase of plaintiff's expenses after the renovation of the Peekskill during a period of declining grosses. Finally, on October 11, 1952, plaintiff closed the Peekskill Theatre and has never operated it since that time.

[*Basic Findings*]

From the facts adduced, the court made four basic findings:

(1) There was no evidence of any vertical or horizontal conspiracy in violation of the Sherman Antitrust Act after May 15, 1950.

(2) Whatever conspiracy may have existed up until September 15, 1950, was fully terminated "when plaintiff demanded and was accorded the right to bid competitively for the pictures of the defendant distributor." In this regard, not only was competitive bidding[3] "available to the plaintiff at all times during the period of plaintiff's operation for each picture of each defendant-distributor," but also such bidding "was truly competitive and neither exhibitor knew the offers made by the other exhibitor." Despite the opportunity for competitive bidding, however, plaintiff avoided such an arrangement at all times during its operation when it thought it could get pictures for exhibition in any other way.

(3) Apart from the actual periods of competitive bidding, plaintiff never com-

[2] The trial court stated that no evidence was adduced as to the manner in which licenses for the exhibition of motion pictures in Peekskill were negotiated during the period from April 1951 to December 1951. Actually, however, the testimony seems to indicate that during that period plaintiff's agent made inquiry of AB-PT from time to time as to the pictures which the latter wanted, and those it did not want, for the Paramount Theatre. The information was supplied to him. The matter does not appear controlling under our view of the case.

[3] The court said that

"Competitive bidding is a fair and reasonable method of resolving conflicting demands of competing exhibitors for a license to exhibit a particular picture or pictures on the same run." The court further defined competitive bidding as a process by which

"a distributor advises each exhibitor of the picture for which offers are solicited. Each exhibitor independently decides the amount which it is willing to offer for the right to exhibit the particular picture and submits an offer to the distributor. The competing offers are evaluated by the distributor and the license to exhibit the picture is awarded to the exhibitor whose offer is believed to present the most satisfactory licensing opportunity."

municated with any distributor concerning the licensing or booking of any motion picture, either before the requests for competitive bidding were made or after the requests for competitive bidding were withdrawn. Indeed, the court found no evidence that, after the renovation of the theatre, "plaintiff * * * ever made any demand to any distributor, which demand was refused." This failure to make a demand was therefore "fatal to the plaintiff's claim" since it clearly indicated that "the arrangements voluntarily made by plaintiff were satisfactory to it."

(4) Finally, plaintiff "failed to prove that it suffered any damage as the result of any act of the defendants or any of them in violation of law, and * * * to prove the amount of its damages, if any."

I.

[*Continuance of Conspiracy*]

Appellant claims that the court erred in finding that the conspiracy which existed up to May 15, 1950, was confined to that period. Therefore, appellant argues, the court also was in error in finding that (1) there was no unlawful conspiracy after May 15; (2) even if such conspiracy existed, it terminated when competitive bidding was allowed; and (3) even if a conspiracy continued, it was not the proximate cause of any legal injury to plaintiff giving rise to any claim for damages. Appellant finally claims that findings relating to the period from April 1952 were inadequate.

Our review of the record, however, does not lead us to the conclusion that the trial court's findings of fact are clearly erroneous. See Fed. R. Civ. P. 52(a). On the contrary, we think they are—over-all—adequate and soundly based, and certainly so as to the portions of which appellant complains. Here, as in a somewhat similar case recently before this court, "the plaintiff had the burden of proving that the conspiracy in fact did continue * * *" *Webster Rosewood Corp. v. Schine Chain Theatres, Inc.* [1959 Trade Cases ¶ 69,282], 263 F. 2d 533, 535 (1959). The District Court could properly find that the burden was not sustained.

II.

[*Competitive Bidding*]

Appellant also contends that the court below was in error in holding on the facts before it that the allowance of competitive bidding by the distributor-defendants was sufficient to terminate any conspiracy that may have existed. Appellant points to *United States v. Paramount Pictures, Inc.* [1948-1949 Trade Cases ¶ 62,244], 334 U. S. 131, 164 (1948), in which a system of competitive bidding originally ordered by the three-judge District Court in its decree was reversed by the Supreme Court in favor of divestiture.

Such a contention has been raised in other cases and has been rejected. As the Seventh Circuit has indicated: "[T]he reasons assigned by the Supreme Court for rejecting the elaborate system of competitive bidding, applicable to a nation-wide industry, * * * [bear] little relation to a situation where all competing exhibitors are in the same restricted locality." *Loew's, Inc. v. Milwaukee Towne Corp.* [1952 Trade Cases ¶ 67,392], 201 F. 2d 19, 24 (7th Cir. 1952), cert. denied, 345 U. S. 951 (1953). We recognize that the system of competitive bidding has serious drawbacks for competing exhibitors. It places a premium on experience, judgment, and financial resources. Costs for all competitors tend to rise, and in the end all may suffer. See Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making,* 31 So. Calif. L. Rev. 150, 161-64 (1958). The so-called "split" system, whereby exhibitors divide the list of available pictures and then approach the distributors separately on that basis, enables them to purchase films at lower prices. Whatever the legality of this system—and we are not called upon to deal with that issue here—it probably tends to keep more exhibitors in business than would be the case if competitive bidding were the universal rule. See *id.* at 164-65.

Plaintiff-appellant apparently rejects both these systems—the split and the competitive bid. What it would have in their stead is far from clear. Its primary object in this suit, of course, is to collect damages from the defendants, blaming on them the collapse of its theatrical enterprise in Peeks-

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kill.[4] This it cannot do unless it shows a violation of law, and a causal connection between the violation and its losses. Clearly, the appellant cannot be heard to condemn a system of competitive bidding as a *per se* violation of law. Appellant is only entitled to be placed in the same competitive situation as its competitors. Yet, if its reasoning were carried to its logical conclusion, the courts would be required to place it in a preferred or privileged position, superior to that of its competitors. This we cannot do. See *Milwaukee Towne Corp. v. Loew's, Inc.* [1950-1951 Trade Cases ¶ 62,891], 190 F. 2d 561, 571 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952); *Bigelow v. RKO Radio Pictures, Inc.* [1946-1947 Trade Cases ¶ 57,577], 162 F. 2d 520, 524 (7th Cir.), cert. denied, 332 U. S. 817 (1947). A system of competitive bidding is clearly valid if the films are sold at a fair and reasonable rental. So long as each theatre may bid for the films in an atmosphere of free and open competition, that is all that is required. See *Bigelow v. Loew's, Inc.* [1952 Trade Cases ¶ 67,393], 201 F. 2d 25, 28 (7th Cir. 1952), cert. denied, 345 U. S. 950 (1953); *Milwaukee Towne Corp. v. Loew's, Inc.* [1956 Trade Cases ¶ 68,336], 139 F. Supp. 809, 812 (N. D. Ill. 1956). Here, the court found that the competitive bidding "was truly competitive and neither exhibitor knew the offers made by the other exhibitor." As we cannot say that this finding by the court was clearly erroneous, the system of competitive bidding in the present case must be upheld. See *Rushing v. Metro-Goldwyn-Mayer Distributing Corp.* [1954 Trade Cases ¶ 67,832], 214 F. 2d 542, 544 (5th Cir. 1954).

III.

[*Lack of "Demand"*]

Finally, appellant complains that its failure to make a demand to the distributors should not be considered fatal to its claim. It presents two reasons for this position: (1) the making of demands would not have had any effect, and (2) the policy of the distributor-defendants was to license "a good picture to the Peekskill only if and when they were unable to get the picture played at the Paramount Theatre." The record contains no adequate evidentiary basis for these contentions, though the record does indicate that the Paramount Theatre had larger daily gross earnings than appellant's Peekskill, and hence that a top-grade picture (normally rented on a basis which includes a percentage of gross earnings) would produce more for the distributor if placed in the Paramount rather than in the Peekskill. Certainly, if a distributor is to be forced to give up a monetary advantage of that sort, he must be confronted with a clear demand—presumably accompanied by an offer of competitive bidding. Perhaps on occasion circumstances may excuse the lack of demand. Cf. *Congress Building Corp. v. Loew's, Inc.* [1957 Trade Cases ¶ 68,725], 246 F. 2d 587, 596, 597 (7th Cir. 1957). But such is not the case here. As we have previously held, and recently reiterated:

> "[P]laintiffs cannot recover damages on account of any failure to obtain feature pictures for first-run exhibition unless they made demand for that of which they now claim they were deprived by the conspiracy."

J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp. [1954 Trade Cases ¶ 67,757], 212 F. 2d 840, 845 (2d Cir. 1954), quoted and followed in *Webster Rosewood Corp. v. Schine Chain Theatres, Inc.* [1959 Trade Cases ¶ 69,282], 263 F. 2d 533, 536 (2d Cir. 1959); accord, *Milwaukee Towne Corp. Loew's, Inc.* [1950-1951 Trade Cases ¶ 62,891], 190 F. 2d 561, 568 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952).

[*Judgment Affirmed*]

For these reasons, the judgment below must be *Affirmed.*

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[4] The trial court's finding of a conspiracy in the initial period before September 30, 1950, appears to have been largely based on evidence that defendants followed like policies with respect to appellant, i.e., each distributor was unwilling to negotiate for a particular film unless and until notified that the Paramount Theatre did not wish to show it. No cross-appeal was taken from the judgment, and appellees do not contest this finding in this court. With respect to the defendant AB-PT, there is little or no evidence that it sought to drive appellant out of business; rather, it appears to have been interested in maintaining its own theatre as the leading one in the community.

[¶ 69,378] Leo O. Johnson, an individual doing business as Johnson Hair and Scalp Clinic v. Federal Trade Commission.

In the United States Court of Appeals for the Fifth Circuit. No. 17411. Dated May 21, 1959. Petition for rehearing denied, July 21, 1959.

Petition for Review of an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—False Advertising—Misrepresenting Medicinal or Curative Properties of Hair Preparation.—A Federal Trade Commission order prohibiting the misrepresentation of do-it-yourself kits and clinic treatments as effective cures for baldness and dandruff was affirmed on the basis of the doctrines announced in *Mueller v. United States*, 1958 TRADE CASES ¶ 69,219.

See Unfair Practices, Vol. 2, ¶ 5081.813; False Advertising, Vol. 2, ¶ 6005; and FTC Enforcement and Procedure, Vol. 2, ¶ 8611.55.

For the petitioner: James I. McCain, New Orleans, La.

For the respondent: J. B. Truly, Attorney, Federal Trade Commission, and James E. Corkey, Assistant General Counsel, Federal Trade Commission, both of Washington, D. C.

Affirming and enforcing a Federal Trade Commission cease and desist order in Dkt. 6497.

Before RIVES, CAMERON and JONES, Circuit Judges.

[*False Advertising*]

PER CURIAM [*In full text*]: We find no such differences in fact as distinguish this case from *Mueller v. United States*, 5th Cir. 1958 [1958 TRADE CASES ¶ 69,219] 262 F. 2d 443. We adhere to the doctrines there announced. The order of the Commission is affirmed and will be enforced.

Affirmed.

CAMERON, Circuit Judge, dissenting.

[¶ 69,379] United States v. Consolidated Laundries Corporation, et al.

In the United States Court of Appeals for the Second Circuit. October Term, 1958. Argued May 5, 1959. Decided May 18, 1959. Docket No. 25724.

Appeal from the United States District Court for the Southern District of New York, EDMUND L. PALMIERI, Judge.

Case No. 1316 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Appellate Review—Appealability of Order Adjusting Record.—In a criminal action in which various firms and individuals in the linen supply industry were found guilty of violating Sections 1 and 2 of the Sherman Act, the Government's motion to dismiss an appeal from an order denying a motion for the filing, certification, and transmittal of a supplemental record on appeal was granted. An order merely adjusting the record is not a final judgment from which a separate appeal lies; the error, if any, could be easily corrected in the appeals proper.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Appellate Review—Sentences—Record on Appeal—"Pre-Sentence" Reports—Transmittal Under Seal.—Various firms and individuals found guilty of restraining and monopolizing trade in linen supplies were granted, in part, a cross-motion for an order directing the unsealing of certain papers and documents before the district court, and directing the transmittal of those documents and papers as a supplemental record on appeal. All documents submitted

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to the trial judge would be open and unsealed, except the pre-sentence recommendations and reports received by the judge after conviction. After trial memoranda have served their purpose, there is no reason why they should not then become a part of the files of the case open to all parties for any action they think appropriate. On the other hand, pre-sentence reports received in confidence by the judge after conviction, to assist him in the task of fixing a just punishment, stand on a different basis. However, those reports could be transmitted to the appellate court under seal if the defendants desired to assign error involving them.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.880.

For the appellants: Whitney North Seymour of Simpson, Thacher & Bartlett (Halperin, Natanson, Shivitz, Scholer & Steingut; Cahill, Gordon, Reindel & Ohl; Paul, Weiss, Rifkind, Wharton & Garrison; Mervin C. Pollak; and Rosenman, Goldmark, Colin & Kaye, on the brief), all of New York, N. Y.

For the appellee: Richard B. O'Donnell, Chief, Antitrust Division, Department of Justice, New York, N. Y. (Richard A. Solomon, Henry Geller, Morris F. Klein, and John D. Swartz, Attorneys, Antitrust Division, Department of Justice, on the brief).

For prior decisions of the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 69,077, 68,976, 68,975, 68,935, and 1957 Trade Cases ¶ 68,787.

Before: CLARK, Chief Judge, WATERMAN, Circuit Judge, and GALSTON, District Judge.

Appellee, United States of America, moves to dismiss an appeal from an order denying a motion for the filing, certification, and transmittal of a supplemental record on appeal, and appellants, Consolidated Laundries Corporation *et al.*, cross-move for an order consolidating this appeal with pending appeals from their judgments of conviction, directing the unsealing of certain papers and documents before the district court, and directing their transmission as a supplemental record on appeal.

[*Record on Appeal*]

PER CURIAM [*In full text*]: The motion to dismiss this appeal must be granted, as an order merely adjusting the record is not a final judgment from which a separate appeal lies and the error, if any, can be easily corrected in the appeals proper. *United States v. Knight,* 3 Cir., 162 F. 2d 809; *Dempsey v. Guaranty Trust Co. of New York,* 7 Cir., 131 F. 2d 103, certiorari denied 318 U. S. 769; *Belt v. Holton,* D. C. Cir., 197 F. 2d 579. The cross-motion is granted to the extent that in the main appeals from the judgments of conviction all documents submitted to the trial judge will be open and unsealed and transmitted to our clerk under our Rule 11(a), except the pre-sentence recommendations and reports received by the judge after conviction; these latter may, however, be transmitted to us sealed if appellants desire to assign error involving them.

[*Secrecy of Proceedings*]

In general it appears to be sound public policy to avoid secret judicial proceedings in the course of trial so far as possible; it will promote confidence merely to avoid the suspicions which always attend secrecy. The late Arthur T. Vanderbilt felt so strongly about this that he was instrumental in persuading the Advisory Committee on Rules of Criminal Procedure to recommend a rule forbidding *ex parte* trial briefs, which, however, the Supreme Court declined to accept, apparently fearing it a reflection on trial judges. Nothing daunted he carried his case to the Judicial Conference of the United States, which, upon report of its study committee,

> "disapproved the practice, prevalent in some districts, of trial judges in criminal cases receiving from the attorney on one side a brief or trial memorandum that has not been furnished to the attorney on the other side, and recommended the immediate discontinuance of such practice." Rep. of Jud. Conf. of Senior Circuit Judges, Oct. 1-4, 1946, page 21.

In Vanderbilt's lively account of this episode in *Cases and Materials on Modern Procedure and Judicial Administration* 22 (1952) he says, "Another battle for the right to a fair trial had been won." Here we do not need to go as far as he would in limiting trial court discretion to say that, in any event after trial memoranda have served their initial function, there is no reason why they

should not then become a part of the files of the case open to all parties for any action they think appropriate. On the other hand, pre-sentence reports received in confidence by the judge, after conviction has been had, to assist him in the difficult task of fixing the just punishment stand on a clearly different basis. *Williams v. New York,* 337 U. S. 241; *Friedman v. United States,* 8 Cir., 200 F. 2d 690, 697, certiorari denied 345 U. S. 926; *Stephan v. United States,* 6 Cir., 133 F. 2d 87, 100, certiorari denied 318 U. S. 781; Fed. R. Crim. P. 32.

[*Judgment*]

The motion to dismiss the appeal is granted. The cross-motion is granted in part and to the extent herein indicated.

[¶ 69,380] Leo Feist, Inc., Crawford Music Corporation, and Williamson Music, Inc. v. The Lew Tendler Tavern, Inc. and Muse-Art Corporation.

In the United States Court of Appeals for the Third Circuit. No. 12,861. Argued May 27, 1959. Filed June 5, 1959.

Appeal from the United States District Court for the Eastern District of Pennsylvania. JOHN W. LORD, JR., District Judge.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Violations as Defense to Copyright Infringement Action—Alleged Conspiracy to Monopolize Trade in Musical Compositions. —A trial court properly rendered judgment in favor of three publishers of musical compositions whose copyrights had been infringed by a restaurateur and a corporation engaged in transmitting and furnishing music to various businesses. Although the infringers' answer alleged that the publishers had combined and conspired with others to monopolize the field of musical compositions in violation of the antitrust laws, no evidence was offered in support of that allegation; therefore, the reviewing court did not decide the point. The trial court had pointed out, however, that it was settled that such collateral attack is not permissible in a copyright infringement action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.100.

For the appellants: Ronald N. Rutenberg, Philadelphia, Pa.

For the appellees: George E. Beechwood, Philadelphia, Pa.

Affirming a judgment of the U. S. District Court, Eastern District of Pennsylvania, 1958 Trade Cases ¶ 69,136.

Before GOODRICH, KALODNER and STALEY, Circuit Judges.

Opinion of the Court

[*Copyright Infringement*]

PER CURIAM [*In full text*]: In this case the plaintiffs have recovered judgment against the defendants for an infringement of copyright 17 U. S. C. § 1(e) (1952). The matter was thoroughly discussed in an opinion by the district judge to whom the case was tried [1958 TRADE CASES ¶ 69,136], 162 F. Supp. 129 (E. D. Pa. 1958), and we shall affirm.

It was found as a fact that four musical compositions were publicly performed for profit on the premises of Lew Tendler Tavern, Inc., and that no permission for this performance was given by the copyright owners. Tendler was a subscriber to the services of Muse-Art Corporation which transmits music played on records to its patrons by private telephone wire. The customers pay for the service, but may turn the music off or on at will. Tendler's is a restaurant to which members of the public may resort for food and drink.

It is true that Muse-Art did not broadcast its music directly to the public, but it did send it to Tendler for the purpose of having it played to Tendler's customers as and when Tendler wished so to entertain them. Rendition of a musical composition under these circumstances is a public performance for profit by Muse-Art as well as Tendler. The district judge correctly so held.

Point was made that it was not proved that on the night in question the music may

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not have come from Muse-Art, but may have come through the restaurant's loudspeaker from a radio. But there was no evidence one way or the other that there were musical facilities other than Muse-Art available in Tendler's and there was positive testimony that there were not such pauses in the music program either by or for commercials as are found in radio programs. There was sufficient support for the trial court's conclusion that the compositions heard in Tendler's came from music "piped" in by Muse-Art.

[*Antitrust Issue*]

There was raised in the answer an allegation concerning violation of anti-trust law by plaintiffs. No evidence was offered on the point; the district judge did not decide it and neither do we.

[*Judgment Affirmed*]

The judgment of the district court will be affirmed.

[¶ 69,381] Reines Distributors, Inc. v. Admiral Corporation; Admiral Credit Corporation; Admiral Distributing Corp. (Metropolitan Division); Admiral Distributors Metropolitan Division of Admiral Corp.; and Admiral Corporation New York Distributing Division, Inc.

In the United States District Court for the Southern District of New York. Civil Action No. 143-263. Filed June 9, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Proper Judicial District—Test of Venue—"Transacting Business."—A Delaware corporation engaged in financing distributors and dealers in household appliances, while qualified to do business only in Illinois, was properly sued in the Southern District of New York because it was "transacting business" there. Section 12 of the Clayton Act provides that a suit under the antitrust laws may be brought against a corporation not only in the judicial district of which it is an inhabitant, but also in any district where it may be "found" or "transacts business." The expression "transacts business" was intended to broaden the choice of forum previously available to plaintiffs in antitrust actions, in contrast to the narrower concepts of "found" or "doing business" as construed in earlier cases determining whether a corporation had submitted itself to local service of process. Thus, the test of venue is the practical concept of doing or carrying on business of any substantial character. It was true that the corporation in the instant case had no offices, officers, or statutory agents in the district and was not qualified to do business there. However, documents instituting credit transactions were executed in New York; merchandise shipped to dealers in New York were covered by a bill of sale vesting title in the corporation; salesmen in the district made collections and checked dealers' inventories as agents of the corporation; a distributor was required to execute reports and forms and send them to the corporation at its home office; and the corporation borrowed extensively in the state and maintained substantial deposits in New York banks.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210.

Private Enforcement and Procedure—Suit for Civil Damages—Service of Process—Corporations—District Where Corporation Is an "Inhabitant" or Is "Found"—Service on New York Secretary of State—Service on "Managing Agent."—A Delaware corporation, in an action filed in a Federal court in New York, was validly served with process at its headquarters in Chicago under Section 12 of the Clayton Act, which provides that process in an antitrust action may be served in the district of which a corporation is an "inhabitant" or wherever it may be "found". In addition, a Delaware corporation which had surrendered its certificate of authority to do business in New York, and claimed to have been "in dissolution," was validly served with process in New York by service on the New York Secretary of State, under Section 216, Subdivision 2, New York General Corporation Law, by virtue of Rule 4(d)(7) of the Federal Rules of Civil Procedure. Under that New York statute, process against a foreign corporation that has surrendered its authority

to do business in the state may be served upon the Secretary of State "in an action upon any liability or obligation incurred within this state before the filing of such certificate of surrender of authority." However, attempted service on a New York corporation, through an alleged "managing agent" in charge of another corporation, was defective as having been made on one not authorized to accept service on behalf of the defendant.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.350.

Private Enforcement and Procedure—Suit for Civil Damages—Who May Be Liable—Parties Defendant—Unincorporated Division of Corporate Defendant.—An organization which claimed to be merely an unincorporated division of another corporation could not be retained as a defendant in an antitrust action if that claim was confirmed. While the plaintiff did not contradict the claim, there was merit to its contention that the kaleidoscopic corporate forms of the defendants in the action had rendered it impossible for its attorneys to check it. Therefore, a motion to dismiss the action as to that organization was denied, without prejudice, to give the plaintiff an opportunity to complete an investigation to its satisfaction.

See Private Enforcement and Procedure, Vol. 2, ¶ 9006.

For the plaintiff: Nathan Shapiro and Berthold H. Hoeniger, New York, N. Y.

For the defendants: O'Brien, Driscoll & Raftery, New York, N. Y.

Memorandum

[*Conspiracy—Price Discrimination*]

EDELSTEIN, District Judge [*In full text*]: The plaintiff, who was until January of 1959 the distributor of Admiral branded products in several counties of the State of New York, including five counties of the Southern District, has brought an action against five defendants in four causes of action: (1) against all defendants, claiming unlawful price discriminations in violation of the Clayton Act, as amended by the Robinson-Patman Act; (2) against all defendants claiming a price discrimination conspiracy in violation of the Sherman Act; (3) against Admiral Corporation and Admiral Credit Corporation, claiming breach of a contract provision for non-discrimination between distributors in prices; and (4) against Admiral Corporation, claiming damages for breach of express and implied warranties. All of the defendants except Admiral Corporation move to dismiss on the various grounds of lack of jurisdiction over the person, improper venue, insufficiency of process and insufficiency of service of process.

[*Service of Process—"Dissolution"*]

The defendant Admiral Distributing Corporation (sued as Admiral Distributing Corp. Metropolitan Division) is a Delaware corporation claimed to be "in dissolution". It was qualified to do business in New York until it surrendered its certificate of authority on March 30, 1959. It has, however, not been dissolved, and the Secretary of State of the State of Delaware has certified that it had a legal corporate existence on April 3, 1959, on which date service upon the corporation was made through the New York Secretary of State. Service on this defendant is alleged to have been made originally on March 2, 1959, by having the United States Marshal serve a person claimed to be a managing agent for the defendant at a time when it had not yet ceased all activities in the State, but was involved in winding up its affairs here both directly and through its parent, Admiral Corporation. But this service is contested on the ground that the person to whom process was given was an employee of Admiral Corporation and not anyone authorized to accept service on behalf of Admiral Distributing Corporation. Whether or not such service was good, the subsequent service on the Secretary of State on April 3 was certainly valid, under section 216, subdivision 2 of the New York General Corporation Law, by virtue of Rule 4(d)(7) of the Federal Rules of Civil Procedure. Section 216 subdivision 2 provides

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that process against a foreign corporation that has surrendered its authority to do business in the state, "in an action upon any liability or obligation incurred within this state before the filing of such certificate of surrender of authority may be served, after the filing thereof, upon the secretary of state." And there is no doubt that the complaint alleges liability incurred within the state before the surrender of the certificate of authority. See *Carlton Properties, Inc. v. 328 Properties, Inc.*, 208 Misc. 776, 143 N. Y. S. 2d 140; *Antonana v. Ore Steamship Corporation*, 144 F. Supp. 486. The motion as applicable to Admiral Distributing Corporation is denied.

[*Venue—"Transacting Business"*]

The objection of the defendant Admiral Credit Corporation is one of venue. It is a Delaware corporation qualified to do business only in the State of Illinois, and was served at its headquarters in Chicago. This service is unquestionably valid under section 12 of the Clayton Act, 15 U. S. C. § 22, which provides that process in an antitrust action may be served in the district of which a corporation is an "inhabitant" or wherever it may be "found". The same section provides that a suit under the antitrust laws may be brought against a corporation "not only in the judicial district whereof it is an inhabitant, but also in any district where it may be found or transacts business * * *" This defendant denies that it is "doing business" or that it "transacts business" in this district.

In its discussion of the problem the defendant largely ignores the well settled conceptual distinction between "doing business" and "transacting business". *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359; *United States v. Scophony Corporation* [1948-1949 Trade Cases ¶ 62,238], 333 U. S. 795. The Supreme Court held that the expression "transacts business" in section 12 of the Clayton Act was intended to broaden the choice of forum previously available to plaintiffs in antitrust actions, under section 7 of the Sherman Act, 15 U. S. C. § 15, in contrast to the narrower concepts of "found" or "doing business" construed in earlier cases in the determination of whether a foreign corporation had submitted itself to local service of process. Thus, the test of venue is the "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' * * *" in lieu of the previous "hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence * * *". *United States v. Scophony Corporation, supra*, 333 U. S. at pages 807, 808. Moreover,

> "the question of venue cannot be determined by drawing up a 'check list' of specific incidents of business done and comparing it with the activities in [a] particular [cited] case. In the *Scophony* case the Supreme Court expressed disapproval of this practice of 'atomization'. It is the totality of acts and conduct rather than isolated and fragmented items thereof which must govern."

Abrams v. Bendix Home Appliances [1950-1951 Trade Cases ¶ 62,792], 96 F. Supp. 3, 8.

[*Local Transactions*]

By this test I am convinced that the affidavits and depositions on file reveal that the defendant Admiral Credit Corporation is "transacting business" in this district and is properly answerable here. It is true that the defendant has no office or officers in New York. It is not qualified to do business in this state nor does it have a statutory agent here. The details of the manner in which it transacts business are highly complex, but it is claimed that the business is transacted solely from the Chicago office without intrusion of transactions in New York. On the face of it this contention is unrealistic and excessively technical. It is in the business of financing distributors, through the acquisition of their trade acceptances, and dealers, through a "floor plan-trust receipts" scheme. Dealers and distributors throughout the United States are thus financed, and if the defendant is not transacting business in New York it is difficult to understand how it is transacting business anywhere. Documents by means of which credit transactions are instituted are executed in New York. One type of instrument, a "Statement of Trust Receipt Financing" is regularly filed in the office of he Secretary of State of the State of New York. Merchandise shipped by the distributor to qualified dealers in the State of New York is covered by a bill of sale vesting title in the defendant. The distributor's salesmen in this district make collections and check dealers' inventory as agents of the defendant, and the distributor is required to execute reports and forms and

send them to the defendant at its home office. The defendant borrows extensively in this state and maintains substantial deposits in New York banks. These and other activities are carried on regularly, indeed steadily, and in very substantial volume. The motion as applicable to Admiral Credit Corporation is denied.

[*Service of Process on "Agent"*]

Admiral Corporation New York Distributing Division, Inc. is a New York corporation which, it is claimed, was liquidated on December 31, 1953, but which has not surrendered its charter. Service was attempted through an alleged managing agent in charge of Admiral Distributing Corp. Metropolitan Division. Without a further showing, this service is defective as having been made on one not authorized to accept service on behalf of the defendant. The plaintiff urges that it has not been able to check the averments that this defendant was entirely inactive during the relevant period, and that should it discover them to be true, it will consent to dismissal. It further argues that a holding of improper service would be merely formalistic, for the only result will be that a new summons and complaint will issue to the Marshal for service upon the Secretary of State. But in that event a dismissal would not prejudice the plaintiff. The service was invalid and the defendant presses the point. The motion as applicable to Admiral Corporation New York Distributing Division, Inc. is granted.

[*"Unincorporated Division" as Defendant*]

Admiral Distributors Metropolitan Division of Admiral Corporation is stated in the moving papers to be merely an unincorporated division of Admiral Corporation. Plaintiff does not contradict this statement of fact but argues that the defendants' kaleidoscopic corporate forms have rendered it impossible for its attorneys to check the fact. There is merit to the contention, and plaintiff should have an opportunity to complete an investigation to its satisfaction. Obviously, if the fact is confirmed, this defendant cannot be retained in the action and no prejudice will accrue to any defendant. Accordingly, the motion so applicable to Admiral Distributors Metropolitan Division of Admiral Corporation is denied without prejudice to a renewal within thirty days from the date of an order to be settled in accordance with this memorandum.

[¶ 69,382] Becker-Lehmann, Inc. v. The Firestone Tire and Rubber Company, The Texas Company, Shell Oil Company, Continental Oil Company, and Sunray Mid-Continent Oil Company.

In the United States District Court for the Eastern District of Missouri, Eastern Division. No. 58 C 364(2). Dated May 28, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Conspiracy to Monopolize—Agreement to Promote Sale of Product for Commission—Absence of Evidence of Conspiracy to Restrain or Monopolize Trade.—Four oil companies and a manufacturer of automobile tires, batteries, and accessories were granted summary judgments in a treble damage action charging that they conspired to restrain and monopolize trade to the injury of a distributor of the manufacturer. Affidavits filed by each of the oil companies disclosed separate agreements between each oil company and operators of service stations selling their products, and separate agreements between each oil company and the manufacturer as well as separate agreements between each of the oil companies and other such manufacturers. Under the oil company-manufacturer agreements, the oil companies agreed to promote and aid the manufacturers in selling their products to the service station operators in return for a commission ranging up to ten per cent of the sales to their respective service station operators. The affidavits stated that these were the only agreements between the oil companies and the manufacturer, and that there was no agreement between any of the oil companies and their respective service station operators pertaining to the sale of tires, batteries, and accessories. The deposition of the plaintiff-distributor disclosed that (1) it did not have any evidence of a conspiracy, (2) it was aware that many of the service stations sold brands other than those of the manufacturer, (3) there was strong competi-

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tion for service station accounts among the plaintiff and the distributors of other brands of products and other independent distributors of the manufacturer, (4) it stocked a competing brand of tires, and (5) the manufacturer was willing to and did open several new independent distributors of its products. Absent the oil companies from the alleged conspiracy, the charge against the manufacturer failed. A conspiracy or combination, whether to restrain trade or create a monopoly, requires at least two parties.

See Combinations and Conspiracies, ¶ 2005, 2005.355; Monopolies, Vol. 1, ¶ 2520.30, 2610.

Robinson-Patman Price Discrimination Act

Price Discrimination—Brokerage Commissions—Receipt of Brokerage Without Rendition of Any Service—Damages.—Oil companies were entitled to summary judgments in an auto product distributor's treble damage action alleging that the manufacturer of the products it distributed granted to the oil companies commissions without such companies' having rendered any services in connection with the sale or purchase of the manufacturer's brand of products by the service stations of the oil companies. The distributor contended that when the oil companies trained and provided personnel to promote the sale of the manufacturer's products, and provided other promotional services, they were passing something of value on to their operators which the operators of competing oil company service stations did not receive. It was these promotional services that the oil companies allegedly contracted to render for the manufacturer. If, the court noted, the service stations of the oil companies are put in a better competitive position to sell the manufacturer's products than are service stations of other oil companies, it is difficult to see wherein the distributor has cause to complain. The distributor testified that about 75 per cent of its entire volume of tires were sold to service station accounts, and that the service stations of the oil companies made up about 90 or 95 per cent of the distributor's service station business. Also, it appeared that the oil companies did render services in connection with the sale or purchase of the manufacturer's products by their stations.

See Price Discrimination, Vol. 1, ¶ 3520; Private Enforcement and Procedure, Vol. 2, ¶ 9011.565.

Private Enforcement and Procedure—Suit for Civil Damages—Damages as Proximate Result of Price Discrimination.—A manufacturer's motion for a summary judgment on the ground that even if it did discriminate against a distributor, the distributor cannot recover because it cannot show that it has suffered any damages as a proximate result of the conduct of any one defendant, was denied. Proof that the manufacturer illegally discriminated in price against the distributor would be sufficient in itself to show some damage to the distributor. If prices are illegally discriminating, the person discriminated against is damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.565.

For the plaintiff: Mortimer A. Rosecan, St. Louis, Mo.

For the defendants: John H. Lashly and Paul B. Rava, of Lashly, Lashly & Miller, St. Louis, Mo., for The Firestone Tire and Rubber Co.; Richard P. Conerly, of Thompson, Mitchell, Thompson & Douglas, St. Louis, Mo., and Amzy B. Steed, New York, N. Y., for The Texas Co.; Richard P. Conerly, of Thompson, Mitchell, Thompson & Douglas, St. Louis, Mo., and William Simon, Washington, D. C., for Shell Oil Co.; Nelson W. Hartman, of Fordyce, Mayne, Hartman, Renard & Stribling, St. Louis, Mo., for Continental Oil Co.; and Richard P. Conerly, of Thompson, Mitchell, Thompson & Douglas, St. Louis, Mo., and J. P. Greve, Tulsa, Okla., for Sunray Mid-Continent Oil Co.

Memorandum Opinion

[*Parties*]

Roy W. Harper, District Judge [*In full text*]: This is an action for treble damages brought by Becker-Lehmann, Inc., against the Firestone Tire and Rubber Company, and four oil companies, The Texas Company, Shell Oil Company, Continental Oil Company, and Sunray Mid-Continent Oil Company. The complaint charges violation of the Sherman Act, 15 U. S. C. A. Sections 1

and 2, and the Robinson-Patman Act, 15 U. S. C. A. 13(a), (c), (d), (e), and (f). The defendant oil companies filed joint motions for summary judgment and joint motions to dismiss. Firestone filed similar motions separately.

The plaintiff, Becker-Lehmann, Inc., was until about July 15, 1958, a corporation selling truck and automobile tires, batteries and accessories in the St. Louis area. They dealt, though not exclusively, in Firestone brand products, selling at wholesale and retail.

[*Agreements*]

The defendant oil companies have each filed affidavits in support of their motions which include a copy of a separate agreement between each oil company and operators of service stations selling their petroleum products, and a copy of the separate agreement between each oil company and Firestone. Also included in the affidavits is a copy of the agreements, similar to the Firestone-Oil Company agreements, between each defendant oil company and either the B. F. Goodrich Company, or the Goodyear Tire and Rubber Company. The provisions of these agreements between the oil companies and the tire and rubber manufacturers are substantially the same, the oil companies agreeing to promote and aid the tire manufacturers in selling their products to the service station operators in return for a commission ranging up to 10% of the sales to their service station operators. The affidavits state that the appended agreements are the only contracts between Firestone and the oil companies and that there is no agreement whatsoever between any of the defendant oil companies and their respective service station operators pertaining to the sale of tires, batteries and accessories. The deposition of Mr. Benjamin Tepper, President and owner of a 25% interest in the plaintiff corporation, was taken. Mr. Katz, past president and owner of the remaining 75% interest was present and it was stipulated that were he asked the same questions that were asked of Mr. Tepper, he would give the same answer or would say he did not know the answer to the question.

[*Summary Judgment*]

Rule 56 of the Federal Rules of Civil Procedure, under which the motions for summary judgment are filed, provides in pertinent part that ". . . the summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law . . ." In *Durasteel Company v. Great Lakes Steel Corporation,* 205 F. 2d 438, at page 441, the court said:

> "If it is made clearly to appear on such motion that even though there is an issue under the pleadings there is in fact no dispute as to the controlling material facts, then the court should enter summary judgment."

[*Conspiracy Charge*]

The deposition of Mr. Tepper shows that the plaintiff does not have any documents or written evidence, no personal knowledge, or any credible second-hand knowledge of a conspiracy to restrain or monopolize trade. Mr. Tepper's conversations with other tire dealers in the St. Louis area refer to a "bad deal" Firestone had handed the plaintiff. Tepper's deposition also shows, among other things, (1) that contrary to the allegation in paragraph 6(c) of the complaint that the oil companies require their service station operators to sell Firestone products, plaintiff was aware many of the stations sold brands of tires, batteries and accessories other than those of Firestone; (2) that there was strong competition for the service station accounts among the plaintiff and the distributors of other brands of tires, and other independent Firestone distributors; (3) that the plaintiff stocked a competing brand of tires; and (4) that Firestone was willing to and did open several new independent distributors of their products during the period encompassed by the complaint. Paragraphs 14 and 15 of the complaint, under the heading of "MONOPOLY," charge that the contracts and agreements between Firestone and the oil companies have ". . . substantially lessened competition and/or have tended to create a monopoly . . ." These are the same contracts, agreements and understandings on which the plaintiff bases the charge of conspiracy in violation of Section 1 of the Sherman Act, and this is the same "conspiracy" of which the plaintiff has no knowledge or credible evidence, and which the affidavits and deposition on file refute. The bare statement in the complaint alleging violations of the Sherman

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Act are not sufficient to withstand a motion for summary judgment which is supported by the affidavits and by the deposition. *Marion County Cooperative Ass'n v. Carnation Company* [1954 Trade Cases ¶ 67,792], 214 F. 2d 557. Also applicable to the case at bar is the statement in Moore's Fed. Prac. (2d ed.) Vol. 6, par. 56.11(3), p. 2067:

> "Where on the basis of the materials presented by his affidavits the movant would be entitled to a directed verdict and the opposing party fails either to offer counter-affidavits or other material that raise a credible issue or to show that he has evidence not then available, summary judgment may be rendered for the moving party."

Absent the oil companies from the alleged conspiracy, the charge fails against Firestone. A conspiracy or combination, whether to restrain trade or create a monopoly, requires at least two parties. *Nelsen Radio & Supply Co. Inc. v. Motorola, Inc.* [1952 Trade Cases ¶ 67,386], 200 F. 2d 911, 914; *Mackey v. Sears Roebuck & Co.* [1956 Trade Cases ¶ 68,519], 237 F. 2d 869, 873.

Opposing the motions for summary judgment, plaintiff argues it ". . . should be entitled to an opportunity for pre-trial discovery and its day in court", citing *Pfeiffer v. Frank,* 19 F. R. D. 15, S. D. N. Y. 1955. The reliance appears ill-placed because in that case the statement was made by the court after it had found there was a triable issue as to whether one party had waived a right to proceed by arbitration and it is not authoritative for the proposition that a party to a lawsuit need only file a complaint to obtain a right to pre-trial discovery for the purpose of trying to find a genuine issue of material fact that could be disputed.

[*Robinson-Patman Act Claims*]

The plaintiff conceded that it has no claim against the defendant oil companies under Sections 2(a), (d), (e) or (f) of the Robinson-Patman Act. Plaintiff maintains it has a claim against the oil companies for violation of Section 2(c), 15 U. S. C. A. 13(c). Employing some of the language of Section 2(c), paragraph 9(n) of the complaint, fully set out below, alleges a discrimination against the plaintiff as follows:

> "(n) By paying and granting to the defendant Oil Companies commissions, brokerages, compensations, allowances and discounts in lieu thereof without said defendants having rendered any services in connection with the sale or purchase of the said Firestone brand products by the gasoline service stations of the defendant Oil Companies."

The circuitous arguments of the plaintiff on this point are difficult to follow but it appears that the oil companies did render services in connection with the sale or purchase of the Firestone products by their service stations. Plaintiff argued strenuously that when the defendant oil companies train and provide personnel to promote the sale of Firestone products, and provide other promotional services, they are passing something of value on to their operators which the operators of competing oil company service stations do not receive. It was these promotional services that the defendant oil companies contracted to render for Firestone. If, as the plaintiff argues, the service stations of the defendant oil companies are put in a better competitive position to sell tires than are service stations of other oil companies, it is difficult to see wherein the plaintiff has cause to complain. Tepper testified that about 75% of plaintiff's entire volume of passenger car tires were sold to service station accounts, and the service stations of the defendant oil companies made up about 90% or 95% of the plaintiff's service station business.

The charge that Firestone discriminated in favor of The Suburban Tire Company was not touched upon in any of the affidavits. The deposition of Mr. Tepper, which was taken on behalf of two of the defendant oil companies, does not show that the alleged discriminations are non-existent. Firestone has chosen to support its motion for summary judgment on the grounds that even if they have discriminated against the plaintiff, it cannot recover because it cannot show that it has suffered any damages as a proximate result of the conduct of any one defendant. Proof that Firestone illegally discriminated in price in favor of The Suburban Tire Company would be sufficient in itself to show some damage to the plaintiff. As appears in *Bruce's Juices v. American Can Co.,* 330 U. S. 743 [1946-1947 Trade Cases ¶ 57,553], at page 757:

> ". . . If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination."

The Eighth Circuit case of *American Can Co. v. Russellville Canning Company* [1950-1951 TRADE CASES ¶ 62,895], 191 F. 2d 38, is in accord, although "extraordinary circumstances" not shown to exist in the case at bar were found to be present in that case.

[*Rulings*]

The joint motion of defendant oil companies for summary judgment is sustained. In view of this ruling it is not necessary to pass on the motions to dismiss with respect to the oil companies.

The motion of defendant, The Firestone Tire & Rubber Company, for summary judgment is sustained as to the charge of conspiracy in violation of Section 1 of the Sherman Act and as to the charge of conspiracy to monopolize under Section 2 of the Sherman Act. In view of this ruling it is not necessary to pass on the motion of defendant Firestone to dismiss with respect to Sections 1 and 2 of the Sherman Act.

The motion of defendant, The Firestone Tire & Rubber Company, for summary judgment and to dismiss the complaint is denied insofar as directed to the alleged violations of the Robinson-Patman Act.

Attorneys for the defendants will prepare the proper orders to be entered by the court and submit same to the court for entry.

[¶ 69,383] Federal Trade Commission v. Barnard Hosiery Co., Inc., a corporation; Nathan Natelson and Robert Sharp, individually and as officers of said corporation.

In the United States District Court for the Southern District of New York. Civ. 146-129. Filed May 28, 1959.

Wool Products Labeling Act

Wool Labeling Under Wool Products Labeling Act—Misbranding of Wool Under Section 4(a)—Meaning of Label—"Sole Cushioning" as "Recognizably Distinct Section" of Men's Socks—Temporary Injunction.—The Federal Trade Commission was denied a temporary injunction to restrain a manufacturer of men's socks from labeling its products as "100% WOOL—SOLE CUSHIONING—Top, Body All Cotton." The product was made of cotton throughout, except that there was knitted onto the inner side of the sole a layer of soft wool. Rejecting the Commission's contention that the label misrepresented the true wool content of the socks by representing that the whole sole was composed of 100% wool, the court found that the label meant that a layer of wool cushioning was affixed to a sock made entirely of cotton. Also, the court rejected, as arbitrary, the Commission's contention that the label was defective because it did not describe the wool content of a "recognizably distinct section" of a man's sock, as required by Rule 23 of the rules and regulations prescribed by the Commission pursuant to the Wool Products Labeling Act. The Commission failed to make "a proper showing" entitling it to temporary injunctive relief.

See Labeling Wool, Vol. 2, ¶ 6525.

Wool Labeling Under Wool Products Labeling Act—Injunctions under Section 7(b)—Commission's Application for Temporary Injunction—Lack of "Proper Showing."—The Federal Trade Commission was denied a temporary injunction to restrain a manufacturer of men's socks from using labels which allegedly misrepresented the true wool content of those socks where the Commission's contentions apparently rested on no more than the opinions of its lawyers who had brought the proceeding. There had been neither hearings nor findings by the Commission, and it had offered no affidavit by anyone who claimed to be an expert in the hosiery business. If granted, the temporary injunction would have remained in effect until some unpredictable time in the future when the Commission's administrative processes had been completed. Congress has provided that, under such circumstances, "a proper showing" by the Commission is necessary for temporary injunctive relief of such scope. In the instant case, that burden had not been sustained by the Commission.

See Labeling Wool, Vol. 2, ¶ 6542.10.

For the plaintiff: Thomas A. Ziebarth and Albert G. Seiderman, New York, N. Y.

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Memorandum and Order

[*Misrepresentation Charged*]

McGOHEY, District Judge [*In full text*]: The Commission has moved, pursuant to Section 7 of the Wool Products Labeling Act of 1939,[1] for a temporary injunction to restrain the defendants from affixing to men's socks sold in interstate commerce by the defendants, labels which the Commission asserts misrepresent the true wool content of the socks.

[*Statutory Requirements*]

The statute defines a "wool product" as one which contains or is represented as containing wool.[2] If such a product also contains other fibers, the percentages by weight of the wool content must be shown in plainly legible figures.[3] The Commission pursuant to statutory authority[4] has promulgated rules of which Rule 23[5] is here relied on by the Commission to support its charge against the defendants.

[*Meaning of Label*]

The defendants' product is concededly made of cotton throughout except that there is knitted onto the inner side of the sole a layer of soft wool. The allegedly misleading label which the defendants stamp on these socks is as follows:

"100% WOOL
SOLE CUSHIONING
Top, Body All Cotton"

It is not contended by the Commission that the "cushioning" on the inside of the sole on the defendants' product is less than "100% wool." The contention is rather that the defendants' label represents "that the soles of said hose are composed of 100% wool whereas, in truth and in fact, the wool content [of the whole sole] is substantially less than 100%." That contention is rejected. To me, the label means and represents only this: a sock made entirely of cotton to the inside of whose sole a layer of wool cushioning has been affixed. The sample pair of socks marked in evidence on the argument conforms to the foregoing description.

[*"Recognizably Distinct Section"*]

The Commission further urges that the label is nevertheless defective because it does not describe the wool content of a "recognizably distinct section" of a man's sock, as required by Rule 23. The argument here is that "Sole Cushioning" or "Cushioning Sole" is not an "appropriate recognizably distinct section." This argument is strongly disputed by the defendant Natelson who swears, without contradiction, that he has been in the hosiery business for almost forty years. He asserts that the Commission's contention in this respect is entirely arbitrary, and it seems so to me.

[*Absence of Expert Opinion*]

If the Commission's contentions here rested on administrative findings based on expert testimony adduced at hearings, they would, of course, carry great weight. But there has been neither hearings nor findings by the Commission. These contentions, as far as appears, rest on no more than the opinions of the two Commission lawyers who have brought this proceeding. They do not claim to be experts in the hosiery business. No affidavit of anyone claiming to be such is offered by the Commission.

The injunction if granted would remain in effect until some unpredictable time in the future after the Commission's administrative processes of complaint, hearing, cease and desist order and review thereof had been completed.[6] The Commission concedes in its papers that this would surely entail delay. In these circumstances Congress understandably has provided that "a proper showing" by the Commission is necessary

[1] 15 U. S. C. § 68 ff.
[2] 15 U. S. C. § 68(e).
[3] 15 U. S. C. § 68b.
[4] 15 U. S. C. § 68d(a) par. 3d.
[5] 16 C. F. R. 300.23.
[6] 15 U. S. C. § 68e(b)(2).

for temporary injunctive relief of such scope. The Commission has failed to carry that burden here.

[*Injunction Denied*]

Accordingly the application for a temporary injunction is denied, but with leave to file a new application based upon authoritative affidavits containing facts sufficient to constitute a "proper showing."

The stay heretofore granted in the order to show cause is vacated.

So Ordered.

[¶ 69,384] Holland Furnace Company v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1958—April Session, 1959. No. 12451. Dated June 16, 1959.

Petition for Review of an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Jurisdiction of Federal Trade Commission—Acts in Interstate Commerce—Warehousing in Particular State, Prior to Local Sales, as Cessation of Interstate Commerce.—The Federal Trade Commission properly held that the acts, representations, and conduct of a furnace manufacturer's employees in selling and distributing furnaces to ultimate consumers in numerous states, after those furnaces had been shipped from Michigan and warehoused in each separate state before being sold locally, were "in commerce" within the meaning of the Federal Trade Commission Act. The manufacturer, contending that the Commission had no jurisdiction to enter a cease and desist order, claimed that its products had "come to rest" in its warehouses in each state prior to their local sale and were, therefore, no longer in interstate commerce. Contrary to that contention, there was no logical point, between the shipment of the furnaces from Michigan and their sale and delivery to the ultimate consumers, through the manufacturer's own employees, when the furnaces ceased to be in interstate commerce. Without the sales, deliveries, and installations made by its salesmen and servicemen, the manufacturer's interstate business would have ceased. With them, and measured by them, it had a continuous interstate business reaching into 44 states. Under such facts, the temporary warehousing of the products in each separate state was but an incident of the interstate business. Thus, the local sales of the manufacturer's salesmen had such a close and substantial relation to interstate commerce as to bring them within the regulative powers of the Commission.

See Unfair Practices, Vol. 2, ¶ 5005.55, 5005.83, 5031, 5055.40, 5081, 5089.60.

For the petitioner: Stuart S. Ball, Chicago, Ill.; Robert H. Trenkamp and Edward A. McLeod, Cleveland, Ohio.

For the respondent: James E. Corkey, Assistant General Counsel, Federal Trade Commission.

Denying a motion to vacate, on jurisdictional grounds, a Federal Trade Commission cease and desist order in Dkt. 6203. For a prior opinion of the U. S. District Court, Western District of Michigan, Southern Division, see 1954 Trade Cases ¶ 67,858.

Before SCHNACKENBERG and HASTINGS, Circuit Judges, and WHAM, District Judge.

[*FTC Jurisdiction*]

WHAM, District Judge [*In full text*]: Petitioner, Holland Furnace Company, a corporation, filed its petition in this court for review of a final order of the Federal Trade Commission, dated July 7, 1958, which directs Holland to cease and desist from certain practices found to be deceptive and to constitute unfair competition. Thereafter, Holland filed a motion under the provisions of Rule 15(f) of this court moving for a determination of jurisdictional

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issues in advance of a hearing on the merits. This motion was granted. In the motion Holland says that the Commission had no jurisdiction to enter said final order for two reasons, namely, (1) that the findings of fact upon which said final order is based, together with the stipulated facts and documents of record, affirmatively demonstrate that the practices enumerated in the commission's order were not employed in commerce and (2) that said findings of fact are wholly inadequate to sustain the jurisdiction of the Commission in that they fail to demonstrate that the practices enumerated in the Commission's order were employed in commerce.

The Commission rests its claim to jurisdiction upon the whole case. For a proper understanding and discussion of this claim it seems essential that the substance of the pleadings, findings and conclusions in so far as they bear on jurisdiction should appear. To conserve space they appear in marginal notes.

The substance of the Commission's complaint appears in the margin.[1]

Holland's answer.[2]

[*Examiner's Order*]

After extensive hearings before the Commission's examiner on the issues framed by the complaint and answer the examiner determined the issues in favor of the Commission and made his initial decision with his findings, conclusions and his order directing Holland, its officers, agents, representatives and employees, to cease and desist from the wrongful and deceptive practices therein found in connection with its offering for sale, sale or distribution in commerce of furnaces, heating equipment and parts therefor.

In the initial decision the examiner preliminary to his findings made this statement: "This matter being now before the Hearing Examiner for final determination based upon the record as an entirety, he having presided at all hearings, observed all witnesses, considered and ruled upon all testimony and exhibits of record, finds that this proceeding is in the interest of the public and hereinafter makes his findings as to the facts, conclusions drawn therefrom, and order."

The examiner's findings pertinent to the jurisdiction of the Commission appear in the margin.[3]

[1] That Holland, a Delaware corporation with principal place of business in Holland, Michigan, is and has been engaged in the manufacture, sale and distribution of furnaces, heating equipment and parts therefor; that it owns and operates approximately 475 branch offices, located in different states of the United States, and a number of subbranches; that its products are shipped from its said plant in Michigan to the various branch offices in other states for delivery to purchasers thereof, some shipments being made before sale and some after sale; that Holland maintains and has at all pertinent times maintained a course of trade in said products in commerce among and between the various states of the United States in substantial competition with others engaged in the manufacture, interstate sale and distribution of furnaces, heating equipment and parts therefor.

Further, that Holland, to sell its product, employs salesmen and house-to-house canvassers who have received instructions, sales manuals, and other material from Holland and are assigned a territory and required to make a report of each sale; that installation of equipment sold is made by Holland's servicemen.

Further, that in the course and conduct of its aforesaid business and for the purpose of selling its products Holland directly and through its representatives employs many false, unfair and deceptive practices among which are misrepresentation by the salesmen and servicemen that they are inspectors or representatives of government agencies or of gas and utility companies, or heating engineers, together with many other detailed wrongful practices all to the prejudice and injury of the public and Holland's competitors and constituting unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

[2] The answer denies all allegations of unfair competition and says that it has not maintained a course of trade in its products in commerce among and between the various states of the United States; that the Commission has no jurisdiction to hear or determine the matters set forth in the complaint and no jurisdiction to issue the cease and desist order therein sought for the reason that the acts and practices allegedly constituting unfair methods of competition or unfair or deceptive acts or practices in commerce as set forth therein, were not committed in commerce within the intent and meaning of the Federal Trade Commission Act. Respondent says that such acts or practices in so far as admitted and not denied, were committed in transactions which were purely local in character and were not transactions in commerce within the intent and meaning of the Federal Trade Commission Act.

[3] "1. Respondent, Holland Furnace Company, is a corporation organized under the laws of the State of Delaware with its principal place of business located at No. 489 Columbia Avenue, Holland, Michigan.

"2. Respondent is now, and has been for the past several years, engaged in the manufacture, sale and distribution of furnaces, heating equipment and parts therefor. Respondent owns and operates approximately 475 branch offices, as well also a number of subbranches, located in

[*Interstate Commerce*]

The examiner in his initial decision listed as issue number one: "Is the respondent engaged in interstate commerce within the purview of the Federal Trade Commission Act?" In his first conclusion the examiner said: "The contentions of the respondent to the contrary not withstanding, it is found that respondent was, at all times touched upon herein, engaged in interstate commerce as such is defined in the Federal Trade Commission Act and under the many court decisions interpretative of said Act." The examiner ordered that Holland and its "officers, agents, representatives, and employees, * * * in connection with the offering for sale, sale or distribution in commerce, as 'commerce' is defined in the

various states of the United States. All sales of furnaces, heating equipment and parts therefor, effected by the Holland Furnace Company or its representatives are to the ultimate purchasers and users of such equipment.

"3. In conducting its business respondent does not ship furnaces as units but, typically, sends a carload of the essential parts which are assembled either in its warehouses or branches, or 'on the job' where the furnaces are to be installed. The warehouses mentioned are, in some instances, branch warehouses, that is to say, ones which are connected with the respondent's branches, or central warehouses located at strategic points and which supply the branches in adjoining or surrounding territory. Generally speaking, a central warehouse is located in a large city and acts as a source of supply for respondent's branches located in that city and in surrounding territory. When need arises in the branch offices for material or equipment which is not there on hand or in stock, such is ordered direct from the factory and, in the cases of small branches, the order generally goes direct to the factory rather than to a central warehouse. Respondent also sells repair and replacement parts for its equipment to independent furnace servicing concerns or individuals, which are obtainable from the branch offices. Also the branches, on occasion, exchange material between themselves when necessary, although this is not general, the branches, being under instruction to order their needs direct from the factory. The branch offices of the respondent extend throughout the United States with the exception of three or four states in the far south. Deliveries are made by respondent preferably by means of automobile trucks, such trucks not only delivering supplies to the appropriate consignees but, on return trips, haul back to the factory at Holland, Michigan, scrap metal and old equipment for recovery purposes. Where exceedingly long hauls are involved, as for instance from Holland to the States of Washington, Oregon, or California, deliveries may be made by railroad freight.

"This system of operation has been substantially the same since the year 1934.

* * *

"4. Respondent maintains, and has maintained, a course of trade in its products aforesaid, in commerce among and between the various states of the United States and in the District of Columbia to such extent as to make it amenable to the jurisdiction of the Federal Trade Commission under the provisions of the Federal Trade Commission Act as 'interstate commerce' is defined in said Act.

"For a long period of time respondent operated a branch office in the City of Washington, D. C. Respondent furnished certain papers * * * showing that from the year 1936 through 1942 respondent operated a branch office in the City of Washington, D. C.; from 1943, to and including 1948, this office was designated a subbranch; during the years 1949, 1950 and 1951, this outlet reassumed its status as a branch, and from 1952 to June 30, 1954, was designated as a subbranch. The complaint in this case is dated May 4, 1954, so the foregoing constitutes an admission that respondent was operating in the Washington territory subsequent to the date of the complaint herein. Testimony shows that although respondent claims to have abandoned operations in the Washington, D. C. area it continued to do business therein through the instrumentality of its Baltimore, Maryland, branch, and that if a home-owner in this area had a Holland furnace which needed parts and wrote to the respondent at its home office, the latter would refer the inquiry to the nearest branch, which in this instance would be Baltimore, Maryland, which branch would first dispatch a salesman to ascertain exactly what was needed, and upon determination thereof an agreement would be executed and the material would be delivered through the Baltimore Branch.

"The respondent's manager of the Baltimore branch testified that sales are made in the Washington area through the Baltimore branch and that equipment is delivered in Washington from Baltimore by means of the respondent's own truck, or by the trucks of their mechanics; that the Holland Furnace Company has a Washington telephone number with the calls thereon being taken by a so-called 'answering service' and relayed to the Baltimore office, and that this telephonic arrangement was in effect in the Baltimore branch when this particular manager took over; that the Baltimore branch does not at present have a subbranch in Washington, D. C.; that he had handled complaints from the Washington area and had been instrumental in resolving such complaints.

"There are also of record twelve exhibits which show actual sales of respondent's equipment and repair services through the instrumentality of the Washington, D. C. office, in the States of Virginia and Maryland, as well also in the District of Columbia; there is also an exhibit of record showing a sale from an Indiana branch of respondent to an Illinois customer.

"The exhibits * * * show the locations of respondent's eleven central warehouses and its numerous branch and subbranch warehouses strategically located throughout the United States, while a glance at a map of the United States, prepared by respondent, will disclose its widespread, nation-wide, activities which have enabled it to effect gross annual sales which, according to one witness, has reached

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Federal Trade Commission Act, of furnaces, heating equipment, or parts therefor, do forthwith cease and desist from" various designated representations, misrepresentations and acts which the examiner had found to be unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce.

[*FTC Order*]

Holland appealed to the Commission from the initial decision and order of the examiner. After hearing, the Commission rendered its opinion and entered a final order adopting as its own the hearing examiner's initial decision, including its findings, conclusions and order.

The pertinent language used by the Commission in its opinion appears in the margin.[4]

To clarify the issues and make clear the positions of the respective parties, excerpts from their briefs appear in the margin.[5]

[*Controlling Legislation—FTC Act*]

The controlling legislation is found in paragraphs (1) and (6) of Sec. 5(a) (15 U. S. C. A. Sec. 45(a)(1) and (6)) of said act which read:

"(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

"(6) The Commission is empowered and directed to prevent persons, partnerships,

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$30.000.000.00. * * * a quotation from the 1952 Annual Report of the corporation, over the signature of its President, 'by order of the Board of Directors' is revealing:

" 'As you may possibly know, your company is the only manufacturer in the heating industry which retails. The public cannot buy heating equipment direct from any other factory —only from dealers who sell under their own names. Our branch system throws the complete responsibility for all the actions of its personnel, as well as the functioning of its equipment, directly upon the company. * * *'

"The said report then goes on to point out:

" 'Clearly, our 15,000,000 customers have found this policy gratifying.'

* * *

"5. Respondent is now, and has been at all times herein mentioned, in substantial competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of furnaces, heating equipment, and parts therefor. While respondent admits the charge of competition, it denies that such competition took place in interstate commerce. The fact that the respondent has been engaged in interstate commerce having been specifically found to be true in the preceding finding, it is not felt necessary to analyze further the testimony of record in support of this finding.

* * *"

[4] "The record discloses Holland owns and operates some 475 branch offices, or retail outlets, as well as a number of subbranches. Salesmen or house-to-house canvassers sell respondent's products with gross annual sales amounting to about $30 million. All sales effected by the Holland Furnace Company or its representatives are to the ultimate purchasers and users of such equipment. Respondent does not ship furnaces as units but sends quantities of essential parts to central or branch warehouses. * * *

"* * * The heating equipment involved is manufactured in Holland, Michigan, and shipped from there and sold by respondent's authorized representatives on a nationwide basis in some forty-five states through Holland's own retail outlets. * * *

"Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and a purchasing public on respondent's behalf which must be accepted by the home office: and representations made by salesmen in selling respondent's products—all are part and indicate a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act.

"Furthermore, there is record evidence that sales were made from respondent's Baltimore, Maryland, branch in the District of Columbia and in Virginia; that the Niles, Michigan, branch sold in Indiana; that the South Bend, Indiana, branch sold in Michigan; Missouri branches sold in Illinois; and Kentucky branches sold in Ohio. * * * The fact that respondent's products are shipped to respondent's employees at its branch warehouses for subsequent delivery to purchasers does not put an end to the interstate character of the transaction."

[5] In its brief Holland says: "For the purposes of this motion, it must, of course, be assumed that Holland committed the acts and engaged in the practices alleged as found by the Commission. The sole question now before this court is, assuming that Holland did engage in such unfair and deceptive practices, was it within the jurisdiction of the Federal Trade Commission to order Holland to cease and desist from such practices?

* * *

"Corporations such as Holland, which are engaged in a multi-state business and which ship products to branches, necessarily engage in both interstate and intrastate commerce. While the Federal Trade Commission may have jurisdiction with respect to interstate operations, under the terms of the Act, the Commission has no jurisdiction whatsoever with respect to unfair or deceptive practices used in the intrastate operations of an interstate corporation."

The Commission's brief says. "The sole contested issue is: Whether the Commission correctly concluded that, upon the facts as set forth in the pleadings, the initial decision, and the opinion of the Commission, the methods,

or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

The quoted sections of the statute plainly disclose that the reach of the act is controlled and limited by the phrase "in commerce". That the statute should not be applied to transactions which are not "in commerce" was declared in the case of *Federal Trade Commission v. Bunte Bros., Inc.* [1940-1943 TRADE CASES ¶ 56,098], 312 U. S. 349. The court said:

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

By its decision the Supreme Court affirmed this court which in disposing of the same question in the same case had said:

> "The only practices with which the Commission may concern itself are transactions 'in interstate commerce.' * * * The words, the meaning of which we are to construe, are definitely 'in commerce' not 'affecting interstate commerce.'
>
> * * *
>
> "* * * If an extension of the Federal Trade Commission's jurisdiction be advisable so as to include practices affecting interstate commerce, it is for Congress, not the court to make the change." *Bunte Bros., Inc. v. Federal Trade Commission*, 7 Cir., 110 F. 2d 412.

[*Products Did Not "Come to Rest"*]

Holland concedes that it is engaged in interstate commerce but claims that it is also engaged in intrastate commerce and that all acts of unfair competition and deception by its salesmen and servicemen found by the Commission were committed in the intrastate phase of its business. This contention is based on the claim that all of its sales, distribution and installations are made within any given state subsequent to the time when its products have come to rest in its warehouse or warehouses in such state and are no longer in interstate commerce. This claim seems to be refuted in part, at least, by the findings that Holland made sales in the District of Columbia through a branch and subbranch located in said District over a period of many years and through a subbranch from 1952 to June 30, 1954, and made other sales therein through the Baltimore, Maryland, branch; made other sales of respondent's equipment and repair service through the instrumentality of the Washington, D. C. office in the states of Virginia and Maryland, as well as in the District of Columbia; that the Niles, Michigan, branch sold in Indiana; that the South Bend, Indiana, branch sold in Michigan; Missouri branches sold in Illinois and Kentucky branches sold in Ohio; also, a sale from an Indiana branch of respondent to an Illinois customer. Though these particular findings of interstate transactions may be applicable to a comparatively small portion of the vast operations conducted by Holland they seem sufficient to negative Holland's contention that the Commission under its findings, is wholly without jurisdiction. Whether or not the findings just mentioned are sufficient to uphold an order by the Commission to cease and desist requires a consideration of the merits and from this we refrain.

After due consideration of the principles declared in *Bunte* and other applicable decisions we are of opinion that under the facts found by the Commission, as hereinbefore set out, the Commission was correct in its holding that it had jurisdiction in the case. We hold as did the Commission that the acts, representations and conduct of Holland's employees in selling and distributing Holland's furnaces and parts,

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acts and practices of Holland Furnace Company which are the subject of this proceeding, are methods of competition in commerce, and acts and practices in commerce, within the coverage of Section 5(a)(1) of the Federal Trade Commission Act.

* * *

"These salesmen and solicitors are Holland's agents whose function is to solicit and to consummate sales in the several states. If sales are not made no goods move from Michigan to the other states in which Holland does business. Thus the salesmen and solicitors are an integral and vital part of Holland's interstate sales promotion. * * *

* * *

"It is our position, of course, that the warehousing of goods in the several states is but an incident of Holland's business and in no way changes the character of the activities engaged in by its solicitors and salesmen. Moreover, it appears that Holland actually ships goods between the branches in fulfillment of contracts and when contracts are negotiated the branches may even secure delivery of the necessary parts directly from Holland. * * *"

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whether before or after such products had been warehoused in the state where sold and distributed, were in commerce within the meaning of the Federal Trade Commission Act. In its opinion the Commission said, correctly we think:

"* * * The heating equipment involved is manufactured in Holland, Michigan, and shipped from there and sold by respondent's authorized representatives on a nationwide basis in some 45 states through respondent's own retail outlets. A realistic view of respondent's activities in moving its products from Michigan across state lines to accomplish its stated purpose of direct sales to ultimate consumers through '500 Direct Factory Branches serving Over 15,000,000 Customers' admits of no other conclusion than that respondent is engaged 'in commerce.'

"Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and the purchasing public on respondent's behalf which must be accepted by the home office; and representations made by salesmen in selling respondent's products—all are part and indicate a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act."

In making the foregoing statements the Commission had before it the evidence that in its 1952 Annual Report Holland asserted to its stockholders:

"* * * The public cannot buy heating equipment direct from any other factory —only from dealers who sell under their own names. Our branch system throws the complete responsibility for all the actions of its personnel, as well as the functioning of its equipment, directly upon the company. * * *
* * *

"Clearly, our 15,000,000 customers have found this policy gratifying."

[*Local Sales "Essential Part" of Interstate Business*]

Under the policy and practice found by the Commission there seems to be no logical point between shipments from the State of Michigan and the sale and delivery of Holland's products through its employees to the ultimate consumer in another state when, in view of the provisions and purposes of the Federal Trade Commission Act, they cease to be in interstate commerce until they rest finally in the possession of the purchaser or ultimate consumer. Without the sales, deliveries and installations made by Holland's salesmen and servicemen from its own warehouses its interstate business would cease. With those sales, deliveries and installations and measured by them Holland has a continuous interstate business reaching into forty-four states. Under such facts the temporary warehousing of the products in each separate state in Holland's own warehouses is but an incident in its interstate business. The work of Holland's salesmen and servicemen create and are an essential part of Holland's vast interstate business and therefore is in commerce and subject to the regulative powers of the Commission.

[*Cases Considered*]

Holland urges the case of *Federal Trade Commission v. Bunte Bros., Inc., supra,* as decisive here in its favor. We find it to be clearly distinguishable. In that case, quite contrary to this, the unfair methods of competition sought to be regulated by the Commission were admittedly confined to activities wholly within the State of Illinois relating to goods manufactured in Illinois and which had been at no time in interstate commerce. In the case here the goods were manufactured in Michigan and shipped from that state into at least forty-four other states to be sold and distributed by the manufacturer's own agents and employees to the ultimate consumers.

Holland cites and relies strongly on the case of *Ward Baking Co. v. Federal Trade Commission,* 264 Fed. 330. In that case Ward hauled bread in trucks from one state into another where by means of unfair sales methods, it sold the bread from its trucks to local purchasers. The court held that the sales were local and for that reason the unfair sales methods were beyond the reach of the Federal Trade Commission. It is observed that the court based its conclusion that the sales from Ward's trucks were not in commerce within the meaning of the Federal Trade Commission Act upon the authority of a Supreme Court case relating to alleged interference with interstate commerce by local taxation. *Wagner v. City of Covington,* 251 U. S. 95. Though the factual situations were similar in the *Wagner* and *Ward* cases, entirely different statutes were being applied and the legal principles which were

applicable in *Wagner,* a tax case, were different from those which were properly applicable in the *Ward* case under the Federal Trade Commission Act. In view of later cases hereinafter discussed we believe that *Ward* is entitled to little weight here.

Other Federal Trade Commission cases cited by Holland such as *Canfield Oil Co. v. Federal Trade Commission,* 274 Fed. 571; *Winslow v. Federal Trade Commission,* 277 Fed. 206 and *California Rice Industry v. Federal Trade Commission* [1932-1939 TRADE CASES ¶ 55,211], 102 F. 2d 716, have been examined and found to be distinguishable on facts. The same is true of *Ewing-Van Allmen Dairy Co. v. C and C Ice Cream Co.* [1940-1943 TRADE CASES ¶ 56,005], 109 F. 2d 898; *Lawson v. Woodmere* [1954 TRADE CASES ¶ 67,904], 217 F. 2d 148 and *Brosious v. Pepsi-Cola Co.* [1946-1947 TRADE CASES ¶ 57,459], 155 F. 2d 99, which were Sherman Anti-trust cases. We have also examined *Walling v. Goldblatt,* 7 Cir., 128 F. 2d 778; *Walling v. Jacksonville Paper Co.,* 317 U. S. 564 and *Higgins v. Carr Bros. Co.,* 317 U. S. 572, Fair Labor Standards Act cases which are not only distinguishable factually but because the purpose of the statute being applied in those cases is essentially different from the purpose of the Federal Trade Commission Act.

[*Persuasive Holdings*]

Though the Commission has cited no authority precisely in point, there are cases with facts sufficiently similar to make the holdings therein persuasive if not completely authoritative in support of the Commission's jurisdiction. The nearest in point is *Standard Oil Co. v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,746], 340 U. S. 231, which went from this court, 173 F. 2d 210, to the Supreme Court. In that case Standard received interstate shipments of crude oil for refining at its refinery at Whiting, Indiana. A portion of the gasoline so produced was shipped by tankers on the Great Lakes from Whiting to Standard's marine terminal at River Rouge, Michigan, and was there stored in bulk where it remained for varying periods under ownership by Standard until sold and delivered to its customers in the Michigan area, including Detroit. In the autumn sufficient gasoline was stored to meet winter demands. The gasoline was not taken to River Rouge pursuant to orders already taken, though the demands of the Michigan territory were fairly constant, and the customers' demands could be accurately estimated. The court said: "Such temporary storage of gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character. *Stafford v. Wallace,* 258 U. S. 495." That the case involved price discriminations under and in violation of Sec. 2(a) of the Clayton Act, as amended, 15 U. S. C. A. Sec. 13, does not affect the question of interstate commerce within the meaning of the Federal Trade Commission Act.

In the same case this court speaking of *Stafford v. Wallace,* 258 U. S. 495, as being analogous said:

> "In that case, the livestock came by carrier interstate and intrastate into the receiving pens of the stockyards where the animals were fed, watered, and held until sales were consummated, either to the packers who drove them across the street to the packing house, or to the wholesale dealers or feeders who reshipped them. The transportation was broken at the yards. The animals came to rest, but the stream of commerce moved on to final destination; and the stockyards, with its holding pens, was held to be in commerce, just as here the various changes in the manner of movement may have slowed down the stream of commerce between Whiting and Michigan, but never stopped it. The tanks at River Rouge were similar to a 'packing house' on the way to market. The tank cars and trucks were the most convenient 'packages' that could be used to complete the distribution of the gasoline. It is unlike *Walling v. Goldblatt Bros.,* 7 Cir., 128 F. 2d 778, where the warehouse was only a detached stockroom for retail stores of a retailer. There the stream of commerce ended at the warehouse for the most part. Here it reached at River Rouge only an intermediate stage preliminary to its final disposition to the petitioner's customers.
>
> "We decline, as the Supreme Court did in *Stafford v. Wallace, supra,* 258 U. S. at page 519, 42 S. Ct. at page 403, 66 L. Ed. 735, 23 A. L. R. 229, '* * * to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.' "

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Holland argues earnestly that its warehouses and subsequent retail sales therefrom are different from the storage facilities of Standard at River Rouge and its deliveries therefrom to its distributors in Michigan. Yet, on principle there is no dissimilarity in so far as the application of the Federal Trade Commission Act is concerned. In the *Standard* case the Federal Trade Commission exercised power over local sales made by Standard from gasoline in storage which had been shipped from another state and here the Commission seeks to exercise its power over local sales by Holland which are filled from storage of products owned by Holland and shipped by it from another state. In each case the interstate commerce was wholly dependent on the sales made subsequent to storage in connection with which unfair and deceptive practices were used and kept moving through estimates of future needs created by said sales. To hold that such unfair and deceptive practices were beyond the regulatory powers of the Federal Trade Commission because of such temporary storage would be to permit a "technical legal conception" to destroy a "practical one drawn from the course of business." *Swift & Co. v. United States,* 196 U. S. 375, 398.

The case of *Ford Motor Company v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,132], 120 F. 2d 175, cert. den. 314 U. S. 668, is closely in point. Ford was ordered to cease and desist from using a misleading financing plan and advertisement in connection with installment sales of its cars through local dealers who had purchased the cars from Ford for resale locally. Ford filed petition for review of the Commission's order. The court having found that such dealers were aided in promoting such resales through use of the unfair financing plan and misleading advertising and that they constituted unfair competition said:

> "All of those things which stimulate or decrease the flow of commerce, although not directly in its stream, are essential adjuncts thereto and the Congress has power to confer on the Federal Trade Commission their regulation."

Citing *Stafford v. Wallace, supra.* The court said further:

> "The sale on credit of petitioner's cars by its local dealers, when separately considered, may be intrastate in character but when the activities of petitioner's local agencies are weighed in the light of their relationship to the petitioner, and its financing sales of cars, it is at once apparent that there is such a close and substantial relationship to interstate commerce that the control of such activities is appropriate to its protection."

[*Helpful Cases*]

Among other cases found helpful in defining the jurisdiction of the Federal Trade Commission are *General Motors Corp., et al. v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,056], 114 F. 2d 33, cert. den. 312 U. S. 682; *Progress Tailoring Co. v. Federal Trade Commission* [1946-1947 Trade Cases ¶ 57,440], 153 F. 2d 103; *International Art Co. v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,304], 109 F. 2d 393; *Federal Trade Commission v. Standard Education Society* [1932-1939 Trade Cases ¶ 55,170], 302 U. S. 112; *Consumers Home Equipment Co. v. Federal Trade Commission* [1948-1949 Trade Cases ¶ 62,202], 164 F. 2d 972; *Goodman v. Federal Trade Commission* [1957 Trade Cases ¶ 68,690], 244 F. 2d 584; *Federal Trade Commission v. Hoboken White Lead & Color Works, Inc.* [1932-1939 Trade Cases ¶ 55,039], 67 F. 2d 551; *Carter Carburetor Corporation v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,306], 112 F. 2d 722.

Our study of the cases showed that seldom were two cases found relating to the jurisdiction of the Federal Trade Commission in which the facts were alike and we were impressed by the truth of the statement in more than one opinion that each case must be ruled by its own particular facts.

[*Local Sales Within FTC Jurisdiction*]

In the light of *Standard Oil Co. v. Federal Trade Commission, supra; Ford Motor Co. v. Federal Trade Commission, supra;* and the authorities subsequently mentioned it seems plain that the local sales by Holland through its own employees, filled from Holland's warehouses to which its products were shipped in interstate commerce prior to such sales, have such close and substantial relation to interstate commerce as to bring them within the regulative powers and jurisdiction of the Federal Trade Com-

mission. We hold that the findings of the Commission herein adequately support its jurisdiction and that Holland's contentions to the contrary are without merit.

[*Motion to Vacate Order Denied*]

Holland's motion to vacate the Commission's order on jurisdictional grounds is denied.

[¶ 69,385] United States v. The Procter & Gamble Company, et al.

In the United States District Court for the District of New Jersey. Civil Action No. 1196-52. Filed June 9, 1959. Supplementary Opinion filed June 11, 1959.

Case No. 1150 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Discovery and Production of Evidence—Discovery of Grand Jury Testimony Secured by Government After Decision to Proceed by Civil Rather Than Criminal Action.—The Government, in a civil antitrust action filed shortly after the termination of Grand Jury proceedings in which the Government had not sought an indictment, would be required to answer interrogatories as to when it finally determined to proceed against the defendants by civil rather than criminal action. The United States Supreme Court, in *U. S. v. Procter & Gamble Co.*, 1958 TRADE CASES ¶ 69,046, made clear the principles that (a) as long as the Government has a criminal investigation in mind, whether that is its sole purpose or a purpose conjoined with one to seek a civil remedy, the Government's use of the criminal procedure remedy by Grand Jury proceedings is valid, but (b) if the Government has no such criminal proceedings in mind and intends to seek only a civil remedy, then any use of the Grand Jury remedy thereafter constitutes, as to such later action, a "flouting of the policy of the law" and a subversion of criminal procedure, regardless of when that "solely civil purpose" authoritatively arises. Thus, if the Government had determined not to proceed by indictment before the last witness had testified before the Grand Jury, then, as to that last witness, the Grand Jury process had been subverted and the testimony of that witness should be discovered and produced to the other side.

The Government's contention that its decision to pursue only a civil remedy would not have prevented the Grand Jury from seeking an indictment on its own was rejected; in the absence of proof of such a "runaway" Grand Jury, it followed that the Government's decision would have been controlling. As to the Government's objection that a presumption of regularity in the conduct of governmental affairs should be deemed to exist, it was noted that the Government, prior to the decision in *Procter & Gamble*, had considered it proper to use a Grand Jury to make out a solely civil case under the antitrust laws. Further, the defendants should not be deprived, by such a presumption, of the right to seek evidence to the contrary.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225, 8225.593.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Discovery and Production of Evidence—When Government Decided to Use Civil Rather Than Criminal Remedy—"Mental Processes"—"Work Product."—In a civil antitrust action filed shortly after the termination of Grand Jury proceedings in which the Government had not sought an indictment, interrogatories seeking to ascertain when the Government had finally decided to proceed against the defendants by civil rather than criminal remedies did not ask for "privileged" information. No formal claim of privilege had been lodged by the Attorney General, the Executive Department of the Government had voluntarily sought the aid of the Judicial Department to enforce the law of the land, and the United States Supreme Court had declared that the law of the land required a "finding" as to when the Government had decided to proceed solely by civil action. In such a situation, it would not seem that the Executive Department could rely on a "housekeeping" privilege of its own to refuse to give evidence as to such a "finding." That finding did not relate to the Department's "mental processes" in reaching a decision

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involving judgment or discretion, or to the internal workings of the Department. Further, that decision did not constitute the "work product" of the Department of Justice. Even if it did, however, the United States Supreme Court's declaration that a finding as to that decision was necessary in order to do justice between the parties would constitute "good cause" for the discovery of that decision.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.600.

For the plaintiff: Chester A. Weidenburner, United States Attorney, by Charles H. Hoens, Jr., Assistant United States Attorney, and Miss Margaret Brass, Antitrust Division, Department of Justice.

For the defendants: O'Mara, Schumann, Davis & Lynch, and Cahill, Gordon, Reindel & Ohl, by Mathias Correa, for Colgate-Palmolive Co. Bailey & Schenck, and Arnold, Fortas & Porter, by Abe Fortas, for Lever Brothers Co. Toner, Crowley, Woelper & Vanderbilt; Royall, Koegel, Harris & Caskey, by Kenneth C. Royall; Dinsmore, Shohl, Dinsmore & Todd, by Joseph Dinsmore; and Taft, Stettinius & Hollister, by Charles Sawyer, for Procter & Gamble Co. Davies, Richberg, Tydings & Landa, by Shelby Fitze, and McCarter, English & Studer, for Assn. of American Soap & Glycerine Producers, Inc.

For a prior opinion of the U. S. Supreme Court, see 1958 Trade Cases ¶ 69,046; for prior opinions of the U. S. District Court, District of New Jersey, see 1959 Trade Cases ¶ 69,333 and 69,260, 1956 Trade Cases ¶ 68,488, 68,457, and 68,335, 1955 Trade Cases ¶ 68,228, 1954 Trade Cases ¶ 67,677, and 1953 Trade Cases ¶ 67,497.

Opinion on Use of Grand Jury Transcript

[*Grand Jury Proceedings—Discovery*]

HARTSHORNE, District Judge [*In full text*]: The various defendants herein have filed a series of motions and interrogatory proceedings directed to the use, or prohibition against the use, by all parties, of the transcript of the Grand Jury proceedings herein. The defendants claim reliance upon the principles, some of them of novel import, recently enunciated by our highest court in this very case, *United States v. Procter & Gamble Co., et al.* [1958 TRADE CASES ¶ 69,046], 356 U. S. 677 (1958). It should be noted that these Grand Jury proceedings, in which the testimony of some thirty persons was taken over the course of many months, all terminated more than six years ago, on November 25, 1952, without an indictment, and but a short time before the complaint in this civil antitrust suit was filed by the Government on December 11, 1952.

[*Subversion of Grand Jury Process*]

The first of such defense motions to be filed asks this Court to impound from all concerned not only this entire Grand Jury transcript now in the hands of the Government, but all data obtained by the Government therefrom. If this motion were granted, then, barring later application to this Court on cause shown, the Government might be compelled to divest itself of all data and knowledge obtained in its lengthy discovery proceedings herein during the past six years, including literally hundreds of thousands of defendants' documents, if indeed the complaint itself could still stand, since all are doubtless based on the information obtained through the Grand Jury proceedings. The second defense motion is one asking this Court to make available to the defendants certain test mony before the Grand Jury, for special cause shown, including the testimony, on the one hand, of a deceased witness, and, on the other hand, of an important Government Defense official. The third of such proceedings is in the form of a long series of interrogatories which the defendants ask the Government to answer, in order to ascertain with respect to such Grand Jury proceedings whether and, if so, when, the Government decided to pursue only civil antitrust proceedings against the present defendants. This determination apparently occurred at some time, since the present civil complaint was filed, shortly after the Grand Jury proceedings terminated, but no indictment was ever sought from the Grand Jury, *United States v. Procter & Gamble Co., et als., supra,* at p. 687, note 2. The defendants' theory here is that, if any Grand Jury proceedings were taken subsequent to the Government's determination not to seek an

indictment, such subsequent proceedings were a subversion of such Grand Jury proceedings, under the above decision of the Supreme Court, which would entitle the defendants to receive the transcript of the Grand Jury proceedings, to that extent. The final motion by the defendants, upon the basis of similar interrogatories, and assuming that such a subverison as the above has occurred, asks that the transcript of such Grand Jury proceedings and all data obtained therefrom by the Government, apparently including the complaint itself, be suppressed from any use by the Government.

[*Interrogatories*]

To consider this final motion now would be premature, since such motion is sought only if it has been previously established that there has been a subversion of the Grand Jury process, as stated in *Procter & Gamble,* by the use of the Grand Jury process solely for civil purposes. Moreover, the first of such motions—that to impound the Grand Jury transcript from all parties—is one as to which the Supreme Court itself, as differentiated from a distinguished member of the Court, has not yet laid down the controlling principle. Since the second of the above motions concerns only a relatively small portion of the Grand Jury transcript, while the third proceeding—that on the defense interrogatories—covers not only this portion, but the entire Grand Jury proceedings, in which all parties are actually interested, including this important question as to a possible subversion of the Grand Jury process, this Court will deal now with this third motion.

[*Issue*]

The issue between the parties on this motion falls within small compass. The Government admitted, both in its brief and on the argument, that if, *at the outset* of the Grand Jury investigation, the Government intended to bring a civil case only, then under *Procter & Gamble* there would have been such an abuse of the Grand Jury process that wholesale discovery of the Grand Jury transcript to the defendants would be warranted. The parties are at issue only on the point as to whether the same result follows, if the Government's determination to proceed with a civil case only is made, not before the Grand Jury is summoned, but thereafter, during the course of its proceedings, and thus might constitute a subversion of so much of the Grand Jury proceedings as occurs after the Government has determined not to proceed criminally at all.

[*Law of the Case*]

As the Government well says, the decision of the United States Supreme Court in *Procter & Gamble, supra,* "is not only the law of the land; it is the law of this case." Accordingly, we turn to the statement of our highest court as to the law of the land and of this case in the above regard.

In *Procter & Gamble, supra,* in referring to the opinion of another branch of this Court, which it reverses, our highest court says:

> "It [the lower court] also seemed to have been influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecution were using that device, it would be flouting the policy of the law. . . .
>
> "We cannot condemn the Government for any such practice in this case. There is no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach. It is true that no indictment was returned in the present case. But that is no reflection on the integrity of the prosecution. For all we know, the trails that looked fresh at the start faded along the way. What seemed at the beginning to be a case with a criminal cast apparently took on a different character as the events and transactions were disclosed. The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case. It is only when the criminal procedure is subverted that 'good cause' for *wholesale* discovery and production of a grand jury transcript would be warranted." [Emphasis by the Court] pp. 683-684.

Clearly, our highest court has thus held that to use "criminal procedures to elicit evidence in a civil case . . . would be flouting the policy of the law" and that, under such circumstances, "when the criminal procedure is subverted that 'good cause' for *wholesale* discovery and production of a grand jury transcript would be warranted."

[*Critical Question*]

The critical question thus is, when this case first became only "a civil case." From that time on, our highest court has said that using the Grand Jury to elicit evidence in

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that case would flout the law, would subvert criminal procedure, would require that any advantage thus obtained improperly by the Government be wiped out, by giving the opposing party the use of so much of the Grand Jury transcript as was thus obtained by a criminal procedure in a purely civil case. It would seem that neither the language of our highest court, nor its basic reasoning, can reasonably be read otherwise. It would be as unfair to permit the Government, after having finally decided not to proceed criminally, to continue to use the unique, and solely criminal, functions of a Grand Jury for a solely civil purpose, as it would be to permit the Government to do this same thing when, from the beginning, it had that same, solely civil, intention. The subversion of this ancient criminal procedure, for the time that it exists, is the same in the one case as in the other.

The sole reason for bringing this motion at this time is because our highest court, in the absence of evidence such as is sought by the present interrogatories, was compelled to say that at the time the case was laid before it "there is no finding that the Grand Jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach." Of course, as the Court says, where "the trails that looked fresh at the start" for a criminal prosecution "faded along the way," so that "what seemed at the beginning to be a case with a criminal cast apparently took on a different character as the events and transactions were disclosed," even so, that does not mean that the evidence obtained could not be used "in a civil case," if, when that evidence was obtained, it had not already been decided to abandon the criminal proceedings. If such criminal proceedings were still in contemplation, the criminal procedure by the Grand Jury was being properly used, and there was no subversion. If, on the contrary, for instance, before the last witness had testified before the Grand Jury, the Government had determined authoritatively not to proceed by indictment, then as to that last witness, the law had been flouted, and since the Grand Jury process had been subverted, the testimony of that witness should be discovered and produced to the other side.

Furthermore, if the Government's argument were correct, that the existence at the inception of the Grand Jury proceeding of an intent to seek an indictment rendered these entire proceedings valid, despite the fact that almost immediately thereafter the Government abandoned any such criminal proceedings, it is easy to see to what abuses it would give rise. Indeed, the situation then would approach that in the recent past when, before the above decision in *Procter & Gamble*, the Government admittedly used Grand Jury proceedings freely, at its discretion, for civil purposes only.[1]

[*Government's Contentions*]

The Government, in answer to the above, argues that the mere decision by the Government to pursue a civil remedy only does not finally prevent the Grand Jury proceedings from being used for indictment purposes, since the Grand Jury itself might decide to seek an indictment, despite such decision of the Government, i. e., to become a "runaway" Grand Jury. Of course, if any such unusual situation as this did occur, then, upon its proof, the Grand Jury would continue to be one pursuing a criminal investigation, and there would be no subversion. But, in the absence of such proof, it would follow that the determination of the Government not to obtain an indictment would be controlling and decisive, particularly in an antitrust case, the complexity of which virtually requires the careful, long-continued control of the Grand Jury proceedings by the Government itself, in order to make out a case.

Nor is the Government correct in its argument that the dissenting opinion in *Procter & Gamble*, p. 689, indicates that *Procter & Gamble* holds that the only subversion of the Grand Jury process occurs when the Grand Jury investigation had been "instituted solely in aid of a civil suit." In the first place, the majority opinion is not so limited. Indeed, the language of the Court that "For all we know, the trails that looked fresh at the start faded along the way," p. 684, would seem to infer the contrary possibility. In addition, the basis

[1] See the testimony, May 12, 1955, before the Special Antitrust Subcommittee of the Judiciary Committee of the House of Representatives, of Honorable Stanley N. Barnes, then Assistant Attorney General of the United States in charge of the Antitrust Division. *Bureau of National Affairs, Inc. Report*, p. 350.

of the dissent is that it is "unable to see why the case where a Grand Jury investigation has aborted, and the Government thereafter uses the transcript solely in aid of its civil case, should be treated differently" from the situation where the Grand Jury proceedings were from the beginning instituted solely in aid of a civil suit. This abortion, alluded to by the dissent, apparently connotes a proper conception—of a Grand Jury proceeding in the first place, i. e., for the purpose of an indictment, either alone or conjoined with civil proceedings—with the outcome of such proceedings thereafter unexpectedly showing that no such criminal proceedings will lie, i.e., an abortion. The refusal of the Court to hold that such a situation would not prevent the use of the Grand Jury transcript for civil purposes, in nowise indicates that the Court would permit the use, for civil purposes only, of evidence taken before the Grand Jury, after the Government had finally decided not to use the Grand Jury process for any criminally investigative purpose at all, but for civil purposes only. These situations are widely different. In the first, the Grand Jury procedure—a criminal procedure—is, in addition to a possible civil purpose, in fact used for an actual, intended, criminal purpose, and, as *Procter & Gamble* holds, is therefore lawful, and there has been no subversion. In the second, the testimony before the Grand Jury, after the finding of an indictment has been abandoned, is the use of criminal procedure for a solely civil purpose. Such taking of the evidence is therefore improper, and there has been a subversion of the Grand Jury process to that extent. Thus, in order to prevent the Government from obtaining an unfair advantage of the defendants by its unlawful act of discovery, and yet at the same time not to render impossible the effectuation of the policy of the antitrust acts, the evidence thus improperly obtained must be discovered also to the defendants.

[*Presumption of Regularity*]

As for the Government's objection that a presumption of regularity in the conduct of governmental affairs should be deemed to exist, it should be noted, first, that previous to the decision in *Procter & Gamble*, the Department of Justice had regularly considered it the proper thing to do, when the occasion arose, to use the Grand Jury to make even a solely civil case under the antitrust laws.[2] Thus the question here is not whether the Government did the regular thing in fact, but whether this regular thing which it did was in fact lawful, in the light of the rule for the first time laid down by our highest court in *Procter & Gamble*. Not only so, but this presumption of regularity, being a mere presumption, is effective, like other presumptions of fact, only in the absence of evidence to the contrary. Here what defendants seek is to ascertain if there is evidence to the contrary. They cannot be deprived of this right by that presumption. Finally, there is cause for the defendants' seeking to ascertain this fact from the only source which knows that fact—the Department of Justice. We must here bear in mind, first, that initially both criminal and civil investigation and prosecution as to the present defendants were authorized,[3] but that ultimately no indictment was ever presented to the Grand Jury by the Government, as previously noted. In the second place, we must bear in mind that, within less than three weeks after the Grand Jury was discharged, the carefully drawn and voluminous civil complaint herein was filed. True, that does not necessarily prove that the decision to abandon an indictment was not made until after the Grand Jury was discharged, but the contrary may also have been the fact, and it is this "finding" of fact which our highest court has determined to be crucial, in order to do justice between the parties.

[*"Privilege"*]

The Government also contends that the information sought by the defendants here is privileged and not the subject of discovery. However, when the Court at the argument called the Government's attention to the fact that it had not made a "formal claim of privilege [which] must be lodged by the Attorney General after actual personal consideration by that officer." *U. S. v. Reynolds*, 345 U. S. 1, 8 (1952), the Government indicated it had not decided whether or not to lodge any such formal claim of privilege. Without going into details, it may therefore be helpful to note that, where the Executive Department of the Government has voluntarily sought the

[2] See note 1, *supra*.

[3] See note 4, *infra*.

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aid of the Judicial Department of the Government to enforce the law of the land, as here, and the United States Supreme Court has declared that the law of the land requires a certain "finding", in order to do justice between the parties in that judicial proceeding, it would not seem that the Executive Department could rely on a mere "housekeeping" privilege of its own, to refuse to abide by the law of the land and give evidence as to such "finding." Nor is this "finding" one as to the Department's "mental processes" in reaching a decision involving judgment or discretion. The finding is actually as to the decision reached, not as to the reasons for such decision. It also is as to a decision, not as it affects the internal workings of the Department, but as it results in the prosecution of third parties in the courts, as determined by that very decision, and by the very official who presumably made that decision. In addition, it would seem inconceivable that the national security and the safety of the nation generally was involved, as alluded to in *Reynolds,* so as to prevent the Department of Justice from stating what this determination was, and when it was made, as to proceeding criminally, civilly, or both, as to those defendants, as already held necessary by our highest court in this very case, in order to do justice to all concerned.

Nor would any authoritative decision by the Department of Justice to proceed thereafter solely civilly in this antitrust case constitute the "work product" of the Department, generally privileged from discovery, under *Hickman v. Taylor,* 329 U. S. 495 (1947). In the first place, a determination to indict or not to indict is far different from the reasons bearing on a determination as to what evidence to use or not to use on the trial of a certain indictment, the latter being a common example of work product. In the next place, any such determination not to indict is the specific "finding," which the United States Supreme Court has declared in this very case to be necessary to do justice between the parties. This holding by our highest court would thus constitute the good cause to discover this determination of the Department of Justice, even if indeed it were a "work product," as *Hickman* specifically holds.

[*Principles*]

Our highest court has thus made clear the principles that (a) as long as the Government has a criminal investigation in mind, whether this be its sole purpose or a purpose conjoined with one to seek a civil remedy, the Government's use of this criminal procedure remedy by Grand Jury proceedings is valid. But (b), on the contrary, if the Government has no such criminal proceedings in mind, but intends to seek a civil remedy solely, then any use of the Grand Jury remedy thereafter constitutes, as to such later action, a "flouting of the policy of the law" and a subversion of criminal procedure, regardless of when this solely civil purpose authoritatively arises.

[*Facts*]

In the light of these principles, we turn to the facts in this cause. On April 9, 1951, the then Attorney General wrote Mr. Walker Smith, Antitrust Division, Department of Justice:[4]

> "You are hereby specially retained and appointed under the authority of the Department of Justice in connection with the investigation and prosecution of alleged violations of the Federal antitrust laws . . . and other Federal criminal statutes, by certain persons, firms, corporations, associations . . . engaged in the production . . . and sale of soap and other detergents . . . In this connection you are hereby expressly directed to conduct . . . any and all kinds of legal proceedings, civil and criminal, or both, including Grand Jury proceedings . . . which district attorneys are authorized by law to conduct."

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[4] The full letter reads as follows:

"April 9, 1951

Mr. Walker Smith,
Antitrust Division
Department of Justice

Dear Mr. Smith:

As an attorney and counselor at law you are hereby specially retained and appointed under the authority of the Department of Justice in connection with the investigation and prosecution of alleged violations of the federal antitrust laws, Sherman Act (c. 647, 26 Stat. 209, U. S. C., Title 15, Sections 1-7, 15) as amended by the Act of August 17, 1937 (c. 690, 50 Stat. 693, U. S. C., Title 15, Section I), Clayton Act (38 Stat. 730, U. S. C., Title 15, Sections 12-27) as amended, and other federal criminal statutes, by certain persons, firms, corporations, associations and their members, and others.

It will be noted, first, that this subordinate official of the Antitrust Division of the Department of Justice is appointed in connection not only with the "investigation" but with the "prosecution" of the present case. It will be noted also that he is not merely authorized to conduct this investigation and prosecution, but is "directed" to conduct both such investigation and prosecution. In other words, he is directed to make investigation along all lines, using the general proceedings "which district attorneys are authorized by law to conduct," including specifically Grand Jury proceedings. Only after he has carried out this direction to him to use investigatory procedures, both criminal and civil, can Mr. Smith have possibly carried out these directions to him to make such investigation. Only after he has completed such investigation, can he possibly be in a position to have a determination made by someone in the Department of Justice as to how the "prosecution of alleged violations of the Federal antitrust laws" shall occur, whether by the criminal proceedings set forth in such statutes, by the civil remedies set forth therein, or by both. Furthermore, the affidavit of Walker Smith as to exactly what the situation was so far as he is concerned, executed March 21, 1953, states "that he was authorized and instructed by his superiors in the Department of Justice to carry on a complete investigation [as above] . . . so that a determination could be made as to whether there were violations of . . . the Federal antitrust laws and as to what action should be taken in performance of the duties of the Attorney General and of the Department of Justice to enforce those laws through criminal or civil proceedings, or both; that the investigation and all proceedings incident thereto, including the Grand Jury proceedings in the District of New Jersey . . . were carried on pursuant to and within those instructions . . . ."

Further details as to the procedure in the Department of Justice in such situations is set forth by the defendants as coming from the Assistant Attorney General in charge of the Antitrust Division in 1955. This was agreed to by the Government as setting forth generally the situation in this very case in fact as follows:

> "In the first instance a recommendation is made by the attorney in charge of the particular investigation. If he is in the field, his recommendation is then reviewed by his field office chief. It is then reviewed by the appropriate litigation section chief in Washington. The section chief's decision is reviewed by the first or second assistant to the Assistant Attorney General and by the Assistant Attorney General. Review at the various levels is effected not only by oral conferences, but also by written memoranda of facts detailing the evidence against each proposed defendant."[5]

Therefrom it appears that the attorney in charge of the particular investigation, here Mr. Walker Smith, does not have the power to determine what action the Government shall take, whether civil or criminal, or both, as the result of his investigation into a possible violation of the antitrust laws. All this attorney in charge can do is first to investigate, and thereafter to recommend to his field office chief what course this prosecution should take. This review of his field office chief is then in turn reviewed by the litigation section chief in Washington, D. C. The latter's review in turn is reviewed by the first or second assistant to the Assistant Attorney General, and thereupon by the Assistant Attorney General. Whether it is the Assistant Attorney General, or the Attorney General himself, who determines whether the prosecution is or is not finally to be criminal, would seem unimportant. Whichever it is, the finding should be sought first from him.

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engaged or having been engaged in the production, processing, distribution, purchase, and/or sale of soap, other detergents or materials used in their manufacture, or in related activities.

In this connection you are hereby expressly directed to conduct in the United States District Court for the District of New Jersey, and in any other judicial district where the jurisdiction thereof lies, any and all kinds of legal proceedings, civil and criminal, or both, including grand jury proceedings, proceedings before committing magistrates, proceedings by information, and removal proceedings, which district attorneys are authorized by law to conduct.

You are to serve without compensation other than that you are now receiving as an attorney in the Department.

Please execute the required oath of office and return one copy thereof to the Department of Justice.

Respectfully,
J. H. McGrath
Attorney General

By the Attorney General:
/s/ Peyton Ford
Deputy Attorney General."

[5] Report, *Attorney General's National Committee to Study Antitrust Laws*, p. 350 (1955).

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It is the lack of proof in this cause as to what such authoritative determination by the Government was, and when it was made, that made our highest court in *Procter & Gamble* say that "there is no finding that the Grand Jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach." But that Court has also held that "the use of criminal procedures to elicit evidence in a civil case . . . would be flouting the policy of the law," and a subversion of criminal procedure, and that this would call for "wholesale discovery" by clear inference of all of the Grand Jury proceedings which were taken after the Government had determined not to proceed criminally. Thus it now becomes necessary, in order to do justice, to determine when the Government did finally determine to proceed against the present defendants solely by the present civil complaint, as it obviously did at some time.

[*Point of Inquiry*]

It follows that since no subordinate, such as the attorney in charge of the particular investigation, here Walker Smith, could normally do more than make a mere recommendation in that regard to his superiors, the point of inquiry as to when this determination was made should be first directed to the authority who could make such a controlling determination here, presumably the Assistant or Deputy Attorney General, or the Attorney General himself. But this fact, crucial to the rights of the parties, as stated by our highest court, must be ascertained in order to do justice.

[*Discovery to be Granted*]

In order to ascertain the above "finding that the Grand Jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach," or that it was not, the defendants have filed voluminous interrogatories directed to the officials of the Department of Justice, from top to bottom. Since the crucial determination, as to when the Department determined to proceed civilly only, was presumably made only at the highest levels, clearly all such interrogatories at the lower levels are presently unnecessary, harassing and improper. It is only if discovery at these highest levels is fruitless, that discovery at lower levels may become appropriate. In order to lessen the difficulties of the parties and to expedite the result, the Court will confer with counsel for all concerned as to the most appropriate procedure, in order to ascertain the above "finding," deemed crucial by the United States Supreme Court in this very case.

[¶ 69,386] Safeway Stores, Incorporated v. Oklahoma Retail Grocers Association, Inc., and Louie J. Speed, Inc.

In the Supreme Court of the United States. October Term, 1958. No. 252. Dated June 22, 1959.

On Appeal from the Supreme Court of Oklahoma.

Oklahoma Unfair Sales Act

Sales Below Cost—Oklahoma Unfair Sales Act—Constitutionality—Meeting Competition Defense—Good Faith—Legality of Competitor's Prices.—An injunction prohibiting a retail grocery chain from selling any items of merchandise at prices which are less than cost to the retailer in violation of the Oklahoma Unfair Sales Act, except to meet in good faith the prices of competitors who are selling the same articles or products of comparable quality at cost to them, did not deprive the chain of a right to compete in violation of the Fourteenth Amendment to the United States Constitution. The chain contended that the injunction prohibited the meeting of prices of competitors who are selling below cost. The state court had found that the chain could not avail itself of the statutory defense of meeting competition since its reductions were not in good faith but were made to meet prices which the chain "either knew or had reason to know were illegal." The injunction, phrased substantially in the terms of the Oklahoma Unfair Sales Act, allows the chain to meet the prices of competitors who are selling "at cost to them" if the other requisites of the good faith defense are met. There is no constitutional right

to employ retaliation against action outlawed by a state. The chain had no constitutional right to embark on the very kind of destructive price war the Act was designed to prevent. It had ample means, under the state law, to enjoin the illegal methods of its competitors.

See Sales Below Cost, Vol. 2, ¶ 7111.38, 7151, 7161, 7241, 7263.

Sales Below Cost—Oklahoma Unfair Sales Act—Constitutionality—Issuance of Trading Stamps—Legality—Price Reductions To Meet Trading Stamp Competition.—The Oklahoma Unfair Sales Act, which was construed by the Oklahoma Supreme Court as not prohibiting the giving of trading stamps with items sold at or near statutory cost and as forbidding the reduction of prices to meet trading stamp competition, does not violate the Fourteenth Amendment to the United States Constitution. It had been contended that even though the state may prohibit sales below cost, it is barred from allowing a merchant to give trading stamps with goods sold at or near the statutory cost, unless it allows competing merchants to make an equivalent price reduction. The Oklahoma court decided that, although price cuts below cost were prohibited by the statute, the use of trading stamps was not a price reduction but constituted a cash discount, that is, a reduction given to customers for prompt payment of cash. The United States Supreme Court, ruling that it might content itself in resting on a clash of expert opinion to show that the state court decision was not wanting in a foundation that may not unjustifiably have commended itself as a state policy, noted that there are readily apparent differences between the practices which support the state's differentiation and thereby the power asserted by the state. There was a reasonable basis for a conclusion that selective price cuts tend to perpetuate the abuse of "loss-leader" selling whereas the use of trading stamps does not. Also, there was a basis for the view that the use of trading stamps has an entirely different impact on the consuming market than do price cuts. The United States Supreme Court ruled that it will not interpose its own economic views when the state has made its choice; it is enough that it is open to Oklahoma to believe the distinctions to be valid as the basis of a policy for its people.

See Sales Below Cost, Vol. 2, ¶ 7111.38, 7161, 7201.

For the appellant: V. P. Crowe, Oklahoma City, Okla., Robert L. Clark, Ramsey Clark, and William L. Keller, Dallas, Tex.

For the appellees: George Miskovsky, W. J. Holloway, Sr., M. A. Ned Looney, and Clyde J. Watts, Oklahoma City, Okla., Samuel M. Lane and Robert P. Beshar, New York, N. Y.

Affirming a decision of the Oklahoma Supreme Court, 1957 Trade Cases ¶ 68,888.

[*Oklahoma Sales Below Cost Law*]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court [*In full text*]:

This is a suit for an injunction, brought in a state court in Oklahoma by appellee, Oklahoma Retail Grocers Association, against appellant, Safeway Stores, for selling several specified items of retail grocery merchandise below "cost" in violation of the Oklahoma Unfair Sales Act. Okla. Stat. tit. 15, §§ 598.1-598.11 (1951). Section 598.3 of the Act provides:

> "It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this Act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this Act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."

The elements of "cost" are enumerated in other sections of the statute. Safeway defended on the ground, *inter alia*, that its reductions were permitted by § 598.7 of the Unfair Sales Act which allows "any retailer or wholesaler" to

> ". . . advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer."

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Safeway by cross-petition sought to enjoin several named members of appellee Association, including Speed, alleging that they were selling below cost in violation of the Act. The trial court, with some qualification, granted the injunction against Safeway and denied relief against appellees. On appeal, the Supreme Court of Oklahoma affirmed. [1957 TRADE CASES ¶ 68,888] 322 P. 2d 179, and since the constitutionality of the state statute was challenged under the Fourteenth Amendment, we noted probable jurisdiction, 358 U. S. 807, and brought the case here under 28 U. S. C. § 1257(2).

[*Meeting Competition*]

Safeway makes two main claims.

1. Safeway justified cutting prices below cost in some cities by claiming it was to meet the prices of some of its competitors who were also selling below cost. The statute allows a reduction below cost only when it is a good faith meeting of the competition of a seller who is selling at his own cost. The trial court found that Safeway's reductions violated the Act, and that Safeway could not avail itself of the statutory defense of meeting competition since its reductions were not in good faith but were made to meet prices Safeway "either knew or had reason to know were illegal . . ." The court enjoined Safeway from

> ". . . selling, at retail, any items of merchandise . . . at prices which are less than cost to the retailer as defined in the Oklahoma 'Unfair Sales Act' and in violation of the provisions of said 'Unfair Sales Act', except to meet in good faith the prices of competitors who are selling the same articles or products of comparable quality at cost to them as retailers as defined in the Oklahoma 'Unfair Sales Act', and except in instances of other exempted sales as provided in Section 598.6 of said Oklahoma 'Unfair Sales Act.'"

The injunction, phrased substantially in the terms of the statute, allows Safeway to meet the prices of competitors who are selling "at cost to them" if the other requisites of the good faith defense are met. Appellant claims that this injunction deprives them of a constitutional right to compete since it forbids meeting the prices of competitors who are selling below cost. There is no constitutional right to employ retaliation against action outlawed by a State. Safeway, the Oklahoma court held, had ample means, under the state statute, to enjoin the illegal methods of its competitors. It had no constitutional right to embark on the very kind of destructive price war the Act was designed to prevent.

Appellant also claims that there are situations in which a competitor might reduce his prices below cost without violating the Act, and hence, under the injunction, Safeway would have no remedy whatsoever since it could not retaliate in kind and judicial relief would not be available. The conclusive answer to this claim is that it is not before us for adjudication. The court below found that Safeway was meeting prices it "knew or had reason to know" were illegal. It then phrased its injunction in the terms of a statute which has yet to be construed in the abstract circumstances presented by appellant. The Oklahoma Supreme Court carefully noted that it was interpreting the Unfair Sales Act as applied to the particular facts of this case, pointing out that "until a proper factual case is presented which requires a clear determination and offers a practical situation in which all the conflicting problems and considerations of the area involved are apparent, this court will refrain from theorizing." 322 P. 2d, at 181. If this is a rule of wise restraint for the courts of Oklahoma in this situation, it clearly bars constitutional adjudication here.[1]

[*Trading Stamps*]

2. Appellant's second contention involves its competitors' use of trading stamps. Trading stamps, it hardly needs to be stated, are, generally speaking, coupons given by dealers to retail purchasers on the basis of the dollar value of the items purchased, *e.g.*,

[1] The Oklahoma Supreme Court said:
"In this connection our attention has been called to the recent case (10-4-57) of *State by Clark v. Wolkoff*, Minn., 85 N. W. 2d 401, 403, wherein it was held that '(I)f a merchant in good faith sets the price of an article on the basis of a competitor's price, which price he in good faith believes to be a *legal price*, there is no violation,' which clearly is not the case herein. In the instant case, Safeway obviously and admittedly did not, in good faith, set the price of its articles which were subject to the Unfair Sales Act on the basis of its competitors' prices, which it in good faith believed to be legal prices under the Unfair Sales Act, but on the contrary it set illegal prices for the sole purpose of meeting prices of its competitors which it thought to be illegal." 322 P. 2d, at 181.

one stamp for each ten cents' worth of goods, and are collected by the purchaser until he has enough to redeem for various items of merchandise. Trading stamps have had a checkered career in the United States, but since World War II their popularity has grown until now it is a reasonable estimate that these multi-colored scraps of paper may be found in almost half of America's homes.[2]

When this suit was brought Safeway did not use trading stamps. In the Oklahoma City-Midwest City area several of its competitors did. These stamps were deemed to be worth approximately 2.5 percent of the price of the goods with which they were given. Safeway contended in the Oklahoma courts that giving a trading stamp with goods sold at or near the statutory minimum resulted in an unlawful reduction below "cost" to the extent of the value of the trading stamp. To be specific, if an item sold for $1, and that price was statutory cost, the trading stamps given with it would be worth approximately 2.5 cents and the net price was therefore $.975, or 2.5 cents below cost. Safeway sought to restrain its competitors from selling below cost in this manner and also claimed that it was justified, in order to meet competition, in reducing its prices to the net of its competitors' prices, taking into account the value of trading stamps. The Oklahoma court found that the giving of trading stamps with items sold at or near statutory cost was not a violation of the statute and denied Safeway's request for an injunction. The court also decided that Safeway could not reduce its prices to meet the trading stamp competition. It did, however, provide that Safeway could do what appellees did, it might issue "trading stamps, cash register receipts, or other evidence of credit issued as a discount for prompt payment of cash . . . ," as long as the value of the discount did not exceed three percent.[3]

[*Constitutional Objection*]

Safeway contends that such a construction of the Unfair Sales Act violates the Fourteenth Amendment. Appellant claims that even though the State may prohibit sales below "cost," it is barred from allowing a merchant to give trading stamps with goods sold at or near "cost," unless it allows competing merchants to make an equivalent price reduction. For the State to differentiate between the use of trading stamps and price-cutting is, so the argument runs, a constitutionally inadmissible discrimination.[4]

> "It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of the equal protection of the laws has been applied. The generalities on this subject are not in dispute; their application turns peculiarly on the particular circumstances of a case." *Goesaert v. Cleary,* 335 U. S. 464, 467.

The Oklahoma court decided that, although price cuts below cost were prohibited by the statute, the use of trading stamps was not a price reduction but constituted a cash discount, *i.e.,* a reduction given to customers for prompt payment of cash. Opposing expert accountants sustained and rejected the validity of such a difference. In matters of this sort we might content ourselves in resting on the clash of expert opinion to show that the Oklahoma decision was not wanting in a foundation that may not unjustifiably have commended itself as a state policy. However, we may note some readily apparent differences between the practices which support the State's differentiation and thereby the power asserted by the State.

[*Differences Between Practices*]

Trading stamps are given to cash customers "across the board," namely, the number of stamps varies directly with the total cost of goods purchased. Safeway's price-cutting, however, was selective. This difference is

[2] The latest chapter in trading stamp history was recounted in The [London] Economist for May 30, 1959, at p. 850:
"In Colorado a proposal to tax the stamps brought battalions of housewives to the state capital. One of its original sponsors changed his mind when his own mother threatened to campaign against his re-election if he did not alter his stand. The newest twist to the trading stamp story is that they can now be exchanged, in the East, for a theatre seat, even, after July 12th, for one for 'My Fair Lady.' This will take, however, the stamps accumulated on nearly $700 worth of purchases—about what it costs to feed a family for five months."

[3] Safeway, in fact, did offer its own cash discount coupons during the course of this litigation.

[4] This Court, in other contexts has upheld against a challenge based on the Fourteenth Amendment, state tax laws which discriminated against the use of trading stamps. *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342; *Tanner v. Little,* 240 U. S. 369; *Pitney v. Washington,* 240 U. S. 387.

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vital in the context of this Act. One of the chief aims of state laws prohibiting sales below cost was to put an end to "loss-leader" selling. The selling of selected goods at a loss in order to lure customers into the store is deemed not only a destructive means of competition, but it also plays on the gullibility of customers by leading them to expect what generally was not true, namely, that a store which offered such an amazing bargain was full of other such bargains.[5] Clearly there is a reasonable basis for a conclusion that selective price cuts tend to perpetuate this abuse whereas the use of trading stamps does not.

[*Impact on Market*]

This difference alone would be enough to require affirmance. It is reinforced by other tenable grounds for distinction. There was a basis in evidence for the view that the use of trading stamps has an entirely different impact on the consuming market than do price cuts. When prices are the same customers tend to go to the store offering trading stamps. But when prices are cut to the extent of the value of the trading stamp the stamps lose their lure and lower prices prove a more potent attraction. On the basis of this not unreasonable belief as to the economics of the highly competitive, low-profit-margin retail-grocery business, Oklahoma could well have concluded that its choice was to provide that all use a cash discount system or none could do so.[6] Such a view of the economic aspects of the problem affords an ample basis for the legislative judgment enforced by the court below.

[*Economic Views*]

Certainly this Court will not interpose its own economic views or guesses when the State has made its choice.

> "The Fourteenth Amendment enjoins the 'equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 147.

We are not concerned with the soundness of the distinctions drawn. It is enough that it is open to Oklahoma to believe them to be valid as the basis of a policy for its people.[7]

Affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

[¶ 69,387] Pittsburgh Plate Glass Company v. United States. Galax Mirror Company, Inc., et al. v. United States.

In the Supreme Court of the United States. October Term, 1958. Nos. 489 and 491, respectively. Dated June 22, 1959.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Case No. 1327 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Trial—Right of Defendant to Inspect Grand Jury Testimony of Government Witness—Necessity of Showing "Particularized Need".—Defendants in a criminal action charging a price fixing conspiracy did not have the right to inspect the grand jury testimony of a Government witness upon a showing on cross-examination of that witness at trial that he testified before the grand jury. Under case law and Rule 6(e) of the Federal Rules of Criminal

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[5] See the article by Mr. Brandeis, as he then was, in the November 15, 1913, issue of Harper's Weekly, at p. 10.

[6] This would come about if the dealer using trading stamps were allowed to meet the lowered price, or if, by dropping trading stamps, the other dealer was forced to raise prices. It is conceivable that a mathematical formula might be developed to equalize the use of trading stamps and price cuts. But certainly the Constitution does not place such a complex and, at best, uncertain and speculative, burden on the States.

[7] Appellant also claims that the Oklahoma law is pre-empted by federal antitrust laws. However, this claim was not made below.

Procedure, the inspection or not of grand jury testimony is committed to the discretion of the trial judge. Under the circumstances of the instant case, the trial court did not err in refusing to make such grand jury testimony available to the defendants for use in cross-examination. The contention that the defense has a "right" to the delivery of a witness' grand jury testimony upon such a showing runs counter to the long established policy of secrecy of grand jury proceedings. The burden is on the defense to show that "a particularized need" exists for the testimony which outweighs the policy of secrecy. There was no such showing in the instant case. The defendants contended only that they had a "right" to the testimony because it dealt with subject matter generally covered at the trial. The defendants did not invoke the discretion of the trial court, but asserted a supposed absolute right, a right which they did not have. The decision in *Jencks v. United States,* 353 U. S. 657, was not applicable to the instant case. It had nothing to do with grand jury proceedings, and its language was not intended to encompass grand jury minutes. Likewise, it is clear that Congress intended to exclude such minutes from the operation of the Jencks Act (18 U. S. Code, Sec. 3500).

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360, 2005.395; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029, 8029.140, 8029.600, 8029.625.

For the petitioners: Leland Hazard, Pittsburgh, Pa.; Cyrus V. Anderson, Pittsburgh, Pa.; and James B. Henry, Jr., New York, N. Y., for petitioner in No. 489. H. Graham Morison, Samuel K. Abrams, and Robert M. Lichtman, Washington, D. C., for petitioners in No. 491.

For the United States: J. Lee Rankin, Solicitor General; Daniel M. Friedman, Assistant to the Solicitor General; and Richard A. Solomon, Samuel Karp, and Ernest L. Folk, III, Attorneys, Department of Justice, Washington, D. C.

Affirming a decision of the U. S. Court of Appeals, Fourth Circuit, 1958 Trade Cases ¶ 69,157.

[*Grand Jury Minutes—Inspection*]

Mr. Justice Clark delivered the opinion of the Court [*In full text*]:

Petitioners stand convicted on a single-count indictment charging a conspiracy under § 1 of the Sherman Act. They contend that the trial judge erred in refusing to permit them to inspect the grand jury minutes covering the testimony before that body of a key government witness at the trial. The Court of Appeals affirmed the convictions, [1958 Trade Cases ¶ 69,157] 260 F. 2d 397. With reference to the present claim, it held that Rule 6(e) of the Federal Rules of Criminal Procedure [1] committed the inspection or not of grand jury minutes to the sound discretion of the trial judge, and that in this instance, no abuse of that discretion had been shown. We granted certiorari limited to the question posed by this ruling. 358 U. S. 917, 918. We conclude that in the circumstances of this case the trial court did not err in refusing to make Jonas' grand jury testimony available to petitioners for use in cross-examination.

[*Evidence of Price Fixing*]

The indictment returned in the case named as defendants seven corporations, all manufacturers of mirrors, and three of their officers. However, only three of the corporations are petitioners here, along with one individual, J. A. Messer, Sr. The indictment charged a conspiracy to fix the price of plain plate glass mirrors sold in interstate commerce. It is not necessary for our purposes to detail the facts of this long trial, the record of

[1] "Rule 6. The Grand Jury.

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

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which covers 860 pages. It is sufficient to say that the Government proved its case through 10 witnesses, the last of whom was A. G. Jonas. He was President of a large North Carolina mirror manufacturing company and had a reputation for independence in the industry. Although neither he nor his corporation was indicted, the latter was made a co-conspirator. The evidence indicates that the conspiracy was consummated at two meetings held on successive days during the week of the annual meeting of The Mirror Manufacturers Association in 1954 at Asheville, North Carolina. Jonas, not being a member of the Association, did not attend the convention. Talk at the convention regarding prices culminated in telephone calls by several representatives of mirror manufacturers to Jonas concerning his attitude on raising prices. On the day following these calls Jonas and three of the participants in the conspiracy met at an inn away from the convention headquarters and discussed "prices." Within three days thereafter each of the manufacturers announced an identical price increase, which was approximately 10 percent. Jonas' testimony, of course, was confined to the telephone calls and the meeting at the inn where the understanding was finalized. The Government admits that he was an "important" witness. However, proof of the conspiracy was overwhelming aside from Jonas' testimony. While he was the only witness who characterized the outcome of the meetings as an "agreement" on prices, no witness negatived this conclusion and the identical price lists that followed the meeting at the inn were little less than proof positive.

[*Demand for Minutes Denied*]

After the conclusion of Jonas' testimony, defense counsel interrogated him as to the number of times he appeared and the subject of his testimony before the grand jury. Upon ascertaining that Jonas had testified three times on "the same general subject matter" counsel moved for the delivery of the grand jury minutes. He stated that the petitioners had "a right . . . to inspect the Grand Jury record of the testimony of this witness after he has completed his direct examination" relating to "the same general subject matter" as his trial testimony.[2] As authority for "the automatic delivery of Grand Jury transcripts" under such circumstances counsel cited *Jencks v. United States,* 353 U. S. 657 (1957). As previously indicated, the motion was denied.

[*Jencks Decision*]

It appears to us clear that *Jencks v. United States, supra,* is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. Likewise, it is equally clear that Congress intended to exclude those minutes from the operation of the so-called Jencks Act, 71 Stat. 595, 18 U. S. C. (Supp. V, 1958) § 3500.[3]

[*General Rule*]

Petitioners concede, as they must, that any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6(e) promulgated by this Court in 1946 after the approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge.[4] Our cases announce the same principle,[5] and Rule 6(e) is but declaratory of it.[6] As recently as last Term we characterized cases where grand jury minutes are used "to impeach a witness, to refresh his recollection, to test his credibility and the like" as instances of "particularized need where the secrecy of the proceedings is lifted discreetly and limitedly." *United States v. Procter & Gamble* [1958 TRADE CASES ¶ 69,046], 356 U. S. 677, 683 (1958).

[*Contention*]

Petitioners argue, however, that the trial judge's discretion under Rule 6(e) must be exercised in accordance with the rationale of *Jencks;* namely, upon a showing on cross-examination that a trial witness testified be-

[2] The fact that the trial testimony and that before the grand jury included the same "subjects" or related to "the same general subject matter" is not contested.

[3] See S. Rep. No. 981, 85th Cong., 1st Sess.; 103 Cong. Rec. 15933.

[4] *E. g., United States v. Spangelet,* 258 F. 2d 338; *United States v. Angelet,* 255 F. 2d 383; *United States v. Rose,* 215 F. 2d 617, 629; *Schmidt v. United States,* 115 F. 2d 394; *United States v. American Medical Assn.,* 26 F. Supp. 429.

[5] *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150 (1940). And see *United States v. Procter & Gamble Co.* [1958 TRADE CASES ¶ 69,046], 356 U. S. 677 (1958); *United States v. Johnson,* 319 U. S. 503, 513 (1943).

[6] See Notes of the Advisory Committee on Rules, following Rule 6, Fed. Rules Crim. Proc.

fore the grand jury—and nothing more—the defense has a "right" to the delivery to it of the witness' grand jury testimony.

[*Policy of Secrecy*]

This conclusion, however, runs counter to "a long-established policy" of secrecy, *United States v. Procter & Gamble, supra,* at 681, older than our Nation itself. The reasons therefor are manifold, *id.,* at 682, and are compelling when viewed in the light of the history and *modus operandi* of the grand jury. Its establishment in the Constitution "as the sole method for preferring charges in serious criminal cases" indeed "shows the high place it [holds] as an instrument of justice." *Costello v. United States,* 350 U. S. 359, 362 (1956). Ever since this action by the Fathers, the American grand jury, like that of England, "has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." *Ibid.* Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. *Id.,* at pp. 362, 363. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness. And this "go slow" sign would continue as realistically at the time of trial as theretofore.

It does not follow, however, that grand jury minutes should never be made available to the defense. This Court has long held that there are occasions, see *United States v. Procter & Gamble, supra,* at 683, when the trial judge may in the exercise of his discretion order the minutes of a grand jury witness produced for use on his cross-examination at trial. Certainly "disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co., supra,* at 234.

[*"Particularized Need" Not Shown*]

The burden, however, is on the defense to show that "a particularized need" exists for the minutes which outweighs the policy of secrecy. We have no such showing here. As we read the record the petitioners failed to show any need whatever for the testimony of the witness Jonas. They contended only that they had a "right" to the transcript because it dealt with subject matter generally covered at the trial. Petitioners indicate that the trial judge required a showing of contradiction between Jonas' trial and grand jury testimony. Such a preliminary showing would not, of course, be necessary. While in a colloquy with counsel the judge did refer to such a requirement, we read his denial as being based on the breadth of petitioners' claim. Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider that problem because petitioners made no such request of the trial judge. The Court of Appeals apparently was of the view that even if the trial judge had been requested to examine the transcript he would not have been absolutely required to do so. It is contended here that the Court of Appeals for the Second Circuit has reached a contrary conclusion. *United States v. Spangelet,* 258 F. 2d 338. Be that as it may, resolution of that question must await a case where the issue is presented by the record. The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have. The judgment is therefore *Affirmed.*

[Dissenting Opinion]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting [*In full text*]:

[*Issue*]

In the words of the Court of Appeals, Jonas was the Government's "principal prosecuting witness."[1] He was President of Lenoir

[1] Jonas was the only witness to testify that the defendants had actually agreed to a uniform price increase. Furthermore, his testimony was necessary to refute other testimony that the President of petitioner Galax Mirror Co., Inc., had stated that he would follow his pricing policy regardless of what the other manufacturers did. Jonas' testimony was also instrumental in connecting petitioner Pittsburgh Plate Glass Co. to the price-fixing agreement.

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Mirror Company, which company was a participant in the alleged price-fixing conspiracy, but was not indicted. After Jonas testified on direct examination defense counsel asked for the production of his relevant grand jury testimony. The trial judge immediately made clear his intention not to grant the motion: "Unless you can show some sound basis that contradicts between what happened in the Grand Jury room and his testimony before the Grant Jury and his testimony in this trial, I am not going to require the production of the Grand Jury records. It would be easy for any attorney to get access to the records of the Grand Jury by just such a motion as you are making here." Defense counsel protested, "we are not attempting that. We want just a transcript of his testimony before the Grand Jury *regarding the subjects to which he has testified on direct examination.*" (Emphasis supplied.) This request thus encompassed all of Jonas' grand jury testimony only if all of that testimony covered the subject matter of Jonas' trial testimony. The court replied, "You have stated what you want to ask him and I am denying your right to do it." Plainly defense counsel were not asking to see the minutes of the entire grand jury proceedings, nor even of all of Jonas' testimony before the grand jury unless all of it was on the same subject matter as his trial testimony. Their motion was carefully limited to a request for so much of Jonas' grand jury testimony as "covered the substance of his testimony on direct examination." This request that secrecy be "lifted discretely and limitedly," *United States v. Procter & Gamble* [1958 Trade Cases ¶ 69,046], 356 U. S. 677, 683, necessarily implied a request that the trial judge inspect the grand jury minutes and turn over to the defense only those parts dealing with Jonas' testimony on the same subject matter as his trial testimony. In this posture, then, the question for our decision is the narrow one whether the trial judge erred in denying the defense request for inspection of the grand jury testimony of a key government witness which covered the subject matter of that witness' trial testimony.[2] I dissent from the Court's affirmance of the trial judge's ruling denying this carefully circumscribed request.

[*Grand Jury Secrecy*]

Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice. See *McNabb v. United States,* 318 U. S. 332. It is true that secrecy is not to be lifted without a showing of good reason, but it is too late in the day to say, as the Court as a practical matter does here, that the Government may insist upon grand jury secrecy even when the possible prejudice to the accused in a criminal case is crystal clear and none of the reasons justifying secrecy is present. "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.* [1940-1943 Trade Cases ¶ 56,031], 310 U. S. 150, 234. Thus grand jury minutes have been made available to a defendant accused of committing perjury before the grand jury so that he could adequately prepare his defense, *United States v. Remington,* 191 F. 2d 246; *United States v. Rose,* 215 F. 2d 617, and to a defendant who can show an inconsistency between the trial testimony and grand jury testimony of a government witness, *United States v. Alper,* 156 F. 2d 222; *Burton v. United States,* 175 F. 2d 960; *Herzog v. United States,* 226 F. 2d 561; *United States v. H. J. K. Theatre Corp.,* 236 F. 2d 502. On occasion the Government itself has recognized the fairness of permitting the defense access to the grand jury testimony of government witnesses even though it considered that it was not bound to do so, *United States v. Grunewald,* 162 F. Supp. 621. This Court has implied that grand jury minutes would be discoverable by a defendant in a civil antitrust suit instituted by the Government on a showing of "particularized need," *United States v. Procter & Gamble* [1958 Trade Cases ¶ 69,046], 356 U. S. 677, 683.[3] Nor can we overlook that the Government uses grand jury minutes to further its own interests in litigation. It is apparently standard practice for government attorneys to use grand jury minutes in

[2] As the Court points out, discovery of grand jury minutes is not affected by the *Jencks* statute, 18 U. S. C. (Supp. V) § 3500.

[3] *United States v. Procter & Gamble,* upon which the Court relies, actually is authority for permitting discovery in this case. The Court

preparing a case for trial, see *United States v. Procter & Gamble* [1958 TRADE CASES ¶ 69,046], 356 U. S. 677, 678, in refreshing the recollection of government witnesses at trial, see *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 233, and, when the need arises, in impeaching witnesses at trial, see *United States v. Cotter,* 60 F. 2d 689. Of course, when the Government uses grand jury minutes at trial the defense is ordinarily entitled to inspect the relevant testimony in those minutes. *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 233; *United States v. Cotter,* 60 F. 2d 689. Indeed, Rule 6(e) of the Federal Rules of Criminal Procedure itself recognizes that grand jury testimony is discoverable under appropriate circumstances.[4]

The Court apparently agrees with the conclusion compelled by these precedents, for its opinion states that grand jury minutes are discoverable when " 'a particularized need' exists for the minutes which outweighs the policy of secrecy." But the Court pays only lip service to the principle in view of the result in this case. It is clear beyond question, I think, that the application of that principle to this case requires a holding that Jonas' grand jury testimony is discoverable to the limited extent sought. Since there are no valid considerations which militate in favor of grand jury secrecy in this case, simple justice requires that the petitioners be given access to the relevant portions of Jonas' grand jury testimony so that they have a fair opportunity to refute the Government's case.

[*Reasons for Secrecy*]

Essentially four reasons have been advanced as justification for grand jury secrecy.[5] (1) To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.

None of these reasons dictates that Jonas' grand jury testimony, to the limited extent it is sought, should be kept secret. The Court, while making obeisance to "a long-established policy" of secrecy, makes no showing whatever how denial of Jonas' grand jury testimony serves any of the purposes justifying secrecy. Certainly disclosure at this stage of the proceedings would not enable the defendants to escape from custody or to tamper with the witness who has already testified against them on direct examination. Certainly, also, protection of an innocent accused who has not been indicted has no bearing on this case. Discovery has been sought only of Jonas' grand jury testimony on the same subject matter as his testimony at trial. This testimony will have condemned someone to whom he did not refer at trial only if he has concealed information at the trial, and this creates the very situation in which it is imperative that the defense have access to the grand jury testimony if we are to adhere to the standards we have set for ourselves to assure the fair administration of criminal justice in the federal courts. Similarly, disclosure of Jonas' relevant grand jury testimony could not produce the apprehended results of retaliation or discomfort which might induce a reluctance in others to testify before grand juries. Jonas has already taken

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in that case recognized that grand jury minutes were discoverable where the need outweighed the advantages of secrecy, but held that such was not the case in the circumstances because, unlike this case, *Procter & Gamble* concerned a demand for a transcript of the entire grand jury proceedings to be used in pretrial preparation of a civil suit. This case, of course, concerns a demand for discovery of a particular witness' relevant testimony for use on cross-examination at trial in a criminal prosecution. The Court specifically stated in *Procter & Gamble:* "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly." 356 U. S., at 683.

[4] See *United States v. Alper,* 156 F. 2d 222, 226; *In re Bullock,* 103 F. Supp. 639.

[5] See *United States v. Rose,* 215 F. 2d 617, 628-629; *United States v. Amazon Industrial Chemical Corp.,* 55 F. 2d 254, 261; 8 Wigmore, *Evidence* (3d ed. 1940), § 2360.

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the stand and testified freely in open court against the defendants. His testimony has been extremely damaging. Disclosure of his testimony before the grand jury is hardly likely to result in any embarrassment that his trial testimony has not already produced.

> "If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm . . . which his testimony on the open trial does not equally tend to produce." 8 Wigmore, *Evidence* (3d ed. 1940), § 2362, at p. 725.

Witnesses before a grand jury necessarily know that once called by the Government to testify at trial they cannot remain secret informants quite apart from whether their grand jury testimony is discoverable. Finally, the defense seeks nothing which would disclose the votes or opinions of any of the grand jurors involved in these proceedings. All that is sought is the relevant testimony of Jonas. If there are questions by grand jurors intertwined with Jonas' testimony disclosure of which would indicate the jurors' opinions or be embarrassing to them, the names of the grand jurors asking the questions can be excised. Cf. *United States v. Grunewald,* 162 F. Supp. 621.

Plainly, then, no reason justifying secrecy of Jonas' relevant grand jury testimony appears. The Court's insistence on secrecy exalts the principle of secrecy for secrecy's sake in the face of obvious possible prejudice to the petitioners' defense against Jonas' seriously damaging testimony on the trial. Surely "Justice requires no less," *Jencks v. United States,* 353 U. S. 657, 669, than that the defense be permitted every reasonable opportunity to impeach a government witness, and that a criminal conviction not be based on the testimony of untruthful or inaccurate witnesses. The interest of the United States in a criminal prosecution, it must be emphasized, "is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U. S. 78, 88.

[*Inconsistency in Testimony*]

Obviously the impeachment of the Government's key witness on the basis of prior inconsistent or contradictory statements made under oath before a grand jury would have an important effect on a trial. Thus it has long been held that a defendant may have access to inconsistent grand jury testimony for use in cross-examination if he can somehow show that an inconsistency between the trial and grand jury testimony exists. *United States v. Alper,* 156 F. 2d 222; *Burton v. United States,* 175 F. 2d 960; *Herzog v. United States,* 226 F. 2d 561; *United States v. H. J. K. Theatre Corp.,* 236 F. 2d 502. But in an analogous situation we have pointed out the folly of requiring the defense to show inconsistency between the witness' trial testimony and his previous statements on the same subject matter before it can obtain access to those very statements. In *Jencks v. United States,* 353 U. S. 657, we said that it offers no protection to permit a defendant to obtain inconsistent statements to impeach a witness unless he may inspect statements to determine if in fact they are inconsistent with the trial testimony. We said in *Jencks:*

> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in *Gordon* [*Gordon v. United States,* 344 U. S. 414] the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected." 353 U. S., at 667-668.

The considerations which moved us to lay down this principle as to prior statements of government witnesses made to government agents obviously apply with equal force to the grand jury testimony of a government witness. For the defense will rarely be able to lay a foundation for obtaining grand jury testimony by showing it is inconsistent with trial testimony unless it can inspect the grand jury testimony, and, apparently in recognition of this fact, the Court holds today that a preliminary showing of inconsistency by the defense would not be necessary in order for it to obtain access to relevant grand jury minutes. It is suggested by the Government, however, that rather than permit the defense to inspect the relevant grand jury minutes for possible use on cross-examination, the trial judge should inspect them and turn over to the defense only those portions, if any, that the *judge* considers would be useful for purposes of impeachment. This procedure has sometimes been utilized in the past as a

way to limit discovery of grand jury minutes. See *United States v. Alper*, 156 F. 2d 222; *United States v. Consolidated Laundries* [1958 TRADE CASES ¶ 68,975], 159 F. Supp. 860. But we pointed out in *Jencks* the serious disadvantages of such a procedure and expressly disapproved of it. We said:

"Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

". . . We hold . . . that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." 353 U. S., at 667-669.

[*Subject Matter of Testimony*]

From Jonas' own admission it appears that his grand jury testimony covered the subject matter of his trial testimony. The reasons for permitting the defense counsel rather than the trial judge to decide what parts of that testimony can effectively be used on cross-examination are certainly not less compelling than in regard to the FBI reports involved in *Jencks*. For grand jury testimony is often lengthy and involved, and it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness. See *United States v. Spangelet*, 258 F. 2d 338. His task should be completed when he has satisfied himself what part of the grand jury testimony covers the subject matter of the witness' testimony on the trial, and when he has given that part to the defense. Then the defense may utilize the grand jury testimony for impeachment purposes as it may deem advisable in its best interests, subject of course to the applicable rules of evidence.

I would reverse the Court of Appeals and order a new trial for failure of the trial judge to order the production of Jonas' revelant grand jury testimony.

[¶ 69,388] Dallas Farm Machinery Co. v. Minneapolis-Moline Co., et al.

In the Texas Court of Civil Appeals, Fifth Supreme Judicial District. No. 15,503. Delivered May 1, 1959.

Appeal from a District Court of Dallas County.

Texas Antitrust Laws

Combinations and Conspiracies—Texas Antitrust Laws—Exclusive Sales Territory—Antitrust Illegality as Defense to Action for Fraud in Inducement of Illegal Agreement.—A trial court properly granted summary judgment in favor of a farm machinery manufacturer which had been charged by one of its dealers with, among other things, selling at retail in the dealer s exclusive sales territory. The dealer's interpretation of its dealership agreement as one which gave it the exclusive right to sell the manufacturer's products in Dallas County, Texas, would make that agreement violative of the Texas antitrust laws. Also, there was no merit in the contention that, even if the dealership agreement was void as violative of the state antitrust laws, the dealer was entitled to recover damages for fraud in the inducement, procurement, and execution of the agreement. When parties have entered into a contract to violate the law, the courts will not grant relief to either of them, but will leave them where it found them. The reviewing court also rejected the contention that the agreement was one of agency, not of sale, and did not, therefore, violate the antitrust laws. The agreement made no attempt to control the retail prices charged by the dealer and contained various provisions which made it clear that it was a contract of sale, not of agency.

See Combinations and Conspiracies, Vol. 1, ¶ 2321.46, 2323.46, 2345.46, 2407.46.

For the appellant: Wilbur T. Knape, Dallas, Tex.

For the appellee: Bowyer, Thomas, Crozier & Harris, Dallas, Tex.

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[*Nature of Action*]

DIXON, Chief Justice [*In full text except for omissions indicated by asterisks*]. This is an appeal by L. D. Beckham and G. H. Kincaid, Jr., partners doing business as Dallas Farm Machinery Company, plaintiffs in the trial court, from a summary judgment in favor of appellees that appellants recover nothing by their suit against appellees Minneapolis-Moline Company and W. D. Barry, defendants in the trial court.

In their second amended petition appellants alleged that on September 23, 1953 they entered into a written dealership contract with Minneapolis-Moline Company. They alleged that they were fraudulently induced to enter into the written contract by the oral representations of appellee Company's agents to the effect that (1) company records reflected a sales volume of $37,000.00 in the Dallas area in a period of only a few months; (2) Dallas Farm Machinery Company could be the authorized dealer representative for Minneapolis-Moline Company as long as desired by Dallas Farm Machinery Company; and (3) the Company would pay to appellants the difference between the retail price and the factory invoice price on all sales which might be made for the convenience of customers at the factory branch. None of these alleged representations are carried forward into the written contract entered into by the parties.

Appellants further alleged that (4) the contract of September 23, 1953 gave them an exclusive dealership in Dallas County; (5) but about four and a half months after the inception of the contract appellee Company, in conspiracy with W. D. Barry, its Texas Division Manager, began making retail sales in Dallas County without accounting to appellants; (6) which partial breach of the contract caused damages to appellants of $50,000.00 for a period of time up to February 22, 1957; (7) on the latter date appellee Company attempted fraudulently to cancel the contract, and thereafter refused to sell machinery and parts to appellants; (8) to appellants' damages in the amount of $400,000.00 covering a period of twenty years beginning February 23, 1957.

* * *

[*"Exclusive" Sales Agreement*]

In their fourth, fifth, sixth, and eleventh points appellants say that the trial court erred in its interpretation of paragraph 2 of the contract of September 23, 1953. Paragraph 2 provides that both the Company and Dealer may sell goods covered by the contract to Federal, State or local governments and departments thereof and educational institutions, and if such sales are made by the Company it shall not be liable to the Dealer for any compensation. Appellants' position is that since this provision expressly permits appellee Company to sell to the named persons, it excludes by implication the right to sell to other persons, thus providing for exclusive retail sale by appellants of appellee Company's products in Dallas County.

Again we find ourselves unable to agree with appellants. Such an interpretation would read an implied covenant into an express contract, which under the circumstances here present may not be done. *Danciger Oil & Refining Co. of Texas v. Powell,* 154 S. W. 2d 632; *Palm v. Mortgage Investment Co. of El Paso,* 229 S. W. 2d 869.

For about four months after Kincaid came into the business the Company permitted appellants to send their customers to the factory branch warehouse for the filling of orders. Thus the Company was for a time and to an extent allowing itself to be used as a sales agent for appellants. But the written contract contains no provision requiring such procedure. The practice was stopped soon after Kincaid became a partner. So when appellants executed the superseding contract of November 16, 1955, which contained an identical paragraph 2, they well knew the business policy and practices followed by the Company in its interpretation and performance of the contract. This business policy was contrary to the interpretation for which appellants now contend. Appellee Company pled ratification. Having executed the new contract with such knowledge, appellants have in effect ratified the Company's interpretation. *Henshaw v. Texas Natural Resources Foundation,* 216 S. W. 2d 566, 571; *Teders v. Mercantile Bank,* 235 S. W. 2d 485; *Simpson v. McCain,* 295 S. W. 2d 258.

[*Texas Antitrust Laws*]

Furthermore we think appellants' interpretation would make the contract violative of the anti-trust laws of the State of Texas. Art. 7426-7428 and 7437 V. A. C. S., *Patrizi v. McAninch* [1954 TRADE CASES ¶67,787], 269 S. W. 2d 343; *Henderson Tire & Rubber*

Co. v. Roberts, 12 S. W. 2d 154; *American Brewing Ass'n v. Woods,* 215 S. W. 448.

[*Agency*]

In their eleventh point raised for the first time in their Supplemental Brief, appellants argue that the contracts are contracts of agency, not of sale, therefore they are not violative of our anti-trust statutes. In support of this allegation they point to paragraph 14 of the contract of September 23, 1953. This paragraph provides that title shall remain in the Company until the entire purchase price shall have been paid in cash to the Company. Such a conditional sales agreement, which by its own terms shows that it was entered into to secure payments of the purchase price, is declared by statute to be a chattel mortgage. Art. 5489 V. A. C. S. *Minnehoma Financial Co. v. Johnson, et al.,* 258 S. W. 2d 78; *Sussdorf, et al. v. Lee, et al.,* 2 S. W. 2d 344.

Other provisions also make it plain that the contracts are contracts of sale, not of agency. The contracts make no attempt to control the retail prices to be charged by appellants. They do provide that appellants shall pay all transportation, insurance and storage charges on the goods and shall be liable for all taxes. They also provide that appellants, when requested by the Company, will execute and deliver a note, or notes for the unpaid purchase price of goods ordered and shipped to them; and that, when requested by the Company, appellants will furnish a guaranty of payment for goods shipped, and on demand will furnish collateral security on past due notes or open account. Appellants' eleventh point is overruled.

[*"Unclean Hands"*]

In their tenth point appellants argue that if the contracts are void because they violate the anti-trust laws of this State, as contended by appellees, appellants under their pleadings are still entitled to recover damages for fraud in the inducement, procurement and execution of the contracts.

We see no merit in appellants' tenth point for these reasons: (1) appellants have not pled for damages because of fraud in the procurement of the contracts; (2) by executing similar superseding contracts after knowledge of the alleged fraud, appellants will not now be heard to cry out that they were fraudulently induced to execute the first contract; and (3) if the contracts are violative of our anti-trust laws, they are void and unenforceable. *Henderson Tire & Rubber Co. v. Roberts,* 12 S. W. 2d 154. When parties have entered into a contract to violate the law, courts will not grant relief to either of them, but will leave them where it finds them. Appellants' tenth point is overruled.

[*No Conspiracy*]

It is undisputed that appellee W. D. Barry was at all times involved herein acting as a disclosed agent of Minneapolis-Moline Company. It is undisputed that the contracts were not even discussed with him by appellants prior to the dates the contracts were signed. We find no evidence of a conspiracy between Barry and the Company. It is not denied that Barry acted within the scope of his authority as agent. Under such circumstances he has not individually incurred any responsibility or liability to appellants. *Synatzske v. Gorham,* 211 S. W. 2d 391; *Foster v. Hackworth,* 164 S. W. 2d 796; 2 Tex. Jur. 2d 602.

[*Judgment Affirmed*]

The judgment of the trial court is affirmed.

[¶ 69,389] Caribe Amusement Co., Inc. v. Columbia Pictures Corporation, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 59 C 178. Dated June 11, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Injunctive Relief—Pretrial Procedures—Preliminary Injunction—Necessary Showing in Conspiracy Case.—An operator of a motion picture theatre was not entitled to a preliminary injunction restraining a competitive theatre and a motion picture distributor from carrying out their license agreement for the showing of a Spanish-language picture unless and until the distributor solicits new bids for the picture from all interested exhibitors including the plaintiff-operator.

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There was no evidence which tended to prove the existence of the conspiracy alleged in the operator's complaint o. of any agreement, combination, collusion, or concert of action between the defendants with respect to the licensing of the motion picture. To justify the granting of such an injunction, a plaintiff must make a showing of at least a *prima facie* case, if not a probability of ultimate success, upon the allegations of the complaint. Also, the operator failed to make any showing that it would be irreparably injured.

See Private Enforcement and Procedure, Vol. 2, ¶ 9026.15.

For the plaintiff: Richard F. Watt and Ira A. Kipnis of Cotton, Fruchtman & Watt; and Elmer R. Segal, Chicago, Ill.

For the defendants: Morris Gosenpud and Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Ill.

Findings of Fact and Conclusions of Law

[*Preliminary Injunction*]

HOFFMAN, District Judge [*In full text*]: This cause having come on to be heard upon plaintiff's Motion for Preliminary Injunction, and the court having considered the Motion and the affidavits in opposition thereto and having heard in open court the testimony of witnesses and the arguments of counsel and being fully advised in the premises, Doth Hereby Find and Hold as follows:

I.

Findings of Fact

[*Antitrust Claim*]

1. Plaintiff, Caribe Amusement Co., Inc., filed its complaint on February 5, 1959, alleging a conspiracy in violation of the anti-trust laws to restrain trade and commerce in the Spanish-language motion picture industry among the several states of the United States. The complaint designates Columbia Pictures Corporation, Plaza Theatre Corporation, and Abraham Gomez and Leonor Gomez, partners doing business as Tampico Theatre, as the defendants in this action.

2. Plaintiff, in its Motion for Preliminary Injunction which was filed on May 8, 1959, asserts that the licensing of the motion picture SUBE Y BAJA by the defendant Columbia to the defendants Gomez for exhibition at the Tampico Theatre, with priority of run and clearance over the plaintiff's Senate Theatre, was an overt act in furtherance of the conspiracy alleged in the plaintiff's complaint. Plaintiff requests that the defendants Gomez and Columbia be restrained from carrying out their license agreement unless and until Columbia shall have solicited new bids for the motion picture SUBE Y BAJA from all interested exhibitors including the plaintiff.

[*Parties*]

3. Plaintiff, Caribe, is a corporation organized and existing under the laws of the State of Illinois. At all times referred to herein it has operated the Senate Theatre, a motion picture theatre located at 3128 West Madison Street in Chicago, Illinois. Since November 28, 1957, this theatre has shown Spanish-language motion pictures exclusively.

4. Defendant Columbia is a corporation engaged in the business of distributing Spanish-language motion pictures to theatres for exhibition to the public.

5. Columbia transacts business in Chicago, Illinois, and has offices and a registered agent in Chicago, Illinois. Motion pictures licensed by Columbia are regularly exhibited in the theatres in the City of Chicago.

6. The motion pictures which Columbia distributes are made entirely outside of the State of Illinois and are shipped in interstate commerce from outside of Illinois to Chicago, Illinois, for the purpose of being exhibited in Chicago theatres pursuant to license agreements.

7. Defendants Gomez are residents of Chicago, Illinois. They have been engaged in business as a partnership under the name of Tampico Theatre since 1952. The Tampico Theatre is located at 1611 West Roosevelt Road in Chicago, Illinois.

8. Defendant Plaza is a corporation organized and existing under the laws of the State of Illinois. The Plaza Corporation has operated the Plaza Theatre located at 308 West North Avenue in Chicago, Illinois, since 1956.

9. A majority of the issued and outstanding capital stock of the Plaza Corporation is, and since its formation has been, owned by the defendants Gomez. Abraham Gomez manages both the Tampico and Plaza Theatres. During the time that defendants Gomez have operated the Tampico Theatre, that theatre has shown Spanish-language motion pictures. During the time that Plaza Corporation has operated the Plaza Theatre, that theatre has shown Spanish-language motion pictures.

10. The Senate Theatre, owned and operated by the plaintiff, competes for audiences for Spanish-language motion pictures with the Tampico Theatre.

[*Request to Bid*]

11. Plaintiff learned several months ago that a new motion picture called SUBE Y BAJA would be released by defendant Columbia for showing sometime this spring in Chicago. This motion picture featured the Mexican actor Cantinflas. Plaintiff communicated with defendant Columbia, by a letter dated January 21, 1959, stating, among other things:

> "We desire an equal opportunity with the Plaza and Tampico theatres to negotiate or bid for this Cantinflas picture and all other Spanish-language motion pictures distributed by Columbia for first run exhibition in Chicago."

12. In reply thereto, plaintiff received a letter from defendant Columbia stating, among other things:

> "In conclusion, I want to assure you that you have had and will continue to have a full, fair and equal opportunity to bid against the Tampico Theatre for all Spanish language feature pictures released by my company . . ."

13. On or about April 3, 1959, in Chicago, Illinois, plaintiff's vice-president, Elmer R. Segal, and two other agents of plaintiff had a conversation with Mr. Egon Klein, an agent of defendant Columbia. During that conversation, Mr. Klein advised plaintiff's representatives, including Mr. Segal, that the Cantinflas picture would be awarded on the basis of bids.

14. On or about April 16, 1959, plaintiff received from defendant Columbia a "Request for Bid" for the picture SUBE Y BAJA, starring Cantinflas. This request indicated that the picture would be available commencing May 14, 1959, for a "non-exclusive first run engagement of 7 consecutive days."

[*Bids Submitted*]

15. In response to defendant Columbia's request, plaintiff thereupon bid for the picture and, on the form provided, indicated that it would make a guarantee of $4,500.00 and would pay 60 per cent of the gross receipts for a seven-day run.

16. In response to defendant Columbia's request, defendants Gomez submitted a bid for the exhibition of said picture at the Tampico Theatre and, on the form provided, indicated that they would pay 60 per cent of the gross receipts for a fourteen-day run, that they would exhibit the picture as a single feature program and that the guaranteed adult admission price would be $1.25 throughout all fourteen days.

[*Rejection of Plaintiff's Bid*]

17. The defendant Columbia thereupon rejected the bid of the plaintiff for said picture and accepted the bid for the exhibition of said picture at the Tampico Theatre.

18. On May 1, 1959, plaintiff caused telegrams to be sent to the defendant Columbia and to the defendants Gomez in which it asserted:

> "Have been advised today * * * that our competitor Tampico submitted his bid for a two-week run and that Tampico was consequently awarded picture for two weeks day and date showing with Plaza. This is illegal preference of Tampico and Plaza Theatres and constitutes collusion between Columbia, Gomez and Plaza Theatre Corp. and a deliberate agreement to restrain competition. Demand that you immediately withdraw as illegal award to Tampico and Plaza and reoffer Sube y Baja for bids showing at a reasonable future date and that you accept best bid in terms of offer."

19. On May 5, 1959, Columbia caused a telegram to be sent to the plaintiff which stated:

> "We understand your disappointment in not being high bidder and your desire for another opportunity to bid. This would not be fair to successful bidder who now has contract for picture. Cannot believe you serious that any exhibitor may not bid additional playing time beyond minimum requested by distributor."

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[*No Evidence of Conspiracy*]

20. No evidence has been adduced by the plaintiff in support of its Motion for Preliminary Injunction which tends to prove the existence of the conspiracy alleged in the plaintiff's complaint or any agreement, combination, collusion or concert of action between the defendant Columbia and the defendants Gomez with respect to the licensing for exhibition of the SUBE Y BAJA motion picture. The uncontradicted affidavit of Donald F. McConville, manager of the domestic division for the distribution of Spanish-language motion pictures of the defendant Columbia states that:

> "The manner in which Columbia offers and licenses its Spanish-language motion pictures in Chicago is determined exclusively by Columbia without any consultation or agreement with any of the other defendants herein. I personally decided when and in what manner the picture Sube y Baja should be offered for bidding as between the Tampico and Senate Theatres and I personally designated the form which the request for bids should take. I did not consult with any other defendants in connection therewith."

II.

Conclusions of Law

1. The granting of an interlocutory injunction rests in the discretion of the trial court, which discretion should be governed by the facts of a particular case.

2. A preliminary injunction should be granted with caution.

3. The granting of an injunction is an exercise of far-reaching power, and should not be granted except in a case clearly demanding it.

4. To justify the granting of a temporary injunction, a plaintiff must make a showing of at least a *prima facie* case, if not a probability of ultimate success, upon the allegations of the plaintiff's complaint.

5. In this case, the plaintiff has failed to make a *prima facie* showing of the truth of the allegations of conspiracy asserted in its complaint.

6. The purpose of a temporary injunction is to prevent the party seeking such injunction from sustaining irreparable injury.

7. In this case, the plaintiff has failed to make any showing that it will be irreparably injured if the injunction is not granted.

8. Plaintiff's Motion for Preliminary Injunction must be *denied*.

[¶ 69,390] Carter Products, Inc. v. Federal Trade Commission.

In the United States Court of Appeals for the Ninth Circuit. No. 15,373. Dated June 16, 1959.

Petition to Review and Set Aside an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresenting Medicinal or Curative Properties of Product—Laxative—Sufficiency of Evidence.—A Federal Trade Commission order prohibiting a company (1) from representing, among other things, that its laxative will make bile flow freely or increase or beneficially influence the formation, secretion or flow of bile; represents a fundamental principle of nature in self-treatment; does not contain strong medicines; is unqualifiedly safe; is an effective treatment for sluggish liver function or will have any therapeutic action on any condition, disease, or disorder of the liver; will cause the proper flow of, or beneficially affect, the gastric juices or digestive juices, or lessen food decay; or will provide two-way relief or possesses therapeutic properties in addition to those afforded by laxative action; and prohibiting the company (2) from using the word "liver" in the trade name for its laxative was affirmed and enforced on the ground that the findings upon which the order was based were supported by substantial evidence.

See Unfair Practices, Vol. 2, ¶ 5055.41, 5087.41, 5087.43, 5201.131.

Unfair Practices—Jurisdiction and Power of Federal Trade Commission—Validity of Order Prohibiting Use of Word "Liver" in Trade Name.—The Federal Trade Commission

acted well within the orbit of its authority when it prohibited a company from using the word "liver" in the trade name of its laxative. The Commission had properly found (1) that through the use of the word "liver" in its trade name, the company represented that its laxative would have some therapeutic action, effect, and influence on the liver and was for use in the treatment of conditions, disorders, and diseases of the liver, but that (2) the ingredients in the laxative would have no therapeutic action, effect, or influence on the liver and that the laxative would have no therapeutic value in the treatment of any condition, disorder, or disease of the liver, or the biliary system.

See Unfair Practices, Vol. 2, ¶ 5201.481; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.91, 8621.523.

Unfair Practices—Jurisdiction and Power of the Federal Trade Commission—Validity of Cease and Desist Order—General Scope of Order—Court Review.—In reviewing a Federal Trade Commission order prohibiting a company from making certain therapeutic claims for its laxative and from using the word "liver" in the trade name of its preparation, the court held that the Commission made an allowable judgment in its choice of a remedy to be applied. The Commission is the expert body to determine what remedy is necessary to eliminate the unfair and deceptive practices it found to exist, and it has wide latitude for judgment. Congress entrusted the Commission with the responsibility of selecting the means of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence. The Commission had discretion to fashion a remedy of a civil nature to attain the desired goals, and its choice fell within an allowable area of its discretion. Only where the remedy selected has no reasonable relation to the unlawful practices found to exist, should a reviewing court interfere.

The company's contention that, in view of the great age of the litigation and the changing nature of medical frontiers, the Commission's order should not be approved and the case should be remanded to the Commission for a determination as to whether or not the order is appropriate under present circumstances was rejected. Also, the Commission did not abuse its discretion by prohibiting certain advertising claims which the company claimed had been discontinued. In answer to the company's contention that the order would totally destroy its business, the court ruled that the order did not enjoin the use of advertising claims concerning the cathartic properties of its preparation unless such claims were of a character clearly prohibited by the express terms of the order.

See Unfair Practices, Vol. 2, ¶ 5201.481; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.91, 8621.

Federal Trade Commission Enforcement and Procedure—Court Review of Commission Findings—Medical Testimony.—In reviewing a Federal Trade Commission order prohibiting a company from making certain therapeutic claims for its laxative, the court noted that the Commission was faced with the duty of concluding and determining from the body of medical evidence just what medical facts had been established as true by evidence of a substantial character. In attacking the substantiality of the Commission's evidence, the company contended that the testimony of the expert witnesses presented a conflict of general informed medical opinion on basic medical issues, and that this conflict was so substantial "as to compel enforcement by this Court of the standard of certainty in the proof of the falsity of a harmless, honest therapeutic claim prescribed by the Legislature in enacting the" 1938 amendments to the Federal Trade Commission Act and by the Federal Constitution. The reviewing court, noting its disagreement with the contention concerning the effect of the amendments and that the company's position seemed to be that the court should weigh all of the evidence, ruled that the testimony presented a fact issue which would have to be primarily resolved by the Commission in light of all of the expert testimony on the subject. "Whatever might be our personal judgment concerning the probative worth of a huge mass of medical testimony which tended to prove or disprove the existence of such a body of 'medical opinion,' our views would have to yield to the specialized experience and knowledge of the Commission." The question of whether or not an expert used a correct method in experimentation was a factual one for decision by the Commission when it weighed the evidence.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.01, 8611.08.

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Federal Trade Commission Enforcement and Procedure—Court Review of Commission Order—General Rules for Courts of Appeal.—The Courts of Appeal in reviewing orders of administrative agencies must determine whether or not such an order is supported by substantial evidence on the record considered as a whole. If after canvassing and fairly assessing the entire record a reviewing court cannot conscientiously find that the evidence supporting the agency order is substantial, "good conscience" dictates that the agency order be reversed. In so appraising the whole record, the reviewing court must take into account whatever in the record fairly detracts from the weight of the evidence which underlies the agency order and is opposed to the agency's view. An order of an administrative agency should be set aside unless justified by a fair estimate of the worth of the testimony of witnesses or the agency's informed judgment on matters within its special competence or both; however, the requirement for canvassing the whole record in order to ascertain substantiality is not intended to negative the function of the agency as one presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the agency conclusive as to the facts if supported by testimony, and they cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the agency. It is for the agency and not the courts to pass upon the credibility of witnesses and the weight to be accorded their testimony. This is also true of the weight to be given by the agency to the facts and circumstances admitted as well as inferences reasonably to be drawn from them.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8621.650, 8621.690.

Federal Trade Commission Enforcement and Procedure—Disqualification of Hearing Examiner—Bias—"Recommended" Decision as Distinguished from "Initial" Decision.—The Federal Trade Commission did not abuse its discretion when it denied a respondent's motion to disqualify a hearing examiner from taking any further action in the proceeding and for an order wholly terminating the proceeding because of bias of the examiner. The question whether the examiner should have been disqualified and the hearings terminated presented issues the disposition of which rested in the sound discretion of the Commission. The issues in the proceeding were adjudicated by the Commission under a procedure in which the examiner filed only a "recommended decision," that is, a report upon the evidence as provided by a rule of the Commission in effect when the proceeding was instituted. The examiner did not make an "initial decision," as required under present procedures of the Commission. The Commission made its own formal findings as to the facts, its own conclusions, and issued its own order to cease and desist. The report upon the evidence was advisory only and not binding on the Commission. Since the first hearings in the proceeding were conducted under the "recommended decision" procedure, subsequent hearings also were conducted under that procedure, although the "initial decision" procedure was then in effect.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611, 8611.33.

Federal Trade Commission Enforcement and Procedure—Sufficiency of Commission's Findings of Fact—Necessity of Including Actual Testimony of Witnesses.—A respondent's contention that the Federal Trade Commission's final findings of ultimate probative facts were fatally defective because portions or possibly all of the actual testimony of some of the Commission's witnesses was unreported in its findings, that is, such testimony was not set out verbatim in the Commission's findings of fact, was rejected. The Commission's findings of fact need not repeat part, or all, of such testimony.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.33.

Federal Trade Commission Enforcement and Procedure—Sufficiency of Evidence—Duty of Commission.—When a respondent made representations as to the therapeutic qualities and effect of its pills in advertising claims, it was therein making statements of fact, and the truth or lack of truth in these representations presented an issue of fact to the Commission. The burden of proof was on the Commission, and its legitimate administrative task was to primarily determine whether the probative weight of the proof submitted in respondent's defense served adequately to rebut the proof presented by witnesses

supporting the Commission's complaint. Whether the respondent's evidence was sufficient in this respect presented a question of fact primarily for the Commission to decide from the entire record. The duty of the Commission was to weigh all of the evidence before it, and in so doing to determine therefrom whether all or any part of this evidence was convincing in its probative weight or was so inconclusive or unconvincing as to lack the probative weight necessary to carry conviction of its truth.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.81.

Federal Trade Commission Enforcement and Procedure—Cross-Examination of Witnesses Limited—Scope of Examination on Remand.—Where a Court of Appeals had held that a respondent was denied a fair hearing because a Federal Trade Commission hearing examiner unduly and prejudicially restricted the respondent's right to cross-examine expert witnesses who appeared in support of the Commission's complaint, and had, upon direction of the United States Supreme Court, remanded the case to the Commission for further hearings, the Court of Appeals subsequently held that its remand order could not be construed as requiring a proceeding *de novo* or as an invitation or suggestion that the proceeding might be opened for the purpose of receiving additional testimony from witnesses other than the above expert witnesses.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.10, 8621.540, 8621.640.

For the appellant: William L. Hanaway, Stoddard B. Colby, Herman Phleger, Alvin J. Rockwell, and Brobeck, Phleger & Harrison, San Francisco, Cal.; and Breed, Abbott & Morgan, New York, N. Y.

For the appellee: Earl W. Kintner, General Counsel, FTC; James E. Corkey, Assistant General Counsel, FTC; and Jno. W. Carter, Jr., and Fletcher G. Cohn, Attorneys, FTC, Washington, D. C.

Affirming and enforcing a Federal Trade Commission order to cease and desist in Dkt. 4970. For a prior opinion of the U. S. Supreme Court, see 1953 Trade Cases ¶ 67,582, vacating and remanding a judgment of the U. S. Court of Appeals, Ninth Circuit, 1953 Trade Cases ¶ 67,421.

Before: Healy, Bone and Hamley, Circuit Judges.

[*History of Case*]

Bone, Circuit Judge [*In full text*]: The instant case, which has a long history, is before us on a petition by Carter for review of and to set aside a Cease and Desist Order (hereafter "Order") of the Federal Trade Commission (hereafter "Commission") which order was entered in 1956 at the conclusion of about 149 hearings held before a Hearing Examiner of the Commission. These hearings were held on a complaint of the Commission which charged petitioner Carter Products, Incorporated (hereafter "Carter") with engaging in unfair and deceptive acts and practices in violation of the Federal Trade Commission Act (hereafter the "Act"). The instant litigation was instituted by the Commission's complaint bearing date of May 28, 1943. In the earlier stages of the proceeding, the Commission dismissed its complaint (without prejudice) as to a co-defendant and the case is now before us with Carter alone seeking a review of the Order.

This litigation was previously before this court and the much narrower issues then presented were disposed of by our opinion and judgment reported in [1953 Trade Cases ¶ 67,421] 201 F. 2d 446, *Carter Products, Inc. v. Federal Trade Commission.* On certiorari, the Supreme Court vacated this judgment and remanded the cause to this court with directions. [1953 Trade Cases ¶ 67,582] 346 U. S. 327. This court thereupon entered judgment as directed by the mandate of the Supreme Court.

Pursuant to our judgment remanding the cause to the Commission for further hearings, these "further hearings" were held before the Hearing Examiner for the Commission who had presided over the first and original set of hearings. At these supplemental hearings conducted in accordance with our said remand order, Doctors Case and Bollman, two of the *three* expert Commission witnesses whose original cross-examination by Carter this court held had been improperly curtailed and restricted, were tendered to Carter for further cross-examination. Because of the intervening death of Dr. Lockwood (one of these three

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Commission witnesses in the first hearing) this witness could not be tendered for cross-examination and *all* of the testimony and *all* of the exhibits based upon, or connected with, the testimony of Dr. Lockwood in the first set of hearings were stricken by the Hearing Examiner. For this reason the Lockwood part of the record in the original hearings was not before the Commission for its consideration when it made and entered its formal Decision along with an entirely new set of Findings of Fact and the new Cease and Desist Order which is before us on this review.[1]

PRELIMINARY STATEMENT

[*Prior Ruling—Scope*]

Because of the great length of the records now before us (which embrace both the original and the supplemental hearings here mentioned)[2] an important aspect of this controversy should be noted. In the mandate of the Supreme Court on its remand, this court was ordered and directed "to reinstate its prior judgment and order after amending it so that it specifically authorizes the Federal Trade Commission to open this proceeding for further evidence *and a new order consistent with the Court of Appeals opinion herein.*" (Italics supplied.)

In the "prior judgment and order" of this court, thus referred to, we set aside the order of the Commission, and specifically indicated therein our reasons for this action. We held that Carter had been denied a fair hearing *because* the Hearing Examiner had unduly and prejudicially restricted Carter's right to cross-examine the three above mentioned expert witnesses who had appeared in support of the allegations of the Com-

[1] The formal "Decision" of the Commission promulgated on October 4, 1956 sets forth therein its FINDINGS AS TO THE FACTS, its Conclusion, and the Cease and Desist Order before us in this review proceeding. In this Decision the Commission points out that because of the death of one of the three witnesses whose cross-examination this court had held was improperly curtailed, the entire testimony and all exhibits introduced through that witness (Dr. Lockwood) were, on Carter's motion, stricken by the Hearing Examiner. The Decision also sets forth the formal recitation that "the Commission, having exhaustively considered the entire record, including the evidence adduced after the remand and the briefs and oral arguments of counsel, now finds that this proceeding is in the interest of the public and makes this its modified and supplemental findings as to the facts and its conclusion drawn therefrom, the same to be in lieu of those contained in its decision of March 28, 1951." (The 1951 decision here referred to was the decision which led Carter to file a petition to review and set aside this order. The review in this court eventuated in our opinion in *Carter Products, Inc. v. Federal Trade Commission* [1953 FEDERAL TRADE CASES ¶ 67,421], 201 F. 2d 446.)

[2] In the proceeding now before us both parties also cite and rely upon all that appears in the various briefs, records and files lodged in this court in the first review proceeding (201 F. 2d 446), save and except all of the testimony of Dr. Lockwood, and all of the exhibits based upon, or connected with his testimony. See our comment on this procedure. The printed transcript filed in this court in that proceeding was in four volumes. This record was also utilized in the supplemental proceedings later held pursuant to the remand directed in our opinion cited supra. The printed transcript filed in this Court and covering the supplemental proceedings appears in ten volumes and, as in the set of printed transcripts in the first review proceedings, appears to contain those parts of the record regarded as pertinent to the inquiry this court must make.

The size of the printed record now before us suggests the conclusion that the further cross-examination of witnesses supporting the Commission's complaint which was directed in our remand, was extensive and searching and fully conformed to our requirement that counsel for Carter be given "broad latitude" in such cross-examination. The testimony of Doctor Case in the supplemental proceedings occupies 164 pages of the printed transcript on this review. The testimony of Doctor Bollman in these supplemental proceedings occupies 300 pages of the printed transcript.

At the conclusion of the first set of hearings counsel for Carter stated to the Examiner that there were then 15,000 pages of testimony in the record (obviously referring to the full reporter's transcript).

Aside from the printed record here noted there was lodged with us in the instant review on the merits an enormous array of documents filed as exhibits in the first hearing in connection with the testimony of witnesses in proceedings before the Hearing Examiner. Commission's brief points out that in this first hearing (ending in 1945) 2209 exhibits were introduced in evidence.

The exhibits admitted in evidence in the hearings also include many copies or photostats of announcer's scripts used in radio "broadcasts" in which broadcasts Carter made many elaborate claims concerning the therapeutic action and value of its pills. Along with these radio exhibits were many photostatic copies of advertisements which Carter had caused to be published in various publications in the United States and in which advertising matter the same claims were made concerning the therapeutic action and quality of its pills. In the aggregate, these radio broadcasts and the newspaper and/or magazine ads contained an array of the advertising claims of Carter which the Commission's complaint repeats, and therein asserts were false and misleading, and which the 1956 findings of the Commission as to the facts also assert were false and misleading in many material respects.

mission's complaint; that the error of the examiner was his failure to permit a "broad latitude" in the cross-examination of these three witnesses.[3] So that no doubt might remain concerning the exact reason for our action, we there carefully identified the particular rulings of the Hearing Examiner which we assailed and which we concluded had caused Carter to be denied a fair hearing.[4]

It is also our firm conclusion that if the *new order* of the Commission so authorized in our order of remand was to be truly "consistent with" our opinion (as directed by the Supreme Court) this *new order* would have to be bottomed on the evidence and testimony received in the original hearings (except where appropriately stricken as in the case of Dr. Lockwood) *plus* the "further evidence" adduced in the renewed and

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[3] In its Petition to this court to review and set aside the final Cease and Desist Order of the Commission which was issued on October 4, 1956, Carter avers, inter alia, that this court had held that Doctors Case, Bollman and Lockwood were "key witnesses of the Commission"; that it was the "unjustifiable restrictions" on the cross-examination of these "key witnesses" that deprived Carter of a fair hearing; that on February 9, 1955 the Hearing Examiner issued written rulings denying certain motions of Carter including its motion to strike the testimony of "key witnesses" Doctors Case and Bollman, along with Carter's written "offers of proof and additional evidence" all dated May 26, 1954; that the Hearing Examiner did strike the testimony of Dr. Lockwood; that on March 3, 1955, the Hearing Examiner entered his order closing the case.

Carter's said petition for review further avers that it moved the Commission to disqualify the Hearing Examiner and terminate these proceedings; that on March 3, 1955, and before the Commission could decide the motion to disqualify the Hearing Examiner, that officer filed his Supplemental Report with respect to the proceedings on remand, and therein recommended the issuance by the Commission of the same form of Cease and Desist Order as previously entered by the Commission in 1951; that on September 20, 1955, the Commission denied Carter's motion to disqualify the Examiner, strike his Supplemental Report, and terminate these proceedings; that on appeal to the Commission Carter renewed its said motions and filed its proposed findings and conclusions of law; that thereafter and on October 4, 1956, the Commission issued its Cease and Desist Order in substantially identical form with its previous Cease and Desist Order dated March 28, 1951. (See footnote 1, supra.)

Carter prayed that this court strike the Supplemental Report of the Hearing Examiner, terminate the instant proceeding, and reverse and set aside the Cease and Desist Order now before us.

[4] It was this particular curtailment of cross-examination in the original hearings which caused this court to set aside the Commission's order and led this court to declare in its opinion and decision, 201 F. 2d at page 448, that "Questions pertaining to the sufficiency of the evidence or to the merits are not presented by the petition. What is claimed, principally, is that a fair hearing was denied petitioner in that the trial examiner unduly and prejudicially restricted its right of cross-examining certain of the Commission's expert witnesses upon whose testimony, in large measure, the [March 28, 1951] findings and order were based. The witnesses in question were Doctors Carlson, Bollman, Lockwood and Case. We are of the opinion that petitioner's claim is well grounded in respect of the three experts last named, but not in respect of the witness Carlson."

Relative to this same "principal claim" of Carter, we ended our opinion with the further comment (at p. 454) "It is argued that there was ample evidence from other quarters to sustain the findings and order of the Commission, hence the rulings, even if wrong, were not prejudicial. We are of the opinion, however, that the cumulative effect of these unjustifiable restrictions on the cross-examination of key witnesses for the Commission was to deprive petitioner of a fair hearing. Such being the case the court is not disposed to speculate as to what would have been the outcome had a fair and impartial hearing been accorded."

In discussing at one point in our said opinion the latitude to be allowed in the cross-examination of expert witnesses, we referred to the fact that the Examiner imposed upon Carter the condition that it make Dr. Lockwood its own witness and we characterized this action (p. 452) as "flagrant error." As noted supra in this opinion, the death of Dr. Lockwood caused the Hearing Examiner to later strike from the records in this proceeding all of the testimony and all of the exhibits based upon, or connected with, the testimony of Dr. Lockwood in the first set of hearings. As a consequence of this action, the record shows that the new set of Findings of Fact and the new Cease and Desist Order now before us and which were entered by the Commission under date of October 4, 1956, do not rest in any degree upon the Lockwood testimony and the exhibits based upon or connected therewith, and in our view the "flagrant error" we mentioned has ceased to be a factor in this proceeding.

Because a question arose concerning the probative value and admissibility of testimony relating to experiments on dogs and human patients, this court also took occasion to comment upon this phase of the proceedings before the Hearing Examiner. In footnote 1 of our previous decision, supra, (p. 448) we said: "Petitioner also urges that fatal error was committed in admitting evidence pertaining to certain experiments on dogs and human patients. In our opinion the objection to these experiments, several of which will be mentioned hereafter, goes to their weight only, not to their admissibility."

On this review we find no reason to part company with the views we previously expressed in this footnote.

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additional cross-examination of two of the Commission's above noted expert witnesses in the supplemental hearings which followed the remand. If it be the view of Carter that our order of remand required a proceeding *de novo,* or was properly to be construed (in light of the direction from the Supreme Court) as an invitation or suggestion that the proceedings might (also) be opened for the purpose of receiving additional testimony from witnesses other than the two expert witnesses we have mentioned (Case and Bollman) we must disagree with Carter since our conclusion is to the contrary.

After Case and Bollman were further cross-examined at length in the following supplemental hearings above referred to, and on October 4, 1956, the Commission made and entered an entirely new and second set of Findings of Fact, a Conclusion of Law, its formal Decision (see footnote 1) and the Cease and Desist Order[5] which is here involved. A formal Opinion of the Commission was also filed on October 4, 1956. For reference to date and place of publication of an official copy of the here noted Commission's Cease and Desist Order, see last paragraph of footnote 5.

[*FTC Act*]

Applicable provisions of the Act with which we are here concerned are:

[5] The formal Decision of the Commission embodies its final Cease and Desist Order, its Conclusion of Law, and its "Findings as to the Facts." The Conclusion of Law and the Cease and Desist Order now before us read as follows:

CONCLUSION

"The acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act."

FINAL ORDER

"It Is Ordered that the respondent, Carter Products, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of the product now designated 'Carter's Little Liver Pills,' or any other product of substantially similar composition or possessing substantially similar properties under whatever name sold, do forthwith cease and desist from:

"(1) Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, which advertisement represents directly or by implication—

"(a) That said preparation represents a fundamental principle of nature in self-treatment;

"(b) That said preparation will bring on or restore regularity of bowel movement, or is a cure, remedy or competent or effective treatment for constipation, or has any beneficial value in the treatment of any of the symptoms thereof in excess of the temporary relief afforded by its laxative action;

"(c) That said preparation does not contain strong medicines;

"(d) That said preparation is unqualifiedly safe;

"(e) That said preparation is an effective treatment for sluggish liver function or that it will have any therapeutic action on any condition, disease or disorder of the liver;

"(f) That said preparation will make bile flow freely, increase or beneficially influence the formation, secretion or flow of bile, or prevent or overcome discomforts caused by over-indulgence in food or other pleasures;

"(g) That said preparation will provide two-way relief or that it possesses therapeutic properties in addition to those afforded by laxative action;

"(h) That said preparation will cause the proper flow of, or beneficially affect, the gastric juices or digestive juices, or lessen food decay;

"(i) That said preparation is based on the fundamental principle of the operation of the digestive system;

"(j) That said preparation will help food digestion, or regulate digestion or the digestive system;

"(k) That said preparation will have any influence in inducing a state of 'bounce,' vigor or well-being except in those instances in which a lack thereof is due solely to constipation;

"(l) That constipation poisons the body;

"(m) That said preparation has any value in the treatment of headache, ugly complexion, bad breath, coated tongue or a bad taste in the mouth, or for those conditions in which an individual feels 'Down-and-out,' 'blue,' 'down-in-the-dumps,' 'worn out,' 'sunk,' 'logy,' 'depressed,' 'sluggish,' 'all-in,' 'listless,' 'mean,' 'low,' 'cross,' 'tired,' 'stuffy,' 'heavy,' 'miserable,' 'sour,' 'grouchy,' 'irritable,' 'cranky,' 'peevish,' 'fagged out,' 'dull,' 'sullen,' 'what's-the-use,' 'bogged down,' 'grumpy,' 'run-down,' or 'gloomy,' in excess of such temporary relief therefrom as may be afforded by an evacuation of the bowels in those cases in which such symptoms or conditions are associated with and caused by constipation;

"(n) That said preparation is a competent or effective treatment for indigestion or retarded digestion;

"(o) That said preparation is a competent or effective treatment for biliousness.

"(2) Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, in which the word 'Liver' is used in the trade name for the respondent's preparation.

"(3) Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to

"Sec. 5(a)(1). [Section 45(a)(1) of Title 15, U. S. C. A.] * * * unfair or deceptive acts or practices in commerce, are declared unlawful.

"Sec. 5(a)(6). [Section 45(a)(6) of Title 15, U. S. C. A.] The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using * * * unfair or deceptive acts or practices in commerce."

Pursuant to the order authorizing the Commission to open the proceedings for the further evidence mentioned and for entry of a new order consistent with the opinion of this court, the Commission did, by order, reopen the proceeding and refer it to the Hearing Examiner "for such further proceedings as may be necessary to correct the errors in the original hearings as specified by the Court of Appeals." The examiner was directed to file "a report upon the additional evidence and state the changes, if any, he wishes to make in his original recommended decision as a result of such additional evidence."

[*Disqualification of Examiner*]

After an order of the examiner was later made closing the record and denying Carter's motion and offers of certain proof, Carter (on April 18, 1955) filed a motion to disqualify the Hearing Examiner from taking any further action in this proceeding, and for an order wholly terminating these proceedings because of bias of the examiner. Subsequently, the examiner filed his supplemental report and his recommendation. Later on, and in an opinion carefully analyzing the issues tendered by the said motion, the Commission denied Carter's motion to disqualify the examiner and to terminate the proceedings.

We are of the opinion that the question whether the Hearing Examiner should have been disqualified (for the reason urged by Carter) and in addition the hearings terminated, presented issues the disposition of which rested in the sound discretion of the Commission. From the record as a whole we cannot conclude as a matter of law that the Commission abused its discretion when it denied Carter's said motion for the relief here mentioned.

As the Commission emphasizes in its brief, the issues in this case were adjudicated by the Commission under a procedure in which the examiner files only a "recommended decision," i. e., a "report upon the evidence" as provided by a rule of the Commission in effect when the proceedings were instituted. Therefore, the examiner in the instant matter did not make an "initial decision," as is required under the present procedure. It should be noted that in this proceeding the Commission made its own formal findings as to the facts, its own conclusion and issued its own order to cease and desist. While the Commission's "rule" here referred to required the trial examiner to make a "report" upon the evidence to the Commission, this controlling rule also provided that such a report was advisory only and not binding upon the Commission.

[*Area of Factual Conflict*]

For many years Carter has engaged in the sale and distribution in interstate commerce of its laxative pills sold under the Trade Mark or trade name of "Carter's Little Liver Pills." These pills are admittedly sold as a laxative and admittedly contain only two active drugs—aloes and podophyllum. On this review the Commission takes the position that the evidence adduced in support of the allegations of the complaint clearly establishes that these two drugs are recognized as "irritative laxatives"; that this evidence shows that Carter repeatedly made, and is making, false representations in its general advertising in

induce, directly or indirectly, the purchase of said product in commerce, as 'commerce' is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraphs (1) and (2) hereof.

"It Is Further Ordered that the charges of the complaint as they relate to the respondent Street & Finney, a corporation, be, and the same hereby are, dismissed without prejudice to the right of the Commission to take such further action as future conditions may warrant.

"It Is Further Ordered that the respondent, Carter Products, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

"By the Commission, Commissioner Mason not participating.

"Issued: October 4, 1956."

An official copy of the above Cease and Desist Order was published in the October 23, 1956 issue of the Federal Register, Volume 21, Number 206.

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commerce that use of its medicinal preparation will stimulate the production and flow of liver bile thereby rapidly improving the health of users; that Carter also falsely claims in this widely disseminated advertising that use of its pills provides an effective treatment for a vast array of common human ailments, including disorders and diseases of the liver, and that many of these claims constitute false representations in advertising; that this sort of conduct constitutes unfair and deceptive acts and practices in interstate commerce within the meaning of Section 5 of the Federal Trade Commission Act, *supra*. Highlighting the position of Commission counsel is their assertion that the actual area of factual *conflict* in this proceeding relates simply and solely to what influence, if any, Carter's laxative pill will have on the production and flow of liver bile. Our examination of the medical evidence and testimony in the record leads us to conclude that this position of counsel finds strong support in the records. (See footnotes 7 and 8, *infra*.)

The Complaint

The Commission's complaint directed against the advertising claims of Carter covers sixteen pages of the printed transcript and sets forth a long array of charges. In general, it avers that in furtherance of the sale and distribution of its medicinal preparation known as "Carter's Little Liver Pills," Carter has disseminated and now is disseminating many false and misleading advertisements to the general public concerning this preparation, and also making disparaging statements about the drug calomel and other laxative preparations, this by use of the United States mails and by various means in commerce as defined by the Act. The complaint charges that the dissemination of this false advertising by Carter was for the purpose of inducing, and was likely to induce, directly or indirectly, the purchase of Carter's preparation "Carter's Little Liver Pills" in commerce, as "commerce" is defined in the Act.

The length of the complaint and the answer of Carter requires that we summarize these pleadings. In our summary of the complaint we shall indicate the general character of the charges appearing in some of the paragraphs wherein certain advertising claims of Carter are carefully specified in detail, but we do not undertake to list all of the advertising claims noted in the complaint. In the hearings, the proof that a great array of these advertising claims had been made by Carter by publication in newspaper ads and in "commercial announcements" in radio broadcasts, was presented by introducing (apparently without objection) copies of these ads and the radio announcers' scripts. To list at this point all of the claims thus shown concerning the alleged merits of Carter's preparation would expand this opinion beyond any reasonable length. The Commission's complaint however sets them out in elaborate detail.

As we shall later note, the Cease and Desist Order of the Commission now before us (footnote 5, *supra*) does not enjoin the use of *all* of the many advertising claims of Carter described in the complaint; it specifically enjoins Carter from use of certain advertising claims which are carefully described in the Order.

The complaint (paragraph 6), *inter alia*, charges in lengthy detail that by and through the use of words, phrases, statements and representations appearing in the advertising material disseminated and caused to be disseminated by Carter (as above noted) which purport to be descriptive of the preparation "Carter's Little Liver Pills," and descriptive of their therapeutic action, and the result and value of the action of this preparation, Carter therein represents directly and by implication, among other things, that its preparation:—represents a fundamental principle of nature in self-treatment; is a competent and effective treatment for a condition designated as a "sluggish liver"; will "wake up the flow of [liver] bile"; is "effective in making bile flow freely by getting the liver back to normal and back to producing"; will cause the proper flow of gastric juices, natural vital digestive juices and vital alkaline juices; is based on the fundamental principle of the operation of the digestive system, and will "help food digestion," "lessen food decay," regulate digestion and the digestive system; will bring on, help and restore regularity and is a cure and remedy and constitutes a competent and effective treatment for constipation; will clear away the "dark clouds of listlessness and despondency" and "give one's personality a chance"; will "keep up one's pep and vigor"; will "make one feel good and up to par

again" and "keep one smiling and happy"; will "eliminate those uncomfortable feelings" that cause a bad disposition and will keep good dispositions "cheerful, happy and a regular thing"; and will help in more ways than one to make one feel better again fast and differently and will provide *two-way relief.*[6]

The complaint further charges (in paragraph 6) inter alia, that in its said advertising Carter has represented directly and by implication that its preparation "follows nature's own order for regularity and so regulates the digestive process that, if it is taken as directed before retiring at night, one will awaken the following morning feeling the way one wants to feel, but he will also discover that such use (as directed) of Carter's preparation will bring about (as specifically enumerated in the complaint) some 44 (additional) physical reactions and manifestations in the user's body all indicating the restoration of pep, physical vigor and a feeling of well-being. It is further charged in paragraph 6 that Carter's advertising has represented that use of its preparation will so influence the production or flow of liver bile that one can overeat and overindulge in "good times" without the usual ordinary discomfiture resulting therefrom, and that Carter's product will overcome the effects that ordinarily follow such indiscretions, this by reason of its stimulating influence on the production or flow of liver bile.

The complaint also charges in paragraph 6, *inter alia,* that in its said advertising Carter has represented that its preparation "does not contain any strong medicine" and is "safe to use"; that "it is not an ordinary laxative but possesses therapeutic properties over and above and in addition to its laxative action." The complaint, in paragraph 7, alleges, *inter alia,* that Carter's advertising material has (also) disseminated and caused to be disseminated, as aforesaid, material which purports to describe approximately 66 abnormal physical conditions and distressing mental attitudes (specifically noted in the complaint) and as to

[6] In many of Carter's representations appearing in its advertising material placed in evidence, there appears the claim that Carter's preparation will give the user "two-way relief." This "two-way relief" was generally described by Carter as relief from "irregularity" without disturbing digestion, and also a stimulation of the liver which would cause a flow of two pints of bile per day. Such advertisements frequently emphasized that Carter's pills were a "laxative plus" because they provided this sort of "two-way relief." The Commission's Cease and Desist Order enjoins Carter from further use of the term "two-way relief" in its advertising. See note 5, supra.

Many of the exhibits in evidence were extracts from radio scripts used in national promotion of sales of Carter's pills. These radio advertisements lauded the unusual therapeutic virtues of Carter's pills, emphasizing that they were "Laxative Plus" which provided a unique form of gentle "two-way relief" not to be found in any other simple laxative, including calomel. Just below we quote the language used by Carter in some of the many radio advertising scripts here mentioned.

"They [Carter's Little Liver Pills] provide two-way relief—relief you cannot expect from a simple laxative alone. First, they help wake up the flow of bile—a vital digestive juice. And they usually start to do this within 30 minutes after taking. Second, they help restore regularity. In days gone by, folks took calomel to get results like this. But today you get gentle relief from Carter's without the ordeal of calomel."

"Scientific facts show it takes a two-way treatment to get the vital digestive juice [bile] flowing quickly—and to relieve sluggishness without disturbing digestion. Now—this type of two-way treatment follows Nature's own order for regularity.—Remember—many ordinary simple laxatives *DON'T*—but Carter's Little Liver Pills *DO* give this two-way treatment you want. Only genuine Carter's have this proven formula."

"Medical knowledge proves that Nature must produce about two full pints of the vital digestive juice [bile] your liver makes each day. Otherwise, your food may not digest properly—and leave you feeling dull, headachy, sluggish. Scientific facts show it takes a two-way treatment to get the vital digestive juice flowing quickly—and to relieve sluggishness without disturbing digestion. Now—this type of two-way treatment follows Nature's own order for regularity."

"First—Carter's starts your liver bile flowing quickly. Second—Carter's gently help you to that glorious feeling that goes with regularity."

"One of the reasons for irregularity is that sometimes the alkaline digestive juices don't flow fast enough to help digest the food you eat. Another reason is that sometimes the peristaltic waves slow down. Many laxatives have no effect on the Alkaline Juices I'm talking about. Many of 'em only stimulate the peristaltic waves. But there's one laxative that may increase the flow of these vital Alkaline Juices. That's why we call it a Laxative Plus. By this time, I'm sure most of you know that I'm talking about Carter's Little Liver Pills."

"When two pints of that juice [bile] flow through our lower food canal every day, irregularity, gas, bloating, fatty indigestion below the belt and bilious grouch may go away. Then many of us may feel full of joy like a barefoot boy. Carter's Little Liver Pills are made of two simple vegetable medicines. No calomel in them."

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these it is alleged by the Commission that Carter advertised that "if any individual feels" *any* of these "conditions," i. e., suffers from *any* of them, "then such person is exhibiting symptoms, manifestations or conditions indicating irregularity of bowel movement or constipation; that irregularity of bowel movement or constipation is the cause of such symptons, manifestations or conditions"; that "the preparation 'Carter's Little Liver Pills' is a competent and effective treatment for such symptoms, manifestations and conditions." Also, that Carter further represented in its advertising material, among other things, in the manner, means and method aforesaid, that constipation poisons one's body.

Paragraph 8 of the complaint charges that advertising material has been disseminated in commerce by Carter in which material it purports to describe the "therapeutic action" of its preparation, and the result and greater value of such action in an invidious comparison with the value of calomel and other laxative preparations or compounds sold on the market. In this connection, it is charged that Carter's advertising material has represented directly and by implication, among other things, that calomel, "is a harsh, drastic, dangerous laxative, the use of which is an ordeal and puts one through the wringer"; that "other ordinary laxative preparations or compounds sold on the market do not possess the same desirable therapeutic action nor will the use thereof be as effective, or produce as beneficial results," as Carter's product, and that this product "is superior to such laxative preparations or compounds."

Paragraph 9 of the complaint also charges, *inter alia,* that all of Carter's advertising claims (noted above) are "grossly exaggerated, false and misleading," and it further avers that Carter's Little Liver Pills do not represent a fundamental principle of nature in self-treatment; that they are not effective in making liver bile flow freely; that they will not get the liver back to normal or back to "producing" (bile), nor will they cause the proper flow of the gastric juices, natural vital digestive juices or vital alkaline juices; that Carter's pills are not based on the fundamental principle of the operation of the digestive system, and will not help "food digestion" nor lessen "food decay," nor will they regulate digestion or the digestive system; that to the contrary, Carter's preparation "is likely to interfere with the digestive process," and will not bring on, help or restore "regularity"; that it does not constitute a competent or effective treatment for constipation, and it will not produce in the users of the preparation the 36 different physical indications of abounding health and vitality (enumerated in this paragraph) and which Carter had advertised will result from the use of its preparation. Paragraph 9 further charges that Carter's preparation will not influence the production or flow of liver bile so as to enable one to overeat or overindulge in "good times" without experiencing the usual discomforts resulting therefrom; that it will not (if taken as directed by Carter) cause one to awaken feeling better (in the 36 ways specified in this paragraph) as advertised by Carter; that Carter's preparation does "contain strong medicines," and that "it is not safe to use under all circumstances"—that it is "an ordinary laxative or cathartic and possesses no therapeutic properties over, above, or in addition to, its laxative action."

Paragraph 10 of the complaint refers to and describes approximately 59 distressing physical conditions and unhappy mental attitudes mentioned in Carter's advertising. (See reference in paragraph 7 to these and/or similar physical troubles which Carter's advertising indicated would be eliminated by use of Carter's preparation.) Paragraph 10 charges that the existence of one or more of such 59 symptoms, manifestations or conditions does not indicate that the individual is suffering from irregularity of bowel movement or from constipation; that Carter's preparation is not a competent or effective treatment for such symptoms, manifestations or conditions; that when such symptoms or manifestations are caused by, or associated with, irregularity of bowel movement, then Carter's preparation "will have no greater therapeutic value in the treatment thereof than the temporary relief afforded by an evacuation of the bowels." It is further averred in this paragraph that Carter's pills "will have no therapeutic action, effect or influence on the secretion and flow of bile and will therefore have no therapeutic value, whatever, in the treatment of any symptom, manifestation or condition, under whatever name or names designated, caused by or due to disorders in the secretion and flow of bile—that according to the consensus of

opinion of recognized scientific and medical authority, constipation does not poison one's body."

Paragraph 11 of the complaint alleges that calomel used with proper caution and given in proper doses for, and taken in a proper manner to act as, a laxative, is not dangerous; and it is no more drastic in its action, nor is the taking thereof any more of "an ordeal," nor does it "put one through the wringer" to any greater degree than Carter's preparation which is an ordinary laxative or cathartic possessing no other therapeutic property; that the action of Carter's preparation is no different from, nor will the results obtained from its use be any more effective or beneficial than, that obtained from the use of many other ordinary laxative preparations and compounds containing vegetable laxative or cathartic drugs sold on the market; that Carter's preparation is not superior to such other laxative preparations or compounds.

The complaint (paragraph 12) also generally charges, *inter alia,* that Carter engaged in further false and misleading representations in reference to its preparation through and by the use of the word "Liver" in the name of "Carter's Little Liver Pills" used in its advertising material to identify and describe the medicinal preparation it sold and distributed; that Carter there represented, directly and by implication, that its preparation is for use in the treatment of conditions, disorders and diseases of the liver and that said preparation will have some therapeutic action, effect and influence on the liver. The complaint further alleges that Carter's pills contain no ingredient or ingredients, recognized by competent medical or scientific authority, either alone or in any combination of the one with the other, as having any therapeutic value in the treatment of any condition, disorder or disease of the liver, or that the ingredients in the said pills, alone or in any combination of the one with the other, will have any action, effect or influence, corrective or otherwise on the liver.

The complaint (paragraph 13) further avers that Carter's advertisements were false inasmuch as they represent its pills as a competent, effective, safe treatment for common and recurrent pains and fail to reveal facts material in the light of such representations or material in respect to the consequences that may result from the use of the preparation under conditions described in the said advertisements or under such conditions as are customary or usual; that Carter's preparation is an irritant laxative or cathartic which is potentially dangerous if taken by persons suffering from abdominal pains, nausea, vomiting or other symptoms of appendicitis.

The complaint avers generally in paragraph 14 that Carter's advertising material does not accurately disclose or describe its preparation or the true results to be obtained from its use, all of which misleads the public into the erroneous and mistaken belief (1) that the use of Carter's preparation will have the effect and accomplish the results claimed for it by Carter, as set forth in paragraphs 6 and 7 of the complaint, (2) that its preparation is superior to calomel and superior to other ordinary laxatives sold on the market, (3) that it will have some therapeutic action, effect and influence on the liver, and/or that it is for use in the treatment of conditions, disorders and diseases of the liver, (4) that it is safe to take. The complaint further avers in this paragraph that Carter's advertising material "has had and now has the tendency and capacity to, and might easily, induce a substantial portion of the purchasing public, because of such erroneous and mistaken beliefs, to purchase" Carter's preparation.

And see our later reference to dismissal of two charges set forth in the Commission's complaint. Commission's finding No. 19 orders dismissal of these two charges.

The complaint finally avers that the acts and practices of Carter (in its noted advertising) are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Act.

Carter's Answer

Carter filed an answer in July, 1943 in which it admitted its identity, the sale of its product and the dissemination of advertisements containing statements and representations concerning its laxative pill, a list of which is set forth in the Commission's Complaint.

While admitting in its answer the use of certain of the representations appearing in its advertising material (as shown by the evidence) the answer averred that as to such representations the Commission's com-

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plaint was so framed as to attribute to many of Carter's therapeutic claims *a meaning* which Carter did not intend in making the claims. It further averred therein that some of the advertising claims noted in the complaint had been abandoned for a long time; that some of these advertising claims were regarded by Carter "as permissible trade puffery or permissible sales talk," and others as being supported by competent evidence. The answer charged that paragraph 6 of the complaint "contains facts, innuendoes and inferences built upon inferences."

The answer admitted that many of the words and phrases set forth in paragraph 7 of the complaint had been used to advertise Carter's pills, and denied that it had claimed that constipation poisons one's body. It averred that the drugs in its pills "act upon the liver to stimulate the flow of bile," and denied that it had ever represented its products "for treatment of disorders of the liver generally."

Carter finally averred that its advertising of its product "truthfully describes its properties"; that "the mere fact that one may be mistaken in some respects with regard to the physiological action of Carter's Little Liver Pills does not establish as a matter of law that the seller is guilty of unfair or deceptive acts or practices or that its advertising is misleading in a material respect."

Without going further into detail, it is our view that the averments in Carter's answer put in issue all of the material averments in the Commission's complaint.

The pleadings as thus framed remained unchanged through all stages of the instant litigation. After issue was thus joined, *the first series* of extended hearings were held before an examiner, beginning in November 1943 and ending in November 1945. Upon completion of these first hearings, the examiner made his formal "Report" to the Commission on July 22, 1946. In an earlier part of this opinion we called attention to the procedures which were standard practice in proceedings before the Commission at the time this controversy began. The proceedings were therefore *continued under this practice* after this court had remanded the cause for such further proceedings.

This (1946) "Report" of the Hearing Examiner occupies (with its two addendums) approximately 267 pages of the printed transcript. It sets forth a carefully detailed analysis of the testimony and evidence submitted in the first series of hearings. It includes his conclusions of fact and law and a recommendation that the Commission issue a Cease and Desist Order prohibiting Carter (and its then co-respondent Street & Finney, a New York Corporation which had been handling Carter's advertising) from continuing the acts and practices which the examiner found to be in violation of the Act.

In the Commission's *first* disposition of this case by its Cease and Desist Order issued in 1951 the Commission followed the then applicable (and above referred to) procedure in which the Hearing Examiner filed only a "recommended decision," this being done pursuant to a rule of the Commission in effect when the proceedings were originally instituted in 1943. In the second series of hearings held after and pursuant to our order of remand under the order of the Supreme Court, the Hearing Examiner and the Commission continued to proceed under the above noted Commission's rules effective in 1943, since the remand merely continued proceedings which had been interrupted by the first review proceeding in this court. In disposing of the issues arising out of the second series of hearings following the remand, the Hearing Examiner continued to follow the said 1943 Commission rules and did not make an "initial decision" *as is required by procedures now followed.* In the (1956) record before us on this review the Commission ultimately made its own findings as to the facts, its own Conclusion of Law, and formulated its own Order to Cease and Desist. Thus, its ultimate decision now before us on review was not one fashioned by the Hearing Examiner but was that of the Commission itself. This decision was rested upon the entire record in *all* of the various proceedings had in this controversy save and except that part relating to the testimony of Dr. Lockwood.

At the conclusion of all testimony taken *after* our above noted order of remand, and under date of March 31, 1955, the Hearing Examiner filed his Supplemental Report upon the additional evidence received, along with his recommendations to the Commission. In this document the Hearing Examiner, among other matters, described certain past proceedings had in this litigation and this recital was followed by his description

of the additional evidence presented by and through the testimony of Doctors Case and Bollman (see footnote 2) and comments on contentions raised by counsel for Carter.

This (1955) Supplemental Report ends with the "Conclusion" of the Hearing Examiner wherein he stated that he finds no reason to alter, change, amend, add to, or detract from, his original Findings as to the Facts, Conclusion of Law and Recommendation for Appropriate Action, all as set forth in his above noted original Report to the Commission of July 22, 1946. The Hearing Officer also stated therein that "the deletion of the testimony of (the deceased) Dr. Lockwood in nowise detracts from the validity of this decision to adhere to the original recommendations, nor does the disregard of Dr. Bollman's testimony in support of [a certain Commission exhibit] alter such determination * * *." The "Conclusion" ends with the Examiner's general comment that "because of the additional testimony [of Doctors Case and Bollman] and the opportunity to again study, review and appraise the entire record after a lapse of nine years [he] is firm in his conviction that the record fully justifies all findings, conclusions and recommendations originally made [in 1946] and hereby renews his recommendations that an appropriate order be issued consonant therewith."

The "Decision" of the Commission

Prior to the making and entry of the final and formal "Decision" of the Commission before us in the instant proceeding (which document bears date of October 4, 1956) counsel for both sides filed briefs with the Commission in which they tendered comprehensive arguments on the merits of the entire case.

Following the filing of these briefs counsel presented oral arguments before the Commission on June 18, 1956 in support of the contentions set forth in their respective briefs. Thereafter, the "Decision" above mentioned was entered. Among other matters discussed in this Decision, the Commission made a preliminary comment on certain antecedent procedures in this prolonged controversy including therein a reference to the denial by the Commission of a motion by Carter (referred to *supra* in this opinion) to disqualify the Hearing Examiner for alleged bias and prejudice. The Decision also refers to the oral arguments of counsel presented before the Commission on June 18, 1956.

A formal "Opinion" of the Commission was also entered on October 4, 1956. In this Opinion the Commission also discusses the (April 18, 1955) motion of Carter to disqualify the Hearing Examiner who had previously taken all of the testimony in this proceeding. In this motion Carter prayed for an order disqualifying the said Hearing Officer and sought *a hearing de novo* before another hearing officer, or in the alternative, an order dismissing the entire proceeding for failure of proof. The Commission's Opinion rejected Carter's above noted motion and, *inter alia*, recites that its "Decision" represents "the result of its own exhaustive examination of the record." Earlier in this opinion we held that the Commission did not abuse its discretion in rejecting Carter's said motion.

The "Decision" of the Commission contains the formal findings of ultimate probative facts developed in the evidence and testimony in this proceeding and occupies approximately 50 pages of the printed transcript in cause No. 15373. Of necessity we must confine ourselves to a summary of the findings which deal immmediately and directly with what we regard as the most pertinent fact issues in this case. Preliminarily, the Commission recites that having "exhaustively considered the entire record, including the evidence adduced after the remand and [after] the briefs and oral arguments of counsel," it "makes this its modified and supplemental findings as to the facts and its conclusion drawn therefrom, the same to be in lieu of those contained in its decision of March 28, 1951." (See footnote 1.)

After other preliminary findings in the Decision as to Carter's status as a corporate entity and as a litigant, the findings refer to the sale practices of Carter which bring its Commission-condemned advertising operations into the current of interstate commerce and portray its use of this advertising material as one designed for the purpose of inducing, directly or indirectly, the purchase of its medicinal preparation in such commerce. The Decision then sets forth various findings of fact as to the precise nature and character of the advertising representations disseminated by Carter in commerce all as more completely charged in

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the Commission's complaint and as shown in detail in the exhibits in evidence.

Both the Decision and the Opinion of the Commission contain pointed references to the briefs of counsel and their oral argument on the merits at the conclusion of all proceedings before the Commission. In the margin we comment on this phase of the proceedings.[1]

THE COMMISSION'S FINDINGS OF FACT

The ultimate findings of fact entered by the Commission appear in and as part of its Decision dated October 4, 1956. These findings are set forth in twenty separate and numbered paragraphs and the length of this instrument makes it necessary to summarize certain of the Commission's many

[1] The final oral arguments before the Commission were presented on June 18, 1956. They appear in Volume 8 of the Printed transcript in proceeding No. 15373 in this court at pp. 3472 to 3530, inclusive. The findings of fact set forth in the final Decision of the Commission and in its formal Opinion contain several comments upon these oral arguments but their length forbids inclusion in this opinion. However, a brief reference to the arguments before the Commission, and the very significant contentions therein voiced, will be helpful in arriving at a definite understanding of just what opposing counsel regarded as the exact issue or issues which had to be finally decided by the Commission. The great value of these arguments lies in their refreshing candor and frankness, and the purpose of counsel was to narrow the issues facing the Commission to the limited area of controversy there clearly portrayed by counsel. And additionally, it is to be noted that subsequently (and in four of its later noted findings) the Commission on its own motion also materially narrowed the material fact issues which this court is called upon to resolve in its review of the record.

In his oral argument, counsel for Carter stated to the Commission: "I have argued in my brief that one of the tasks this Commission has before it is to review the entire record and make new findings, because the old ones [set out at pages 305 to 333 of the printed transcript in cause No. 12940 in this court] are out the window. You can't make findings on the basis of an incomplete record."

(We have noted in an earlier part of this opinion, that following the second set of hearings the Commission did make and enter an entirely new, second, final and controlling set of Findings of Fact, a Conclusion of Law based thereon, and a formal Cease and Desist Order, these being the instruments made and filed on October 4, 1956.) (See footnotes 1 and 2, supra.)

Concerning just what material issues had finally emerged as the end result of the two series of hearings before the Hearing Examiner during which proceedings (according to Carter's counsel) "thousands of exhibits" had been introduced in evidence, Carter's counsel frankly stated to the Commission: "I think over the course of the years, it has pretty much simmered down to two issues, one, whether or not the ingredients of Carter's Pills—namely aloes and podophyllin will stimulate the flow of bile from the liver. The other is a corollary that flows from that, is the company entitled to use the word 'liver' in the title of its name, Carter's Little Liver Pills, as it has done now, I think, for about 75 years?" This statement is certainly blunt enough to remove any and all doubt as to what Carter regarded as the controlling issues which remained for final determination by the Commission.

The here noted oral statement of counsel for Carter was clean-cut and distinctly posed the ultimate issue for decision as Carter would have the Commission see it. As we read its briefs on this review, counsel for the Commission does not aggressively part company with Carter's statement of the dominant and controlling issue before the Commission.

However, the Carter briefs on this review range over the entire body of testimony. Vigorous exception is generally taken to most of the ultimate findings of fact made by the Commission, and the basic argument is that in reviewing and analyzing the evidence and testimony in its aforesaid final Decision and Opinion rendered in 1956, the Commission did not squarely face up to the facts developed in the hearings, but to the contrary, it unfairly slanted its fact determinations thereby wilfully distorting the real fact picture presented by the testimony. On the basis of the expert testimony in the record, Carter indicts as grossly unfair and prejudicial the Commission's general comments on the testimony and evidence. It charges that the record there made by the Commission demonstrates its biased attitude, a condition which caused it to improperly and unjustly weigh the evidence and thereby deny Carter due process of law.

The final Decision and the final Opinion of the Commission occupy approximately 62 pages of the printed transcript. In these two pronouncements the Commission appears to have squarely met the dominating issue so clearly posed in Carter's final oral argument before the Commission. We think that the extensive and careful analysis given the testimony of certain of the most important expert witnesses serves to clearly indicate a sincere desire on the part of the Commission to reach to the heart of what Carter's counsel frankly assured the Commission in oral argument was the crucial issue for determination. We are convinced (as was the Commission) that Carter was trying to correctly identify the controlling issue finally tendered in this litigation.

Since we are convinced that the persuasiveness of the great mass of expert testimony and other evidence and the probative weight to attach to it, presented fact issues which were clearly for consideration of and determination by the Commission, we must and do conclude and therefore hold that the Commission acted well within the legitimate orbit of its fact finding powers when it determined, as facts, (1) whether or not the expert medical testimony and evidence, taken as a whole, compelled the conclusion that use of Carter's pills, as adver-

fact determinations which we consider particularly pertinent to our present inquiry.

In footnote 9, *infra,* we have set out the text of the Commission's findings 3, 4, 18, 19 and 20 and these five findings are not repeated at this point in our summary of other findings.

The Commission found as a fact (without dispute on this point) that the quantitative formula for Carter's medicinal preparation is

Podophyllum Resin U.S.P. 1/5 gr.
Po. Purified Aloes 1/4 gr.

It also found as a fact that Podophyllum Resin, also known as podophyllin, is used as a laxative, purgative or drastic cathartic, and aloes is one of the irritant cathartics ranking with senna, rhubarb and cascara sagrada; that Carter's preparation serves to increase temporarily the motility of the large bowel by irritation and thus induces partial evacuation of the large intestine.

The Commission, *inter alia,* also found that in connection with the sales of its laxative pills, Carter had represented to the

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tised, would in any way increase the secretion and/or flow of liver bile, and thereby affect the human biliary system, (2) whether or not this same testimony and evidence, taken as a whole, established the existence of any relationship between bile flow and constipation which would or could be affected in any way by use of Carter's Little Liver Pills, (3) whether or not use of Carter's pills would (also) produce a beneficial effect "in the treatment of conditions, disorders and diseases of the liver." (As to point 3 here noted see Commission's Order set out in footnote 5, supra.)

Our comment on the position of Counsel for Carter calls for a further comment on assertions in the Commission's brief. Stress is there laid on the contention that "the actual area of factual conflict relates simply and solely to what influence, if any, petitioner's laxative pill will have on the production and flow of bile." The Commission's brief also emphasizes this point in somewhat different manner in stating that in Carter's (later noted) specification of errors 1 through 8, it states that the Commission's findings are erroneous because of the alleged method and manner in which the Commission considered or failed to consider the testimony and other evidence relating to experiments and tests conducted by witnesses for the Commission and for Carter. (See our comment on this point in footnote 4, supra.) The Commission's brief asserts that this evidence was admitted into the record as being responsive to allegations in the complaint that Carter's statement as to the effect of its laxative pill on the production and flow of bile was false and misleading. It is urged that as a consequence, Carter's specifications must, therefore, relate to the Commission's findings that Carter's laxative pill will have no effect on the formation or flow of bile. As respects this argument the Commission's brief contends that this is borne out by the argument in Carter's brief that there is no substantial evidence to support a Commission finding that Carter's pill will have no effect upon the formation or flow of bile, i. e., that use of Carter's pills will not increase the production and flow of bile.

The Commission's brief also emphasizes the fact that the finding that Carter's laxative pill will have no effect upon the formation or flow of bile is only one of the many findings of fact made by the Commission relating to the falsity of petitioner's statements as to the therapeutic value of its laxative pill. Additionally, it is asserted that "there is no evidence of any nature in the record that any doctor has ever prescribed petitioner's laxative pill for any purpose other than to produce an evacuation of the bowels."

Counsel for the Commission content themselves with the ultimate argument that the only issues raised by Carter on this review are: (1) whether the findings that petitioner's laxative pill will have no effect on the formation or flow of bile is supported by the greater weight of the evidence and (2) whether petitioner was denied a fair and impartial hearing in this proceeding.

It is our considered judgment that the Commission reached its final determinations as to what had been established as facts, by a reliance on a body of testimony and evidence which it firmly believed to be substantial. As we have indicated, it then had before it for consideration not only the briefs and final oral arguments of counsel in 1956, but also the many thousands of pages of the reporter's transcripts of the testimony in the two sets of hearings held before the Hearing Examiner, along with more than 2000 exhibits of a highly technical character. We cannot find any legitimate basis for charging the Commission with dereliction of duty because it kept the analytical comments appearing in its Decision and Opinion within what we regard as a reasonable compass.

The Opinion of the Commission contains an illuminating and enlightening survey of the evidence and testimony as finally viewed by the Commission. This document, along with the Commission's comments on the evidence appearing in its findings of fact which are set out in its Decision, leaves no doubt in our minds that the Commission's final Decision (as averred in the Opinion) reflects the fact that its Decision represents "the result of its own exhaustive examination of the record."

It is also our conclusion from a careful appraisal of the entire record on this review that the Commission made and entered its final findings of fact and its final 1956 Decision, Opinion and Order based thereon, with a full understanding of the content and significance of the entire record in this case which was then before it. That the final oral arguments of counsel were made in May of 1956, and the Decision and Opinion of the Commission (which were entered in the first part of October 1956) bespeaks, if anything, a conscientious and painstaking examination and appraisal of the then record of monumental proportions before reaching the final conclusion announced in these two documents.

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purchasing public that its said preparation (1) represents a fundamental principle of nature in self-treatment; (2) is a competent and effective treatment for "a sluggish liver"; (3) will "wake up the flow of bile," is "effective in making bile flow freely"; (4) will cause the proper flow of gastric juices, vital digestive juices and vital alkaline juices; (5) is based on the fundamental principle of the operation of the digestive system, will "help food digestion," "lessen food decay," regulate digestion and the digestive system; (6) restore regularity, is a cure and remedy and constitutes a competent and effective treatment for constipation; (7) will clear away the "dark clouds of listlessness and despondency" and "give one's personality a chance"; (8) will "keep up one's pep and vigor," "make one feel good and up to par again" and "keep one smiling and happy"; (9) will eliminate bad disposition and keep good dispositions "cheerful, happy and a regular thing"; (10) will help in more ways than one to make one feel better again fast and differently and will provide two-way relief; (11) follows nature's own order for regularity and so regulate the digestive process that if taken at night one will awaken feeling the way one wants to feel, "full of normal old-time pep and vigor," "alive," "alert," "cheerful," "peppy," "eager," "robust," "bright," "lively," "full of pep," "bounce," "energy," "springy," "snap," "go and vigor," "spry and chipper again," "perked up," "up on your toes," "up to snuff," "up to par again," "fit as a fiddle," "chipper as a chipmunk," "on top of the world," "up and up," "rarin' to go," ready to "jump out" or "roll out" of bed, "singing like a lark," "singing a song for the sheer joy of living," "fresh as a daisy," "glad to be alive," "ready for a big breakfast"; (12) will influence the flow of liver bile so that one can overeat and overindulge without any discomfort and if one has overeaten or overindulged it will overcome such discomforts and enable one to wake up, "roll out of bed," "rosy and bright," "clear-eyed and steady-nerved," "feeling just wonderful," "feeling like a million," free from that "blue-Monday feeling," "ready for a great big breakfast," "alert and ready for work"; (13) does not contain any strong medicine and is safe to use; (14) is a competent and effective treatment for the mental and physical disorders set forth in paragraph Seven of the complaint (see our summary of the allegations in this paragraph referred to supra in this opinion); (15) *will have therapeutic value in the treatment of disorders and diseases of the liver.*

Upon consideration of the entire record before it, the Commission further found that the advertising representations of Carter, as just above summarized, were false and misleading in material respects. It also specifically found that through advertising which used the word "Liver" in the name "Carter's Little Liver Pills," Carter thereby represented that its preparation would have some therapeutic action, effect and influence on the liver, and is for use in the treatment of conditions, disorders, and diseases of the liver, and that such a representation was false and misleading.

The Commission's finding as to the false and deceptive character of the advertising representations made by Carter was based on its further findings that "Inasmuch as the laxation afforded by an irritant laxative or cathartic is not a normal physiological method of evacuation and is not based on any principle having relation to natural bowel motility, it is not true that the preparation represents a fundamental principle of nature in self-treatment." This finding in turn was based on the evidence of a witness supporting the Commission's complaint, and of several doctors who testified for Carter.

The Commission also found that

> "In a scientific sense, constipation is a term used to connote a slower rate of evacuation of the large bowel than the one normal for that individual. Although it has reference to delay in the passage of indigestible residues through the alimentary tract and to infrequency of bowel action, and may be used to describe the condition in which the stools are dry and hard, constipation has been described also as being that condition which causes a person to believe that a cathartic is necessary to cause a bowel movement. Normal frequency in bowel movement varies widely among individuals. Because varied notions obtain with respect to what represents normal frequency, the average layman may not diagnose constipation properly and there is a tendency for self-diagnosis to be made on the basis of symptoms having no relationship to constipation. In its chronic form, there are two general types of constipation: (1) spastic, and (2) atonic. The state of the musculature of the large bowel differs in the two conditions named. In the spastic variety, the

musculature is abnormally contracted and rigid and does not propel the contents thereof forward in a normal manner. In the atonic condition usually associated with an enlargement of the large bowel due to tremendously increased content, the musculature does not contract and retain its tonus or state of partial contraction. Atonic constipation is attributable to constitutional weakness of the muscles of the colon and is supposed to occur principally in the rectum, while the spastic type is supposed to be due principally to anxiety, worry, or nervous strain. Among the causes of constipation or irregularity of bowel movement are improper diet and stool habits, insufficient intake of fluids and variations or obstructions of the alimentary tract such as fissure, cancer and debilitating conditions. Factors predisposing to constipation are numerous and thorough study by the physician is necessary before comprehensive treatment is undertaken. Its treatment, therefore, varies in individual cases, but is directed to correcting the basic conditions which are responsible."

(As to the fundamental propositions noted in this finding, the several doctors who testified appear to be in agreement.)

The Commission further found that with regard to the type of constipation known as spastic, Carter's Little Liver Pills "will tend to aggravate any state of spasticity which is present." The Commission also found on undisputed evidence that the habitual use of irritant laxatives and cathartics tends to produce irregularity rather than to restore regularity and the use of Carter's preparation will not restore regularity of bowel movement.

The Commission also found (without dispute) that the statements appearing in Carter's advertising to the effect that its product is composed of two simple vegetable medicines and the references therein to "gentle action purportedly afforded by its use" imply that Carter's Little Liver Pills do not contain strong medicines.

The Commission found (and we think correctly) that Carter's pills do contain "strong medicines." The Commission declares, and the record shows, that though the ingredients of these pills are obtained by purification of members of the plant kingdom, their ingredients are "irritant purgatives." This record also provides substantial evidence that aloes taken in sufficient amounts leads to some hyperemia and increased vascularity; that neither aloes nor podophyllin is absorbed to any great extent, and as long as they remain in the colon may be causative of local irritation. It also found (in the first series of hearings) that podophyllin was removed from the U. S. Pharmacopoeia when the scientific group responsible for the preparation of this publication recognized it as a "drastic," or member of that class of irritant drug which includes colocynth and jalap.

The Commission also found (without dispute) that Carter's product is not safe for and harmless to all individuals who are constipated or suffering from delay or irregularity of bowel movement and symptoms thereof, or from failure of digestion. It also found (without dispute) that Carter's pills are potentially injurious if taken by persons suffering from abdominal pains, nausea, vomiting, or other symptoms of appendicitis. It further found (without dispute) that use of Carter's pills may cause perforation of the intestine in instances where delay in the evacuation is due to obstruction in the tract. (It was emphasized in the evidence that in some instances the use of Carter's pills may be attended with griping and stomach discomfort, and when used in the presence of constipation of the *spastic* type may serve to increase and aggravate such state of spasticity.)

The Commission also found, and the evidence is uncontradicted, that use of a laxative is contraindicated in many conditions.

It also found specifically that the ingredients in Carter's pills, alone or in combination of one with the other, will have no therapeutic action, effect, or influence, corrective or otherwise, on the liver. This finding rests upon the testimony of three experts whose testimony supported the allegations of the Commission's complaint.

The Commission also found that the greater weight of the testimony and other evidence introduced in the record supports informed determinations that Carter's preparation will not stimulate the formation of bile by the liver or increase the secretion of bile by the liver.

It also found, *inter alia*, that Carter's preparation will not increase the flow of bile or any constituents thereof into the duodenum —also that Carter's preparation is not an effective treatment for sluggish liver function and will have no therapeutic action on the liver or diseases thereof; that it will not wake up the flow of bile or cause bile

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to flow freely, or favorably influence the formation or flow of bile either as to quantity or the vital and effective constituents thereof; (As pointed out in footnote 7, *supra,* the vital controversy in this case centers in this area.)[8] that this preparation does not provide two-way relief and has no therapeutic effect beyond that of an ordinary laxative, that is to say, of any substance which increases the movements of the large bowel either through irritation, bulk or fluid content; that it will not influence the production or flow of liver bile so that an individual can overeat and overindulge in "good times" without such discomforts as may normally attend them, nor enable an individual to wake up "clear-eyed and steady-nerved," "feeling just wonderful," and "alert and ready for work"; that Carter's preparation has no chemical action on food which will prevent decay thereof, and the representation that it will lessen food decay is misleading.

It also found that use of Carter's product will not increase the effectiveness of the gastric juices or cause the proper flow of any of the vital digestive juices, and it will not help digestion or regulate the digestive system or digestion, or have any salutary effect upon the gastro-intestinal tract aside from affording temporary partial evacuation of the colon; that to the contrary, in some instances, use of Carter's pills may interfere with and disturb digestion.

The Commission went further and found that when certain conditions exist that are associated with constipation, Carter's pills do not constitute a competent and effective treatment for such manifestations (referred to in finding No. 4—see footnote 9 infra) when they are associated with or caused by constipation; that Carter's preparation is not an effective treatment for indigestion, or "lazy digestion" or retarded digestion in any circumstances in which such conditions may occur.

Based upon its consideration of the evidence as a whole, and its appraisal of the weight to be given the probative value of all of the evidence and testimony adduced in the many hearings over the years, the Commission also found, *inter alia,* that evidence introduced in support of the complaint, particularly when considered in connection with the results afforded by certain of the scientific experiments, constitutes a full

[8] Certain of the Commission's expert medical witnesses testified that Carter's laxative preparation would have no influence on bile flow.

Certain of Carter's expert witnesses differed somewhat in their views on this particular problem; one expert medical witness testified on direct examination that Carter's laxative pill would effect bile flow; one of such witnesses said that his experiments would not permit a conclusion, and a third medical expert (characterized by Carter in its brief as its "key witness") said that Carter's pill would increase bile flow if three conditions were present at the same time.

The "three conditions" mentioned by this third witness were as follows: (1) Carter's pill must be taken in sufficient doses over a sufficient period of time to "produce laxation either within normal limits of fresh weight stools or the maximum effect." This witness stated that to accomplish this, 5 of Carter's pills must be taken every day for 1 week. He admitted that what is a normal limit of fresh weight stools varies in the individual from time to time. He stated that he was not willing to say if a person met this requirement that it would mean the flow of bile would be increased. (2) As to the second "condition," this witness stated that "the rate of flow of bile into the duodenum will be increased in individuals and, only in individuals who show during periods within which they have been taking no [Carter's laxative] pill 'low values' for the biliary constituents in the duodenal fluid in response to a stimulus introduced into the duodenum of the type of Peptone."

As to the way this (second) condition could be met, the expert admitted that unless the purchaser of Carter's pills had had a duodenal drainage performed, he would not know whether such drainage was high or low and unless he did know, he would not be in a position to tell whether Carter's pill would have any effect upon the flow of bile. Again, this witness was not willing to say that even though this second condition was met together with his other "conditions," Carter's laxative pill would secure an increase in bile flow.

The third condition was that Carter's pill will increase the flow of bile "in individuals who show signs, during periods in which they are not taking Carter's pills, of diminished rates of intestinal motility as indicated by abnormally low fresh weight stools and symptoms depending upon the abnormally low rate of intestinal motility."

Counsel for the Commission finds this testimony concerning the third condition to be "difficult of interpretation" and points out that Carter's witness interprets it to mean "that the individual be one who shows signs when not taking the pills of low or diminished rates of intestinal motility as indicated by abnormally small stools or absence of stools."

On cross-examination, this "key witness" of Carter was asked whether, if these "three conditions" he had named were met, he was willing to state that whenever any one takes Carter's Little Liver Pills (under these three conditions) the level of the flow of the biliary constituents into the duodenum would be raised. The witness replied that he was not willing to make such a statement.

refutation of the scientific view by witnesses for Carter to the effect that "a favorable influence on bile flow may result from the increased intestinal motility afforded by the irritating action of a laxative" of the Carter type. It also found that "not only is it apparent that the augmented intestinal motility through this (Carter) type of laxative affords bowel evacuation does not significantly increase bile flow, but the greater weight of the scientific evidence received shows that there is no causal relationship between constipation and bile flow"—that "this conclusion has support in other scientific evidence indicating that constipation will not, under any circumstances, decrease bile in the system to such an extent that there is not sufficient bile to carry on its function in the digestive process."

The Commission further reached and expressed the factual conclusion and opinion on the entire record before it, "that the greater weight of the testimony and other evidence introduced into the record supports informed determinations that the preparation Carter's Little Liver Pills will not stimulate the formation of bile by the liver or increase the secretion of bile by the liver"; that "inasmuch as the evidence further shows that the respondent's product will not cause the gall bladder to contract or cause relaxation of the sphincter of Oddi or prevent its contraction in the first instance or serve in any way to milk bile from the ampula of Vater or the bile duct, the Commission further concludes that the respondent's preparation will not increase the flow of bile or any constituents thereof into the duodenum."

In Paragraph 12 of the Findings the Commission found that

> "Counsel supporting the complaint maintains that the evidence relating to the test studies submitted in support of the complaint conclusively establishes that Carter's Little Liver Pills do not act in any way to increase the secretion or flow of bile. In contending that the greater weight of the evidence fully supports determinations to the contrary, counsel for the respondent asserts that the record shows that a relationship exists between constipation and bile flow in that a large number of people who suffer from constipation also have a subnormal flow of bile; and that, concomitant with the laxation afforded them and the relief of their associated symptoms, the (Carter) preparation causes significant increases in the levels of biliary constituents for these individuals. *Each counsel contends in effect that the scientific evidence presented by his adversary is based on defective experimental procedures and reflects erroneous interpretations of those studies and unsound expressions of medical opinion.*" [Italics supplied.]

See our comments in footnote 4, *supra*, concerning these "experimental procedures." (See reference in footnote 9 to text of Commission's Finding No. 19 in which it dismisses certain charge in its Complaint.)

The Four Controlling Findings

Four of the Commission's final findings of fact here noted require special emphasis by us, this for the reason that they clearly indicate that the Commission finally elected to support the injunctive provisions of its Cease and Desist Order of October 4, 1956 (footnote 5) by an ultimate reliance on the facts which the Commission, in and by these particular findings, determined had been fully and finally established by a body of evidence of a substantial character. In the margin we set out the text of the four crucial findings of fact here referred to.[9] The language of Finding No. 20 serves to

[9] Finding No. 3 reads as follows:

"In furtherance of the sale and distribution of the aforesaid medicinal preparation, the respondent has disseminated, and has caused the dissemination of, advertisements concerning said preparation by the United States mails and various means in commerce, as 'commerce' is defined in the Federal Trade Commission Act; and the respondent has disseminated, and has caused the dissemination of, advertisements concerning such preparation by various means for the purpose of inducing, and which have been likely to induce, directly or indirectly, the purchase thereof in commerce, as 'commerce' is defined in the Federal Trade Commission Act."

Finding No. 4 reads as follows:

"All the representations hereinafter referred to have been made directly or by implication in advertising material which the respondent has disseminated or caused to be disseminated in the manner noted in the preceding paragraph. [The preceding paragraph is Finding No. 3.]

"(a) Through use of words, phrases and statements purporting to be descriptive of the therapeutic value, beneficial effects and advantages afforded by use of the preparation 'Carter's Little Liver Pills,' the respondent has represented, directly and by implication, among other things, that its product represents a fundamental principle of nature in self-treatment, that it is a cure and remedy and constitutes a competent and effective treatment for constipation, and will bring on, help, and restore regularity of bowel movement.

"The respondent also has represented that its preparation does not contain any strong medi-

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further clearly identify the particular advertising representations employed by Carter in the sale of its product (which the Commission ultimately condemned as false and misleading) these including the advertising representations carefully described in Findings Nos. 4 and 18. (Among these false and misleading advertisements is the use of the word "Liver" in the name "Carter's Little Liver Pills.") Finding No. 3 describes these advertising representations as having been disseminated in commerce.

Since the Commission saw fit in these four findings to specify the ultimate basis for its Order here assailed by Carter, we think that by this action the Commission

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cine, and that it is harmless and safe for use by those individuals who have constipation or are experiencing delay in bowel movement or in whom a failure to digest food has occurred.

"(b) The respondent similarly has represented that the preparation is a competent and effective treatment for sluggish liver function, liver ills, and disorders affecting the liver; that its use will 'wake up the flow of bile,' will make 'bile flow freely' by getting the liver back to normal and back to producing; that its use will so influence the production or flow of liver bile that one can overeat and overindulge in 'good times' without the ordinary discomforts resulting therefrom; that if one has overeaten and overindulged in 'good times' that the preparation 'Carter's Little Liver Pills,' by its influence on the production or flow of liver bile, will overcome the discomforts that usually and ordinarily follow such indiscretions and will enable the user to wake up 'clear-eyed and steady-nerved,' 'feeling just wonderful,' and 'alert and ready for work'; that such preparation through its favorable influence on bile flow and in helping to restore regularity provides two-way relief, and that it is not an ordinary laxative but possesses therapeutic properties over and above and in addition to its laxative action.

"(c) The respondent's advertising also has contained statements representing that use of its preparation will cause the proper flow of the gastric juices and natural vital digestive juices; that it will lessen food decay and is based on the fundamental principle of the operation of the digestive system; that such preparation will help food digestion, including the stopping of fatty indigestion, and will regulate digestion and the digestive system; and that it so follows nature's own order for regularity and so regulates digestion that it will make the user 'fit as a fiddle,' and full of 'bounce.'

"The respondent further has represented that constipation poisons the body.

"(d) Through the use of colloquial words and phrases, which purport to be descriptive of various physical and mental conditions, the respondent has represented, directly and by implication, among other things, that when caused by constipation or irregularity of bowel movement, the preparation designated 'Carter's Little Liver Pills' is a competent and effective treatment for those conditions in which an individual feels: 'Down-and-out,' 'blue,' 'down-in-the-dumps,' 'worn out,' 'sunk,' 'logy,' 'depressed,' 'headachy,' 'sluggish,' 'all-in,' 'listless,' 'mean,' 'low,' 'cross,' 'tired,' 'stuffy,' 'heavy,' 'miserable,' 'sour,' 'grouchy,' 'bilious,' 'irritable,' 'cranky,' 'peevish,' 'fagged out,' 'dull,' 'sullen,' 'what's-the-use,' 'bogged down,' 'grumpy,' 'run-down,' and 'gloomy.'

"The respondent similarly has represented that its product is a competent and effective treatment for headache, ugly complexion, bad breath, coated tongue, bad taste in the mouth, 'lazy digestion,' and 'indigestion,' when caused by constipation."

Finding No. 18 reads as follows:

"Through use of the word 'Liver' in the name 'Carter's Little Liver Pills' which is featured in the advertising, the respondent represents, directly and by implication, that the preparation 'Carter's Little Liver Pills' will have some therapeutic action, effect, and influence on the liver, and is for use in the treatment of conditions, disorders, and diseases of the liver. Said representations are false and misleading. The ingredients in the preparation 'Carter's Little Liver Pills,' alone or in any combination of one with the other, will have no therapeutic action, effect, or influence, corrective or otherwise, on the liver. The preparation will have no therapeutic value in the treatment of any condition, disorder, or disease of the liver or the biliary system. Upon consideration of the remedy which should be applied in this connection, the Commission is of the opinion that only excision of the word 'Liver' from the product name will serve to eliminate the deception engendered by its use."

Finding No. 20 reads as follows:

"The Commission, therefore, finds that **the representations appearing in the advertising** for the preparation 'Carter's Little Liver Pills,' **as set forth in Paragraph Four and Paragraph Eighteen hereof,** are misleading in material respects, and that the advertisements **thus disseminated by the respondent Carter Products, Inc.,** constitute 'false advertisements,' as that term is defined in the Federal Trade Commission Act. **The use of such representations and of the word 'Liver'** in the name 'Carter's Little Liver Pills,' by the respondent has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that **all such statements and representations** are true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief to purchase the respondent's preparation." (Italics is ours.)

In addition to the Commission's "four controlling findings" above referred to, the Commission made Finding No. 19 which is favorable to Carter. This particular finding reads as follows:

"(a) The complaint charges also that the respondent's advertisements constitute false advertisements for the further reason that they fail to reveal certain facts as to potential dangers inherent in the use of such preparation under conditions described in the advertisements or conditions as are customary and usual by persons suffering from abdominal pains, nausea, vomiting, or other symptoms of appendicitis. The Commission is unable to find, how-

has materially narrowed our task in reviewing the record. As we view the problem now before us, it is whether the record of evidence and testimony, taken as a whole, presents a body of evidence of a substantial character which provides support for these particular findings of fact. If so, they must be sustained.

In appraising the entire record we were at pains to examine the testimony of the array of witnesses produced by the parties. In so doing we noted the weight which the Commission saw fit to give the various conflicts in the testimony of the several witnesses for both sides as well as to the points of agreement developed in their testimony, a fact to which we have previously adverted. And we think that in view of the great length of this record (including the exhibits) and the complexities enshrined in its mass of highly technical testimony from experts, the Commission is not to be criticized for refraining from engaging in a lengthy recital and appraisal of every facet of this extensive testimony, as buttressed by the exhibits. From our consideration of the record we are fully persuaded that the Commission did carefully and conscientiously consider and appraise the probative force of the entire body of testimony and evidence before entering the Order here assailed. In our judgment its final pronouncements in its decision and formal opinion bear witness to that sort of treatment.

When Carter made the representations as to the therapeutic qualities and effect of its pills in the advertising claims particularly described in Findings Nos. 4 and 18, it was therein making statements of fact, and the truth or lack of truth in these representations presented an issue of fact to the Commission. Carter has vigorously assailed the Commission for referring to the "inconclusive" and/or "impersuasive" character of certain phases of the testimony presented by it, and charges that the record shows that this kind of a conclusion was the result of faulty evaluation of the evidence. The burden of proof was on the Commission, and its legitimate administrative task was to primarily determine, as it did, whether the probative weight of the proof submitted in Carter's defense served adequately to rebut the proof presented by witnesses supporting the Commission's complaint. Whether Carter's evidence was sufficient in this respect presented a question of fact primarily for the Commission to decide from the entire record. The duty of the Commission was to weigh all of the evidence before it, and in so doing to determine therefrom whether *all or any part* of this evidence was convincing in its probative weight or was so inconclusive or unconvincing as to lack the probative weight necessary to carry conviction of its truth. We think that in expressing its determination as to the proper weight to be given the entire body of evidence, the Commission did not err in employing our common vernacular to describe the definite impression this evidence established in the minds of members of the Commission.

As a final comment on the four crucial findings here mentioned, it should be noted that so far as concerns Carter's far-reaching advertising claims in evidence, the record clearly indicates that the several claims described in Findings Nos. 4 and 18 are fairly typical of, and embrace many of the aggregate of Carter's advertising claims as to the therapeutic qualities of its product, all as set forth and described in several other findings of fact entered by the Commission which are supported by substantial evidence. We think that the evidence introduced to show that the claims described in Findings Nos. 4 and 18 had been made in Carter's extensive advertising, was most substantial in character. Our conclusion is that by Findings 4, 18 and 20 the Commission made plain that in the last analysis it elected to rest its injunctive Order of 1956 on Carter's use of the particular advertising claims so carefully identified in these critical findings.

Carter's Specification of Errors

[*Twelve Claims of Error*]

On this review on the merits, Carter's Specification presents twelve claims of error

ever, that the potential danger to the public health inherent in the use of the respondent's preparation is so serious as to require a disclosure in the advertising of the matters to which this charge relates and, in the circumstances, is of the opinion that dismissal of such charge without prejudice is warranted.

"(b) Additional allegations of the complaint charge that the respondent has falsely represented that calomel is a drastic and dangerous laxative compound, the use of which is an ordeal. Although testimony was introduced into the record directed to showing, among other things, that calomel, when taken in proper doses, would not be painful, it is not believed that the charges are supported by the record, and they are, accordingly, dismissed."

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on the part of the Commission. It accompanies these claims with a brief preliminary comment charging that *the record itself* demonstrates that the Commission committed *all* of the errors relied on in this Specification, and that the Commission's proof does not in fact or in law constitute substantial evidence including conviction sufficient to warrant the issuance of the Commission's Order.

Before reaching Carter's Specification and the supporting argument in the briefs, we note the fact that Carter (also) supports the said claims of error by reference to, and adoption of, its formal "Petition to Review and set aside the Commission's Order" and its "Petitioner's statement of Points." In the margin we note some of the salient points raised in these documents.[10] These points are keyed to the general arguments in Carter's briefs in support of its formal Specification of Errors.

Carter's claims of error are supported in two briefs containing 215 pages of argument and citation of approximately 206 cases thought to be pertinent to the issues presented in this review. Statutes and text matter are also cited as authority. We set

[10] In its "Petition to Review" here noted, Carter, inter alia, complains that on March 3, 1955, the Hearing Examiner entered his order closing the case; that Carter then moved the Commission to disqualify this hearing officer and terminate the entire proceedings; that before the Commission could decide this motion, the said officer filed his Supplemental Report with respect to the proceedings on remand from this court and recommended the issuance by the Commission of the Cease and Desist Order now before this court; that on September 20, 1955, the Commission denied Carter's motion to disqualify the said Hearing Officer and also refused to grant the relief sought in Carter's said motion; that an appeal was taken on November 29, 1955 to the Commission from the rulings and Supplemental Report of the Hearing Examiner on which the motion to disqualify him was rested; that the Commission thereafter issued its Cease and Desist Order of October 4, 1956 which is now before us.

In summary, the grounds for relief asserted by Carter in its said "Petition to Review" are as follows:

The Commission's said Cease and Desist Order, and its aforesaid order of September 20, 1955, along with the Decision and findings of fact "are erroneous in law and fact, not supported by the evidence, or by any probative evidence or by substantial evidence;" are contrary to the evidence and the weight of the evidence; are violative and in excess of the Commission's statutory and jurisdictional powers; are violative of Carter's constitutional rights; are contrary to the Federal Administrative Procedure Act; are not in the public interest and are (also) contrary to the mandate of this court heretofore issued; that the aforesaid Cease and Desist Order of the Commission and its denial of the aforesaid motion of Carter are (also) based upon the failure of the Hearing Officer and the Commission "to weigh, consider or receive the competent, material and relevant evidence offered or adduced in these proceedings."

Carter further complains therein that the Commission did not pass "properly" upon its exceptions and proposed findings of fact and conclusions of law; that as a consequence Carter was deprived of due process and a fair and impartial trial on the entire record made in both sets of hearings.

Petitioner's "Statement of Points" contains a vigorous attack upon the validity of the proof tendered by the Commission's witnesses, and the Decision and Opinion of the Commission resting on this proof. It is urged that the said Decision and Opinion are "irresponsive" to Carter's claims; are contrary to the evidence and weight of evidence, and are not supported by reliable, "convincing," probative or substantial evidence or such evidence "as a reasonable mind might accept as adequate to support a conclusion," or as would "logically and rationally permit findings to be made," and are not supported by proof of (and contrary to) the consensus or general agreement of qualified medical opinion. In short, the charge of Carter in his pleading is that the Commission's findings of fact, its Decision and Opinion are, on their face, and inherently, self-destructive and self-contradictory of each other, and on their face, demonstrate the Commission's failure to sustain its burden of proof and convincingly show that the Commission "has never weighed, considered or passed upon this record" in accordance with the letter and the spirit of the mandate of this Court.

It is further urged in these "Points" that the Commission has not subjected the record to "any proper scrutiny at all" in that it failed to pass separately, fairly and carefully upon all of Carter's original and supplementary exceptions and proposed findings.

Carter's "Statement of Points" is lengthy, and is set forth in nineteen paragraphs. It is in the main a vigorous frontal attack on the testimony and proof tendered by witnesses supporting the Commission's complaint. It challenges the validity of the proof dealing with so-called "experimental proof" and the opinion evidence given by the Commission's witnesses in connection therewith. It likewise asserts that the testimony of the Commission's witnesses did not constitute proof by "general medical agreement" or "consensus of medical opinion"—that proof that Carter's "honest, harmless therapeutic claims" were false was not established as required in this type of conflict.

It is obvious that the above noted reference to the "honest, harmless therapeutic claims" of Carter is a comment upon the many claims asserted in the advertising material disseminated by Carter.

out in the margin the text of the *first six claims* of Carter's Specification of Errors.[11]

Carter's arguments supporting these six claims emphasizes, and to a marked degree appears to be predicated upon, the assumption that the Commission's final (1956) administrative findings of ultimate probative facts in this case are fatally tainted and should and must be rejected on this review as invalid because *portions* (or possibly *all*) of the actual testimony of some of the Commission's witnesses was (to quote Carter) "unreported in its findings," that is to say, such testimony was not set out verbatim in the Commission's findings of fact. If it be Carter's theory that in order to be valid and be tolerated in this court the Commission's findings of fact should repeat part, or all, of such testimony, we must and do reject such a theory as lacking validity under established practice in our system of law. And it should be added that our attention has not been drawn to any responsible authority which gives sanction to such a theory concerning the fact-finding functions of an administrative tribunal like the Commission.

We summarize in the margin[12] the remaining six claims of error asserted by Carter.

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[11] "(1) the Commission's findings disregard the testimony and express admissions (unreported in its findings) of its **own** witnesses that their abnormal surgically performed test methods, employed primarily on **animals**, either changed entirely the physical conditions or did not reproduce conditions which could be properly compared to the normal conditions of use of Petitioner's product;

"(2) the Commission's findings disregard the testimony and ignore express admissions (unreported in its findings) of its **own** witnesses that the protocols of **all** their tests, whether upon animals **or** humans, were patently and fatally faulty in design and their tests themselves both fatally defective and irresponsive to Petitioner's claims;

"(3) the Commission's findings disregard the testimony and ignore express admissions (unreported in its findings) of its **own** witnesses (destructive of their test procedures), that **dosages** of various drugs or the same drugs in animal and man are not comparable and introduce a disturbing variable which renders the Commission's evidence unsubstantial;

"(4) the Commission's findings disregard and ignore testimony and express admissions (unreported in its findings) of its **own** witnesses that under the 'abnormal condition of the experimentees' the reactions of man and animal to the same or similar drugs are not identical or substantially identical and require to be supplemented by experimentation on representative groups of normal human beings;

"(5) the Commission's findings disregard and ignore the testimony and express admissions of its **own** witnesses (not reported in its findings) that because of the concededly delayed reaction time of the drugs tested, the Commission's experiments were on their face prolonged for an insufficient length of time to constitute substantial evidence inducing conviction that those drugs do not possess the effects claimed by Petitioner;

"(6) the Commission's findings disregard and ignore the testimony and express admissions by its **own** witnesses (not reported in its findings) that their liver function tests performed on animals are not translatable to man;"

[12] The Commission's findings (1) are mutually self-destructive and self-contradictory because the very same defects which they impute to Carter's experiments in order to disqualify those experiments "by the same token destroy the Commission's own experiments," thus, on their face they demonstrate that the experiments of the Commission's witnesses "cannot possibly constitute substantial evidence inducing conviction"; (2) the findings are based on an erroneous and illegal standard of proof imposed on Carter alone, namely, that its proof be conclusive, thus applying a dual standard of proof, one for its own and another for Carter; (3) the findings (a) were arrived at by "ignoring the spirit and purpose" of this court's remand by excluding proper offers of proof, by prejudiciously restricting, through its Examiner, the cross-examination of Commission's witnesses designed to test the experiments of these witnesses, and by erroneously restricting Carter's examination of its own expert witnesses for the purpose of explaining or amplifying their experiments; (b) are based upon the misconduct of these proceedings by an Examiner whose bias and prejudgment of the issues have now been demonstrated beyond question, and show that the Commission shared the prejudgment and failed to make a fair estimate of the worth of the testimony; (c) were based on its reversible error in denying Carter's motion to disqualify the Examiner and (d) establish beyond question that the Commission has again denied Carter due process of law; (4) that the issues involve a medical field —the liver and biliary system—which is one of the most problematical, controversial and highly unsettled frontiers in the whole realm of medicine and where due process demanded of the Commission, before snuffing out Carter's huge investment and property in this product, particularly high and exacting methods of modern and up-to-date scientific proof and an evaluation based on a disinterested inquiry in the spirit of science; (5) the defects in the Commission's proof are so gross and its misjudgment of that proof so great that it is unnecessary to review Carter's evidence presented in defense, because there has been so clear and so glaring a failure on the part of the Commission to sustain its affirmative burden of proof, and because the Commission made a wholly erroneous disposition of that evidence throughout its Findings which deprived Carter of due process; (6) that however the evidence is viewed, impelling and important constitutional considerations, involving novel questions

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Before leaving the subject of Carter's claims of error, we point out that after our remand, the cross-examination of Commission witnesses Doctors Case and Bollman was resumed (on the 146th hearing in this prolonged litigation which had then spawned a transcript of record containing approximately 13,000 pages). This appears from a statement by the Hearing Examiner. See also footnote 15, *infra*. The cross-examination of both of these witnesses was searching and extensive. Including a re-direct examination by Commission counsel, this part of the record occupies about 300 pages of the printed transcript now before us. A reading of this segment of the huge record induces our belief that Carter's questions on cross-examination after the remand reached into every material phase of the crucial issues present in this case, including a re-examination by Carter of certain views and opinions expressed by these two Commission witnesses in the testimony they had given in the prior series of hearings.

[*Cross-Examination*]

As to the breadth of allowable cross-examination here referred to, the Hearing Examiner stated to counsel in the case that he was "going to give the respondent (Carter) as full leeway as I possibly can irrespective of any objection of the attorney in support of the complaint," this so that counsel might "pursue this cross-examination until he can go no further." At the conclusion of the testimony of Dr. Case, counsel for Carter was asked by the Hearing Examiner if he was satisfied that he had been given ample opportunity to cross-examine this witness, and counsel then stated that he had asked all of the questions he wanted to ask.

At the conclusion of all of the testimony of Dr. Bollman, counsel for Carter stated that he had no further questions.

Bollman was extensively questioned by Carter's counsel as to the *method* he employed in conducting his animal experiments. He was asked to compare his views and supporting data with certain views he had previously expressed, and to justify his views in light of conflicting views expressed by Carter's witnesses and certain other experts. The cross-examination was so thorough and searching that it would be difficult to envision a more complete exploration of professional opinion dealing with a highly technical subject upon which differences of opinion had been developed. In any event, whether Bollman used a *correct method* in experimentation was a factual question for decision by the Commission when it weighed the evidence. See our comments in 201 F. 2d 446, 449, 450.

[*Evidence—FTC's Duty*]

Under the decisions later noted it will not be contended that it is the duty of this Court to weigh the evidence before the Commission and/or choose between inferences which might arise from an appraisal of the probative worth of this evidence, since exercising those important functions became the primary duty of the Commission. We agree with Commission counsel that it was for the Hearing Examiner and the Commission, not the Courts, to pass upon the credibility of witnesses and the weight to be accorded their testimony. See decision of this Court in *Tractor Training Service, et al. v. Federal Trade Commission* [1955 Trade Cases ¶ 68,196], 227 F. 2d 420, 424. See also *Corn Products Refining Co., et al. v. Federal Trade Commission* [1944-1945 Trade Cases ¶ 57,363], 324 U. S. 726, 739. Many decisions of like purport fully support this well established rule. So much may also be said concerning the *weight* to be given by the Commission to the facts and circumstances admitted as well as inferences reasonably to be drawn therefrom. The possibility of drawing either of two inconsistent inferences from the evidence does not prevent the Commission from drawing one of them.

[*Medical Testimony*]

The overwhelming mass of evidence and testimony in this case dealt almost exclusively with not only highly technical problems in the field of medicine, but also with what we regard as pure questions of fact—(1) what therapeutic action, effect or influence, if any, would the use of Carter's

of law, preclude the issuance in this case of any cease and desist order at all.

In presenting the six claims of error just above noted, Carter assails the Commission's findings because they did not contain an "express finding" that Carter's experimental proof does not constitute substantial evidence, the findings only stating that such proof was "not conclusive."

preparation have upon the human liver or diseases thereof, (2) would use of Carter's preparation stimulate the formation of bile by the liver or increase the secretion of bile by the liver, (3) what therapeutic effects, if any, followed the use of Carter's preparation when employed by human beings for the purpose of securing satisfactory relief from the array of human ills and achieving the many physical benefits so vividly described and promised in Carter's widely diffused advertising?

We are quite convinced that answers to such technical questions in the field of medicine could come only from medical experts. Their testimonial conclusions and opinions as to the effect upon the human system arising from the use of Carter's preparation had to rest upon and derive from their "experiments" (later referred to); their knowledge of the character and therapeutic qualities of the two drugs used in Carter's preparation; their own practical professional experience, and upon medical texts and technical opinions of other medical experts which appear to have found their way into the testimony. Confronting the record as a whole, including the testimony from all medical experts, the Commission faced the duty of concluding and determining from this body of evidence just what medical facts had been established as true by evidence of a substantial character.

As to the experiments above referred to, Commission finding No. 11 makes plain that expert witnesses for *both sides* had extensively experimented upon anesthetized dogs and human being to demonstrate the results on these animals from use of the drugs employed in Carter's pills, or from use of drugs possessing similar characteristics. The elaborate testimony of these witnesses, with supporting data, was received in evidence to support the basic contentions of both parties as to results achieved from such experiments. In its Finding No. 12 the Commission was at pains to find that "each counsel contends in effect that the scientific evidence presented by his adversary is based on defective experimental procedures and reflects erroneous interpretations of those studies and unsound expressions of medical opinion." The lengthy comments of the Commission in its findings dealing with the testimony of expert witnesses concerning results of their experiments on dogs and human beings convinces us that this phase of the evidence and testimony was given a searching and conscientious study by the Commission before it made its final findings of fact. (See our comments in footnote 4, *supra,* concerning our first opinion which dealt with admissibility of evidence and testimony relating to such experiments.)

In its attack on the substantiality of the Commission's evidence, Carter vigorously argues that the testimony of the expert witnesses presents a conflict of general informed medical opinion on basic medical issues; that this conflict is so substantial "as to compel enforcement by this Court of the standard of certainty in the proof of the falsity of a harmless, honest therapeutic claim prescribed by the Legislature in enacting the Walter [Wheeler]-Lea amendments to the Federal Trade Commission Act and by the Federal Constitution."

Parenthetically, we point out that we disagree with Carter's contention concerning the effect of these amendments.

Our careful examination of the record demonstrates to us that the issue concerning "general informed medical opinion on basic medical issues," was not only a subject of comment appearing in various professional opinions tendered by Carter's expert medical witnesses, but their opinions on this subject were countered by conflicting views expressed by Commission witnesses. From the tenor and purport of testimony offered by Carter's witnesses it is clear that such testimony was introduced to demonstrate the existence or non-existence of a substantial fact, i. e., whether there existed a "consensus of informed medical opinion" which sustained the validity of Carter's advertising claims concerning the many therapeutic virtues of its medicinal preparation.

Carter's position seems to be that this Court should now proceed to weigh all of the evidence on this particular issue and decide just what this evidence had proved, or failed to prove concerning the existence of some sort of a body of "informed medical opinion" as to the therapeutic worth of Carter's product. We disagree. In our view the testimony presented a fact issue which, in any event, would have to be primarily resolved by the Commission in light of all of the expert testimony on the subject. Whatever might be our personal judgment concerning the probative worth

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of a huge mass of medical testimony which tended to prove or disprove the existence of such a body of "medical opinion," our views would have to yield to the specialized experience and knowledge of the Commission. The judges of this Court are not equipped by education, training or experience to resolve a factual question of this character which obviously concerns the accuracy of the respective scientific views of men who are practicing the art of medicine. The futility of an attempt by a reviewing court to exercise such a function becomes all the more obvious in face of the fact that medical experts have reached different conclusions on this issue. (See footnote 15, *infra.*)

PART TWO

[*Scope of Judicial Review*]

The reports contain a host of decisions dealing with the scope of judicial review of orders of federal administrative agencies, and an imposing array of them deal with decisions of the Federal Trade Commission. It is unnecessary to analyze the holdings in many of the apposite decisions [12] since a comparatively few of them serve to provide a satisfactory answer to the basic review problem confronting us. These few cases have delineated the controlling principles we must apply.

The landmark decision and the one most frequently cited is *Universal Camera Corp. v. National Labor Relations Board,* 340 U. S. 474. In this decision the Supreme Court spelled out with care the general rules that should govern Courts of Appeal in their work of reviewing orders and/or decisions of administrative agencies. The Court held, *inter alia,* (in conformance with a requirement of the Administrative Procedure Act) that such decisions must be supported by substantial evidence "on the record con-

[12] *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U. S. 52, 63; *Corn Products Refining Co. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,363], 324 U. S. 726, 739; *Jacob Siegel Co. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,451], 327 U. S. 608, 612, 613; *American Power & Light Co. v. Securities & Exchange Commission,* 329 U. S. 90, 103, 106, 115, 116; *Reilly v. Pinkus,* 338 U. S. 269, 274, 276, 277; *United States et al. v. Storer Broadcasting Co.,* 351 U. S. 192, 203; *Federal Trade Commission v. Standard Oil Co.* [1958 TRADE CASES ¶ 68,917], 355 U. S. 396, 400, 401; *Federal Trade Commission v. Mandel Brothers, Inc.* [1959 TRADE CASES ¶ 69,342], decided May 4, 1959.

American Medicinal Products, Inc. v. Federal Trade Commission [1940-1943 TRADE CASES ¶ 56,329], 136 F. 2d 426, 427; *Charles of the Ritz Dist. Corp. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,267], 143 F. 2d 676, 679, 680; *J. E. Todd, Inc. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,308], 145 F. 2d 858; *Research Laboratories, Inc. v. United States,* 167 F. 2d 410, 415, 416, cert. denied 335 U. S. 843; *Willapoint Oysters Inc. v. Ewing,* 174 F. 2d 676, 685, 689, 691, cert. denied 338 U. S. 860; *Bristol-Myers Co. v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,722], 185 F. 2d 58, 61, 62; *P. Lorillard Co. v. Federal Trade Commission* [1950-1951 TRADE CASES ¶ 62,747], 186 F. 2d 52; *National Labor Relations Board v. Howell Chevrolet Co.,* 204 F. 2d 79, 85; *Koch et al. v. Federal Trade Commission* [1953 TRADE CASES ¶ 67,526], 206 F. 2d 311, 315, 318, 319, 320; *Standard Distributors Inc. v. Federal Trade Commission* [1954 TRADE CASES ¶ 67,689, 67,712], 211 F. 2d 7, 12; *Dolcin Corp. v. Federal Trade Commission* [1954 TRADE CASES ¶ 67,791], 219 F. 2d 742, 749, 751, 754, 755; *Tractor Training Service v. Federal Trade Commission* [1955 TRADE CASES ¶ 68,196], 227 F. 2d 420, 425; *R. S. Kalvajtys et al. v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,525], 237 F. 2d 654, 656, cert. denied 352 U. S. 1025; *Jacques DeGorter v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,691], 244 F. 2d 270, 273, 281, 283; *Abel Allan Goodman, etc. v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,690], 244 F. 2d 584, 589, 591, 593, 594, 603, 604; *Arrow Metal Products Corp. v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,847], 249 F. 2d 83; *Loesch v. Federal Trade Commission* [1958 TRADE CASES ¶ 69,078], 257 F. 2d 882, 885; *G. H. Miller & Co. v. United States et al.,* 260 F. 2d 286, 296, 297, 302.

The following cases hold that the Commission has authority to resolve conflicts in expert medical testimony.

Federal Trade Commission v. Raladam Co., 283 U. S. 643, 646; *Justin Haynes & Co. v. Federal Trade Commission* [1932-1939 TRADE CASES ¶ 55,233], 105 F. 2d 988, 989; *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,305], 111 F. 2d 889, 891; *Neff v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,308], 117 F. 2d 495, 497; *D. D. D. Corp. v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,189], 125 F. 2d 679, 680, 682; *John J. Fulton Co. v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,319], 130 F. 2d 85, 86, citing cases, cert. denied 317 U. S. 679; *Aronberg v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,324], 132 F. 2d 165, 170.

It is for the Commission and not the courts to pass upon the credibility of witnesses and/or weight to be accorded their testimony. *Tractor Training Service, et al. v. Federal Trade Commission,* 9 Cir. [1955 TRADE CASES ¶ 68,196], 227 F. 2d 420; also see *Corn Products Refining Co. et al. v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,363], 324 U. S. 726; *Federal Trade Commission v. Standard Education Society et al.* [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112; *Standard Distributors, Inc. et al. v. Federal Trade Commission, supra, P. Lorillard Co. v. Federal Trade Commission, supra.*

sidered as a whole." If after canvassing and fairly assessing the entire record a reviewing court cannot conscientiously find that the evidence supporting an agency decision is substantial, "good conscience" dictates that the agency decision be reversed. In so appraising the whole record the reviewing court must take into account whatever in the record fairly detracts from the weight of the evidence which underlies the agency order and is "opposed to the agency's view."

The Court also indicated that an order of an administrative agency should be set aside unless justified "by a fair estimate of the worth of the testimony of witnesses *or its* [the agency's] informed judgment on matters within its special competence *or* both"; but the Court also emphasized that the requirement for "canvassing the whole record" in order to ascertain substantiality, *was not "intended to negative* the function of the [there Labor] Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." (Italics supplied.)

In an opinion issued on the same day, the Supreme Court applied one of the principles announced in *Universal Camera. National Labor Relations Board v. Pittsburg Steamship Co.*, 340 U. S. 498. It again emphasized the fact that Congress had charged the Courts of Appeal, and not the Supreme Court, with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. It held that decisions of the Courts of Appeal would not be disturbed when they involve solely a fair assessment of a record on the issue of unsubstantiality; that the Supreme Court is not the place to review a conflict of evidence nor to reverse a Court of Appeals even if the Supreme Court (in the place of the Court of Appeals) would find the record tilting one way rather than the other, and even though fair-minded judges could find it tilting either way. The Court indicated its adherence to the rule that where conclusions of Courts of Appeal "depend on appreciation of circumstances which admit of different interpretations," the decision of that intermediate court should not be disturbed.

In *Federal Trade Commission v. Standard Education Society* [1932-1939 TRADE CASES ¶ 55,170], 302 U. S. 112, the Court considered "unfair practices" related to the methods of sale of certain kinds of books. In passing upon the judicial function of a reviewing court the Court stated:

> "The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony. The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. The record in this case is filled with the evidence of witnesses under oath which support the Commission's findings."

In *Federal Trade Commission v. Algoma Lumber Co.* [1932-1939 TRADE CASES ¶ 55,041], 291 U. S. 67, the Court again dealt with the findings of the Federal Trade Commission. In reversing a decision of this Court (*Algoma Lumber Co. v. Federal Trade Commission*, 64 F. 2d 618) the Supreme Court quoted the Act here involved which provides: "The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U. S. C. Sec. 45. It then went on to hold that "the Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the findings of unfair competition had no support whatever. In fact, what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision [citing *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63] forbid that exercise of power."

The Court concluded with a further holding that "the finding of unfair competition being supported by the testimony, the Commission did not abuse its discretion in reaching the conclusion that no change of the name short of the excision of the word 'white' would give adequate protection."

Applicability of the principles announced in the *Standard Education Society* and *Algoma* decisions, *supra,* to the problem of review confronting us in the instant case, is clearly demonstrated by the recent reversal of a decision of this Court reported in *James H. Sewell v. Federal Trade Commission* [1956 TRADE CASES ¶ 68,508] 240 F. 2d 228. The Supreme Court reversed this decision in a per curiam opinion in which we were directed to "affirm and enforce the

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order of the Federal Trade Commission" on authority of the two Supreme Court decisions just above cited. See [1957 Trade Cases ¶ 68,720] 353 U. S. 969.

The judge of this Court who dissented in our *Sewell* opinion expressed the view that this Court's decision had "meddled in a decision which it is not authorized to make" and he predicated this conclusion on the holdings of the Supreme Court in the *Algoma* and *Standard Education Society* cases. The Supreme Court agreed with him.

A late decision of the Supreme Court directly touching the authority of the Commission to formulate orders designed to effectuate the conclusions it has reached, is *Federal Trade Commission v. National Lead Co.* [1957 Trade Cases ¶ 68,629], 352 U. S. 419, 429. In that case the Court cited an earlier case wherein it pointed out that "Congress had placed the primary responsibility for fashioning orders upon the Commission"—that the cases have served to narrow the issue to the question: "Does the remedy selected have a 'reasonable relation to the unlawful practices found to exist'." In this connection also see *Federal Trade Comm. v. Mandel Brothers, Inc.* [1959 Trade Cases ¶ 69,342], U. S. —, May 4, 1959.

The Commission is deemed to have expert experience in dealing with matters of the character involved in the instant case. *Federal Trade Commission v. R. F. Keppel & Bros.* (1934) [1932-1939 Trade Cases ¶ 55,042] 291 U. S. 304, 314. And it may draw upon its own experience in order to determine (even) in the absence of consumer testimony, the natural and probable result of the use of advertising expressions. *E. F. Drew & Co. v. Federal Trade Commission* (1956) 2 Cir. [1956 Trade Cases ¶ 68,408], 235 F. 2d 735, 741. See footnote 60 in *De Gorter v. Federal Trade Commission*, 9 Cir. [1957 Trade Cases ¶ 68,691], 244 F. 2d 270, 283.

In the *Keppel* case, *supra*, the court also took occasion to emphasize that the Commission "was created with the avowed purpose of lodging the administrative functions committed to it in a body specially competent to deal with them [practices or methods of competition] by reason of information, experience and careful study of the business and economic conditions of the industry affected, and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

In the margin [13] we cite a group of cases presenting typical examples of how federal courts have applied and elaborated upon vital phases of the problem which confronts us in the case at bar. We think that these decisions are in harmony with the basic principles laid down in the several decisions of the Supreme Court just above cited in this part of our opinion. In many instances these decisions dealt with challenges to the scope of authority of the Commission to make the particular findings involved which concerned facts in evidence, and/or to fashion a remedy or remedies which, under all of the evidence would best afford a just and rational solution for the evils revealed by the evidence.

Part Three

[Courts' Appraisal of Record]

The conclusions expressed below are intended as a supplement to what we have previously said concerning the several issues of law and fact presented in this long-drawn-out controversy.[14]

The many years consumed in this litigation, the claim of Carter that the Commission's Order will have ruinous effects on its business, the highly involved nature of the lengthy expert medical testimony in the record, plus the vigorous arguments of counsel covering practically all of the material issues of fact along with controversies over procedural points, have provided an added incentive to a scrutiny of the entire record with that degree of care suggested by the Supreme Court. Our scrutiny included a reading of the oral arguments of counsel before the Commission just prior to submission of the case (1956) to the Commission for its final decision on the merits.

In our appraisal and assessment of the record as a whole, we endeavored to make

[13] [See footnote 13 on page 75,469.]

[14] On the day the Hearing Examiner announced that the record was (then) being closed in the last series of hearings, he stated to counsel that the hearing then being concluded was the "149th hearing" in this long case; that "on the basis of a five day week, that is approximately three and a half months of actual, continuous hearings."

a fair estimate of the worth of the medical testimony of the expert witnesses, having in mind that in the last analysis, the evaluation of the Commission as to the weight to be given such testimony concerning medical truths was a matter committed for decision to the informed judgment of the Commission, and that making a primary decision on that question was a duty that fell within the area of its competence. So far as concerns any *conflicts* in such testimony, we are also of the view that all such conflicts presented questions of fact for resolution by the Commission and not for resolution by this Court. See *Irwin v. Federal Trade Commission* [1944-1945 TRADE CASES ¶ 57,258], 143 Fed. 2d 316, 323, and note 13, *supra*.

Our assessment and estimate of the probative weight of the entire body of evidence also took into account the contradictory evidence offered by Carter from which conflicting inferences could be drawn which detract from the weight of the evidence supporting the Commission's view.

The meaning of, and the truth or lack of truth in the florid advertising representations of Carter concerning the therapeutic worth of its pills,[15] *and also* the tendency or capacity of its elaborate advertising to mislead and/or deceive the using public, presented questions of fact to be determined by the Commission under all of the evidence. (See *Kalwajtys, et al., v. Federal Trade Commission* (7 Cir.) [1956 TRADE CASES ¶ 68,525], 237 F. 2d 654, 656). Its conclusions on this phase of the case must be upheld by a reviewing court unless it can be said that the Commission's rulings on such questions were arbitrary or clearly wrong. Our conclusion is that the rulings here referred to are not to be condemned. The Commission did not err in making and entering its ultimate findings of fact which reflect its conclusions on these matters.

To an overwhelming degree the expert testimony in this case dealt with highly complicated questions of fact, answers to which had to be found in the realm of medical knowledge. We are fully persuaded that this Court is without authority to substitute its judicial judgment on purely medical facts for that of the Commission by weighing the probative force and effect of a body of testimony dealing directly and exclusively with the effect of a certain combination of drugs on the human system. The function of weighing the rational probative force of such testimony was a primary duty imposed upon the Commission. Our assessment of the evidence and testimony leads to the conclusion that the order of the Commission was not clearly wrong nor was it arbitrary.

[*Abdication of Duty Claimed*]

In argument supporting its claims of error Carter asserts that the Commission's own Findings and Opinion *demonstrate on their face* fatal defects of proof; that taken

[15] Carter suggests that the Commission was here dealing with a case which involves "harmless therapeutic claims honestly made." It contends that at the time the Commission made its (1956) Order the record then before the Commission failed to reveal that there was a "general agreement of medical opinion" concerning the "falsity of the claim"; that for this reason we should reverse the Commission's Order under authority of the holding in *Belmont Laboratories v. Federal Trade Commission* [1932-1939 TRADE CASES ¶ 55,215], 103 F. 2d 538, 543, 7 Cir., 1939. As we view this argument, it at least carries the suggestion that the Commission's Order should not be sustained by this court if any conflict whatever appears in the medical testimony of the expert witnesses concerning the truth or falsity of the various therapeutic claims appearing in Carter's advertising.

We cannot agree with the foregoing argument. The basic purpose of the entire proceeding was to inquire into the factual truth or falsity of many elaborate "therapeutic claims," employed in Carter's advertising. Whether these many "therapeutic claims" were true or false could only be demonstrated through the testimony of medical experts, and that course was followed. The record shows that when the proceedings ground to a close the parties were apparently in agreement that the dominating and controlling area of factual conflict in this case was what influence, if any, Carter's pills would have on the production and flow of liver bile. Carter claimed that the record then before the Commission demonstrated that its pills would produce that result. Its advertising in evidence had claimed that use of its pills would stimulate an increase in the production and flow of liver bile and thereby produce the many beneficial therapeutic results described in this lavish advertising. On the entire body of evidence and testimony the Commission finally decided that the several therapeutic claims of Carter which were carefully noted in its Order did constitute false and misleading advertising, and as such were unfair and deceptive acts and practices in commerce. We find no rational reason for disturbing the Commission's judgment on this point all as reflected in its Order.

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in light of the record as a whole, they demonstrate beyond peradventure of a doubt that there was *a complete abdication* by the Commission of its duty to weigh the proof in the record which fairly detracted from the weight of its own proof. It is urged that this abdication was due either to the Commission's complete disregard of evidence received or its exclusion of evidence offered by Carter.

It is also argued that every line of the Commission's Decision reflects "the unmistakable badges of a corrosive bias, of refusal even to explore (much less to rectify) the deficiencies of proof and procedure recommitted to it by this Court and a consistent demonstration of sheer abdication of its duty to weigh or consider the evidence."

We disagree with the contentions set forth in the two preceding paragraphs and we reject them as without real substance or merit.

[*Disqualification Issue*]

We also find no merit in Carter's claim of error based on the Commission's action in refusing to disqualify the Hearing Examiner and to terminate the proceedings. Furthermore, the reasons assigned to support Carter's general claims of unfairness (including a denial of its demand to introduce additional evidence and for a de novo hearing before a different examiner on all of the issues in this litigation) do not appeal to us as possessing that degree of substance and real worth which would justify a reversal of the Commission's Order and possibly result in an indefinite continuation of this controversy. In this connection, we are also persuaded that the record, as a whole, fails to show that in this proceeding the actions of the Hearing Examiner and the Commission shifted the burden of proof to Carter. A contention to that effect is without merit.

[*Substantiality of Evidence*]

Viewing the record in its entirety, we find no sound reason which, in good conscience, would justify us in impeaching the substantiality, the evidentiary worth, force and persuasiveness, of the body of evidence which the Commission ultimately relied upon to support its Findings of Fact Nos. 3, 4, 18 and 20 to which we made specific reference earlier in this opinion. As we read the record it is plain that much that appears in these four findings is but a recapitulation or restatement of portions of the totality of facts as found by the Commission in some of its other findings. So far as concerns the factor of "substantiality," our considered judgment is that the body of evidence which sustains the four findings here mentioned was substantial and that this evidence provides adequate support for the Order here on review.

[*Excision of "Liver" from Trade Name*]

Even the most casual inspection and appraisal of the entire record would reveal that in all material phases of the long controversy between the parties to this proceeding, the dominating fact issue stressed in the testimony of the expert medical witnesses was whether use of Carter's laxative pills would, or would not, have any influence in stimulating an increase in the *production* of bile by the liver and would or would not, increase the *flow* of liver bile.[15] (See footnote 7, *supra.*) From all the evidence, the Commission found as a fact that this particular claim which Carter characterizes as its "basic therapeutic claim" was false and misleading; that use of Carter's pills would have no effect whatever on functions of the liver, and would not cause the liver to produce *an increased flow* of bile nor would it have any influence in the *production* of bile by the liver. On this factual basis which directly concerned the therapeutic value of Carter's pills, the Commission Order also enjoins the further use of the word "liver" in the trade name of "Carter's Little Liver Pills." We think the Commission was acting well within the orbit of its authority when it ordered excision of the word "liver" from the trade name of Carter's product.

[*Scope of FTC Order*]

And we point out that despite Carter's sweeping claim in its brief that its business will be totally destroyed if the Commission's Order is sustained, the Order *does not* enjoin Carter from use of advertising claims concerning the *cathartic* properties of its pills *unless* such claims are of a character clearly prohibited by the express terms of the Commission's Order.

The Commission concluded (in its Order) that "the acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and constitute

[15] [See footnote 15 on page 75,472.]

unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act." We agree with this conclusion. Furthermore, we think that the Commission made an allowable judgment in its choice of a remedy to be applied. The Commission is the expert body to determine *what remedy* is necessary to eliminate the unfair and deceptive practices disclosed by the record, and it has wide latitude for judgment. Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting *the means* of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence. Here, the Commission had discretion to fashion a remedy of a civil nature to attain the desired goals, and its choice fell within an allowable area of its discretion. Only in cases where the remedy selected has no reasonable relation to the unlawful practices found to exist, should a reviewing court interfere. We are convinced that this is a case where an interference by this Court with the breadth of the Commission's Order would clearly lack justification.

[*Statutory Tests Met*]

The Act prescribes that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive on a reviewing court. 15 U. S. C. A. Sec. 45(c). The Administrative Procedure Act added the further requirement that to be valid, the findings of federal administrative agencies must be supported by *substantial* evidence in the record considered as a whole. The record meets this test.

[*Consideration of Present Circumstances*]

Carter urges in its brief that this case is unique in the annals of Federal Trade Commission proceedings; that in view of the great age of the litigation, the end issue which involves purely questions of "general medical opinion," and particularly in view of "the changing nature of these specific medical frontiers"—where the criteria for establishing the truth or falsity of a therapeutic opinion are peculiarly in constant flux, this court should not only refuse to approve the Commission's Order but should remand the case to the Commission with directions to take additional evidence *which would show* that the entry and enforcement of the Commission's 1956 Order "is appropriate under present circumstances"—which evidence would also "reflect the present day status of these controversial medical topics."

Our answer to the foregoing claim is that the Commission was the body to decide whether (in 1956) the totality of evidence then in the record refuted the "therapeutic opinions" advanced by Carter in its profuse advertising claims and supported in the testimony of its witnesses. While Carter had pleaded in its Answer that it had abandoned the use of some of the advertising claims referred to in the Commission's Complaint, nonetheless in this same pleading it also frankly avowed that "the advertising of Carter's Little Liver Pills truthfully describe it properties." Its brief also urges that *its* convincing presentation of the merits of its case, and *its* analysis of *its evidence and its experiments*, should impel us to conclude that such a showing resulted in "fully establishing the truth of its therapeutic claims."

In argument to this Court the Commission's brief urges that except as to the representations that Carter's laxative will effect the production or flow of bile, Carter's counsel made little or no effort to establish the truth of the many other representations made in Carter's advertising as to the therapeutic value of its laxative pill. (See footnote 7.)

It is our considered judgment that the instant Order of the Commission requiring Carter to cease and desist from further disseminating certain specified false and misleading claims concerning the therapeutic virtues of its pills, presents the only barrier to a possible renewed use of many or all of such therapeutic claims in any future advertising by Carter. On the whole record we would not be justified in substituting our judgment for that of the Commission in shaping the remedial provisions of its Order. The Commission urges in its briefs that there is *no evidence in the record* which would show that Carter had discontinued the various advertising statements found to be false and misleading, and which statements furnish the basis for the Commission's Order to cease and desist. In view of this situation and under all of the circumstances of this case we conclude, and therefore hold, that the Commission did not abuse its discretion in issuing this Order. See *Marlene's Inc., et al., v. Federal Trade Commission* [1954 TRADE CASES ¶ 67,882], 216 F. 2d 556, 560.

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[*Order Affirmed*]

The petition of Carter to reverse and set aside the Cease and Desist Order of the Commission is denied. The said Order is affirmed, and obedience to its terms is hereby Ordered.

[¶ 69,391] Lou Poller v. Columbia Broadcasting System, Inc.; CBS Television; J. L. Van Volkenburg; H. K. Akerberg; Bartell Broadcasters, Inc.; and Thad Holt.

In the United States District Court for the District of Columbia. Civil Action No. 3761-56. Filed June 12, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Broadcasting System's Cancellation of "Affiliation" Contract with Television Station—Refusal to Deal—Injury to Plaintiff—Causation.—An assignee of the owner of a television station, in a treble damage action charging a broadcasting system with cancelling its contract to supply the station with shows or programs and with acquiring a competing station, failed to allege a cause of action because he showed no injury to himself that was caused by a violation of the antitrust laws. In actions brought by the United States, the Government need only show that the defendant violated the antitrust laws; a plaintiff in a private action, however, must also establish that he was injured by the defendant's violation. In the instant case, the cancellation of the contract injured the plaintiff and reduced the value of the station, but that loss resulted from the broadcasting system's exercise of its legal rights. It is a general principle that any person has a right to buy or sell from or to whom he chooses, and he may deal or refuse to deal with anyone that he selects, provided that he does not enter into an illegal conspiracy with someone else to exclude another person from the channels of trade. Here, the broadcasting system was within its rights in choosing to buy the competing station rather than the plaintiff's station, and, in cancelling its contract with the plaintiff, it was exercising a right it had under that contract. Therefore, even if the broadcasting system had violated the antitrust laws, those alleged violations did not result in the damage that the plaintiff sustained.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2610.720; and Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.350.

For the plaintiff: William M. Smith and George R. Beneman, Washington, D. C., and Abraham L. Freedman, Philadelphia, Pa.

For the defendants: Leon R. Brooks, Washington, D. C., and Samuel I. Rosenman, New York, N. Y.

Opinion

[*Treble Damage Action*]

Alexander Holtzoff, District Judge [*In full text*]: This is an action to recover triple damages for violations of the antitrust laws. The action is before this Court at this time on defendants' motion for summary judgment.

The suit is predicated both on Section 1 of the Sherman Act, which proscribes unreasonable restraints of trade, and Section 2 of the statute, which bans monopolies and attempts to monopolize. The plaintiff is the assignee of the owner of a television station that was operating in the City of Milwaukee under the call letters of WCAN. It was a UHF station. The plaintiff claims that as a result of activities which it is asserted were in violation of the Sherman Act the defendant, Columbia Broadcasting System, Inc., practically destroyed the value of the plaintiff's station.

[*Private Actions*]

It must be borne in mind at the outset that the issues presented in an action brought by a private individual for triple damages caused by violations of the antitrust laws are entirely different from those in an action brought by the United States to enjoin such violations. In a private action it is not sufficient to show violations of the antitrust laws committed by the defendant. That is all that the government need show in an action brought by the United States.

In a private action, however, it is essential for the plaintiff to establish that such violations resulted in an injury to the plaintiff.

[*"Affiliation" Contract—Cancellation Provision*]

The facts are not in dispute so far as their salient features are concerned, and insofar as there is any difference in the approach or inferences to be drawn from the facts the Court necessarily will construe them most favorably towards the plaintiff since it is the defendants who move for summary judgment. The defendant, Columbia Broadcasting System, Inc., generally known as CBS, is a business concern that produces shows or programs to be broadcast by individual television stations. It distributes its shows or programs among numerous television stations throughout the United States, making a contract with each of them known as an affiliation contract, by which it undertakes to supply broadcasting material for the station, and the station in turn undertakes to allocate a certain amount of time for the production of such programs. In this instance, the plaintiff's station, WCAN, had an affiliation contract with the principal defendant, Columbia Broadcasting System, Inc. This affiliation contract, as was true with many other such contracts, contained a provision reserving to CBS the right to cancel at the end of any six months' period. In other words, CBS could cut off the affiliation of the station on six months' notice at any time.

[*Cancellation—Injury to Plaintiff*]

The plaintiff's station was a UHF station. There was at the time in question another UHF station operating in Milwaukee. Under the then existing rules of the Federal Communications Commission a broadcasting corporation such as CBS was not permitted to become the owner of more than five television stations. The rule was modified so as to permit each television broadcasting corporation, in addition to owning five VHF stations, also to acquire not more than two UHF stations. When that rule became effective or was about to become effective, CBS determined to acquire a UHF station in Milwaukee. Instead of, however, acquiring the plaintiff's station it decided to acquire his competitor's station WOKY. It did so by procuring an option on WOKY through an intermediary, so that the owner of WOKY was not aware that the real purchaser was CBS. Having procured this option, CBS then cancelled the affiliation contract with the plaintiff's station, taking advantage of the six months' provision. Obviously the cancellation of the affiliation contract seriously injured the plaintiff and greatly reduced the value of his station.

[*Basic Question—Causation*]

The basic question in this action is, however, whether this injury is *damnum absque injuria* or whether it was caused by any violation of the antitrust laws. It is claimed that certain uniform provisions that were inserted in affiliation contracts generally by CBS known as clauses providing for option time and similar provisions constitute illegal restraints of trade in violation of Section 1 of the Sherman Act. It is also claimed that as a result of the transaction just described CBS acquired a monopoly of UHF in Milwaukee in violation of Section 2 of the Act.

The view that this Court takes of the issues in this case makes it unnecessary to determine whether the challenged clauses in the affiliation contracts constitute a violation of the Sherman Act or whether a monopoly was created or existed in this instance. The question to be determined in this litigation is a much narrower one, namely, whether anything that the defendant did in respect to the plaintiff constituted a violation of either Section 1 or Section 2 of the Sherman Act. To repeat, what the plaintiff complains of is that when the defendant desired to purchase a UHF station in Milwaukee, it failed to buy his station but acquired his competitor's station and, further, that it cancelled his affiliation contract, as it had a right to do under the six months' provision.

[*Refusal to Deal*]

We must approach this question from the general principle that any person has a right to buy or sell from or to whom he chooses and he may deal or refuse to deal with anyone that he selects, provided he does not enter into an illegal conspiracy with someone else to exclude another person from the channels of trade. The leading case on this point is *United States v. Colgate & Co.*, 250 U. S. 300. This case was but recently followed in this district in *Orbo Theatre Corp. v. Loew's Inc.* [1957 TRADE

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CASES ¶ 68,869], 156 F. Supp. 770, 779; affirmed 261 F. 2d 380 [1958 TRADE CASES ¶ 69,185], cert. denied, 359 U. S. 943. Consequently, the defendant was entirely within its rights in choosing to buy the competing station. It was also exercising its contract right to cancel the plaintiff's affiliation.

The Court is of the opinion that this case is governed by the case of *Packard Motor Car Co. v. Webster Motor Car Co.* [1957 TRADE CASES ¶ 68,682], 243 F. 2d 418; 100 U. S. App. D. C. 161. That case involved an automobile manufacturer who had several dealers selling the manufacturer's cars in the City of Baltimore. Each of the dealers had a contract or franchise, as it was known, the term of which was only one year. The plaintiff in that action was one of the dealers in question. One of the plaintiff's competitors came to the manufacturer and stated that he would not continue as a dealer unless the manufacturer agreed not to renew the plaintiff's franchise and to grant an exclusive agency to him. The manufacturer came to the conclusion that the plaintiff was less important to him than the competitor and accordingly declined to renew the plaintiff's franchise. Plaintiff brought suit for triple damages, alleging that the transaction constituted a conspiracy in restraint of trade in violation of the Sherman Antitrust Act. The Court of Appeals for this Circuit held otherwise and reached the conclusion that the manufacturer was exercising his rights as a businessman.

A precisely similar situation was presented in a case decided in the Fourth Circuit, *Schwing Motor Co. v. Hudson Sales Corporation* [1956 TRADE CASES ¶ 68,292], 138 F. Supp. 899, affirmed 239 F. 2d 176 [1956 TRADE CASES ¶ 68,564]. In both cases applications were made to the Supreme Court for writs of certiorari but were denied.[1]

So in the case at bar the defendant chose to exercise the option that the affiliation contract reserved to it, of cancelling the agreement on six months' notice. The defendant chose to buy a competing station instead of buying the plaintiff's station. While there is no doubt that considerable financial hardship must have resulted to the plaintiff, nevertheless, the Court is of the opinion that such hardship constitutes *damnum absque injuria.* If the defendant had been violating the Sherman Act, either as to Section 1 or Section 2, which the Court is not deciding and in respect to which it is making no intimation, such alleged violations did not result in the damage that the plaintiff sustained. The plaintiff's loss resulted from the exercise by the defendant of the defendant's legal rights.

[*Summary Judgment Granted*]

The Court concludes that the plaintiff is not entitled to recover and the defendants' motion for summary judgment is granted.

[¶ 69,392] Scapa Dryers, Inc. v. Abney Mills.

In the United States Court of Appeals for the Fifth Circuit. No. 17281. Dated June 30, 1959.

Appeal from the United States District Court for the Southern District of Georgia. FRANK M. SCARLETT, District Judge.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Exclusive Franchise to Use Patented Device—Reasonableness as to Time and Territorial Restrictions—Exclusive Use in United States "in Perpetuity."—An agreement making a textile manufacturer the exclusive user, in the United States, of patented "looms" used in the paper making industry would have been invalid under the antitrust laws if the franchise agreements had, as held by a trial court, given the manufacturer an exclusive use "in perpetuity." The contractual limits upon the time and territory involved in an agreement in restraint of trade, or the absence of such limits, are factors to be considered in determining the reasonableness of the restraint. Since the patentee had agreed to assign its United States patents to the manufacturer, it

[1] *Schwing Motor Co. v. Hudson Sales Corp.*, 355 U. S. 823. *Webster Motor Car Co. v. Packard Motor Car Co.*, 355 U. S. 822.

could not be said that it was unreasonable to include the entire United States as the territory for which the exclusive use was granted. But as to the question of time, the agreement would have been invalid if the parties had intended the exclusive use to be one of perpetual duration. Preferring, however, a construction that would sustain the validity of the agreement, the reviewing court held that the parties did not intend that the exclusive use should continue beyond the expiration of the patents. Since those patent rights had expired, the exclusive use had also terminated, and the manufacturer had no cause of action against a competitor which had used the looms.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.315, 2013.

For the appellant: Robert B. Troutman and Griffin Bell, Atlanta, Ga.; L. J. Bennett, Brunswick, Ga.; L. E. Pedrick and John W. Bennett, Waycross, Ga.; and Laszlo Kormendi, New York, N. Y.

For the appellee: Charles L. Gowen, Brunswick, Ga., and J. Frederic Taylor, New York, N. Y.

Before RIVES, JONES and WISDOM, Circuit Judges.

[*Exclusive Franchise—Perpetuity*]

JONES, Circuit Judge [*In full text*]: Hindle, Son & Co., Ltd., is an English corporation which, among other activities, manufactured looms for the weaving of dryer felts. Dryer felts are thick, wide and long. They are used in the paper making industry and require replacement at periodic intervals. The Hindle looms were patented in England, the United States and other countries. These patents were issued to and held by J. H. Hindle and Thomas Hindle, his son. Thomas Hindle procured patents on dryer felts and associated items. Similar patents were issued to Thomas Hindle and Sam Lord. In 1931 the Messrs. Hindle had made an agreement with Ayers, Limited, a Canadian corporation,[1] by which the Hindles were to assign a one-third interest in certain Canadian patents, were not to grant licenses for the manufacture of dryer felts or offer looms for sale in Canada without the consent of Ayers, nor sell looms in the United States without prohibiting their re-export to Canada.

[*Issue—Interpretation of Agreement*]

The Brandon Corporation, a South Carolina corporation, was a textile manufacturer. It included dryer felts as one of its products. In 1936 it negotiated with the Hindles for the purchase of Hindle looms and their exclusive use in the United States. A written proposal of the Hindle Company was made to Brandon but[2] it felt it could not spare the money that would be required to buy the Hindle looms. Its interest did not vanish, however, and early in 1939 there was a renewal of discussions. The negotia-

[1] John Henry Hindle and Thomas Hindle, mechanical and Textile Engineers, and both of Haslingden, in the County of Lancaster, England, hereby agree to assign to Messrs. Ayers, Limited, of Lachute, Province of Quebec, Canada, a ONE THIRD interest in the following Canadian letters patent for cotton and composite dryer felts and also for looms for weaving such materials, in consideration of a cash payment of Five thousand pounds, receipt of which sum is hereby acknowledged.

[List of Patents]

The joint owners of the patents, viz, Messrs. Ayers Limited, and John Henry and Thomas Hindle jointly and severally agree as follows:

The said Thomas Hindle hereby agrees not to license any other person, firm, or company in the Dominion of Canada for the manufacture of the said Cotton and composite dryer felts without the previous consent of the said Ayers Limited.

The said John Henry Hindle and Thomas Hindle hereby agree not to sell, or offer for sale, in the Dominion of Canada, looms constructed in accordance with the above patents, or otherwise, for weaving Cotton dryer felts of any kind, without the previous consent of the said Ayers Limited.

If the said John H. Hindle and Thomas Hindle, individually or jointly export looms for the manufacture of cotton dryer felts to the United States of America, or any other country, it must be stipulated that such looms will not at any time be re-exported to Canada.

The said Ayers Limited agree not to license any person, firm or company to manufacture the said looms in the Dominion of Canada, without the previous consent of the said John Henry Hindle and Thomas Hindle.

[2] "14th Sept. 1936.

"HINDLE DRYER FELT LOOMS.

"U. S. A. Proposition.

* * *

"General Proposal. In conformity with the policy already established in respect of Gt. Britain, Canada and France, it is not proposed to supply Hindle Looms to more than one individual company in the U. S. A. The prospective Purchaser of such looms will be expected to acquire the exclusive rights in U. S. A. for the use of the Hindle Patent Looms, the manufacture of the various Patented Dryer Felts

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tions on behalf of Brandon were commenced in 1939, as they had been in 1936, by Edward H. Hall. Hall was a representative of Morey Paper Mill Supply Company which handled the selling of dryer felts produced by Brandon pursuant to an arrangement with Woodward, Baldwin & Co. which controlled Brandon and acted as its general sales agent. The negotiations, which had their origin in correspondence, culminated in a conference held in July, 1939, in New York City between the Messrs. Hindle and the president and other representatives of Brandon. As a result of this conference Hindle and Brandon executed the so-called 1939 Memorandum. This Memorandum provided for the sale and delivery by the Hindle corporation to Brandon of two looms at stated prices. The times and place of payment were designated, a paragraph was included which obligated the Hindle corporation to supply Brandon with further looms at then existing prices "plus or minus any intervening difference in the cost of manufacture". A provision captioned "Exclusive Franchise—U. S. A."[3] was incorporated. The primary issues of this litigation depend upon the interpretation and legal effect to be given to this provision. Except for a supplemental letter, which is not here material, the 1939 Memorandum is the only written agreement between the Hindle corporation and Brandon, or its successor in interest, Abney Mills, which bears upon this controversy. Assignments of the patents described in the Memorandum were made to Brandon.

[*Legality of "Perpetual" Franchise*]

Brandon merged with Abney Mills, the appellee, and all of Brandon's rights under the Memorandum became vested in Abney

(including the general technique of their manufacture) and the Link Seam.

"An essential condition of such arrangement will be the Purchaser's undertaking that no loom or its patented products shall be exported to any country in which similar exclusive rights for the same have been or may be assigned. In a similar manner other users of Hindle Looms have agreed to respect the rights to be acquired in the U. S. A.

"A further condition of such arrangement will be the Purchasers' undertaking that no license to manufacture the Hindle Loom or its components or its patented product shall be issued by the Purchaser without the prior consent in writing of the original Patentees.

"The Patentees will agree to give the Purchasers a first option for the purchase of any patents of improvement that may be granted, but only in respect of U. S. A.

"It is realized that the Purchaser may consider a gradual development necessary or desirable, and with the object of facilitating such programme, it is proposed that a contract should be entered into for the purchase of six looms within a period of three years commencing from the date of such contract. This contract to provide for the immediate supply of three looms and the purchase of the sole rights of looms and their patented products in the U. S. A. The remaining three looms covered by such contract to be ordered at any time within the specified period at prices equivalent to those quoted herein, plus such increase or minus such decrease as may be indicated as a consequence of altered cost of manufacture due to wages and/or materials, as compared with conditions existing at this date. Further looms to be available to the Purchaser on a similar basis, either before or after the expiration of the three year period.

* * *

"Subject to the conditions briefly on page 11, the owners will assign to the Purchasers the U. S. Patents enumerated, relating to Looms, Dryer Felts, etc., conveying to the Purchasers the sole and exclusive rights to the Hindle Dryer Felt Looms and their patented products in the U. S. A., in consideration of the payment by the Purchasers of the sum of $50,000 (Fifty Thousand Dollars)."

* * *

[3] "EXCLUSIVE FRANCHISE—U. S. A.

"Agreements will be entered into by the responsible parties making you the exclusive user in U. S. A., of Hindle Dryer Felt Looms (regardless of whether such Looms are constructed under existing Patents or otherwise), and assigning to you the following U. S. Patents covering Looms, Cloths, Seams, etc.:—

No. 1630428	1927 Looms	J. H. & T. Hindle
1678434	1928 Looms	J. H. & T. Hindle
1687865	1928 Looms	J. H. & T. Hindle
1801081	1931 Dryer Felts	T. Hindle
1812206	1931 Looms	J. H. & T. Hindle
1812148	1931 Dryer Felts	T. Hindle
1834343	1931 Dryer Felts	T. Hindle
1976169	1934 Sew. Machine	T. Hindle
1994280	1935 Dryer Felt	T. Hindle
2010302	1935 Link Seam	T. Hindle & S. Lord
2066974	1937 Link Seam	T. Hindle & S. Lord
(Pending)	1939 Dryer Felt (P.M.)	T. Hindle & S. Lord

"The consideration required for the above U. S. rights is the sum of:—£5,000.

"We suggest that payment of this particular item shall be made by 20% upon signing of the contract, with four further payments each of 20% of the total sum at consecutive intervals of six months, thus spreading the payments over two years.

It will be our object, of course, to maintain close cooperation with you, exactly as we have during the last twelve years with Messrs. Ayers, Ltd., of Canada."

Mills. The United States patents on looms which had issued to the Hindles had all expired in 1948. In 1948 the appellant, Scapa Dryers, Inc., was incorporated in Georgia. Its stockholders are Scapa Dryers, Ltd. and Ayers Limited. Scapa Dryers, Ltd. is an English corporation manufacturing dryer felts in England on Hindle looms. The Messrs. Hindle are associated with it. Ayers Limited is the Canadian corporation which manufactures dryer felts on Hindle looms. The Hindles are not connected with Ayers. Scapa Dryers, Inc., the appellant, set up a plant in Waycross, Georgia, where it embarked upon the manufacture of dryer felts on Hindle looms. This suit followed. Abney Mills asserted that by the 1939 Memorandum, of which the Georgia Scapa corporation had knowledge, it acquired an exclusive right to the use of Hindle dryer felt looms in the United States in perpetuity or for as long as it should maintain its corporate existence under its perpetual charter, that Scapa of Georgia wrongfully and tortiously interfered with the contractual relationship and deprived it of the economic advantage resulting from the agreement incorporated in the Memorandum. Damages, an accounting and injunctive relief were sought. The appellant contended that the Memorandum, properly construed, granted Brandon and Abney, its successor by merger, no exclusive franchise beyond the life of the patents, and if the agreement be construed as attempting to grant an exclusive perpetual franchise it would be contrary to public policy, violative of the anit-trust laws, and unenforceable.

[*Intentions of Parties*]

Testimony, oral and documentary, was received. Thomas Hindle testified that the Hindles did not intend to grant to Brandon an exclusive right to use Hindle looms for any period beyond the term of the patents. The President and General Manager of Brandon, Mr. C. E. Hatch, testified that he expected that the exclusive franchise would be perpetual and based his expectations solely on the language of the agreement. It will be remembered that the 1939 renewal of negotiations on behalf of Brandon with the Hindles was made by Hall and much of the correspondence for Brandon was written by him. On April 10, 1939, he requested authority from Thomas Hindle to make patent investigations in the United States. In the course of the letter it was said, "It strikes me that we will actually be paying the franchise cost for what these patents are worth in this country, and we feel a careful investigation of these patents is entirely in order, and hope you may see our point." Again, during the same month he wrote,

> "The first reactions of Mr. Hatch and Mr. Baldwin are too much money involved. They have, some time ago, got price on one loom from Compton & Knowles of Worcester, Mass., and of course this price is way below your loom prices. Furthermore, they point out that the only felt Patent which it seems we will definitely need under our program, will be the Porous Matt felt, because the ordinary asbestos felts, such as are made by Hill, and which would also be made on your looms, are not Patented nor Patentable.
>
> "Therefore, the 5,000 pounds franchise cost seems to pare down to the one Porous Matt Patent, which may still simply be Patent applied for in the United States, plus the franchise on the Patented looms themselves. I must admit that when this is boiled down to these facts, and unless I am incorrect, the franchise price does seem high."

Other letters by Hall were of the same tenor suggesting that the franchise payment was to be for the patents and hence for the duration of the patents. Mr. Hatch wrote to his company's attorney on August 2, 1939, saying, "There is no question but that a loom can be built by any other manufacturer which will satisfactorily weave Cotton Dryer Felts without infringing on any existing patents. We have never thought that owning the United States patents to the Hindle Looms would prohibit other felt manufacturers making satisfactory Dryer Felts, but we do believe that we will have a four or five year jump on the other manufacturers and this is all that we can hope for". Thus there is much doubt as to the correctness of a statement of Mr. Baldwin, of Woodward, Baldwin & Co., made in a letter to the Morey Company that "I feel sure that your Mr. Hall thinks Brandon should have a paper of some sort from Hindle outlining his agreement that no further Hindle looms will ever be sold or operated in this country."

[*Holding of Lower Court—Appeal*]

The district court held that by the "Exclusive Franchise" clause Brandon and its

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successor Abney Mills had been given an exclusive right in perpetuity, or for so long as the right should be exercised, to manufacture dryer felts on Hindle looms. Scapa of Georgia appealed.

Much has been said by the parties as to whether consideration should be given to the offers and representations made during the 1936 negotiations. The conclusions we reach make it unnecessary to pass upon the contentions made in connection with this phase of the case. We think that the 1939 discussions which culminated in the July agreement, were new negotiations and not a continuation of those of 1936. Nor do we find it necessary to consider the proposition, urged by the appellee, that the fact that Ayres Limited continues to be the exclusive Hindle operator in Canada requires the construction that the contract with Brandon was intended to grant an unlimited right of exclusive use in the United States.

[*Antitrust Laws*]

The district court construed the agreement as a valid enforceable contract prohibiting Hindle, in perpetuity or for as long as Brandon or its successors should be in business, from selling in the United States looms manufactured by Hindle for the weaving of dryer felts. Such an agreement would restrict Hindle in the sale of its manufactured looms. Competition would be limited. The agreement as found by the district court would be in restraint of trade. An agreement in restraint of trade is illegal at common law or under the Sherman [4] and Clayton Acts [5] only if the restraint is unreasonable. The test as to whether or not a restraint of trade is unreasonable has been stated in this manner:

"A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification if it

"(a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or

"(b) imposes undue hardship upon the person restricted, or

"(c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or

"(d) unreasonably restricts the alienation or use of anything that is a subject of property, or

"(e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment." Restatement, Contracts § 515.

[*Time and Territorial Extent of Restraints*]

The concept of reasonableness, by which the enforceability or unenforceability of an agreement in restraint of trade is determined, is not to be measured by any fixed formula of legal interpretation. The rules are but guides to decision. The reasonableness of the restraint is to be determined by the circumstances of the case and the particular contract involved in it. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

The restraining covenant of "exclusive user" was ancillary to the sale of the two looms by Hindle to Brandon and the assignment of the patents.

The contractual limits or absence thereof, upon the period of time and the territorial extent of the restriction are factors to be considered in determining reasonableness. They are not, by the present trend of the authorities, fixed rules of decision. 17 C. J. S. 622 *et seq.*, Contracts §§ 238-250; 6 Corbin on Contracts, 472, § 1381; Annot. 45 A. L. R. 2d 77; Annot. 46 A. L. R. 2d 119. But, it may be said, the longer the period of time and the larger the extent of the area, the greater will be the likelihood that the restraining covenant will be regarded as unreasonable and unenforceable.

[*Interest to Be Protected*]

Since Hindle agreed to assign its United States patents to Brandon it can hardly be said that it was unreasonable to include the entire United States as the territory for which the exclusive use was granted. As to the question of time the problem has a dual aspect, first, whether the district court correctly found that there was an intent of the parties that the exclusive franchise should be for so long as Brandon or its successors should be in the dryer felt business or, in other words, of indefinite or perpetual duration; and second, if so intended, could

[4] 15 U. S. C. A. § 1, *et seq.*
[5] 15 U. S. C. A. § 12, *et seq.*

the agreement withstand a charge of invalidity. Our task would be easier if the parties, by the agreement, had fixed or attempted to fix the period for which exclusive user was to continue. The duration of the agreement was neither specified in the agreement nor discussed at any time during the negotiations. When we consider whether the interest of Brandon, now Abney Mills, requires a perpetual right of exclusive user we look to the purpose for which the Hindle looms were purchased and the exclusive user was acquired. The felts which Brandon had been making were not such as could compete with those of other manufacturers. It was feared by Brandon in 1937 that unless it was able to make a satisfactory asbestos felt it would be entirely out of the dryer felt business in a few years. In the same year the mills prepared to operate on a three-day week. The Hindle looms were then regarded by Brandon and are now regarded by Abney Mills as the best dryer felt looms obtainable. Brandon believed that the use of the Hindle looms would give it a commanding competitive position in the American dryer felt market. The President of Brandon, about a week after the deal with Hindle was closed, wrote the Company's attorney and, commenting upon the patents, said, "We do believe that we will have a four or five year jump on the other manufacturers and this is all that we can hope for." The patents expired in 1948 and so had a remaining life of about nine years at the time of the transaction. We conclude that the interest which Brandon sought to protect was the exclusive use provided by the patents and for the remaining period covered by the patents. That protection it has had.

Construing the agreement as would Abney Mills and as did the district court, Hindle would be forever prohibited from selling looms in the United States except to the extent, if at all, Brandon should be a customer. There was no agreement by Brandon to ever buy another loom. That it did so is true but to determine the intent of the parties we look at the situation of the parties and their undertakings at the time their agreement was made. We think the inference is unwarranted that Hindle intended to so limit its potential market by forever excluding itself from what would perhaps be its most promising trade area.

[*Policy of Patent Laws*]

By the patents the Hindles had a monopoly on the looms. This monopoly is sought to be extended and perpetuated by Abney Mills, to the extent of the exclusion of Hindle and those claiming under it or using looms made by it. Such an extension of the patent monopoly is in conflict with the policy of the patent laws. By the decision in *Scott Paper Company v. Marcalus Manufacturing Company, Inc.*, 326 U. S. 249, 66 S. Ct. 101, 90 L. Ed. 47, reh. den. 326 U. S. 811, 66 S. Ct. 263, 90 L. Ed. 495, it was held that a contract between a patentee and the assignee of the patent which attempts to exclude the assignor-patentee from using the patented article after the expiration of the patent is contrary to the public policy laid down by our patent laws and consequently is unenforceable. The consuming public is entitled to the benefits which flow from the free and unrestricted use and development of the invention by others, including the assignor, after the expiration of the patent. This is a part of the consideration for which the monopoly for a limited duration is granted. In the course of its opinion the Court said:

> "By the patent laws Congress has given to the inventor opportunity to secure the material rewards for his invention for a limited time, on condition that he make full disclosure for the benefit of the public of the manner of making and using the invention and that upon the expiration of the patent the public be left free to use the invention. [Citing authorities]. As has been many times pointed out, the means adopted by Congress of promoting the progress of science and the arts is the limited grant of the patent monopoly in return for the full disclosure of the patented invention and its dedication to the public on the expiration of the patent. [Citing authorities].
>
> "The aim of the patent laws is not only that members of the public shall be free to manufacture the product or employ the process disclosed by the expired patent, but also that the consuming public at large shall receive the benefits of the unrestricted exploitation, by others, of its disclosures. [Citing authority]. If a manufacturer or user could restrict himself, by express contract, or by any action which would give rise to an 'estoppel', from using the invention of an expired patent, he would deprive himself and the consuming public of the advantage to be derived from his free use of the disclosures. The public has invested in such free

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use by the grant of a monopoly to the patentee for a limited time. Hence any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws. And for the same reason a stranger, such as respondent Marcalus, cannot, by securing and assigning a patent on the invention of the expired Inman patent, confer on petitioner any right to deprive the public of the benefits of the free use of the invention for which the public has paid by the grant of a limited monopoly.

"By the force of the patent laws not only is the invention of a patent dedicated to the public upon its expiration, but the public thereby becomes entitled to share in the good will which the patentee has built up in the patented article or product through the enjoyment of his patent monopoly. Hence we have held that the patentee may not exclude the public from participating in that good will or secure, to any extent, a continuation of his monopoly by resorting to the trademark law and registering as a trademark any particular descriptive matter appearing in the specifications, drawings or claims of the expired patent, whether or not such matter describes essential elements of the invention or claims. [Citing authorities].

"It is thus apparent that the patent laws preclude the patentee of an expired patent and all others including petitioner from recapturing any part of the former patent monopoly; for those laws dedicate to all the public the ideas and inventions embodied in an expired patent. They do not contemplate that anyone by contract or any form of private arrangement may withhold from the public the use of an invention for which the public has paid by its grant of a monopoly and which has been appropriated to the use of all. The rights in the invention are then no longer subject to private barter, sale, or waiver. [Citing authorities]." 326 U. S. 255-257.

[*Governing Principle*]

The *Scott Paper Co.* case has been criticized and referred to as the "Dreadful Scott decision". Lechner, *Estoppel Against Patent Assignors-The Scott Paper Company Case.* 28 J. Pat. Off. Soc'y 325. Cf. 4 Toulmin, *Anti-Trust Laws* 194, § 7.24. Whether or not the decision is sound, and we think it is, we are bound by it and the doctrine which it states is a principle governing the decision in the case before us.

[*"Perpetual" User Would Be Invalid*]

If the district court's construction of the meaning of the contract be followed, we would have no choice but to hold it invalid. Where an agreement is susceptible of two constructions, one of which would render the contract invalid and another which would sustain its validity, the latter construction is to be preferred. *W. C. Shepherd Co. v. Royal Indemnity Co.,* 5th Cir. 1951, 192 F. 2d 710. So we conclude that Hindle and Brandon did not intend that Brandon's exclusive rights to the use of Hindle looms should continue beyond the time when all of the patents described in the agreement had expired. The rights under the patents have terminated and so has the right of exclusive user granted to Brandon and assigned by it to Abney Mills. Therefore the judgment of the district court for the appellee was erroneous. That judgment is reversed and judgment is here rendered for the appellant.

Reversed and Rendered.

[¶ 69,393] Rita Gottesman, et al. v. General Motors Corporation and E. I. du Pont de Nemours and Company.

In the United States Court of Appeals for the Second Circuit. October Term, 1958. Argued April 13, 1959. Decided June 18, 1959.

On petition for an interlocutory appeal from an order of the United States District Court for the Southern District of New York, SIDNEY SUGARMAN, Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Interlocutory Appeals—Requirements—"Substantial Grounds for Difference of Opinion"—Shortening Litigation.—In a minority stockholders' derivative antitrust action against a chemical company which had wrongfully acquired and used 23 per cent of their corporaton's stock, a petition

to enter an interlocutory appeal from a trial court's order denying a motion to dismiss the complaint was denied. Such an appeal should not be permitted unless the order under attack "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Here, there was no "substantial ground for difference of opinion" as to the correctness of the trial court's refusal to require the minority stockholders to demand, of the majority stockholders, the bringing of the action. Such a demand would have been futile because of the chemical company's sizable ownership of the corporation's stock, the number and diffusion of the remaining shareholders, and the inability of the shareholders as a body to cause their corporation to prosecute the action. Also, such an interlocutory appeal would prolong rather than shorten the litigation. A shareholders' vote cannot prevent the institution of a derivative suit, annul one already begun, or ratify violations of the antitrust laws. Thus, a reversal of the trial court's ruling could, at most, lead only to a remand for repleading, with possibilities of further interlocutory appeals thereafter.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.70, 9015.

For the plaintiffs: Edward A. Rothenberg of Netter & Netter, New York, N. Y.

For the defendants: Henry M. Hogan, Detroit, Mich., and George A. Brooks, William A. Grier, and Edward B. Wallace, New York, N. Y., for General Motors Corporation; Charles A. Horsky of Covington & Burling, Washington, D. C., and Frank H. Gordon, New York, N. Y., for E. I. du Pont de Nemours & Company.

Denying a petition for an interlocutory appeal from an order of the U. S. District Court, Southern District of New York, 1959 Trade Cases ¶ 69,332. For a prior opinion of the court, see 1958 Trade Cases ¶ 68,928.

Before: CLARK, Chief Judge, and SWAN and MOORE, Circuit Judges.

Defendants, General Motors Corporation and E. I. du Pont de Nemours and Company, petition for permission to enter an interlocutory appeal under 28 U. S. C. § 1292(b) from an order, D. C. S. D. N. Y. [1959 TRADE CASES ¶ 69,332], 171 F. Supp. 661, denying their motion to dismiss the complaint in a consolidated shareholders' derivative action. Petition denied.

See also D. C. S. D. N. Y. [1958 TRADE CASES ¶ 68,928], 158 F. Supp. 526.

[*Stockholders' Antitrust Action*]

CLARK, Chief Judge [*In full text*]: General Motors Corporation and E. I. du Pont de Nemours and Company, defendants in a shareholders' derivative action, seek permission to take an interlocutory appeal under 28 U. S. C. § 1292(b) from the denial of their motion to dismiss the complaint for failure to comply with Rule 23(b), F. R. C. P. This suit, a consolidation of three actions instituted shortly after the Supreme Court's decision in *United States v. E. I. du Pont de Nemours & Co.* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586, is prosecuted by stockholders of General Motors seeking to recover treble damages and other relief on behalf of their corporation for activities of Du Pont held unlawful in the above Supreme Court decision.

[*Interlocutory Appeal*]

By their motion to dismiss, defendants attack the rather lengthy allegations of paragraphs 7 and 21 of the consolidated complaint as failing to meet the requirements of F. R. 23(b) as to a demand on the shareholders of General Motors or an excuse for a failure to make one. In substance these paragraphs say that demand for action by the stockholders would be futile because of Du Pont's commanding position by virtue of its ownership of at least 23 per cent of General Motors common stock, with the remaining interest divided between several hundreds of thousands of small holders residing in widespread parts of the world. No attempt is made to attack corresponding allegations of paragraphs 7 and 20 excusing a lack of like demand upon the Board of Directors of General Motors. Judge Sugarman denied the motion to dismiss in a reasoned opinion in which he held the allegations sufficient, citing *inter alia Delaware & H. Co. v. Albany & S. R. Co.*, 213 U. S. 435. But then he proceeded to give the certificate of substantial question

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which is the first step in the procedure for limited interlocutory appeals provided in the new statute, 28 U. S. C. § 1292(b). D. C. S. D. N. Y. [1959 TRADE CASES ¶ 69,332], 171 F. Supp. 661.

[*Legislative Intent*]

In granting this certificate we think the judge acted improvidently and contrary to the legislative intent; and we cannot now take the second and final step toward allowing an appeal without creating troubles for ourselves and litigants for the future in wasteful and delaying appeals not contemplated by the framers of the act, as is carefully explained in *Milbert v. Bison Laboratories,* 3 Cir., 260 F. 2d 431. The limited purposes of the new statute have been made very clear. Although the federal rule against "piece-meal appeals" had been of long and cherished standing, certain vigorous attacks upon it led to the appointment of a distinguished Committee of the Judicial Conference of the United States under the chairmanship of the late Judge Parker to study the question. Rep. Jud. Conf. Sept. 24-26, 1951, pp. 32, 33. The Committee held hearings and took the views of the federal judges, who generally opposed the change. The Committee then reported unanimously disapproving the original proposal as unduly encouraging "fragmentary and frivolous appeals with the evils and delays incident thereto," and this report was approved by the Conference. Rep. Jud. Conf. March 20-21, 1952, p. 7; App. to Rep. Jud. Conf. Sept. 22-24, 1952, p. 203.

At Judge Parker's suggestion the Committee was continued to receive other proposals. One of these was to apply the principle then recently embodied in amended F. R. 54(b) of allowing an appeal of separable matters when both trial and appellate courts agreed on its propriety. The validity of that rule had been under attack in a limited number of cases, although ultimately it was sustained in *Sears, Roebuck & Co. v. Mackey* [1956 TRADE CASES ¶ 68,370], 351 U. S. 427, and *Cold Metal Process Co. v. United Engineering & Foundry Co.,* 351 U. S. 445. In any event that rule applied only to civil actions, and it was thought that a limited and controlled right of appeal substantially along these lines might be useful. Accordingly the Conference, with some members still dissenting, accepted the proposal while stressing its limited nature. Rep. Jud. Conf. Sept. 24-25, 1953, pp. 27, 28. The Report of the Judicial Conference and the House and Senate Reports all stress the limited and exceptional character of the cases to which it applies and condemn any indiscriminate use of the authority given. See extensive quotation from these reports in *Milbert v. Bison Laboratories, supra,* 3 Cir., 260 F. 2d 431, 432-435, which holds that the power must be strictly limited to the precise conditions stated in the law. At least three courts of appeals have already passed local rules limiting and regularizing the procedure by which such appeals may be sought. See also *In re Heddendorf,* 1 Cir., 263 F. 2d 887; Wright, *The Interlocutory Appeals Act of 1958,* 23 F. R. D. 199, 202; and Sen. Rep. No. 2434, 85th Cong., 2d Sess., 1958 U. S. Code Cong. & Adm. News 5255, 5262, quoting the *restricted* proposals originally suggested by the writer of this opinion. We are in agreement with this interpretation of the legislation.

[*Requirements for Interlocutory Appeal*]

Hence an interlocutory appeal should not be permitted unless the order under attack "involves a controlling question of law as to which there is substantial ground for difference of opinion and * * * an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U. S. C. § 1292(b). It would seem axiomatic that appeals challenging pre-trial rulings upholding pleadings against demurrer could not be effective in bringing nearer the termination of litigation; on the contrary, they only stimulate the parties to more and greater pre-trial sparring apart from the merits. We are not accustomed to criticize or reverse such pleading decisions, and the chance of reversal here seems so slight as to be quite negligible. Further, a reversal at most could lead only to a remand for repleading, with possibilities of further interlocutory appeals thereafter. If the district judge had thought that there was anything of permanent effect here, he could have severed the issue under F. R. 42(b) and tried it on the facts to a conclusion more meaningful than a ruling on the merit form of plaintiffs' allegations.

As the issue now stands there is no "substantial ground for a difference of opinion" as to the district court's refusal to require plaintiffs to make a demand on General Motors' shareholders. One need not be

made where it is "not reasonable to require it," *Hawes v. Oakland,* 104 U. S. 450, 461, or where it "would be 'futile,' 'useless,' or 'unavailing.'" *Cathedral Estates v. Taft Realty Corp.,* 2 Cir., 228 F. 2d 85, 88. Cf. *Swanson v. Traer,* 354 U. S. 114, 115; *Smith v. Sperling,* 354 U. S. 91, 94 n. 2. Without a doubt the combination of Du Pont's sizable ownership of General Motors stock, the number and diffusion of the remaining shareholders, and the inability under relevant state law of the shareholders as a body to cause General Motors to prosecute this action renders a demand on these shareholders unnecessary in the instant case. *Delaware & H. Co. v. Albany & S. R. Co.,* 213 U. S. 435; *Citrin v. Greater New York Industries,* D. C. S. D. N. Y., 79 F. Supp. 692, 697; *Berg v. Cincinnati, Newport & Covington Ry. Co.,* D. C. E. D. Ky., 56 F. Supp. 843, 845; *Steinberg v. Hardy,* D. C. Conn., 90 F. Supp. 167; *Continental Securities Co. v. Belmont,* 206 N. Y. 7, 15-16, 99 N. E. 138; *Steinberg v. Adams,* D. C. S. D. N. Y., 90 F. Supp. 604, 609. The absurdity of defendants' contention that plaintiffs must so canvass their fellow stockholders is pointed up by the complete lack of mention of such a requirement in Judge Leibell's careful opinion in the famous case of *Winkelman v. General Motors Corp.,* D. C. S. D. N. Y., 44 F. Supp. 960, 1022-1023.

[*Derivative Suits—Shareholders' Role*]

We are bound to say, moreover, that from the nature of the principles governing shareholders' actions we see no chance that even a more meaningful resolution of the issues attempted to be formulated below can decisively advance the termination of this litigation. As is evident from the alternative relief defendants seek—that this action be stayed and the plaintiffs directed to seek approval of the suit at the next annual stockholders' meeting, the suit to be dismissed "in the event they do not secure such approval"—defendants' petition here is predicated on a fundamental misconception of the role of the shareholders as a body with respect to derivative suits. A shareholders' vote cannot prevent the institution of a derivative suit or annul one once it has been brought; had that been possible it is obvious that very few such suits could or would have been maintained. At best a ratification by the body of shareholders merely compels the minority shareholder plaintiffs to shift slightly the legal theories on which they rely so as to raise charges of fraud, waste of corporate assets, or the like. See *Continental Securities Co. v. Belmont, supra,* 206 N. Y. 7, 18-20, 99 N. E. 138; *Pollitz v. Wabash R. Co.,* 207 N. Y. 113, 100 N. E. 721; *Steinberg v. Hardy, supra,* D. C. Conn., 90 F. Supp. 167; 2 Fletcher, *Cyclopedia of Corporations* § 764 (1931); 13 *id.* § 5795. In the instant case even this slight effect on the litigation cannot occur, since the wrongful acts alleged—violations of the antitrust laws by Du Pont—can in no way be ratified or rectified by a vote of the shareholders of General Motors. Cf. *Chicago v. Mills,* 204 U. S. 321, 328-330.

[*Shortening Litigation*]

In short, the question before these shareholders, were a poll of them here to be ordered, would be not whether this action should be stopped, but merely who ought most properly to press it forward. See *Hawes v. Oakland, supra,* 104 U. S. 450, 460-461; *Corbus v. Alaska Treadwell Gold Mining Co.,* 187 U. S. 455, 463; *Quincy v. Steel,* 120 U. S. 241, 244-249; *Taylor v. Holmes,* 127 U. S. 489; *Dimpfel v. Ohio & Mississippi Ry. Co.,* 110 U. S. 209, 211; *Berg v. Cincinnati, Newport & Covington Ry. Co., supra,* D. C. E. D. Ky., 56 F. Supp. 843, 845; *Cohen v. Industrial Finance Corp.,* D. C. S. D. N. Y., 44 F. Supp. 491, 494-495. Obviously an interlocutory appeal to test the desirability of such a poll can only prolong, rather than shorten, this litigation.[1] We recognize that defense of a derivative suit of this kind may be hard and expensive. But no substitute method of minority corporate supervision has yet been developed, and, as experience shows so repeatedly, delays and evasion of the merits are only wasteful in the long run. A decision such as that of the Supreme Court in the *Du Pont* case is almost sure to result in stockholder attack which must be met soóner or later, if not at the hands of these self-appointed fiduciaries, then of some others. It would seem to the interest of court and

[1] As this action invokes the federal question of jurisdiction of the district court, any realignment of General Motors as a plaintiff, which might follow a highly unlikely shareholders' vote approving the prosecution of this action, could not terminate the action as it might possibly in a suit founded on diversity of citizenship. *Smith v. Sperling,* 354 U. S. 91.

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litigants that these issues be promptly faced and finally adjudicated.

[*Ruling*]

Petition denied.

[*Dissenting Opinion*]

MOORE, Circuit Judge (dissenting) [*In full text*]: For many years, particularly in the Southern District and to some extent in other large metropolitan areas, one of the principal causes of trial calendar delays has been the time consumed by the trial of the protracted case, namely, a case which would require trial time of a judge of three to eight months. There have been protracted conferences by Bench and Bar as to ways and means of remedying the situation. Some results have been achieved by merely putting these cases to one side but the backlog nevertheless remains.

[*Right to Maintain Action*]

As is so frequently the case with procedural reforms, they come long after the need therefor has arisen. One of the reforms finally enacted was the adoption of the so-called Interlocutory Appeals Statute (28 U. S. C. A. § 1292(b)). This statute was intended to give to the trial judge who is charged with the responsibility of facing a future burdened by one of these protracted cases discretion in sending some important phase of the case which might materially advance the ultimate termination of the litigation to an appellate court for review. In this case the trial court, recognizing that his decision "enables a relatively small stockholder interest to plunge two large corporations into inevitably long and expensive litigation which, should this determination be erroneous, would result in a futile waste of time and money by both the plaintiffs and the defendants," has granted a certificate in which he says the order involves "a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation;". Such a certification, in my opinion, is entitled to great weight and should not be rejected unless it is apparent on the face that the considerations which prompted the trial court to issue it have no basis in law or fact. It certainly cannot be said that this new statute has opened the floodgates to needless appeals because thus far a bare trickle of interlocutory appeals has flowed into the stream of appellate litigation. Nor should it be the role of appellate courts judicially to nullify, in effect, the statute without at least giving it a fair trial to see whether the beneficial purpose for which it was enacted may not result in the disposition or the material shortening of the long case. Surely no better example of the type of case which moved the supporters of the statute to action can be found than in that here presented. (See House Report No. 1667, 85 Cong. 2d Sess., pp. 1, 2; Senate Report No. 2434, 85 Cong. 2d Sess., pp. 3, 4.) *Milbert v. Bison Laboratories,* 3 Cir., 1958, 260 F. 2d 431, does not apply because the sole basis of the decision was the failure of the district court judge to make the certificate and the failure of counsel to apply for permission to appeal within 10 days. The two reports of House and Senate from which quotations were made indicate that this might well be the type of case to which the interlocutory appeals section should apply because they refer to "protracted and expensive litigation," "long drawn out cases" and cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action. Certainly it will be too late so far as time and expense are concerned at the end of any hearing on the merits to determine that the plaintiffs had no right to bring this action.

[*Substantive Law Involved*]

Consideration must now be given to the substantive law involved. It is a fundamental principle of corporate law that the management of a corporation is vested in its directors. No individual stockholder is empowered to take over the reins of corporate management. There are certain circumstances, however, which permit a stockholder in a derivative capacity to sue on behalf of his corporation. Before this radical step is permitted certain definite facts must be alleged and proved. Thus, if the directors are personally guilty of misfeasance or malfeasance so that a suit should be instigated against them by the corporation for damages, it would be but natural that they would not be likely to authorize a suit against themselves. Upon such allegations a stockholder would be justified in seeking to

represent the corporation. However, this is by no means the situation here. When analyzed it appears that there is no charge whatsoever in the complaint that the directors or any of them have personally profited at the expense of the corporation or that the proposed derivative stockholders suit seeks damages from or even names any director of General Motors as a defendant. There is no showing as to the names of any of the directors of General Motors, their business affiliations, their connection, if any, with the defendant du Pont, or the circumstances under which they were elected directors. There is no allegation that any one of the directors is beholden to du Pont in a business way or personal way. The only allegation is that du Pont owned approximately 23% of the outstanding common stock of General Motors, followed by the allegation that by reason of this fact "du Pont's stock interest in General Motors exerted a potent influence on the affairs of General Motors, promoted the acts and transactions herein alleged, and induced General Motors to participate therein." There is the further allegation that "defendant du Pont had working control (sometimes hereinafter referred to as 'control') over General Motors, which permitted it to nominate and elect and/or dominate and control the majority of the Board of Directors and/or officers of said corporation, and to select and/or dominate and control a large part of the personnel of said corporation concerned with the acts and transactions herein alleged, to determine a large part of said corporation's policies including those relating to said acts and transactions, and to cause General Motors to participate in said acts and transactions." There is no allegation that any demand was made upon "the managing directors or trustees," namely, the Board of Directors but only an allegation that no demand had been made on the body of stockholders of General Motors. This failure is attempted to be excused by alleging that if the majority of stockholders had demanded that suit be brought it would not have been honored by General Motors Board of Directors. No facts in support of such allegation are set forth. There is no presumption in corporate law that the mere holding of 23% of stock in another corporation is sufficient to justify a stockholder in imposing upon the corporation the burdens and expenses of a protracted law suit against the 23% stockholder. However, the least that should be done here before isolating some trial judge for a period of many months to try such case as there may be is to make sure that at the outset this time and effort will not be wasted.

[*Procedural Point of View*]

From a procedural point of view the plaintiffs quite apart from the ultimate merits of the suit itself should be required to substantiate the allegations that the 23% du Pont stock interest was responsible for all of the so-called domination and control alleged in paragraph 7 of the complaint. These plaintiffs holding a small amount of stock, as the trial judge said, have no right to "plunge two large corporations into inevitably long and expensive litigation" unless they can establish this right at the threshold. It is not too much to ask these plaintiffs to make specific charges and to prove them rather than to create a new principle of corporate law that the ownership of less than 25% of the stock is to be an irrebuttable presumption of domination and control. The question before the court below goes far beyond "the mere form of plaintiffs' allegations" (as says the majority) and deals with the allegations essential to entitle these plaintiffs to proceed. However, the merits of the question are not, and should not be, before the court on this application. Enough appears both from the trial court's certification and from the legal issues involved to entitle the appeal to be heard on the merits. I find it quite inappropriate to suggest that, were the majority of the stockholders to ratify action properly taken, minority shareholders would be compelled to get around this difficulty and "to shift slightly the legal theories on which they rely so as to raise charges of fraud, waste of corporate assets, or the like" (see majority opinion). It scarcely behooves the courts to suggest to litigants that they can satisfy pleading formalities merely by alleging fraud and waste. More seemly would it be to require (as does the law) that fraud charges (if the facts support them) be made as a prerequisite to bringing the action. At least then the party alleging fraud will be under the burden of proving it. Nor is there any presumption that every major antitrust case "is almost sure to result in stockholder attack." This practice may develop if the legal requirements for bring-

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ing such suits are abolished but every governmental attack upon alleged monopoly does not carry with it the presumption of director or stockholder wrongdoing.

[*Cases Considered*]

The court below relied on *Delaware and Hudson Company v. Albany and Susquehanna Railroad Company,* 213 U. S. 435 (1909), saying, "The facts here presented are governed by the ruling in the *Delaware* case * * *" A reading of that case shows that the directors and executive officers of both companies were virtually the same. The Supreme Court said that "The situation was unique" and that "Rule 94 is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases." Furthermore the case came before the court after a final money decree. The *Delaware* case stands upon its own facts leaving other cases to be judged upon theirs.

In *Cohen v. Industrial Finance Corporation,* 44 F. Supp. 491, the defendant corporation was the majority stockholder and as the court said the facts showing director domination were "pleaded with considerable particularity." The same is true in *Winkelman v. General Motors Corporation,* 44 F. Supp. 960, 1022. There 22 out of 27 members of the Board were named as defendants. The court said "Directors could not be expected to sue themselves on behalf of the corporation with any enthusiasm." In *Citrin v. The Greater New York Industries,* 79 F. Supp. 692, the allegations claimed that all members of the Board had participated in the acts complained of. This court said quite recently in *Cathedral Estates v. Taft Realty Corporation,* 2 Cir., 1955, 228 F. 2d 85, that demand on the directors or shareholders need not be made when it would be futile but also added that it need not be made "where the directors and controlling shareholders are antagonistic, adversely interested, or involved in the transactions attacked." At least the complaint there alleged that no demand was made "for the reason that the individual defendants whose acts are complained of control Taft Realty and it would be futile to ask them to sue themselves." *Smith v. Sperling,* 354 U. S. 91 (1957), involved the question of jurisdiction, although even there there were facts which showed that the defendant sought to be sued, namely, United States Pictures Inc., was the corporation of the son-in-law of a director of Warner Bros. Thus in these cases far more is alleged than in the present complaint. Nor is it any answer to say that curative allegations could be made. The whole point of forcing a plaintiff to make an allegation sufficient in law is to force him to prove it if he is to prevail.

I would grant the motion for leave to appeal.

[¶ 69,394] United States v. Hamilton Cosco, Inc.

In the United States District Court for the Southern District of New York. Civil Action No. 147-345. Filed June 29, 1959.

Case No. 1465 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Resale Price Fixing—Consent Decree—Practices Enjoined—Resale Price Agreements—Fair Trade Agreements with Wholesalers.—A furniture manufacturer was prohibited by a consent decree from entering into any agreement with any wholesaler to fix prices for the sale of the manufacturer's products to any third person. The manufacturer was also prohibited from entering into or enforcing any wholesale "fair trade" agreements.

See Resale Price Fixing, Vol. 1, ¶ 3015.20, 3015.80.

Resale Price Fixing—Consent Decree—Practices Enjoined—Resale Price Fixing—Boycott—Coercion.—A furniture manufacturer was prohibited by a consent decree from requiring, compelling, or coercing any wholesaler or retailer to maintain prices fixed or suggested by the manufacturer or any wholesaler for the sale of the manufacturer's products to any third person. The decree also prohibited the manufacturer from (1) boycotting or otherwise refusing to deal with any of its regularly designated wholesalers

who adequately represented it in selling its products and who complied with its reasonable standards, not inconsistent with the decree, for wholesalers, (2) entering into any agreement with any wholesaler to limit or restrict the persons to whom, or the terms under which, any wholesaler might sell the manufacturer's products, or (3) restricting the free choice of any wholesaler in selecting its customers for the manufacturer's products.

See Resale Price Fixing, Vol. 1, ¶ 3015.70, 3015.80.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief —Cancellation of Furniture Manufacturer's Fair Trade Contracts with Wholesalers.—A furniture manufacturer charged with conspiring with wholesalers to fix minimum prices to be charged for its products was ordered by a consent decree to cancel all wholesale "fair trade" agreements to which it was a party.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.45.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Fair Trade Agreements with Retailers.—A provision in a consent decree prohibiting a furniture manufacturer from requiring, compelling, or coercing any wholesaler or retailer to maintain fixed or suggested resale prices was not to be construed as denying the manufacturer the right to enter into and enforce fair trade contracts against retailers.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.39, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; and W. D. Kilgore, Jr., Baddia J. Rashid, Richard B. O'Donnell, Augustus A. Marchetti, and Paul D. Sapienza, Attorneys, Department of Justice.

For the defendant: Cahill, Gordon, Reindel & Ohl, by Jerrold G. Van Cise (D. A. O'Mara and Sheldon Oliensis, of counsel).

Final Judgment

[*Consent Decree*]

ARCHIE O. DAWSON, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on June 29, 1959; the defendant having appeared and filed its answer to the complaint denying the material allegations thereof; and the plaintiff and the defendant, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by either party hereto in any respect of any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim upon which relief against the defendant may be granted under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Wholesale fair trade agreement" means any resale price maintenance contract, or supplement thereto, pursuant to which the resale price of Cosco products on sales by wholesalers is fixed, established or maintained under Federal law and under State fair trade laws in accordance with either Section 1 of the Sherman Act or Section 5(a) of the Federal Trade Commission Act, as amended;

(B) "Wholesaler" means any person insofar as such person purchases Cosco products for resale to persons other than consumers;

(C) "Cosco products" means metal and plastic furniture manufactured and sold by defendant under the brand name "Cosco";

(D) "Retailer" means any person who purchases Cosco products for resale to consumers;

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(E) "Person" shall mean any indvidual, partnership, corporation, association or legal entity.

III

[*Applicability*]

The provisions of this Final Judgment applicable to the defendant shall also apply to its subsidiaries, successors and assigns and to each of its or their officers, directors, agents and employees, and to all persons in active concert or participation with the defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Wholesale Fair Trade Agreements—Cancellation*]

The defendant is ordered to cancel all wholesale fair trade agreements to which it is now a party, and the defendant is enjoined from entering into, adhering to or enforcing, directly or indirectly, any wholesale fair trade agreement.

V

[*Prohibited Agreements*]

The defendant is enjoined from entering into, adhering to, maintaining, furthering or reviving, directly or indirectly, any combination, contract, agreement or understanding with any wholesaler:

(A) To fix, maintain or adhere to prices or minimum prices for the sale of Cosco products to any third person;

(B) To limit or restrict the persons to whom or the terms under which any wholesaler may sell Cosco products.

VI

[*Price Fixing—Coercion*]

The defendant is enjoined from requiring, compelling or coercing or from attempting to require, compel or coerce, directly or indirectly, any wholesaler or retailer to maintain or adhere to prices or minimum prices fixed or suggested by defendant or any wholesaler for sales of Cosco products to any third person; provided, however, that nothing in this Section VI shall be construed to deny the right of defendant to directly enter into, adhere or enforce against any retailer fair trade contracts with retailers for sales of Cosco products to consumers.

VII

[*Boycotting*]

The defendant is enjoined from:

(A) Boycotting or otherwise refusing to deal with, or from threatening to boycott or otherwise to refuse to deal with any wholesaler regularly designated by defendant to act as a wholesaler for the sale of Cosco products who adequately represents defendant in the sale of Cosco products and who complies with defendant's reasonable standards for wholesalers of Cosco products not inconsistent with any of the terms of this Final Judgment;

(B) Impeding or restricting, or from attempting to impede or restrict, directly or indirectly, the free choice of any wholesaler in selecting the latter's customers for Cosco products.

VIII

[*Notice of Judgment*]

Defendant is ordered to mail, within ninety days after the date of entry of this Final Judgment, a true and complete copy of this Final Judgment to each wholesaler on defendant's current distribution list for sales or advertising materials or with whom defendant has in effect on the date of entry of this Final Judgment a wholesale fair trade agreement.

IX

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to the principal office of the defendant, be permitted (1) access during the office hours of the defendant to books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any subject matter contained in this Judgment and (2) subject to the reasonable convenience of the defendant and without restraint or interference from it to interview officers and employees of the defendant, who may have counsel present, regarding any such matters. Upon such written request, said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time

may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any party hereto to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XI

[*Modification*]

Defendant may, at any time after the expiration of three years from date of entry of this Final Judgment, and upon one month's notice to plaintiff, with consent of the plaintiff, or in the absence of such consent, in five years, petition the Court to modify this Final Judgment to permit defendant to enter into, adhere to and enforce wholesale fair trade agreements, and, upon such application, the Court may so modify this Final Judgment if the defendant establishes to the satisfaction of this Court that the defendant is entitled to exercise such rights under applicable Federal and State legislation.

[¶ 69,395] United States v. New York Produce Exchange, E. W. Saybolt & Co., Inc., Joseph H. McCabe, and Randolph W. Sluter, d. b. a. Chas. Martin & Co.

In the United States District Court for the the Southern District of New York. Civil Action No. 147-349. Filed June 30, 1959.

Case No. 1467 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Exclusion from Trade—Business of Licensing "Petroleum Inspectors."—An exchange which issued "licenses" qualifying persons as "petroleum inspectors," in an action charging the exchange, a firm, and two individuals with excluding qualified individuals from entering the business of "petroleum inspection" through a policy of refusing licenses to persons other than those associated with the two individuals and their respective companies, was prohibited by a consent decree from rejecting, except in accordance with procedures provided for in the decree, any application for a petroleum inspector's license. The exchange was also prohibited from (1) permitting the individuals, or any person holding one of its licenses, to participate in the granting, rejecting, suspending, or revoking of any license, (2) hindering any individual from applying for a license, (3) granting a license with geographical limitations, and (4) granting a license with functional limitations unrelated to the licensee's qualifications. The individuals were prohibited from urging or influencing the exchange to deny, suspend, or revoke a license, hindering any individual from applying to the exchange for a license, or hindering any individual from engaging in the business of petroleum inspection.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.660.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Publication of Uniform Standards for Licensing Petroleum Inspectors—Maintenance of Records—Reports.—An exchange which issued "licenses" qualifying persons as "petroleum inspectors" was ordered by a consent decree to publish uniform, reasonable, and non-discriminatory standards for the issuance of licenses, and to grant such licenses to all applicants qualified under those standards. The exchange was also ordered to (1) provide a copy of those licensing standards to any person requesting it, (2) maintain written records relating to the approval, rejection, suspension, or revocation of licenses, (3) file

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with the court an annual report showing the action taken on each application for a license, and (4) cancel or amend any of its by-laws which were inconsistent with the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provision—Discontinuance of Program of Licensing Petroleum Inspectors.—A consent decree which prohibited an exchange, a firm, and two individuals from hindering any person from engaging in the business of "petroleum inspection" provided that nothing contained in the decree should prohibit the exchange, after notice to the United States, from discontinuing its program of issuing petroleum inspectors' licenses by revoking all then existing licenses and refusing to grant any further licenses.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; and W. D. Kilgore, Jr., Baddia J. Rashid, Harry N. Burgess, Richard B. O'Donnell, John D. Swartz, Morris F. Klein, Donald A. Kinkaid, and J. Paul McQueen, Attorneys, Department of Justice.

For the defendants: Howard M. Holtzmann of Holtzmann, Wise & Shepard, New York, N. Y., for New York Produce Exchange and Randolph W. Sluter, d. b. a. Chas. Martin & Co.; William J. Walker, New York, N. Y., and Howard M. Holtzmann of Holtzmann, Wise & Shepard, New York, N. Y., for E. W. Saybolt & Co. and Joseph H. McCabe.

Final Judgment

[*Consent Decree*]

ARCHIE O. DAWSON, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on June 30, 1959, the defendants having respectively appeared and filed their separate answers to such complaint denying the substantive allegations thereof, and the plaintiff and the defendants, by their respective attorneys herein, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party hereto in respect of any issue of fact or law herein.

Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of or any admission with respect to any issue of fact or law herein, and upon the consent as aforesaid of all of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint states claims upon which relief may be granted against the defendants, and each of them, under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Petroleum" means crude oil and any product or products refined from crude oil;

(B) "Business of petroleum inspection" means the service of inspecting, weighing, measuring, sampling, testing or issuing certificates as to the quality or quantity of:

(1) cargoes and other shipments of petroleum or

(2) tankers and other carriers or containers used for the shipment of petroleum.

(C) "Petroleum inspectors' licenses" means and refers to any license granted by defendant New York Produce Exchange and relating to the business of petroleum inspection;

(D) "Exchange" means the defendant New York Produce Exchange;

(E) "Defendants" means defendants Exchange, E. W. Saybolt & Co., Inc., Joseph H. McCabe and Randolph W. Sluter d/b/a Charles Martin & Company;

(F) "Person" means any individual, corporation, partnership, association or any other legal or business entity.

III

[*Applicability—Notice of Decree*]

(A) The provisions of this Final Judgment, applicable to any defendant shall also apply to each of the subsidiaries, suc-

cessors, or assigns thereof, and to each of its officers, directors, managers, partners, employees, nominees and agents and to all other persons in active concert or participation with any of the foregoing who shall receive actual notice of this Final Judgment by personal service or otherwise;

(B) Defendant Exchange is ordered and directed forthwith to serve, by registered mail, a copy of this Final Judgment upon (i) each member of its Board of Managers; (ii) each of its executive officers who is not a member of its Board of Managers and (iii) each member of defendant Exchange who, on the date of this Final Judgment, holds a petroleum inspector's license;

(C) Defendant Exchange is ordered and directed, within sixty (60) days after the date of this Final Judgment to file with this Court and serve upon the plaintiff an Affidavit of its compliance with subsection (B) of this Section III setting forth in said Affidavit the name, position and address of each person upon whom a copy of this Final Judgment shall have been served as therein directed;

(D) Defendant Exchange is ordered and directed, for a period of five(5) years after the date of this Final Judgment, to furnish to any person requesting the same (i) a copy of this Final Judgment, and (ii) a copy of the standards for granting petroleum inspectors' licenses required by Section IV of this Final Judgment.

IV

[*Issuance of License—"Standards"*]

(A) Defendant Exchange is ordered and directed promptly to adopt and publish to the trade generally, uniform, reasonable and non-discriminatory standards for the granting by it of petroleum inspectors' licenses, and is ordered and directed to grant a petroleum inspector's license to any applicant who is qualified therefor under such standards;

(B) The standards required by the foregoing sub-section (A) of this Section IV shall be as objective in nature as the circumstances permit and must specifically provide:

(1) That any individual may apply to defendant Exchange for a petroleum inspector's license;

(2) That defendant Exchange will grant a petroleum inspector's license to any applicant who is qualified for a petroleum inspector's license under such standards;

(3) That membership in defendant Exchange shall not be a condition to the granting by defendant Exchange of a petroleum inspector's license;

(4) That the charge or fee to be assessed by defendant Exchange in connection with the handling and processing of any such application shall not exceed a reasonable and non-discriminatory charge intended solely to defray the costs of such licensing program.

(C) Defendant Exchange is ordered and directed, not later than November 1, 1959, to serve upon the plaintiff for its approval, a copy of the standards which it proposes to adopt pursuant to subsection (A) of this Section IV. Such standards shall not become effective for at least thirty (30) days after the date of such service upon the plaintiff. In the event the plaintiff, for any reason, shall within such thirty (30) days, in writing, disapprove such proposed standards, defendant Exchange is enjoined and restrained from placing such standards into effect or otherwise causing the same to become effective, without prior approval of this Court. In the event of disagreement between defendant Exchange and the plaintiff as to the content of such standards, the matter may be submitted to this Court for its determination by either the defendant Exchange or the plaintiff.

(D) Defendant Exchange is enjoined and restrained from adopting, promulgating, or otherwise making effective any amendments to such standards for a period of five (5) years after the initial effective date thereof except pursuant to the same procedures as are contained in sub-section (C) of this Section IV. After the expiration of five (5) years from the initial effective date of such standards, and for an additional period of five (5) years, defendant Exchange is ordered and directed to serve upon the plaintiff, sixty (60) days in advance of the effective date thereof, a copy of any modification or amendment of or to such standards;

(E) Defendant Exchange is enjoined and restrained from permitting any other defendant, or any partner, owner, officer, director or representative of such other defendant, or any person holding a petroleum inspector's license issued by defendant Exchange, to vote upon, or in any manner participate in the activities of any committee, board or

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other body of the Exchange in connection with any matter relating to the granting, rejecting, suspending or revoking of any petroleum inspector's license;

(F) The defendant Exchange is enjoined and restrained from rejecting any application made to it for a petroleum inspector's license except in accordance with the following procedures:

(1) The meeting of the appropriate Board or Committee of defendant Exchange charged with approving or rejecting such application shall be attended by not less than a quorum thereof and the vote to reject such application shall be concurred in by the votes of not less than a majority of those so attending;

(2) A poll shall be taken of the vote of each member of such Board or Committee and the vote of each such member shall be duly noted in the official minutes thereof;

(3) Defendant Exchange shall advise the applicant, in writing, of the specific reason or reasons for rejection of his application and shall, where reasonably possible, afford the applicant an opportunity to correct the condition constituting the reason or reasons for such rejection;

(4) Defendant Exchange shall serve upon the plaintiff (i) a copy of each letter of rejection of an application for a petroleum inspector's license, and (ii) a certified copy of the official minutes of the meeting of the Board or Committee at which the vote was taken to reject such application;

(G) In any suit or proceeding instituted by the plaintiff pursuant to Section XI of this Final Judgment based upon the rejection by defendant Exchange of any application for a petroleum inspector's license, the defendant Exchange shall establish to the satisfaction of this Court that the applicant was not reasonably qualified for such license under the standards required by subsection (A) of this Section IV.

V

[*Prohibited Activities*]

Each defendant, other than defendant Exchange, is enjoined and restrained from, directly or indirectly:

(A) Voting upon, or participating in the activities of any committee, board or other body of the Exchange, in connection with the approval, rejection, suspension or revocation of any application for a petroleum inspector's license;

(B) Urging or influencing, or attempting to urge or influence, defendant Exchange to refuse or deny a petroleum inspector's license to any applicant or to suspend or revoke any such license after its issuance;

(C) Hindering, restricting, limiting or preventing, or attempting to hinder, restrict, limit or prevent:

(i) Any individual from applying to defendant Exchange for a petroleum inspector's license; or (ii) Any person from engaging in the business of petroleum inspection.

VI

(A) Defendant Exchange is enjoined and restrained from hindering, restricting, limiting or preventing, or attempting to hinder, restrict, limit or prevent:

(i) Any individual from applying to it for a petroleum inspector's license; or

(ii) Any person from engaging in the business of petroleum inspection except that defendant Exchange may, pursuant to and in accordance with the provisions of Section IV of this Final Judgment, reject an application to it for a petroleum inspector's license.

(B) Defendant Exchange is enjoined and restrained from granting, or causing to be granted, any petroleum inspector's license, pursuant to the provisions of Section IV of this Final Judgment, which, in any manner, restricts or limits geographically the area or areas within which any person may engage in the business of petroleum inspection;

(C) Defendant Exchange is enjoined and restrained from granting or causing to be granted, any petroleum inspector's license pursuant to the provisions of Section IV of this Final Judgment, which, in any manner, is restricted or limited functionally except to the extent that any functional restriction or limitation imposed by defendant Exchange upon any such petroleum inspector's license may be related to the qualifications of the licensee under the standards required by Section IV of this Final Judgment.

VII

[*Cancellation of By-Laws—Records*]

Defendant Exchange is ordered and directed:

(A) Not later than November 1, 1959, or such later time as may be fixed by order of this Court to cancel any and all of its by-laws, rules or regulations which are, or may be inconsistent with any of the provisions of this Final Judgment and to amend the same so as to conform to the provisions hereof;

(B) To maintain, for a period of ten (10) years, all of its written records relating to the approval, rejection, suspension or revocation of any petroleum inspector's license including specifically, but without limitation: (i) the application of such license; (ii) the minutes of the meeting of the Board or Committee voting upon the same; (iii) and the letter to the applicant pursuant to Section IV(F)(3) of this Final Judgment advising the applicant of the reason or reasons for rejection of his application for license.

VIII

[*Reports*]

Defendant Exchange is ordered and directed to file with this Court, and serve upon the plaintiff, not later than the first day of April of each of the five (5) years following the date of this Final Judgment a report showing, for the preceding calendar year, the name and address of each person who has applied to it during such preceding calendar year for a petroleum inspector's license and the action or disposition of defendant Exchange on each such application.

IX

[*Discontinuance of Program*]

Nothing contained in this Final Judgment shall prohibit defendant Exchange, upon one hundred and twenty (120) days advance notice to the plaintiff, from discontinuing its program of issuing petroleum inspectors' licenses by revoking all then existing licenses and refusing to grant any further licenses. Upon service upon plaintiff of the 120 days' notice as specified herein nothing contained in this Final Judgment shall be construed to require defendant Exchange to consider further or take any further action upon any application for a petroleum inspector's license then pending or thereafter filed.

X

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its principal office be permitted:

(A) Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and

(B) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters;

(C) Upon such written request the defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of said Final Judgment. No information obtained by the means provided in this Section X shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the Plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XI

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the termination or modification of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

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[¶ 69,396] R. E. Johnson v. W. D. Pate, Defendant and Relator, The Superior Court for Pierce County, Hardyn Soule, Judge, Respondent.

In the Washington Supreme Court. Department One. No. 35053. Dated April 23, 1959.

Application filed in the Supreme Court February 4, 1959, for a writ of prohibition restraining a Superior Court from issuing a temporary injunction. Denied.

Washington Unfair Practices Act

Sales Below Cost Under Washington Unfair Practices Act—Temporary Injunction—Writ of Prohibition—Appeal as Adequate Remedy.—An individual charged with selling dry-cleaning services below cost in violation of the Washington Unfair Practices Act was denied a writ of prohibition to restrain a trial judge from entering an order enjoining such sales. A writ of prohibition is an extraordinary remedy; as a prerequisite to its issuance, there must be no other adequate remedy, either by appeal or writ of review. Under Washington law, however, an appeal may be taken from an order granting a temporary injunction. Therefore, even assuming the correctness of the contention that the Washington Unfair Practices Act does not authorize the granting of a temporary injunction prior to a hearing on the merits, the individual has a plain, speedy, and adequate remedy by appeal if such an order should be entered.

See Sales Below Cost, Vol. 1, ¶ 7263.

For the defendant and relator: James P. Healy.

For the respondent: Scott, Langhorne & McGavick by Edward M. Lane.

[*Sales Below Cost*]

Rosellini, Judge [*In full text*]: This is an original application in this court for a writ of prohibition permanently restraining the respondent, as judge of the superior court for Pierce County, from entering an order enjoining the relator from selling dry-cleaning services below cost, pending the trial of an action brought against him under the provisions of RCW 19.90.040, forbidding price-cutting practices. The relator alleges that the court exceeded its jurisdiction, inasmuch as the applicable statute does not authorize the granting of a temporary injunction, prior to a hearing on the merits.

[*Appeal from Temporary Injunction*]

Assuming the correctness of the relator's contention, it appears that he can have the order reviewed on appeal, under Rule on Appeal 14(3), 34A Wn. (2d) 20, RCW Vol. 0, which provides that an appeal may be taken from an order granting a temporary injunction. *Lewis Pac. Dairymen's Ass'n v. Turner*, 50 Wn. (2d) 762, 314 P. (2d) 625.

[*Writ of Prohibition*]

The writ of prohibition is an extraordinary remedy and is available only where an inferior court is acting without or in excess of its jurisdiction and there is no plain, speedy, or adequate remedy, in the ordinary course of law, from the decision it renders or may render. It does not lie merely because the court decides erroneously or in excess of its jurisdiction. As a prerequisite to its issue, there must be no other adequate remedy, either by appeal or writ of review from the challenged decision. *State ex rel. New York Cas. Co. v. Superior Court*, 31 Wn. (2d) 834, 199 P. (2d) 581; *State ex rel. Sibbald v. Huntington*, 1 Wn. (2d) 413, 96 P. (2d) 446; *State ex rel. Ernst v. Superior Court*, 198 Wash. 133, 87 P. (2d) 294, and cases cited therein.

[*"Cost Survey"*]

It is urged that the court proposed to use a cost survey submitted by the plaintiff as a guide for determining whether the relator is selling his services below cost, and that this survey has not been shown to be accurate or applicable to the relator's business. The relator contends that he will suffer irreparable harm if he is forced to raise his prices to correspond with those shown on the survey. The relator's apprehensions in this regard do not appear to be justified by the court's oral decision which indicates that the proposed injunction will only restrain the relator from selling below his actual costs, whatever they may be. In commenting on the order which it proposed to enter, the court said:

"In this case the prices complained of are not the usual and established prices,

I am satisfied, of Mr. Pate. He has other prices for this work in the normal course. I am not disturbing his normal prices by the order which I am suggesting should be entered, I am only preventing him from running these special promotional prices which on the evidence presented here would appear to be below rock bottom in the trade."

In any event, if any order is entered, whether or not it contains the provision which the relator fears, it will be subject to immediate appeal.

[*Supersedeas*]

If the effect of such order is to change the *status quo* of the parties, the trial court has the authority, which it is presumed it will exercise justly, to allow supersedeas pending the appeal. *State ex rel. Burrows v. Superior Court,* 43 Wash 225, 86 Pac. 632. If it should fail to do so, on proper application, and if upon appeal it should be made to appear to this court that the injunction should be superseded, this court has the authority, in order to maintain the existing status and to preserve the fruits of litigation to an appellant, in aid of its appellate jurisdiction and in the exercise of its discretion, to grant a supersedeas pending the determination of the appeal. *State ex rel. Langlie v. Wright,* 35 Wn. (2d) 703, 215 P. (2d) 407.

[*Writ Denied*]

It would appear, therefore, that the relator has a plain, speedy, and adequate remedy by appeal. Consequently, we refrain from passing on the merits of his contentions at this time.

The writ is denied.

Weaver, Chief Justice, Donworth, Foster, and Hunter, Judges, concur.

[¶ 69,397] Moviecolor Limited v. Eastman Kodak Company, Technicolor, Inc., and Technicolor Motion Picture Corporation.

In the United States District Court for the Southern District of New York. Civil Action 142-86. Filed June 30, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion to Compel Reply to Answer—Futility of Discovery as Basis for Motion.—Two photographic film companies, in an English corporation's treble damage action charging them with destroying its business by suppressing and sabotaging the use and development of a process of color photography, while promoting, in its stead, other processes over which they had exclusive control, were denied a motion to compel the corporation to reply to their answer. The court had the discretionary power to order the corporation to reply, but most of the companies' statements in support of their motion were conclusory and argumentative and did not measure up to the criteria controlling such motions. A reply to an affirmative defense is not to be utilized as a substitute for discovery and inspection, and should not be ordered unless there is a clear factual showing of necessity or other extraordinary circumstances. In the instant case, it would have been premature to accept the futility of the companies' impending discovery proceedings, although it had been contended that the corporation had no place of business, that most of its papers had been destroyed during World War II, and that the only person with an official position in the corporation, a "liquidator," had no personal knowledge of the facts in the case.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.160.

For the plaintiff: Cooper, Ostrin & DeVarco (Herman E. Cooper, of counsel).

For the defendants: Fulton, Walter & Halley (Hugh Fulton, of counsel), for Technicolor, Inc., and Technicolor Motion Picture Corp.; Donovan, Leisure, Newton & Irvine, and Nixon, Hargrave, Devans & Dey (James R. Withrow, Jr. and Arthur S. Stern, of counsel) for Eastman Kodak Co.

Opinion

[*Reply to Answer*]

Herlands, District Judge [*In full text*]:

Whether plaintiff should be ordered to reply to the answer [F. R. C. P. rule 7(a)] is the question posed by defendants' mo-

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tions. Rule 7(a) confers upon the court the discretionary power to "order a reply to an answer."

[*Criteria for Ordering Reply*]

The criteria for determining whether the court should grant or deny a motion to compel a reply have been described by commentators. Moore's *Federal Practice* (2d ed.) vol. 2, p. 1508; Note, 5 Fed. Rules Serv. 7a.222 (1942) at pp. 803 ff.

The decisions represent not only pragmatic judgments based on the facts of the particular case but also expressions of adherence to fundamental principles of federal pleading and practice.

[*Factual Showing Required*]

The courts recognize (1) that there is an essential difference in function between pleadings and pre-trial discovery and inspection; (2) that pleadings should be simple and brief, and should normally be limited to a complaint and an answer; (3) that a reply to an affirmative defense should not be ordered unless there is a clear and convincing factual showing of necessity or other extraordinary circumstances of a compelling nature; (4) that a reply is not to be utilized as a substitute for discovery and inspection [F. R. C. P. rules 26, *et seq.*] or for a pre-trial hearing [F. R. C. P. rule 16].

[*Cases*]

In the following cases, a reply to an answer has been ordered: *Columbia Pictures Corporation v. Rogers* (S. D. West Va. 1949), 81 F. Supp. 580, 584-585; *Bankers Bond & Mortgage Co. v. Witherow* (E. D. Pa. 1940), 3 Fed. Rules Serv. 7a.222, case 1, p. 44; *Mason v. N. Y. Central R. Co.* (W. D. N. Y. 1949), 8 F. R. D. 637; *Mosher v. Snyder & Swanson, Inc.* (W. D. Pa. 1948), 8 F. R. D. 100.

In the following cases, a motion to compel a reply has been denied: *Keller-Dorian Colorfilm Corporation v. Eastman Kodak Co.* [1950-1951 Trade Cases ¶ 62,574] (S. D. N. Y. 1950) 10 F. R. D. 39; *Maschmeijer v. Ingram* [1950-1951 Trade Cases ¶ 62,845], (S. D. N. Y. 1951) 97 F. Supp. 639; *Mission Appliance Corporation v. Ajax Thermostatic Controls Co.* (N. D. Ohio 1948) 8 F. R. D. 588; *Johnson v. Metropolitan Life Ins. Co.* (M. D. Pa. 1945) 4 F. R. D. 294; *Von Mailath v. Order of Daughters of Divine Redeemer* (W. D. Pa. 1950) 10 F. R. D. 420; *Cramer v. Aluminum Cooking Utensil Co.* (W. D. Pa. 1941) 1 F. R. D. 741; *Monk v. United Life & Accident Ins. Co.* (E. D. Pa. 1942) 2 F. R. D. 372.

With the foregoing decisions as a frame of reference, we turn to a consideration of the facts in the present case.

[*Conspiracy Charged*]

The action is for treble damages ($75,000,000.) under the antitrust laws. The complaint (filed on January 22, 1959) alleges that plaintiff, an English corporation, was organized in 1929 to manufacture, sell, use and otherwise exploit in all parts of the world, film and other things produced according to or forming part of a method of color photography known as the Keller-Dorian process.

The complaint asserts that defendants, in violation of the antitrust laws, have destroyed plaintiff as a business enterprise by various wrongful acts of combination and conspiracy to restrain and monopolize trade and commerce in the business of color still and color motion picture photography.

The complaint charges that defendants have suppressed and sabotaged use and development of the Keller-Dorian process and promoted in its stead other processes such as the Technicolor process, over which they have been able to exercise exclusive domination and control, and from which they have extracted vast profits. As a result of defendants' allegedly wrongful acts, plaintiff is said to be insolvent today and in the process of being liquidated.

[*Answers*]

Both answers (served May 14, 1959) contain a general denial and an almost identical set of separate and complete defenses; nineteen in number in the Eastman answer, and eighteen in the Technicolor answer. In addition, there are three separate and partial defenses. All of these defenses are based largely on various statutes of limitations and *res judicata*.

[*Examinations*]

In preparation for motions to dismiss on the basis of these defenses, Eastman noticed the examination of plaintiff commencing with its chief executive officer and managing agent.

Plaintiff's counsel opposed the proposed examination on the grounds that plaintiff "has no place of business, no officers, executive, managing agents, employees"; that

"most of plaintiff's papers were destroyed by bombing during World War II"; and that plaintiff's liquidator, a Mr. Ortmans, allegedly the "only person presently with an official position" with plaintiff "has no direct personal knowledge of the facts of this case."

In addition to pleading that such examinations would be useless, plaintiff's counsel also asserted that plaintiff was completely insolvent and unable to bear the expense of examinations in New York.

[*Priority*]

Under such circumstances, plaintiff's counsel urged that plaintiff be accorded priority of examination and defendants be relegated to proceeding with their discovery by written interrogatories.

Judge Sugarman refused to upset the priority established by Eastman's notice of examination and authorized defendants to proceed with the examination of plaintiff commencing with the liquidator, Mr. Ortmans, subject, however, to the proviso that defendants pay Mr. Ortmans' transportation to the United States and reasonable sustenance while he is detained for such examination. See Judge Sugarman's memorandum decision filed April 24, 1959 (attached to the opposing affidavit as Exhibit "B.")

[*Discovery—Alleged Futility*]

As stated in the opposing affidavit, "all visible signs indicate that defendants are about to embark on extensive efforts at discovery, in which all opportunities available under the Rules will be utilized to the fullest." (See opposing affidavit of Herman E. Cooper, paragraphs "15" to "21," and "26.")

While events may substantiate defendants' fears as to the efficacy of their impending pre-trial discover proceedings, the present factual record is not adequate to warrant this court's departure from the general rule. Most of defendants' statements are conclusory and argumentative; and do not measure up to the criteria controlling the motions at bar. At this time, it would be premature and speculative to accept the futility of defendants' pre-trial discovery proceedings as a working premise.

[*Motion Denied*]

In view of the foregoing, the defendants' motions are denied but without prejudice to defendants' right to renew, if so advised, upon the completion of all pre-trial discovery proceedings.

This decision constitutes an order.

[¶ 69,398] United States v. Sun Oil Company.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 10483. Filed July 1, 1959; as amended October 9, 1959.

Case No. 1010 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Exclusive Dealing—Restrictive Trade Practices—Policy of Requiring Exclusive Dealing—Legality—Sale of Petroleum Products and Automobile Accessories.—An integrated oil company, producing and selling its own brand of gasoline, motor oils, and lubricants and selling a full line of automotive accessories (TBA) which it purchased or received on consignment for resale, violated Section 3 of the Clayton Act by adopting and pursuing a uniform policy and practice of requiring its more than 6,500 independent dealer service stations in eighteen states and the District of Columbia to handle its gasoline exclusively and of requiring such dealers to sell its motor oils, lubricants, and sponsored TBA exclusively. The company did not enter into gasoline supply agreements with dealers who sold a competitive brand of gasoline, and although its supply agreements did not contain provisions requiring the dealers to handle its gasoline exclusively, the dealers did not take on a competitive brand of gasoline. If a dealer took on a competitive brand of gasoline, the company would terminate his supply agreement upon the expiration of the current term. Also, the company refused to enter into a supply agreement with a dealer unless he orally or tacitly agreed to handle only the company's products and sponsored TBA, and it did not permit a dealer to display signs of competitive products. The fact

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that a dealer may have a few containers of competitive motor oil or several items of competitive TBA displayed was not indicative, in and of itself, that the dealer was free to handle such products in any quantity he desired.

The provisions of supply agreements with dealers, who were independent contractors, were not the result of negotiation but were determined by the company alone and were imposed upon the dealers as a condition of their doing business with the company. The agreements did not contain express provisions which either prohibited the dealer from buying products from competitors or requiring him to purchase his products exclusively from the company; they did not provide for a price differential depending upon the exclusive handling of the company's products; and there were no clauses providing for penalties or liquidated damages in the event of a default. There were no written agreements with respect to the purchase and sale of TBA by the dealers. Real estate leases, which were executed by dealers who leased a station from the company and who also executed the supply agreement, did not require exclusive dealing.

The court found that the company pursued a continuous uniform policy of requiring its dealers to handle its gasoline exclusively and to force such dealers to discontinue the advertisement, display, and sale of competitive brands of motor oils and TBA as a condition to becoming and remaining dealers of the company, and that the company induced and coerced its dealers to enter into the written agreements supplemented by oral or tacit understandings, having the purpose and effect of requiring them to deal exclusively with the company. The court considered, among other things, the company's policy with respect to "undivided" and "divided" stations, right to cancel and its cancellation of supply agreements, minimum quantity purchase requirement, required ratio between gasoline and motor oil purchases, refunds to dealers on a progressive percentage scale based upon quantity of products purchased, and refusal to allow a new dealer to purchase competitive products carried by the outgoing dealer.

See Exclusive Dealing, Vol. 1, ¶ 4009.100.

Exclusive Dealing—Competitive Effect of Policy of Requiring Exclusive Dealing—Substantial Lessening of Competition.—An integrated oil company, producing and selling its own brand of gasoline, motor oils, and lubricants and selling a full line of automotive accessories (TBA) which it purchased or received on consignment for resale, violated Section 3 of the Clayton Act by adopting and pursuing a uniform policy and practice of requiring its more than 6,500 independent dealer service stations in eighteen states and the District of Columbia to handle its gasoline exclusively and of requiring such dealers to sell its motor oils, lubricants, and sponsored TBA exclusively. The effect of the company's written agreements, supplemented by oral or tacit agreements and understandings, with its dealers, the court held, "may be to substantially lessen competition in the sale of petroleum products and TBA" in the company's marketing area. Specifically, the court found that, as a result of the collective, but not collusive, policy and practices of the company and its major competitive suppliers of gasoline, others, unless they have the capital to establish their own stations, are denied the opportunity of selling gasoline in the company's market area, and the sale of competitive brands of gasoline has been almost completely eliminated at over 6,500 independent dealer stations selling the company's gasoline; that, as a result of the company's policy and practices, the sale of competitive motor oil and lubricants has been virtually eliminated and the sale of TBA not sponsored by the company has been substantially eliminated from over 6,500 stations selling the company's gasoline; and that, as a result of the company's policy and practices, the company's dealers are being prevented from handling competitive petroleum products and TBA at their stations, and competitive suppliers are being foreclosed or prevented from selling these products to over 6,500 dealers of the company.

In the area served by the company, there were 91,382 service station dealers, involving 68 brands of gasoline, and the company ranked fifth in the number of outlets. The company was not one of the dominant or leading marketers throughout the country; however, it was, as an established competitor, one of the nation's major marketers in the area it served. In terms of invested capital and domestic net income among the twenty largest

oil companies, the company ranked twelfth, and its sales of gasoline were approximately 3.48 per cent of the total motor fuel consumption in the United States and approximately 8.42 per cent of the total in its market area. Its profits, although large, had not differed substantially from those of many of its competitors, and its marketing area was substantially smaller than that of many of its integrated competitors. It had not grown as rapidly as other companies, and its annual sales of all products to its dealers amounted to $155,780,774. Also, the number of independent service stations with which it had business dealings constituted a substantial part of the market for the retail sale of petroleum products and TBA, and the volume of its sales of such products was substantial. The qualifying clause of Section 3 of the Act is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected.

See Exclusive Dealing, Vol. 1, ¶ 4007.275, 4007.400.

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Injunctive Decrees—Exclusive Dealing.—Upon finding that an integrated oil company violated Section 3 of the Clayton Act by adopting and pursuing a uniform policy of requiring its dealers to handle its gasoline, motor oils, lubricants, and sponsored TBA exclusively and that there was a likelihood that the company would continue such a policy, a court ruled that the Government was entitled to a decree prohibiting the company from inducing, coercing, and compelling independent service station operators with whom it does business to enter into and operate under written contracts, supplemented by oral and tacit agreements and understandings requiring them to purchase petroleum products and TBA for resale exclusively from the company.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.750.

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For the defendant: Philip H. Strubing, Trial Attorney, Philadelphia, Pa.; and John G. Bartol, Jr., Robert E. Jones, Samuel K. White, Richard L. Freeman, James Alan Montgomery, Jr., Henry A. Frye, and Rawle & Henderson, Philadelphia, Pa., of counsel.

For prior opinions of the U. S. District Court, Eastern District of Pennsylvania, see 1955 Trade Cases ¶ 67,930 and 1950-1951 Trade Cases ¶ 62,684.

Opinion

[*Nature of Action*]

GANEY, Chief Judge [*In full text*]: This is an action brought by the United States to enjoin the defendant Sun Oil Company from conducting its business allegedly in violation of § 1 of the Sherman Act, 15 U. S. C. A. § 1, and § 3 of the Clayton Act, 15 U. S. C. A. § 14.

The complaint charges that for more than a quarter of a century the defendant has been unreasonably restraining interstate commerce and substantially lessening competition in a line of commerce by excluding its competitors from access to a substantial part of the market for petroleum products and automotive accessories in its marketing area. This has been and still is being accomplished, the complaint states, by defendant's inducing and coercing independent automotive service station operators to enter and operate under contracts, supplemented by agreements and understandings, having the purpose, intent and effect of requiring them to purchase petroleum products and automotive accessories exclusively from it, and to refrain from purchasing these products from its competitors. Defendant is not charged with acting in concert with any other supplier of one or more of those products; nor does the evidence adduced show that it has done so.

From the evidence presented to it, the court makes the following

Findings of Facts

[*Defendant's Business*]

1. Defendant Sun Oil Company, hereinafter called "Sun," is a corporation organized and existing under the laws of New Jersey. It transacts and has its principal place of business at 1608 Walnut Street, Philadelphia, Pennsylvania, within the East-

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ern District of Pennsylvania. Sun is known to the motoring public as "Sunoco."

2. Sun is engaged in the business of producing, transporting, refining and marketing crude oil and petroleum products. It obtains and purchases crude oil in the principal oil producing fields of the United States and transports it to refineries owned by it at Marcus Hook, Pa., and at Toledo, Ohio. Among the principal petroleum products manufactured at these refineries are a single grade of gasoline, sold under the name "Blue Sunoco" (and for a time as "Sunoco Dynafuel"), motor oil sold under the trade names "Sunoco Mercury Made" (classified as a regular grade oil) and "Dynalube" (classified as a premium motor oil), and other automotive lubricants.[1] Sun transports, distributes and sells all of these products to over 6500 independent service station operators in the Sun marketing area. It markets petroleum products under the trade name "Sunoco." In order that its gasoline may be readily identified by the public, Sun colors it blue, and uses the color scheme of blue, white and yellow on its containers, dispensing equipment, signs and advertising matter, and service stations at which its gasoline is sold. It has adopted the symbols of the diamond superimposed upon an arrow as its identifying mark.

3. Sun also sells a full line of automotive accessories, which, with a few exceptions, it purchases or receives on consignment from other suppliers. These accessories include equipment items and replacement parts which are capable of being installed or applied on automotive vehicles at a service station without major mechanical operations, such as tires, batteries, spark plugs, oil filters, fan belts, automobile polishes, waxes, lamp bulbs, seat covers, and antifreeze preparations. For convenience they are referred to as "TBA" or "tires, batteries and accessories." The line of TBA which Sun purchases from manufacturers and distributors located in various states is also transported, distributed and sold by it in interstate commerce to more than 6,500 independent service station operators in Sun's marketing area. The manufacturers which supply Sun with TBA items do not sell their products directly to Sun dealers.

4. Some of the principal TBA products which Sun purchases for resale to its dealers include: *Kelly* tires, from Kelly-Springfield Tire Co., Cumberland, Maryland; *Sunoco* batteries, from Globe-Union Inc., Milwaukee, Wisconsin; *Fram* oil filters, from Fram Corporation, East Providence, Rhode Island; and *Champion* spark plugs, from Champion Spark Plug Company, Toledo, Ohio; *Zerone* and *Zerex* anti-freeze, from E. I. duPont deNemours & Company, Wilmington, Delaware; *Westinghouse* sealed beam lights and miniature lamps from Westinghouse Electric Corporation, Philadelphia, Pa.

5. Sun itself operates approximately only forty service stations throughout its marketing area. These stations, of course, sell Sun products exclusively and only the line of TBA sponsored by Sun. The attendants at these company-owned and operated stations, which are also used for training new Sun dealers, are employees or agents of Sun.

[*Marketing Regions*]

6. For sales purposes, Sun had divided its marketing area, involving eighteen states and the District of Columbia, into six regions, roughly as follows:

(a) *Middle Atlantic Region*—comprising eastern Pennsylvania, the larger portion of New Jersey, a small portion of New York, and all of Maryland, Virginia and the District of Columbia;

(b) *New York Region*—comprising practically all of New York, and small portions of Pennsylvania, New Jersey, Connecticut, Massachusetts and Vermont;

(c) *New England Region*—comprising the New England States excepting those portions included in the New York Region;

(d) *Central Region*—comprising western Pennsylvania, eastern Ohio, West Virginia, and a small part of western New York;

(e) *Western Region*—comprising Michigan, eastern Indiana, western Ohio and northern Kentucky; and

(f) *Southeastern Region*—composed of portions of Florida.

These regions are further subdivided into sixty-four districts and in some instances into branches within the district. The boundaries of a district do not necessarily

[1] It also sells and distributes furnace oils to consumers.

follow state lines. Each district contains a district office, a warehouse or warehouses and distribution facilities.

[*Sales Personnel*]

7. Sun's hierarchy of sales personnel in the market area is as follows:

(a) At the top is the executive officer who is in charge of Sun's marketing organization. At present his title is vice president in charge of sales. He is assisted by a general sales manager, formerly called a coordinator of sales, who sometimes acts for the vice president in charge of sales in dealing with marketing activities;

(b) In charge of each regional office is a regional manager who is the "executive officer" of his region, and as such supervises Sun's marketing operations in that region. Assisting the regional manager is an assistant regional manager, a regional TBA manager and other sales personnel. Generally, company marketing policy is determined at meetings of regional managers and is put into effect by the regional managers in their respective regions through a chain of command from regional to district managers, to salesmen. Since 1939, the regional manager has been responsible for the execution of real estate leases with dealers. He is the final arbiter in determining whether Sun will do business with a dealer.

(c) In charge of each district is a district manager who is the executive officer of his district. He is sometimes assisted by a motor products sales manager. Each district manager has authority to execute and terminate supply agreements with dealers but sometimes he is required to obtain the approval of the regional manager.

(d) Each district has a number of motor products salesmen who regularly call on an assigned group of dealers to sell them Sun's products and sponsored TBA and to convey to them company policy. Salesmen are selected, hired, trained and discharged by the district manager with the approval of the regional manager. These salesmen receive instructions and directions principally from their respective district managers and/or district motor products sales managers at weekly sales meetings and in individual conferences with such superiors. They assist in the selecting and contacting of new dealers and sometimes participate in the cancellation of agreements with dealers. Pursuant to instructions, they relate to dealers the quota of motor oil and TBA they should purchase. In addition to their regular salary, they receive a commission if the stations assigned to them obtain a certain ratio of the purchase of oil and gasoline. Sometimes their tenure of employment has been dependent in part upon the dealers maintaining such quotas.

(e) Most of the regional offices, from time to time, also employ "Inspectors" to obtain information concerning the operation and physical condition of the stations selling Sun's products. The information sought is for the purpose of aiding Sun in determining whether the stations' sales approach their potential, and Sun's salesmen are using their best efforts to sell Sun's products and sponsored TBA.

[*Distribution of Products*]

8. The main conduits through which petroleum products and TBA are distributed and sold to the consumer are the retail service stations located at sites adjacent to heavily traveled highways.[2] Suppliers maintain the bulk of the stock required for supplying the needs of the consumer because of the space limitations at service stations. The operators of the stations render a specialized service which is essential to drivers of automotive vehicles.

9. Almost all gasoline and motor oil, and many items of TBA, are offered for sale under brand names. As a group, the consuming public has no definite knowledge of the quality of the petroleum products which it buys repeatedly in small quantities. It buys a particular branded product by reason of its preference for the brand based upon past experience, the reputation of the supplier, the honesty and good will of the dealer, or because of the convenient location of the station. Suppliers strive mightily to establish a public attachment to their individual brand. To this end Sun spends a large sum of money to advertise its products. For example, in 1954 it spent close to

[2] The term station, as used herein, includes a drive-in filling station, garage, car dealership or other retail outlet for the sale of gasoline, lubricants and, in most cases, tires, batteries and automotive accessories to the motoring public.

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six million dollars on various advertising media. The name "Sunoco" is well known to the motoring public in Sun's marketing area.

10. The principal product and big attraction at most service stations is gasoline, a virtual consumer necessity. It accounts for the largest part by far of the business of both Sun and its dealers in terms of dollars. Close to 90% of the gross intake of the average dealer is accounted for by the sale of gasoline.[3] Other products, such as motor oils, lubricants and TBA, although important, are secondary as far as drawing customers is concerned. For example, in 1949, Sun's sales were as follows:

a. Gasoline	$149,000,000	(88.7%)
b. Motor oils and lubricants	9,500,000	(5.3%)
c. TBA	9,750,000	(6.0%)

11. Gasoline, because of its highly volatile and flammable nature, is not purchased in large quantities in advance of use and stored away until needed by the average motorist, as is coal or furnace oil. Presently, the only practicable way of buying gasoline for automotive purposes is at conveniently located service stations where it may be pumped into the vehicle from the tank at the time of purchase. It would follow that the prevention of the sale of a competitive brand of gasoline at service stations—Sun and all others included—in a particular retail market area by suppliers of established brands of gasoline, would in effect amount to foreclosing the sale of the competitive brand in that area, unless the owner of the brand has the resources to purchase his own retail outlets.

12. Motor oils, lubricants and TBA are, of course, not in the same class as gasoline. They may be purchased far in advance of use at the neighborhood shop and stored away until needed. However, because the time of need cannot always be anticipated, and dirty hands and soiled clothes usually eventuate from pouring oil into a combustion engine, draining a crankcase, installing or replacing a TBA item, the motoring public prefers to purchase those products, when the need arises, at the many conveniently located service stations where immediate service accompanies the purchase of the product. Lacking such service, auto accessory, hardware or department stores are not places as suitable as the service station to purchase those products. Therefore to restrict the sale of competitive motor oils, lubricants and TBA at all service stations in a market area is, as can be readily seen, tantamount to a foreclosure of the sale of competitive products in that area.

13. Displaying a product and advertising it at service stations facilitates its sale. Hence, inconspicuous, undisplayed and nonadvertised products cannot be effectively sold at such stations. Compelling the removal of signs displaying the fact that a particularly branded product is for sale at a dealer's station at least retards its sale, since motorists will not, as a rule, drive from station to station for the purpose of inquiring whether the brand of motor oil or TBA of their preference is being sold on the premises.[4]

14. The mere fact that a Sun dealer may have a few containers of motor oil not of Sun brand or several items of competitive TBA openly displayed either from left-over stock or because of token purchases to satisfy the brand preference of a few customers is not indicative in and of itself that the dealer is free to handle such products in any quantity he chooses.

[*Brand Change Over*]

15. The changing over from one brand of petroleum products to another by a dealer subjects him to an economic hardship and even to the risk of a business failure. To begin with, the major suppliers of petroleum products scrupulously respect the contractual arrangements of their competitors and will not supply a dealer with its brand of products unless it is certain that the full term of a previous supply contract has been legally terminated. And the dealer will not always be able to obtain the brand of petroleum products of his choice for his

[3] In his dissenting opinion in the *Standard Stations* case [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, 321 (1949) , Mr. Justice Jackson said at p. 323: "No retailer can long remain in business if he does not always, and not just intermittently, have gas to sell."

[4] A competing supplier of motor oil summed it up this way: "Well, to sell Quaker State Oil at a station without putting a sign out, you simply might as well not sell oil . . . you can't stop at every station to see if they have Quaker State. By then you would run out of gas."

station may not fit into the distribution plan of the supplier. Even when a new supplier is secured a time lag between the removal of Sun's dispensing equipment and signs and the installation of the new and the repainting of the station inevitably takes place. Moreover it takes time before all the motorists in the locality who have a preference for the newly installed brand of gasoline become acquainted with the fact that it is being sold at the location. And there is always the chance that the new brand of gasoline and motor oil will not attract customers as well as the former brand did. Consequently the supplier's threat of cancellation of a supply agreement is not lightly received by a dealer, and he will usually hesitate before accepting an ultimatum to discontinue an established business under the banner of a proven profitable product.

[*"Undivided" and "Divided" Stations*]

16. An "undivided" station is a station where the petroleum products or the gasoline of a single supplier are sold, in contrast to the "divided" or "split" station where the gasoline of more than one supplier is sold. An exclusive or 100% outlet is a station where the products of a single supplier are sold.

17. In the wholesale distribution of branded gasoline and related branded petroleum products and TBA, it has become the almost universal practice in the industry in Sun's marketing area for suppliers of gasoline to compete for strategically located outlets which will sell their brand of gasoline exclusively.[5] Over 99% of branded gasoline purchased by the motoring public in Sun's marketing area is done at "undivided" retail stations which are identified as being stations selling the products of its particular supplier. By contrast wholesalers and jobbers of motor oils and/or TBA seek to distribute their products to all dealers even though they sell competitive products. The market areas of Sun's competitors are not necessarily co-extensive with that of Sun's; they embrace only those dealers, of which Sun dealers are but a segment, within the profitable reach of their supplies.

18. According to a station census taken by Sun in 1954, there were only 422 undivided stations out of more than 90,000 stations canvassed. The practice of dealing primarily with the divided stations is not restricted to the major oil companies alone. Southern States, a small cooperative, served no divided accounts in its chain of 25 outlets within Sun's marketing area; Jenney has one divided out of 497 stations; Sterling (Quaker State) served 47 divided to 487 undivided; Kendall has 61 as against 389; and Pennzol's stations numbered 13 and 507. Even new competitors seek to establish their own outlets, either by erecting new stations or by winning existing wholesale distributors or retail dealers from other suppliers.

19. Benzol Stations, Inc., with offices in Dearborn, Michigan, is the only supplier that follows the practice of selling its gasoline "Benzol" through undivided stations alone in Sun's marketing area; it does not own or lease service stations. Benzol gasoline is a premium or specialty gasoline which sells at a price higher per gallon than Sunoco gasoline. In the decade preceding the trial of this action, Benzol has lost ground to its competitors. For the total number of outlets in the territory in which it is sold in and about Detroit, Michigan, dropped from 355 to 286, and a dealer selling 3,000 gallons of Benzol gasoline per month is considered a large customer of Benzol Stations, Inc. In 1955, there were twenty-four undivided stations selling Benzol gasoline side by side with Sunoco, a drop of fifty-three since 1945.[6]

[*Competitive Position in Market*]

20. As of 1954, in the area served by Sun there were 91,382 service station dealers involving 68 brands of gasoline. Some of these outlets were part of chains ranging from 2 to 9,717 stations. In the group, Sun ranked fifth with 6,703 outlets. A partial list of the oil companies and their outlets at this time is as follows:

[5] As Mr. Justice Jackson put it in his dissenting opinion in the *Standard Stations* case [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, 321 (1949) at p. 323: "The retail stations, whether independent or company-owned, are the instrumentalities through which competition for the ultimate market is waged."

[6] Elmer J. Blaisdell, vice president of Benzol Stations, Inc., was the only person to appear on the witness stand at the trial of this action to complain of the difficulty or inability of a supplier of gasoline to obtain outlets already selling the gasoline of another supplier to take on an additional brand of gasoline.

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	Oil Company	No. of Stations	No. of Sun Districts in which Stations are located
1	Gulf	9,717	64
2	Esso	9,489	48
3	Mobilgas	9,173	34
4	Texaco	8,326	64
5	Sunoco	6,703	64
6	American	5,858	54
7	Sinclair	5,646	55
8	Atlantic	5,539	48
9	Shell	5,112	55
10	Tidewater	3,557	44
11	Cities Service	3,126	63
12	Pure	2,894	23
13	Standard of Ohio	2,819	11

21. Sun is not one of the dominant or leading marketers of gasoline, lubricants and TBA throughout the country. As an established competitor, it is, however, one of the nation's major marketers of such products in the market area it serves. In terms of invested capital and domestic net income among the twenty largest oil companies, Sun ranked twelfth as of the year 1954,[7] the last year for which statistics were available. In the same year its sales of branded gasoline were approximately 3.48% of the total motor fuel consumption in the United States and approximately 8.42% of the total in Sun's market area. Sun's profits, although large, have not differed substantially from those of many of its competing oil companies, and its marketing area is substantially smaller than that of many of its integrated competitors. In addition it has not grown as rapidly as Gulf, Shell, Phillips and Skelly.

22. Sun's annual sales, in terms of dollar value, of gasoline, motor oils and lubricants, and TBA to its dealers for the years 1945 to 1948 inclusive, were:

1945	$ 55,236,126
1946	89,948,046
1947	122,719,392
1948	155,780,774

23. The number (over 6,500) of independent service stations with which Sun has business dealings constitutes a substantial part of the market for the retail sale of petroleum products and TBA, and the volume of Sun's sales of these products is substantial.

[*Exclusive Franchises*]

24. Sun depends upon fewer dealers than are used by its major competitors to sell the same quantity of gasoline. This is so because Sun operates under the "franchise" plan of distribution whereby it does business with a dealer only if the station will not compete to an appreciable degree with another Sun dealer in the immediate adjoining area. In return for the privilege of being the sole marketer of Sun's products in what amounts to an exclusive territory, Sun expects the dealer to devote his entire efforts to selling Sun's products, or at least to give a "well-rounded performance"; that is, to sell Sunoco gasoline exclusively and a "reasonable" amount of its motor oils and sponsored TBA. The giving of an "exclusive franchise" is not expressed or implied in the written dealer agreement forms, but is one of the understandings had with the dealer at the time he enters into business relations with Sun.[8] Should the dealer refuse to operate his station according to Sun's expectations, Sun will seek to replace him with another dealer in the locality or cease to supply him with petroleum products as soon as the contractual relationship, as expressed in a supply agreement, will permit it to do so.

[7] In 1946 it ranked 15th.

[8] In answer to a letter of a Sun Oil Company stockholder who complained of Sun's policy in the New York City area, the vice president of Sun wrote on July 19, 1948:

"We would like to explain . . . that it is the policy of the Sun Oil Company not to establish duplication of outlets in the various areas in which we do business. Thus the dealer who handles our products in any one location is our sole representative, and if he does not actively press the sale of our products we have no other outlet to supplement his efforts. It is, therefore, essential that every one of our dealers be an enthusiastic proponent of Sunoco policies and products.

"We believe that in offering to a dealer a franchise to be the sole marketer of our products in a limited market area gives him the opportunity to wholeheartedly develop business for our products, without the fear that he is building up patronage for Sunoco products that may drift to another Sunoco dealer across the street."

Almost identical explanations were given by Sun to the Secretary of the Marketing Committee in a letter dated April 1, 1935, and to the Department of Justice in a communication dated September 24, 1941. (Exhibits G-289 and G-225, respectively.)

[*Turnovers in Stations*]

25. Although the total of Sun's stations may remain relatively constant over a period of time it does not mean that there are few turnovers in stations during the passing of that period of time. During a year's time, for example, Sun may lose a certain number of dealers and gain a similar number and thus end up with more or less the same total as it had at the end of the previous year. In 1954 Sun lost 326 stations and gained 143 new ones, for a net loss of 183. Not all losses of dealers are the result of direct competition, but may come about because the stations do not measure up to Sun's requirements. Over the years Sun has entered into supply agreements with more than 40,000 different dealers.

[*Types of Stations*]

26. Sun's dealers may be classified under either of two types: "A" or "AA." The "A" dealers are those who either own their stations or lease them from someone other than Sun. While the "AA" dealers (sometimes referred to as "operators or lessee dealers") are those who lease the station from Sun. Included in the latter type are the "lease and release" dealers who own their service stations but lease them to Sun which in turn releases them back to such dealers. These dealers, both "A" and "AA", are not employees or agents of Sun, but are independent contractors.

[*"Dealer's Agreement"*]

27. Before a dealer may obtain Sun's products, he must sign a standard form supply contract designated as a "Dealer's Agreement." Taking into account the wide discrepancy in bargaining power between Sun and its dealers, the provisions of the supply contract are not the result of negotiation but are determined by Sun alone and are imposed upon the dealers as a condition of their doing business with Sun.

28. The pertinent provisions of the supply agreement ("Dealer's Agreement") are as follows:

(a) The duration of the agreement runs for a certain term, usually for one year, and then from year to year unless either party shall give the other sixty days' written notice of termination prior to the expiration of the initial term or yearly extension thereof;

(b) Sun agrees to loan the dealer the necessary equipment for the purpose of storing, advertising and dispensing Sunoco products;

(c) All equipment and signs loaned to the dealer by Sun are to remain the property of Sun. The dealer is to use such equipment only for the purpose of storing, advertising, selling and dispensing Sunoco products. Any equipment of the dealer not loaned by Sun and used by him during the term of the agreement for the storage, selling and dispensing of Sunoco products, is to be labeled and identified by the dealer with the appropriate trademark or trade name of Sun's products and decorated in the manner and colors adopted by Sun; and when the use of such equipment is discontinued, the dealer is to remove Sun's trademark or trade name and to redecorate the equipment with colors other than those used by Sun;

(d) The dealer is to operate under his own name all business conducted upon the premises, and is to display prominently at all times the name of the dealer. As proprietor and operator of the business, the dealer agrees not to represent in any manner his business as an agency of Sun, or that the dealer is an agent of Sun;

(e) During each calendar month of the agreement the dealer will buy not less than 75% of the number of gallons of Sunoco gasoline delivered by Sun to the premises during the corresponding calendar month of the preceding calendar year, and Sun in turn is not obligated to sell more than 125% of the number of gallons of gasoline delivered by it to the premises during the same period;

(f) During each month the dealer is to buy from Sun and Sun is obligated to sell to the dealer at least one gallon of motor oil for every sixty-five gallons of Sunoco gasoline, based upon the minimum set forth in paragraph (e) above. For the purpose of determining whether the ratio has been attained, eight pounds of lubricants is considered the equivalent of one gallon of motor oil;

(g) In those areas wherein Sun utilizes its Fair Trade Agreements, the dealer is not to sell Sunoco motor fuel except at prices stipulated by Sun;

(h) All trade-marked or branded Sunoco products purchased by the dealer or delivered to his station by Sun are to be sold by him as the respective trade-marked or branded Sunoco products, and he is prohibited from adulterating, mixing or blend-

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ing such products with other substances before their delivery to the consumer. Sun has the right to enter upon the premises at any time for the purpose of inspecting any equipment used for storing or dispensing Sunoco products to test and take samples of Sunoco products offered for sale on the premises, and to make any repairs to any of Sun's equipment or signs it deems advisable;

(i) Sun has the right, upon twenty-four hours' written notice to the dealer to cancel[9] the agreement if during the term or any extension thereof, the dealer shall abandon his business, or assign the agreement without Sun's consent, or be evicted by reason of a default under any lease of the premises, or shall substitute any products for those of Sun's, or shall mix, blend or adulterate any of Sun's trade-marked or branded products by or with any other substances before delivery to the consumer, or if attachment, execution or like process shall be made or issued against the dealer; if during any two calendar months within any twelve-month period of the term of the agreement the dealer fails or refuses to purchase the minimum quantities of Sun petroleum products, or Sun fails to supply the dealer with the contractual maximum, the party not in default has a right to cancel the agreement on giving written notice to the other.

[*No Expressed Restrictions*]

29. The supply agreements do not contain express provisions which either prohibit the dealer from buying products from Sun's competitors or require him to purchase his products exclusively from Sun; they do not provide for a price differential depending upon the exclusive handling of Sun's products; nor are there any clauses providing for penalties or liquidated damages in the event of a default. The agreement form is also silent regarding the purchase and sale of TBA, for Sun does not use, and never has used, written agreements in connection with the sale of TBA to dealers.

[*Prices*]

30. The wholesale prices for Sun's petroleum products and TBA also do not appear in the supply agreement for the cost of gasoline to the dealer is governed by Sun's official posted tankwagon or wholesale prices at its bulk plants at time and place of delivery, and the cost of motor oils, lubricants and TBA are set forth in price lists for those products. Subject only to the restraining influence of supply and demand and/or what competitors are charging for the same or similar products, these prices are set and revised by Sun according to its own discretion. With certain exceptions, prices for these products in particular geographical areas tend to be the same.

[*Minimum Quantity Clause*]

31. Oral or tacit agreements and understandings aside, if the dealer's monthly purchases of gasoline in any one calendar year remain the same as or are greater than the corresponding monthly purchase of the previous calendar year, the minimum quantity clause of the supply agreement will require him to buy 75% or less of his gasoline requirements. If on the other hand his monthly purchases of gasoline in any one year drop, the minimum quantity clause approaches a full requirement clause as the decrease approaches 25% of the corresponding monthly purchases of the previous year, and the clause goes beyond a full requirement clause if the decrease is greater than 25%.

32. Statistics reveal that sales of motor oil in ratio to gasoline increase when all stations, including car dealerships, garages and auto repair shops, which normally sell substantially more oil in relation to gasoline than service stations, are considered. But even if such sales are taken into account, the average gallon consumption ratio of motor oil and lubricants to gasoline in Sun's marketing area is less than the ratio of 1:65 (or 1.54% of the volume of gasoline) set forth in the supply agreements. And despite the fact that less oil is consumed in relation to gasoline during the fall-winter months than during the spring-summer months, the minimum monthly quantity clause requires the dealers to maintain the constant ratio of 1:65 on a monthly basis the year around without regard to seasons or the locale of the dealers. Moreover, since the ratio is made dependent upon the volume of gasoline delivered to the premises during the previous year, the minimum monthly quantity clause is or approaches a total requirement clause if the dealer's present purchases of Sunoco motor oil are equal

[9] The term "cancel" does not always appear in the printed agreement. It is used in the findings as meaning termination during the contract period in contrast to the term "termination" or the refusal to renew by giving the required notice prior to the expiration of the contract period.

to or less than the ratio of one gallon of motor oil for every sixty-five gallons of gasoline purchased in the corresponding month of the previous year. It is difficult or almost impossible for the dealer of the average service station to attain a Sunoco ratio of 1:65 if he sells competitive motor oils in fair amounts along with Sunoco motor oils.[10]

[*"Real Estate Agreement"*]

33. Each "AA" dealer must execute a lease designated as a "Real Estate Agreement." The lease relates only to the real estate, and its duration is coextensive with that of the supply agreement. It requires the dealer to make certain improvements when necessary, and, while the record discloses no exercise of the provision, and in most instances the word "none" was typed in the lease, the potential nevertheless obtained. The lease automatically terminates if the dealer should abandon the premises, become bankrupt or insolvent, or if any receivership or assignment for the benefit of his creditors be made. It gives Sun the option of cancelling the lease in the event of the non-payment of rent, or if attachment, execution or like process be issued against the dealer. It does not require exclusive dealing with Sun and no penalties are provided if the dealer chooses to handle products of Sun's competitors.

34. At the time the "AA" dealer executes the lease, he must also enter into a supply agreement with Sun. With certain omissions and slight modifications, the supply agreement is the same as that used by Sun with its "A" dealers. Prior to 1937, the supply agreement and the lease were combined in one written instrument.

35. Sun employs two types of financing arrangements, an "Improvement Lease" and a "Mutual Option Agreement", which enable "A" dealers, through the lease and release device, to construct new stations or to improve their existing ones.

(a) *Improvement Lease.* Pursuant to this arrangement a dealer who desires to construct a modern station, but lacks ready capital for that purpose, borrows money from a local bank and secures this loan by leasing his station to Sun in return for a monthly rental sufficient to amortize the loan over a period of years and by assigning the right to receive the rent to the bank. Sun in turn will release the station to the dealer on a yearly term at a rental slightly in excess of the monthly rental Sun agreed to pay the dealer.

(b) *Mutual Option Agreement* [*and*] *Bailment Option Agreement.* Pursuant to this agreement Sun pays a substantial consideration either in money or improvements in return for an option under which Sun acquires the right to lease the station for a number of years at a previously agreed monthly rental. The dealer is also given the option to require Sun to lease the station from him for the same period at the rental. The mutual option agreement and the bailment option agreement provided that Sun shall have the right, upon giving thirty days' notice, to remove the dealer and take over the operation of the station, and the dealer, likewise, has the privilege of revocation after thirty days.

[*Termination of Lease*]

36. When Sun cancels or terminates a lease and supply agreement with an "AA" dealer, it selects the new operator and prescribes the products he is permitted to purchase from the inventory of the outgoing operator. Sun will not allow him to purchase the competitive products, and the outgoing operator is left to dispose of the remaining inventory as best he can, usually at a loss.

[*Refunds*]

37. As has been its practice for many years, Sun offers refunds to dealers on a progressive percentage scale based upon the quantity of Sun's motor oils, automotive lubricants and dollar volume of Sun's sponsored TBA, and also on a ratio basis on every gallon of motor oil or certain dollar volume of TBA to a certain quantity of gasoline purchased during a contractual year. For the purpose of determining the refunds on oil purchases, eight pounds of lubricants is considered the equivalent of one gallon of motor oil. The refunds are not conditioned

[10] Sun's vice president admitted that the ratio figures were designed to cover at least 75% of the dealers' needs of motor oil. He further testified that they were intended "to impose upon the dealer a responsibility for the selling of a reasonable amount of oil compared with the amount of gasoline he was supposed to sell." And according to Sun's calculations, in 1955 Sun dealers were contractually bound to purchase 18.1 million gallons of motor oil as against their "computed requirements" of 19.3 million gallons. Hence by Sun's own figures, its dealers were contractually obligated to purchase 93.8% of their requirement of motor oil from Sun.

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upon exclusive dealings in Sun's products. The ostensible purpose of allowing these refunds is to offer an inducement to the dealers to sell more of Sun's motor oils, lubricants and sponsored TBA. However, it must not be overlooked that the purpose of such refunds is to encourage the dealers to look to Sun as a central source of supply both for petroleum products and TBA.

38. Effective October 1, 1950, Sun's schedule of motor oils and lubricant prices for dealers listed:

(a) a quantity refunded for purchases of gallons of motor oils as follows:

1 to 899	none
900 to 1199	2.0¢ per gal.
1200 to 1499	2.5¢ " "
1500 to 1999	3.0¢ " "
2000 to 2499	3.5¢ " "
2500 to 3499	4.0¢ " "
3500 to 4499	4.5¢ " "
4500 or over	5.0¢ " "

(b) a ratio refund of 1¢ for every gallon of motor oil if the dealer attained a purchase ratio of one gallon of motor oil for every sixty-five gallons of gasoline.

39. Effective July 5, 1949, Sun's dealer price schedule for TBA provided:

Quantity Refund

A refund in accordance with the following rates and based on the annual total net invoiced dollar value of following merchandise purchased and paid for by Dealer while this price schedule remains in effect, shall be paid to Dealer by Company each time the Dealer's Agreement between Company and Dealer has an anniversary of its commencement.

. . .

Refund For Contract Year Payable At Following Rates:

$1,500 to $1,999	1%
2,000 to 2,999	2%
3,000 to 3,999	3%
4,000 to 4,999	4%
5,000 to 5,999	5%
6,000 to 6,999	6%
7,000 to 7,999	7%
8,000 and over	8%

Ratio Refund

. . .

Ratio per 1,000 Gallons [of Sun gasoline]	Refund
$20.00 to $29.99	1%
30.00 and over	2%

Because of Fair Trade or Franchise Agreements between Sun and the manufacturer, the dealer is not permitted by Sun to include certain items of TBA in computing the total amount of purchase for refund purposes. The price schedule indicates the cost price of which items the dealer may take into account in determining the dollar volume of TBA purchased for refund purposes.

[*Sales Policies*]

40. With the exception of undivided stations in the Detroit, Michigan, area, which sell Benzol gasoline along with Blue Sunoco, it is the policy and settled practice of Sun not to enter into supply agreements with dealers who sell a competitive brand of gasoline. And although its supply agreements do not contain provisions requiring the dealers to handle Sunoco products exclusively, the dealers do not take on a competitive brand of gasoline. None of Sun's major competitors will sell their gasoline to a dealer who has an outstanding supply agreement with Sun. If a dealer should perchance take on a competitive brand of gasoline after signing up with it, Sun will give timely notice of its desire to terminate the agreement upon the expiration of the current term, and will not renew the supply agreement, if at all, with that dealer unless he foregoes selling the competitive brand of gasoline. Therefore Sun's marketing practice with respect to gasoline does not foreclose all its competitors from selling their brand of gasoline at Sun's independent dealer stations for such competitors choose not to sell to Sun dealers.

41. It is also Sun's policy to require dealers selling Sunoco gasoline to sell Sun's motor oils, lubricants and sponsored TBA exclusively. To this end it refuses to enter into a supply agreement with a dealer unless he orally or tacitly agrees to handle only Sun's products and sponsored TBA. It does not permit the dealer to display signs of competitive products on the premises of the service station. Sun admits, at least, that about 12% of its dealers sell Sun products to the exclusion of others. However, those dealers who do sell competitive motor oils, lubricants and TBA do not do so openly, but store them in inconspicuous places, in most instances hidden from view, to await final disposal. They do not stock competitive products in visibly appreciable quantities.

42. A consumer demand for competitive motor oils and TBA exists in Sun's market-

ing area, and even though Sun widely advertises as a fact that the combined use of Sunoco gasoline and motor oil makes for better and less costly operation of an automotive vehicle, an appreciable number of motorists who have a preference for and purchase Sunoco gasoline also prefer, and even demand, competitive motor oil and items of TBA not sponsored by Sun. With some exceptions, Sun dealers are willing to stock and sell these competitive products in order to satisfy this customer preference and demand, provided they are not required to relinquish the selling of Sunoco gasoline to do so.

43. Sun has pursued and is pursuing a continuous uniform policy and course of conduct throughout its marketing area of requiring its independent dealers to handle its gasoline exclusively and to force these dealers to discontinue the advertisement, display and sale of competitive brands of motor oils and TBA as a condition to becoming and remaining Sun dealers.

44. Sun has induced and coerced its independent service station dealers to enter into written contracts supplemented by oral or tacit agreements and understandings, having the purpose, intent and effect of requiring them to purchase its petroleum products and TBA exclusively, and to refrain from selling, advertising or displaying these products at their stations.

[*Results and Effects*]

45. As a direct result of the collective, although not collusive, policy and practices of Sun and its major competitive suppliers of gasoline, others, unless they have the capital to establish their own stations, are denied the opportunity of selling gasoline in Sun's market area, and the sale of competitive brands of gasoline has been almost completely eliminated at over 6,500 independent dealer stations selling Sunoco gasoline.

46. As a direct result of Sun's policy and practices, the sale of competitive motor oil and lubricants has been virtually eliminated, and the sale of TBA not sponsored by Sun has been substantially eliminated from over 6,500 independent dealer service stations selling Sunoco gasoline.

47. As a direct result of Sun's policy and practices, Sun dealers are being prevented from handling competitive petroleum products and TBA at their stations, and competitive suppliers are being foreclosed or prevented from selling these products to over 6,500 independent Sun dealers.

48. The effect of Sun's written contracts, supplemented by the oral tacit agreements and understandings, with its dealers may be to substantially lessen competition in the sale of petroleum products and TBA in Sun's marketing area.

49. Unless Sun is enjoined by this Court there is a likelihood that Sun will continue its policy and practices regarding the sale of competitive petroleum products and TBA at its over 6,500 independent dealer stations.

SUN'S HISTORY

50. From 1901, the date of its incorporation by Joseph Newton Pew, until the end of the First World War, Sun's principal business was the manufacture of asphalt, gas oil and basic lubricating oils at refineries in Marcus Hook and Toledo. Gasoline was produced by it as a by-product of the refining process and was sold by Sun as an unbranded product to wholesale marketers.

51. After the First World War Sun tried to develop a domestic market for its motor oils, which it blended from its basic lubricating oils. However, it soon appeared to Sun that it could successfully sell its grade of oil to the motoring public only in connection with the sale of gasoline. In 1920, by which time the business of marketing gasoline and motor oil to the motoring public had become well developed, Sun entered the market and opened its first service station for the retail sale of its petroleum products in Ardmore, Pa. Although subsequent to 1920 Sun slowly increased the number of its own company-operated stations, it sought out and depended mainly upon independent divided or split dealers, whether they were curb-side or drive-in stations, to sell the greater volume of its gasoline to the motoring public. Sun continued this practice even though in the mid twenties the major suppliers began to withdraw from divided stations and gasoline was being marketed increasingly through dealers handling one brand of gasoline.

52. In 1927 Sun developed a new high-grade gasoline possessing the favorable qualities of the so-called premium grades. It gave the gasoline a blue coloring so that the motoring public could distinguish it from other brands, and sold it under the name "Blue Sunoco." It had wide public acceptance. By 1928 Sunoco petroleum products

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were being marketed through 2,370 dealers supplied directly by Sun.

53. Effective January 1928, Sun's schedule of retail dealer's list prices for motor oils and greases in addition to permitting a discount for bulk sales, allowed a quantity refund for oil purchased during the contractual year of a supply agreement to the dealers as follows:

10 to 19 barrels	5%
20 to 49 barrels	8%
50 or more barrels	10%

For the years 1928 to 1936, inclusive, the only accessories purchased by Sun for resale were valve cases and caps, windshield wiper arms and blades, and grease fittings, which it sold only through its company-operated stations.

54. Like its competitors, Sun supplied petroleum products and storage and dispensing equipment to its "A" dealers pursuant to printed standard form supply agreements, and to its "AA" dealers in conformity with combined supply agreement and lease forms. Over the years Sun constantly changed and revised the provisions and conditions in the printed forms, and occasionally put out forms for the purpose of amending existing agreements. In the late twenties and early thirties, the following clauses or provisions, among others, appeared in most of the supply agreements with undivided "A" dealers:

(a) *Term clause*—a provision stating that the agreement was for a certain duration, usually from one to three years, and thereafter from year to year unless either party should give the other thirty days' written notice, prior to the end of the term or any extension thereof of the desire to terminate the agreement;

(b) *Minimum quantity clauses*—provisions requiring the dealer to purchase a stated minimum monthly volume of gasoline at Sun's official posted tankwagon, retail or posted price in effect at place and time of delivery, and motor oil and lubricants, with eight pounds of lubricants being considered as equivalent of one gallon of motor oil;

(c) *Restrictive competitive product clause*—a provision stating that the dealer shall not sell or use on the premises gasoline dispensing equipment or gasoline of any kind other than Sun's except equipment located on the premises at the time of the agreement and the products handled thereon; [11]

(d) *Default clause*—an option in Sun to cancel the agreement immediately or on short notice if the dealer substituted other products for those of Sun's, or adulterated Sun's products with another substance before delivering it to the consumer, or failed to purchase the minimum monthly amounts of Sun's petroleum products set forth in the agreement, and that if either of these events occurred, Sun would be entitled to recover, *as liquidated damages,* a sum equal to one cent on each gallon of the minimum quantities of gasoline and motor oil or grease which the dealer had agreed to purchase from date of default to the end of the term of the agreement.

55. As the number of automobiles grew, competition for the motorists' fuel needs became increasingly keen. To attract the motorist, the major oil companies began to provide modern drive-in stations which were clean and fully equipped. This required a large capital outlay beyond the average dealer's financial resources. In keeping with the trend, Sun purchased or leased favorably located abutting highway properties which could be used as drive-in stations. After erecting stations on these properties, it would enter into combined lease and supply agreements, with "AA" dealers.

56. The lease and supply agreement forms, designated as "Distributor's Special Agreement-Lease", uniformly contained a provision which obligated the "AA" dealers to handle Sunoco gasoline and lubricants exclusively, and that if they should sell or store any competitive petroleum product on

[11] In 1931 the restriction in this clause was extended to include territory within 500 feet of the premises. Subsequently it was made to cover not only existing brands of gasoline, but existing grades. However, not all of the agreements contained the restrictive clause, the reason apparently being that before the case of *N. L. R. B. v. Jones & Laughlin,* 310 I. S. 1 was decided in April of 1937, it was the prevailing view that the transportation of petroleum products from local bulk plants without crossing state boundaries by refiners of those products to dealers pursuant to supply contracts was not a part of interstate commerce. See *Lipson v. Socony-Vacuum Corporation* [1932-1939 TRADE CASES ¶ 55,069], 76 F. 2d 213, 218 (1 Cir., March 9, 1935). Since the laws of some of the states in Sun's marketing area forbade such restrictions, Sun was under the impression that local law might govern the legality of supply contracts in those states.

or within 500 feet of the leased premises, or if they failed to purchase the quantities of petroleum products stipulated in the minimum quantity provisions, or if they adulterated Sun's products or substituted other products for them Sun had the right to cancel the agreement on twenty-four hours' written notice and charge the operators liquidated damages in the amount of one cent per gallon on their prior average sales of Sun's products projected over the remaining term of the lease. The duration of the agreement was for one or more years and months with options in Sun to renew for a specific number of additional yearly periods, and was terminable thereafter only upon thirty days' written notice by either party prior to the end of the initial term or any extension thereof.

57. Some of the "AA" dealers owned their stations and leased them to Sun which in turn leased them back to the dealers. These lease and re-lease arrangements were used by Sun, in part at least, for the purposes of controlling favorably located outlets over a period of years and preventing their being acquired by competitors. Sun also entered into supply agreements with "select" undivided "A" dealers which expressly required them to sell Sunoco products, or at least Sunoco gasoline, exclusively. This type of "A" dealer and the "AA" dealers, because of the exclusive dealings and other restrictive provisions in their written agreements, were sometimes referred to by Sun as "controlled accounts."

58. In 1930, Sun's gasoline sales to Sun dealers amounted to 276,354,071 gallons or 3.69% of the total gasoline consumption in Sun's marketing area, and its sales of motor oil and lubricants to such dealers were equivalent to 5,183,543 gallons, or a ratio of one gallon of motor oil to 53 gallons of gasoline.

59. By 1931, in conformity with the prevailing practice of the major suppliers of petroleum products, Sun adopted the policy of deterring the further growth of divided stations which sold Sunoco products, or of endeavoring to convert them to undivided Sun stations.

60. As an inducement to divided independent "A" dealers to sell Sunoco gasoline exclusively, Sun sold its gasoline ½ cent cheaper pursuant to its official posted prices to those dealers who sold such gasoline exclusively. Sometimes this ½ cent differential was expressly provided for in the agreement. The practice of granting a ½ cent differential to undivided stations was commonplace in the industry in Sun's marketing area at the time. Since the dealer often operated on a small margin of profit, sometimes as low as 2 to 3 cents per gallon, this price differential, although small, was a sufficient economic inducement to prevail upon some dealers to sell one brand of gasoline exclusively. Nevertheless many dealers found it more profitable to continue as divided stations, and even though the divided dealer was selling more Sunoco gasoline than an undivided dealer, he was still required to pay ½ cent more per gallon than the latter.

61. Occasionally, Sun would enter into an agreement with a divided "A" dealer who expressedly agreed to terminate any and all supply agreements with suppliers other than Sun at the earliest time permitted. However, such dealer was not permitted to receive the benefit of the ½ cent differential until all the competitive supply agreements had been terminated, and Sun retained the right to cancel the agreement if the dealer failed to terminate the supply agreements with the other suppliers at the time he agreed to do so.

62. In 1931 Sun marketed for the first time a "regular" grade of motor oil under the brand name "Sunoco Mercury-Made." This oil, although possessing peculiarly low carbon-deposit characteristics, did not have long wear qualities, especially under strenuous conditions. Since it was consumed more quickly than the so-called "premium" grade and Pennsylvania oils, it did not compete very well in the market with those oils. For this reason many dealers who sold Sunoco gasoline relied upon some of the higher priced brands of premium motor oils, and the Pennsylvania grade oils, such as Quaker State, Pennzoil, Kendall, Wolf's Head and Valvoline, in addition to "Sunoco Mercury-Made" brand to satisfy their customers.

63. Effective June 1, 1931, Sun's contract anniversary for refunds on motor oil and lubricants was:

0 to 4 barrels	none
5 to 9 barrels	1¢ per gal.
10 to 19 barrels	2¢ " "
20 to 34 barrels	3¢ " "

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35 to 49 barrels..... 4¢ per gal.
50 to 99 barrels..... 5¢ " "
100 or over..... 6¢ " "

64. For the period 1932 to the latter half of 1949, inclusive, no fixed motor oil ratio had been printed in the supply agreement forms. Minimum monthly quantities for motor oil were expressed in so many gallons without any reference to gallons of gasoline purchased. In some instances, however, a ratio figure rather than a gallonage figure was typewritten in the agreement. These ratios ranged from 1 to 50 to 1 to 75, depending on the locality of the dealer.

65. In the early and middle thirties because of the economic conditions prevailing, third grade gasoline appeared on the market in quantity. Many dealers found it desirable to sell the lower priced gasoline in addition to one or more higher priced or better known brands of gasoline. As a matter of policy, Sun was strongly opposed to dealers selling a cut-rate gasoline along with Sunoco gasoline. To combat this practice, Sun adopted and enforced a policy of requiring such dealers to agree to discontinue the sale of the third grade gasoline as a condition to being permitted to sell Sun gasoline.

66. In the latter part of 1934, Sun adopted an amendment for agreements with undivided stations. This amendment provided that the dealer would lose the benefit of the ½¢ differential as soon as he received on his premises any gasoline and/or motor oil or grease other than the Sunoco brand.

67. In January of 1935, Sun put out a new supply agreement (Form S-290) for undivided "A" dealers with a "term clause" stating that the duration of the agreement would be for 36 monthly periods with the sole option in Sun to cancel the agreement at the end of any one of the monthly periods by giving 30 days' notice before the additional monthly period would otherwise commence; and after the expiration of the 36 periods, the term was to be continued from year to year unless either party gave the other 30 days' written notice prior to the end of the current term of his or its desire to terminate the agreement. According to what would seem to be its initially intended purpose, this rather roundabout thirty-day clause and the subsequent direct one in Form S-407 [12] was successfully used by Sun to require dealers to relinquish selling third grade gasoline at cut-rate prices side by side with Sunoco or else have his supply agreement with Sun cancelled.

68. A memorandum dated February 15, 1935, entitled "Marketing Policy for Blue Sunoco Motor Fuel", provided as follows:

> All new accounts, or renewals thereof, must be made on Form S-290 which permits cancellation by either party on 30 days' notice. We, of course, desire to, whenever possible, change split accounts into 100% customers. This, however, may not always be possible.
>
> We should withdraw our equipment as promptly as our legal position will permit from all split accounts where cut price products are sold, whether they be the third grade of the major companies or independent brands. In other words we will not permit our Motor Fuel to be sold at the same station with products that do not sell at the regular posted price of nationally branded motor fuel in that district.

69. Beginning in 1935, Sun, for a period of about three years, ceased the direct operation of stations except for a limited number of training stations, and leased them to others. In so doing, Sun gave preference to its former employees and sought to have such stations operated in the same manner as Sun had in the past. In August of 1935, Congress passed the Social Security Act under which employers became liable for employee social security tax.

70. In April of 1936, Sun, on the advice of its legal department, revised the supply agreement and also the combined lease and supply agreement forms under which it sold Sunoco petroleum products and leased service stations. All stipulations for the exclusive handling of Sunoco products and restrictions on the handling of additional brands of competitive products were omitted as were the provisions for cancellation upon twenty-four hours' notice and for liquidated damages. Leases, designated "Real Estate Leases", were drawn so that they concerned themselves solely with matters relating to real estate and Sun's storage equipment. And although a 30 day cancellation clause was omitted from the supply agreement

[12] See Finding of Fact No. 71 post. In June of 1935, Form S-290 was revised in form but not in substance by Form S-401, and for the time being this form was used with divided "A" dealers.

forms for "AA" dealers, the following clause was inserted in such forms:

"The term of this agreement shall commence . . . and continue in full force and effect for a period of one (1) year and from year to year thereafter, provided, however, either Company or Lessee may terminate this agreement by giving to the other thirty (30) days' written notice prior to the end of the first six (6) months of said term, or prior to the end of any ensuing period of six (6) months. . . ."

71. In May of 1936, Sun amended the term clause of its supply agreements for "A" dealers by adding the following undisguised 30 day cancellation clause to be exercised solely by Sun: ". . . provided nevertheless, that Company may cancel and terminate this agreement at any time by giving Dealer thirty (30) days' written notice." This proviso first appeared in Form S-407 10M 5-36, and it appeared in future forms long after the third-grade gasoline problem ceased to exist.

72. The new agreement forms and leases were transmitted to responsible personnel in Sun's marketing area with instructions that the new forms were to be used in contracting with new accounts and that all existing dealer agreements were to be replaced by the new forms on the expiration of the current term. When the new supply agreement forms for "AA" dealers were executed, the amounts in the minimum quantity clauses were either left blank or the words "None" or "No minimum requirements" were typewritten in the space. Since the issuance of these new forms all new "AA" dealers have executed both a supply agreement and a lease, in contrast to the prior practice of signing a single document designated as a lease which covered the entire transaction. And except in financing transactions, the practice of leasing stations from dealers and re-leasing them back to them was discontinued by Sun.

73. The change in the printed agreement forms did not mean a reversal of its former sales policy, for Sun believed that with the short term cancellation clause coupled with vigorous, aggressive salesmanship, it could attain the same result as was obtained with the exclusive dealing provision in the prior agreements. And even with the "control" provisions omitted from the agreement, Sun, as formerly, never leased a station to an "AA" dealer unless he agreed to handle Sunoco gasoline and/or motor oil on an exclusive basis.

74. The most significant development influencing Sun's decision to revise its agreement forms was the adoption of chain store tax legislation by one state after another in Sun's marketing area. Some of these chain store taxes provided for a rate as high as $500 a year per outlet for supplies having a large number of retail establishments within a single state, with the result that a supplier, like Sun, could be held liable for as much as $1,000,000 or more annually for the privilege of doing business on the chain-outlet basis in any one state. The potential liability for taxes under these statutes was not to be based upon "ownership" or "management" of outlets, but upon "control" over them. In addition, under the Social Security Act, suppliers "controlling" stations might possibly be held liable for social security tax payments on the profits of dealers and the wages of station attendants. Thus all provisions in the agreements from which Sun thought that control over the dealer could be construed were eliminated by it to forestall the possibility of tax liability on its part under the federal and state legislation.

75. In 1936, Sun's petroleum products were on sale at 9,747 outlets, 9,185 or 94.23% of which were "A" dealers, and 562 or 5.77% were "AA" dealers, supplied directly by Sun. The sale of Sunoco gasoline to these dealers was 494,515,217 gallons at a price of $46,725,879, and Sunoco motor oil and lubricants 5,509,667 gallons at a price of $2,283,405. The average gallon of motor oil to gallons of gasoline was approximately 1 to 90.

76. In October of that year when the number of Sun stations totaled 9,546, the number of undivided stations was 6,518 or 68%, and the divided was 3,028 or 32%.

77. During the year 1937 Sun conducted a survey which caused it to change its marketing approach to motor oils and TBA. This survey revealed that in many respects outlets selling Sunoco products were below par in that their physical equipment was inferior, they were short on proper lubrication facilities and their gallon ratio of motor oil sales to gasoline was poorer than that of competitive outlets. In many cases Sun outlets found it necessary to carry one or

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more competitive motor oils. Moreover such outlets were selling approximately 2,000 less gallons of gasoline per month than the 14,000 gallon average of competitive stations, and they were distinctly behind in the handling of TBA.

78. In the latter part of 1937 Sun issued charge account cards to motorists whose credit rating met its approval. These cards were to be used for buying Sunoco products on credit. When a dealer was permitted to honor these cards under a written agreement which could be canceled at any time, Sun would reimburse him for "all credit sales of Sunoco products or other merchandise and services designated" by Sun which the dealer makes to customers possessing the charge account cards. Despite the fact that dealers were not permitted to include the retail price of competitive products in credit sales, Sun refused to allow dealers who did not sell Sunoco gasoline and motor oils exclusively to honor such cards or permit them to indicate to motorists that they could do so. If a dealer was discovered to have been selling competitive motor oil after having been given permission to honor the credit cards, Sun would withdraw the privilege by canceling the agreement. The reason advanced by Sun for its refusal to grant or to withdraw such privilege was that dealers carrying competitive products would charge the sale of those items on credit sales to customers possessing Sun credit cards, and that the only way it could avoid subsidizing the sale of such competitive products was to refuse to grant or to withdraw the privilege of honoring charge account cards to those dealers.

79. Further, as a result of the survey, Sun, in the early part of 1938, inaugurated a systematic A to Z lubrication service and widely advertised that it would guarantee the proper lubrication of motor vehicles to those who used the service at stations displaying the A to Z lubrication signs. Sun urged all its dealers, where possible, to construct lubritoriums and to accept Sunoco A to Z lubrication franchise. In addition to having to be qualified and equipped to render the type of lubrication service of the standard for A to Z lubrication, the dealer had to purchase a complete inventory of Sunoco automotive lubricants, and agree to follow the systematic lubrication service as outlined in the Sunoco Lubrication Guide. However Sun would not allow dealers carrying competitive oils and greases to display, or to continue to display, A to Z lubrication signs and banners, even though they had the necessary equipment to perform the proper lubrication service. Sun's guaranty, of course, presupposed the use of Sunoco lubricants exclusively in the A to Z service.

80. In addition, Sun urged its dealers to stock and sell TBA, and issued recommended model inventory lists based on the experience of dealers whose stations were successful in marketing TBA. The dealers were left free to purchase any of the recommended TBA items from distributors of their own choosing.

81. Sun then reversed its thirty-six year old practice of distribution which had permitted it to sell petroleum products on a large scale thus enabling it to get in contention and keep pace with the leaders of the industry. It adopted the policy of refusing to enter into new supply agreements with dealers having divided stations and thereafter selected dealers who agreed orally or indicated their willingness to devote their entire efforts to selling Sunoco gasoline and/or motor oil before entering into a supply agreement with them. Also about this time Sun began to put into high gear the practice of eliminating the unfavorably located stations with poor volume purchases of gasoline and motor oil. This process of weeding out stations which did not fit into its franchise plan of distribution was called "Objective Development Plan" by Sun.

82. Effective October 10, 1938, Sun's schedule of prices for dealers contained a provision for refunds each time the dealer's agreement had an anniversary of its commencement, as follows:

Quantity Refunds

1 to 599 gallons inclusive	none
600 to 1,199 gallons inclusive	2¢ per gallon
1,200 to 1,799 gallons inclusive	3¢ per gallon
1,800 to 3,799 gallons inclusive	4¢ per gallon
3,800 or over	5¢ per gallon

Ratio Refunds

A refund of one cent (1¢) per gallon on the total quantity of Sunoco Motor Oils and Automotive Lubricants purchased and paid for by Dealer while this price schedule is in effect, shall be paid by Company to dealer each time the

> Dealer's Agreement . . . has an anniversary of its commencement, if a ratio in Dealer's purchase thereunder is maintained of one gallon of Sunoco Motor Oils and Automotive Lubricants to Sixty (60) gallons of Blue Sunoco Motor Fuel. . . .

In computing quantities for refunds, the dealer was allowed to take eight pounds of automotive lubricants as the equivalent of one gallon of motor oil. In addition a dealer received a discount of six cents a gallon when he bought 100 cases of motor oil at one time.

83. In 1939, 1,089 of Sun's "A" dealers, a drop of 2,119 within three years, were still unpersuaded to operate as undivided Sun stations and continued to pay Sun and their other suppliers ½¢ more per gallon of gasoline.

84. On October 23, 1939, Sun entered into a so-called "override" agreement with U. S. Tire Dealers Corporation, a subsidiary of United States Rubber Company. In return for ". . . the general cooperation and merchandising assistance of your sales promotion department in connection with our sale of U. S. Brand tires, tubes, batteries and accessories to your service station dealer and wholesale distributor customers, including the use of U. S. Brand product in your T. B. A. course of your service station training schools, and your permission to present our merchandising and sales promotion programs at your sales meeting for dealers. . .", U. S. Tire Dealers Corporation agreed to pay Sun commissions of from 7% to 8½% on all sales of U. S. Brand TBA by the former to Sun dealers and wholesale customers.

85. During the period of November 1939 to about March of 1944, Sun required its dealers to execute a U. S. Tire Dealer's franchise as a condition to becoming or continuing as a Sun dealer. Although the franchise agreement form used by U. S. Tire Dealers did not require the Sun dealer to purchase any specific amount of U. S. Brand TBA, he was expected by Sun to give preference to the U. S. Brand products when such line contained the items desired by the dealer.

86. In 1940 Sun was among the major oil companies named defendants in a complaint filed by the United States, charging, among other things, that each had violated the anti-trust laws by allegedly requiring their respective dealers to handle their products exclusively. This complaint was not dismissed until about the time the complaint in the case before us was filed. Thus officials of Sun were aware that the Department of Justice was actively investigating its marketing policies at least for ten years prior to the filing of the instant complaint.

87. After the intervention of World War II, gasoline was rationed and credit sales of petroleum products were prohibited. On April 20, 1942, the Office of Petroleum Coordinator for National Defense recommended that until further notice:

> § 1508.50 Exclusive-dealing. No person, natural or artificial, shall after the effective date hereof, convert, or cause to be converted, by any means or devise whatsoever, any retail outlet from a non-exclusive or so-called "Split" account to an exclusive or so-called "100 per cent account." [13]

In addition the shortage of TBA items became acute. As a consequence the business of service station operators dropped considerably. Since the local U. S. Brand TBA distributors did not make their supplies available to Sun dealers, Sun, in order to help its dealers, went into the TBA business on a limited scale. It purchased tires, batteries and other automobile replacement parts at wholesale from manufacturers in its marketing area and sold them directly to its dealers. But as time went on, it increased its purchases of TBA items.

88. Effective January 1, 1945, Sun's dealer price schedule for TBA, for the first time, provided for a percentage refund on a progressive scale of from 1 to 8% based on annual dollar volume purchases, and a ratio refund based on a certain dollar volume to purchases of a thousand gallons of gasoline. See Finding of Fact No. 39, supra.

89. By July of 1946, Sun's policy of converting divided accounts to exclusive Sunoco gasoline stations had been so successful

[13] In reply to a letter by the assistant Western Region sales manager seeking advice as to the continuation of their present efforts to sell Sunoco products, particularly motor oil, in view of § 1508.50, the acting general sales manager wrote on June 5, 1942: ". . . I am going to answer this by asking you the question 'What would you do if you were the salesman on the territory and what do you think competitive companies are doing?' "

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that, not counting those stations in the Detroit, Michigan, area that sold Benzol gasoline along with Sunoco, only 198 such accounts remained. In that month Sun adopted the policy of *withdrawing* from all divided stations. It decided that at the expiration of the contract term or sooner, unless the dealer agreed to convert his station to an undivided Sun account, the supply agreement would not be renewed and termination or cancellation notice would be sent to him. Within three months the number of divided stations had been reduced to eighty-eight. During this period twenty-six divided dealers in a single district were canceled simultaneously.

90. After the restriction on credit sales was removed in 1946, Sun permitted all undivided stations selling gasoline to honor Sun charge account cards since the major competitors of Sun were carrying out a liberal policy in connection with credit sales at their stations.

91. In 1946, as a result of the advancements made in the solvent refining process during the war by which ordinary crude oils could be refined into motor oils of high quality, Sun began marketing a "premium" grade motor oil, which had been in production for some months previous, under the trade name "Dynalube." This product has been stated to possess outstanding wear characteristics as well as low carbon-forming qualities. Sun believed that "Dynalube" was as good as other "premium" grade motor oils then on the market, since it had a viscosity index allegedly greater than the Pennsylvania grade oils. Thus, after the war, Sun was in a position to offer its dealers a "premium" motor oil in addition to the regular grade "Mercury-Made." It therefore could see no reason why its dealer should continue to sell the competitive oils even though they had stocked these oils in the past.

92. Although the supply of "Dynalube" was plentiful at its refineries, Sun did not require dealers to stock this motor oil at that time because there was a container shortage which prevented the free distribution of the product to the dealers. However, Sun did not wait until the container shortage disappeared before starting a campaign to drive out competing motor oils and TBA at stations selling Sunoco gasoline in order to make room for "Dynalube" and Sun's sponsored TBA. It therefore decided to make a detailed survey of the dealers and service stations and also to check upon the performance of its sales organization for the purpose of ascertaining the direction in which additional sales effort should be applied. To that end it used inspectors to make written reports on its dealers in some of the regions in Sun's marketing area. Similar, although not as comprehensive, surveys had been made in the latter thirties and early forties in other portions of Sun's marketing area.

93. The inspectors' reports contained a list of questions seeking information concerning, among others, the following: (a) Type of supply agreement and its expiration date; (b) Location of the station and the type and condition of the building and equipment; (c) Lighting conditions and the appearance of rest rooms; (d) Number and the appearance of station attendants, their hours of operation and the extra services given motorists; (e) Complaints of the dealer and his attitude toward Sun; (f) Average monthly gasoline and the ratio of Sun motor oil to gasoline purchased; (g) Whether the dealer had an A to Z service franchise; (h) Line of TBA, and (i) Whether competitive motor oils and TBA are being displayed and sold, and the brands of those competitive products.

94. The inspectors personally visited the stations assigned to them and obtained the information sought in the reports. The completed reports, in addition to revealing that most of the dealers' purchases of Sun motor oil were less than the ratio of one gallon to every sixty of gasoline, showed that the dealers, with few exceptions, were selling competitive TBA and motor oils, with the Pennsylvania grade oils being the main culprit.

95. After these inspectors' reports were received and reviewed at the regional office, they were sent to the various district offices within the region, with notations thereon or in accompanying letters of "deficiencies" to be corrected. In almost every instance the deficiencies noted included the matter of dealers advertising, displaying and selling competitive products.

96. The district supervisory personnel, either orally or in writing, brought the "deficiencies" to the attention of the sales-

men for corrective action. They informed the salesmen to instruct the dealers (and that they could go so far as to tell them that they had thirty days in which to comply) to eliminate competitive motor oils and TBA, or else their agreements would either be canceled or not renewed and a new dealer obtained to take their place.[14]

"Please examine each report carefully. On all reports showing other oils carried and on which a notation has not already been made showing that the item is being discontinued, I want a notation stating the dealer's decision to either cancel or carry our lubricants only within the next thirty days."

97. The salesmen called on the dealers who were selling competitive motor oils and TBA and used the selling approach by pointing out to them the advantages of devoting their efforts to selling Sun products exclusively: they could do a better job in selling the products of a single company, their bookkeeping would be simpler, and they would receive annual rebates in the higher brackets on Sun motor oils and sponsored TBA. As a result, a majority of the dealers, some of them mindful of the thirty day cancellation clause, agreed to go along 100%. This meant removing all signs displaying brands of competitive products[15] on the premises and to discontinue the selling of competitive products at the earliest possible moment if they wanted to do business with Sun. A number committed themselves to discontinue to sell competitive products if Sun would keep them supplied with the necessary grades of motor oil and items of TBA. They agreed to do so despite the fact that they could often purchase competitive motor oils and TBA from local sources under better delivery conditions and at lower prices and that they preferred to sell competing brands because of customer demand and better customer acceptance. Those dealers who agreed to go 100% Sun after their "old" stock of competitive products was depleted were subsequently checked by the inspector or salesman to see that the old stock was not replenished.

98. Sometimes Sun would either make at nominal cost to the dealer or grant him a substantial allowance or credit for repairs or improvements of his station to induce him to go along 100% with Sun. It also used indirect methods to have dealers operate their stations according to its requirements, such as tardy deliveries of gasoline, delaying needed repairs to dispensing equipment and signs, and withholding needed additional storage and dispensing equipment.

99. When some of the dealers were undecided what to do, the salesmen reminded them of Sun's right to cancel the agreement on thirty days' notice, and if they did not go along 100%, they would be replaced by a new operator or their station would be replaced by another Sun outlet nearby. As a result of such "reminders," some of them either discontinued the sale of the competitive items or ceased stocking them to any substantial degree. In the latter situation, the competitive products were not prominently displayed or were stored out of view of the salesmen. In other cases some of the dealers were obstinate.

100. After they had taken action, the salesmen reported their efforts to their superiors who, in turn, with or without comment, returned the reports to the regional office. Their efforts in almost every instance related to what had been done and was being done to eliminate the advertisement, display and sale of competitive products at Sun stations.

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[14] For example, one of the memoranda sent by a district manager to his salesmen in May of 1948, states:

"Attached hereto are copies of the inspectors' reports, one for each dealer. While considerable progress has been made in some territories, it appears that there has been some backsliding in others. I refer particularly to other oils in the location.

* * *

"We do not care to continue in a location where the above condition prevails. I do not care about any reasons present or past that have caused dealers to follow the lines of least resistance and stock other oils. You are to inform such dealers to find another supplier. They may buy any product they have in mind to, but we also have a right to protect our good name and to sell to those dealers who understand our products well enough to want to help us preserve it. I feel very strongly about this, and you are held personally responsible to have this situation cleaned up once and for all within the next thirty days and no exceptions. We shall be happy to apply the gallonage from cancelled accounts to our real Sunoco dealers."

[15] A manager of the Toledo, Ohio district was able to report to his regional manager on June 17, 1948: "To the best of our knowledge there are only six signs out of 154 dealer stations which are advertising these competitive products."

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101. In those cases where the dealers proved unyielding or remained undecided, Sun sent them written notice of cancellation or termination. These notices brought some of them around to Sun's point of view, while the others ceased to do business with Sun rather than comply with its demands. This conduct of eliminating "unfavorable" dealers was far removed from "selection of customers" by Sun.

102. Effective February 6, 1948, Sun's motor oil schedule of prices for dealers provided:

Quality Refund

900 to 1199 gal. incl.	2.0¢ per gal.
1200 to 1499 " "	2.5¢ " "
1500 to 1999 " "	3.0¢ " "
2000 to 2499 " "	3.5¢ " "
2500 to 3499 " "	4.0¢ " "
3500 to 4499 " "	4.5¢ " "
4500 or over	5.0¢ " "

The refund of one cent a gallon was made dependent upon the ratio of 1 to 55.

103. In the year 1948 when its new gasoline refinery was nearing completion in Toledo, Sun had, or anticipated having, a sufficient supply of gasoline to satisfy dealer demand in its marketing area while its large competitors were experiencing a shortage. Also about this time the war scarcity of TBA items began to vanish and such supplies were becoming plentiful. In those days there was no need for Sun to seek out new Sun dealers; they came to Sun. Since the demand for gasoline was great, Sun used its advantage to assist its campaign to drive out competitive oils and TBA from stations selling Sunoco gasoline, and to require new accounts to stock supplies of Sun's motor oils and sponsored TBA in amounts beyond their normal needs.

104. On June 7, 1948, the United States District Court for the Southern District of California enjoined the Standard Oil Company of California, and its wholly owned subsidiary, Standard Stations, Inc., from enforcing or entering into *exclusive supply contracts* with some 5,937 independent dealers in one or more petroleum products and TBA because such contracts were in violation of the antitrust laws. See *United States v. Standard Oil Company of California, et al.* [1948-1949 Trade Cases ¶ 62,269], 78 F. Supp. 850.

105. In February of 1949, Sun received a refund check in the amount of $392,189.40 for its purchases of Kelly-Springfield tires during the year 1948.

106. In May of 1949, the total of Sun stations was 6,630. Not counting the stations selling Benzol along with Sunoco gasoline, 6,624 or 99.9% were undivided stations, and only 6 or 0.1%, as compared to 3,028 or 32% in 1936, were still divided.[16]

107. On June 13, 1949, the Supreme Court of the United States affirmed the decree of the District Court in the *Standard Stations* case. See *Standard Oil Company of California, et al. v. United States* [1948-1949 Trade Cases ¶ 62,432], 337 U. S. 293. On page 314 of its opinion the Court stated that "the qualifying clause of § 3 [of the Clayton Act] is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[17]

108. Beginning in July of 1949, the ½¢ differential in Sun's official posted prices and agreements for gasoline was discontinued and the thirty-day cancellation clause was removed from the remaining supply agreements with "A" dealers. In addition the minimum monthly quantity of motor oil and lubricants to be purchased clause in all supply agreements was made to be expressed in terms of a ratio of one gallon of motor oil for every sixty-five gallons of gasoline purchased during the corresponding month of the previous year,[18] and the default clause was modified slightly to provide that if the dealer failed to live up to the minimum quantity provisions in any *two* months of the twelve month period, Sun could cancel the agreement upon giving written notice.

109. By the end of 1949, Sun's petroleum products, as well as its sponsored TBA items, were being distributed through 6,562 dealers supplied directly by Sun. Of these, 4,716 or 71.87% of the total were "A" dealers, and 1,846 or 28.13% were "AA" dealers. This was a decrease since 1936 of 2,623 in the total number of all dealers, and an increase of 22.36% in the number of "AA" dealers. In that year it sold 1,020,040,400

[16] Under these circumstances the ½¢ price differential in the price per gallon of gasoline in favor of the undivided station had either served its purpose or was no longer necessary.

[17] This has been referred to as the "quantitative substantiality" test.

[18] See Finding of Fact No. 28(f) and (i), *supra*.

gallons of gasoline and 14,396,369 gallons of motor oils and lubricants, or a ratio of one gallon of motor oil for every seventy-one gallons of gasoline. It also purchased approximately eleven million dollars worth of TBA from various manufacturers.

110. By January of 1950 the number of stations selling Benzol gasoline along with Sunoco in the Detroit area had been reduced from 77 in 1944 to 26.

111. On January 22, 1950, the instant action was instituted.

112. Effective October 10, 1950, the refund of one cent a gallon in Sun's dealer's schedule of prices for motor oils and lubricants was made dependent upon the attainment of the ratio of 1 to 65.

113. In 1951 a dealer in New Jersey was canceled on sixty days' notice because he refused to give up selling competitive gasoline at a station "adjacent" to his Sun station and because he refused to sell only Sun products at both stations. As late as 1955, a dealer not maintaining his 1:65 oil ratio was told by Sun that other dealers were available.

114. Although the territory in which Sun marketed its petroleum products was increased approximately 36% from 1936 to 1956, the number of dealers was reduced from 9,185 or 9,051 to 6,984.

Conclusions of Law:

1. This Court has jurisdiction over the subject matter of this action. 15 U. S. C. A. §§ 4, 25.

2. This Court has venue jurisdiction over the defendant. 15 U. S. C. A. § 22.

3. The defendant, Sun Oil Company, is and has been engaged in commerce among the several states.

4. The effect of defendant's agreements and understandings with its dealers may be to substantially lessen competition in the selling of petroleum products and "tires, batteries and accessories" in defendant's marketing area contrary to § 3 of the Clayton Act, 15 U. S. C. A. § 14. See *Standard Oil Company of California et al. v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293 (1949).

5. The plaintiff, United States of America, is entitled to a decree enjoining the defendant from inducing, coercing and compelling independent service station operators with whom it does business to enter into and operate under written contracts, supplemented by oral and tacit agreements and understandings requiring them to purchase petroleum products and "tires, batteries and automotive accessories" for resale exclusively from the defendant.

[¶ 69,399] **United States v. Standard Oil Company of California; Shell Oil Company; The Texas Company; Richfield Oil Corporation; General Petroleum Corporation; Tide Water Associated Oil Company; and Union Oil Company of California.**

In the United States District Court for the Southern District of California, Southern Division. Civil Action No. 11584-C. Dated June 19, 1959.

Case No. 1024 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited—Price Fixing—Prices Fixed by Agreement Between Competitors—"Posting" Prices—Petroleum Products.—Six oil producers in the "Pacific States Area" were each prohibited by a consent decree from (1) agreeing with any of the others to fix prices for crude oil produced in the area, (2) agreeing or offering to buy crude oil at prices referenced to those posted by any of the others and (3) posting prices for crude oil in or for any field in which it was not producing, receiving on exchange, purchasing, or seeking to purchase crude oil. The decree also prohibited the producers from agreeing with each other to fix or post prices for refined petroleum products sold in the area.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181; Monopolies, Vol. 1, ¶ 2610.600.

Resale Price Fixing—Consent Decree—Practices Enjoined—Agreement to Maintain Resale Prices—Resale Price Control Through Refusal to Sell—Fair Trade Contracts.—Six oil producers in the "Pacific States Area" were each prohibited by a consent decree from

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entering into contracts with its dealers whereby the dealers agree to resell refined petroleum products at a price designated by the producer. Each of the producers was also prohibited from forcing dealers to resell at such designated prices by threats of cancellation or threats of non-renewal of supply agreements or leases. In the absence of such threats, however, a producer was not prohibited from suggesting, urging, or persuading the dealers to resell at any price. Further, the decree did not limit a producer's right to do business with dealers of its own selection, or prevent it from exercising any right it might otherwise have had to "fair trade" all refined petroleum products other than gasoline. After five years, the decree would not prohibit a producer from fair trading gasoline.

See Resale Price Fixing, Vol. 1, ¶ 3015.20, 3015.70, 3015.80.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited —Production Control.—Six oil producers in the "Pacific States Area" were each prohibited by a consent decree from agreeing with any producer to control the production of crude oil in the area with the object of fixing the price of crude oil or refined petroleum products. Each of the producers was enjoined from entering into any crude oil purchase contract, exchange agreement, or transportation agreement (1) requiring the seller to curtail his production to any quota, allotment, or production rate which was determined by any person other than the producer of the oil or a person with a right in the oil or the land from which it was produced, or (2) permitting a producer to refuse to accept crude oil produced in the area in excess of any such quota, allotment, or production rate. Also, each producer was enjoined from entering into any agreement with any other person to refuse to purchase from, transport for, or exchange with any third person crude oil produced in excess of such quota. In addition, each of the producers was prohibited from entering into or renewing any contract for the purchase of crude oil which extended over a period of more than one year, unless such contract contained a provision giving the seller the right to terminate upon written notice.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.760; Monopolies, Vol. 1, ¶ 2610.800.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited —Allocation of Sales Territories to Distributors.—Six oil producers in the "Pacific States Area" were each prohibited by a consent decree from requiring any "reseller distributor" in the area to refrain from selling refined petroleum products or tires, batteries, and accessories (TBA) to any class of customers, or outside the limits of any prescribed territory, unless (1) the right to make such sales had been reserved, by written agreement, to the producer or others handling its products, or (2) the producer or one of its other distributors was then selling, or offering to sell, the products to the customers in question.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited —Exclusive Dealing—Requirements Contracts.—Four oil producers in the "Pacific States Area" were each prohibited by a consent decree from entering into agreements with their dealers whereby the dealers would agree to (1) purchase all or substantially all of their requirements of refined petroleum products or tires, batteries, and accessories (TBA) from a producer or from a source designated by it, or (2) refrain from handling refined petroleum products or TBA obtained from any other person. Also, the producers were each prohibited from selling refined petroleum products to any dealer in the area on the condition that the dealer purchase other petroleum products or TBA from it or from a source designated by it, or refrain from handling refined petroleum products or TBA obtained from any other person.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690, 2005.703, 2005.825, 2005.848; Monopolies, Vol. 1, ¶ 2610.300, 2610.760.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited —Boycotts—Discriminations.—Six oil producers in the "Pacific States Area" were each prohibited by a consent decree from boycotting or discriminating against others with respect to exchange agreements or other agreements for the use of pipelines or other facilities

for transporting, storing, or loading crude oil or refined petroleum products. The producers were also prohibited from agreeing with each other to follow a policy or practice of refraining from entering into any lease or supply contract with a dealer unless the consent of the producer who had been supplying the dealer was obtained.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533; Monopolies, Vol. 1, ¶ 2610.280.

Combinations and Conspiracies—Consent Decree—Practices Prohibited—Trade Association Membership as Means of Trade Restraint.—Six oil producers in the "Pacific States Area" were each prohibited by a consent decree from holding membership in any oil producers' organization or association which sponsors programs to control the production of crude oil in the area with the objective of fixing the price of crude oil or refined petroleum products.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Oil Producers' Supply Contracts with Dealers—Minimum Terms.—Six oil producers in the "Pacific States Area" were required by a consent decree to offer to their dealers, one year after entry of the decree and for a period of ten years thereafter, contracts and leases having terms of not less than three years. However, that provision applied only to dealers who were being supplied with gasoline by a producer, its assignee, or other agent and did not apply to dealers supplied through a "reseller distributor." The producers were also required to include in those agreements provisions for termination by the dealers upon ninety days' written notice.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.50.

Department of Justice Enforcement and Procedure—Consent Decrees—Nature and Use—Duration of Decree—Effective Date.—A consent decree entered against oil producers in the "Pacific States Area" provided that, with certain exceptions, the final judgment was to take effect six months after the date of its entry and was to continue in effect for fifteen years thereafter.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241.195.

Department of Justice Enforcement and Procedure—Consent Decree—Modification of Consent Decrees—Proof Required—Substantial Impairment of Ability to Compete.—A consent decree entered against oil producers in the "Pacific States Area" provided that, should any consenting defendant, upon application for modification or termination of any provision of the decree, show that its ability to compete in the area with any nonsignatory defendant was substantially impaired by reason of any provision in the decree, the court could grant such relief as it found proper.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8361.18.

Department of Justice Enforcement and Procedure—Consent Decrees—Scope of Decrees—Estoppel.—A consent decree entered against oil producers in the "Pacific States Area" provided that it was based upon an accord and a full compromise and settlement between the Government and the producers, as of the date of the decree's entry, of all issues raised by the charges made in the Government's complaint and its "Outline of Plaintiff's Contentions." It was further provided that the decree, as a condition to the consent of the producers to its entry, should operate as an estoppel and bar to any charge in any proceeding instituted by the Government and based upon, or alleging, any combination, conspiracy, agreement or monopolization charged in the present action. In addition, it was provided that the decree would preclude evidence to support any claims or contentions that, prior to the date of the decree's entry, any two or more of the producers were guilty of any of the several violations of the Sherman Antitrust Act charged in the action. Except as noted in the decree, however, it did not constitute a bar or estoppel to a suit against one or more of the producers (1) for activities occurring after entry of the decree, (2) for acts of any producer individually or in conjunction with a nondefendant, or (3) for acts of two or more of the producers which were not within the scope of the charges made in the present action.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241.65.

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Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—Taking Action with Regard to Legislation and Regulations.—A consent decree entered against oil producers in the "Pacific States Area" provided that nothing therein should be deemed to prevent the producers from (1) taking action to induce the Federal and state governments or their agencies to take action or refrain from taking action, (2) proposing, supporting, or opposing legislation or regulation by any such government or agency, or (3) doing anything required or refraining from doing anything prohibited by the laws, regulations, or orders of the Federal or state governments or their agencies.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; William D. Kilgore, Jr., Baddia J. Rashid, Homer W. Hanscom, George B. Haddock, Lawrence W. Somerville, Walter M. Lehman, John H. Waters, Malcolm F. Knight, and Elliott Chaum, for the United States.

For the defendants: Marshall P. Madison, Francis R. Kirkham, Richard J. MacLaury, and William E. Mussman of Pillsbury, Madison & Sutro, for Standard Oil Co. of Cal.; S. R. Vandivort, George Harnagel, Jr., and McCutchen, Black, Harnagel & Shea (by George Harnagel, Jr.), for Shell Oil Co.; William J. De Martini, Everett B. Clary, William W. Alsup, and O'Melveny & Myers (by Everett B. Clary), for Richfield Oil Corp.; P. E. Bermingham, Howard Painter, and Dolley, Jessen & Painter (by Howard Painter), for General Petroleum Corp.; William F. Kiessig and Edmund D. Buckley (by Edmund D. Buckley), and Wayne H. Knight of Overton, Lyman & Prince (by Wayne H. Knight), for Tidewater Oil Co.; L. A. Gibbons, Douglas C. Gregg, and A. Andrew Hauk (by L. A. Gibbons), and Moses Lasky of Brobeck, Phleger & Harrison (by Moses Lasky), for Union Oil Co. of Cal.

For prior opinions of the U. S. District Court, Southern District of California, see 1959 Trade Cases ¶ 69,240 and 1958 Trade Cases ¶ 69,212.

Final Judgment

[*Consent Decree*]

James M. Carter, District Judge [*In full text*]: The original complaint herein was filed by plaintiff on May 12, 1950, and an amended complaint speaking as of May 12, 1950, was filed herein on August 24, 1956, and the latter was amended on its face pursuant to order of Court filed herein on the date last mentioned. Each defendant named therein filed answers to the original and the amended complaints denying any violation of law. Plaintiff and defendants Standard Oil Company of California, Shell Oil Company, Richfield Oil Corporation, General Petroleum Corporation, Tidewater Oil Company (named as a defendant herein under its former name of Tide Water Associated Oil Company) and Union Oil Company of California, by their respective attorneys, severally consent to the entry of this Final Judgment, before the taking of any testimony and without trial, and without anything in this judgment constituting evidence or an admission by any party hereto in respect of any issue involved in this action, and the defendants not admitting that the alleged combination and conspiracy to monopolize and to restrain trade and commerce and the alleged monopolization of trade and commerce charged in the amended complaint to have existed as of May 12, 1950, ever did exist or that they have done or are doing any act or thing that they are hereafter in this judgment enjoined from doing or have refrained or are refraining from doing any act or thing that they are hereinafter in this judgment required or directed to do.

[*Settlement Negotiations*]

The consent of the plaintiff and defendants signatory hereto to the entry of this Final Judgment grows out of the following described matters:

> At a pre-trial hearing on March 14, 1957, the Court referred to the arguments of defense counsel that while they denied defendants had done anything wrong, they also contended that methods of operation and conditions in the petroleum industry in the Pacific States Area had substantially changed since the filing of the complaint. After referring to the lengthy and expensive trial that would be involved, the Court asked if the parties had ever dis-

cussed the possibility of settlement. The Court was advised that there had been such discussions with some defendants but they had been abandoned because of impossibility of reaching any agreement due to plaintiff's insistence on a prohibition against retail selling by defendants, as prayed for in Prayer 17 of the amended complaint. The Court urged plaintiff and defendants to meet to explore the possibility of settlement of all or some of the issues.

The Court expressed its conviction that all of the parties were believers in the competitive system of the United States and wanted the industry to operate competitively. The Court stated that in this respect the objectives of the parties were identical. The Court urged further settlement talks and stated that they would not be considered as weakness on the part of any of the parties or as a concession that the defendants had done anything wrong.

During 1957 several such meetings were held, but at a pre-trial hearing on December 17, 1957, the Court was informed that discussions of possible settlement had again broken down because, among other things, of defendants' rejection of plaintiff's continuing demand that each defendant be enjoined from engaging in the business of selling refined petroleum products at retail, either through its own employees or by other persons designated as agents, consignees or managers, as prayed for in Prayer 17.

In May 1958, defendant Conservation Committee of California Oil Producers filed a motion for summary judgment of dismissal on the ground that the case as to said defendant had become moot by reason of changes in conditions within the oil industry and in the activities of said defendant since the filing of the original complaint in 1950. On October 24, 1958, after a hearing on said motion, the Court dismissed the case as to defendant Conservation Committee on the ground that the case had become moot as far as said defendant was concerned.

On May 29, 1958, the defendants filed a proposal that the Court consider, in the light of events occurring since the filing of the complaint, trying issues of mootness and relief before the issue of law violation. After a hearing on this proposal in July 1958, the Court deferred a ruling on such proposal, and expressed a desire to explore the type of relief that could be granted to plaintiff under Prayer 17 of the amended complaint. In Prayer 17, plaintiff sought "divestiture" and "divorcement," defining divestiture as a requirement that defendants divest themselves of all right, title and interest, whether ownership, leasehold or other proprietary interest, in service stations and other retail outlets and that they not be permitted to acquire any in the future; and defining divorcement as a requirement that the defendants now engaged in the business of selling refined petroleum products at retail either through their own employees or by agents, consignees or managers, should cease such business and that no defendant be permitted to engage in such business in the future.

The Court directed plaintiff to submit a statement setting forth in some detail the relief sought under Prayer 17 and the reasons therefor. The Court directed defendants to present their views, together with information concerning the existing situation compared to that in 1950 with respect to numbers of service stations; their locations; their relationship to suppliers; the names and numbers of nondefendant refiners and marketers; the number of stations handling their products; the areas in which they operate; the length of leases; and such other data as would give to the Court an over all picture of present marketing of refined petroleum products compared to that existing when the complaint was filed. The requested showing was to be by statement of counsel and not by way of taking of testimony, and as far as possible as an agreed presentation of the parties. All of these matters would be presented and considered on the assumption that the case had been tried on the issue of whether the antitrust laws had been violated by the defendants prior to the commencement of the action on May 12, 1950, and that the Court had found that violation had occurred. The Court announced as its purpose an effort to determine whether, on the basis of such an assumption, the Court would grant all or part of the relief sought by plaintiff in Prayer 17.

Written statements and presentations were made at a pre-trial hearing on October 28 to 31, 1958, pursuant to the Court's direction. At that hearing plaintiff generally conceded the accuracy of the showing made by counsel for defendants as to post-complaint data, as far as it went.

The Court stated that defendants had made a substantial showing of competition in marketing since 1950, both as between defendants and with new marketers entering the Pacific Coast Area since 1950 and with others; and that it was unlikely, on the basis of plaintiff's evidence as to activities of defendants occurring since 1950 and the situation existing at the present time, that plaintiff would now file a

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suit making those charges contained in the amended complaint herein.

On the basis of the written statements, presentations and oral arguments made during said hearing, which were not as a part of trial or the taking of testimony, the Court ruled that even if at the trial of the case it should be proved to the Court's satisfaction that the defendants had violated the law prior to May 12, 1950, the Court should not and would not grant divestiture or divorcement or relief beyond the type within the area of which the relief herein embodied falls.

The Court then again urged defendants to consult with plaintiff to see whether, in view of the foregoing ruling, further progress could be made toward disposing of all or part of this litigation. Plaintiff was charged with responsibility for arranging conferences with defendants concerning settlement. Such conferences were held and the within decree resulted.

It appears to the Court that, by reason of the aforesaid matters and the consent of the plaintiff and the defendants signatory hereto, it is unnecesary to proceed with the trial of the cause against said signatory defendants.

Now, Therefore, before any testimony has been taken herein, and without trial and without adjudication to the effect that any defendant has violated any of the antitrust laws, it is hereby Ordered, Adjudged and Decreed:

I.

[*Jurisdiction*]

The Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The amended complaint states claims for relief against the defendants and each of them under sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment,

(a) "Consenting defendants" shall mean Standard Oil Company of California, Shell Oil Company, Richfield Oil Corporation, General Petroleum Corporation, Tidewater Oil Company and Union Oil Company of California.

(b) "Consignee" shall mean a person who, in the pursuit of an independent calling and not as an employee, is engaged by a consenting defendant as its agent to sell any of said defendant's refined petroleum products for it and at the price designated by it, and is vested by said defendant with possession or control of the product and authorized to receive payment from the purchaser.

(c) "Consignment contract" shall mean a written agreement by which a consenting defendant engages a person to act as its consignee.

(d) "Dealer" shall mean any person who is engaged as a consignee or reseller in the business of selling gasoline at a place of business serving highway automotive vehicles of the general public, but excluding any such place of business operated by or for the government of the United States or of any state or of any political subdivision thereof, or by or for any agency or instrumentality of any such government, such as but not limited to post exchanges, commissaries and ships' stores.

(e) "Defendants" shall mean the consenting defendants and Texaco Inc. (named as a defendant herein under its former name of The Texas Company).

(f) "Distributor" shall mean any person who operates facilities for the storage and distribution of gasoline and who is engaged primarily in the sale of such gasoline to dealers.

(g) "Exchange" and "exchange agreement" shall mean an agreement or arrangement whereby a person delivers crude oil or refined petroleum products to or for the account of another person at a specified place or places or at a particular time and receives in return therefor, from said other person or a third person, an amount of crude oil or refined petroleum products of approximately the same value at another place or places or at another time. The principal characteristic of an exchange is that it involves the transfer from a person to another person of possession and title to crude oil or refined petroleum products, the consideration for which is not primarily money but is the transfer to the first person of possession and title to other crude oil or refined petroleum products of approximately the same value.

(h) "MER" shall mean "Maximum Efficient Rate," which is the highest daily rate of production which can be sustained economically from a particular pool, from exist-

ing wells and facilities, for a reasonable period without loss of economically recoverable ultimate production of oil from such pool.

(i) "Pacific States Area" shall mean the area comprising the states of California, Washington, Oregon, Nevada and Arizona, or any part thereof.

(j) "Person" shall mean any individual, partnership, corporation, association or other legal entity.

(k) "Posted prices" and "prices posted" for crude oil shall mean prices announced to the public by or for a defendant which it will pay for crude oil produced in a field or pool or area in the Pacific States Area for such crude oil as it buys.

(l) "Posted prices" and "prices posted" for a refined petroleum product shall mean prices announced to the public by or for a defendant for the sale of such refined petroleum product in the Pacific States Area.

(m) "Refined petroleum products" shall mean any of the following products resulting from the refining of crude oil; gasoline, lubricating oils, light and heavy fuel oils, diesel oils, stove oil, greases and kerosene.

(n) "Reseller" shall mean any person who buys a refined petroleum product for resale, insofar as said product is concerned. As to any refined petroleum product which such person may handle under consignment contract or other arrangement not involving a purchase and resale by him, he is not deemed to be a reseller.

(o) "Supply agreement" shall mean an agreement of purchase and sale or a consignment contract.

(p) "Tires, batteries and accessories" shall mean replacement parts and articles used on or in the servicing or repairing of highway automotive vehicles and includes tires, tubes, batteries, spark plugs, oil filters, oil filter cartridges, fan belts, battery cables, auto lamp bulbs, fuses, windshield wipers and blades, tire repair and vulcanizing kits, anti-freeze preparations, tire chains, waxes and polishes and other like items.

III.

[*Applicability*]

This Final Judgment applicable to any consenting defendant shall be binding upon such defendant and its officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise. For the purposes of this Final Judgment a defendant and its officers, agents, servants, employees and attorneys when acting in such relationship shall be deemed to be one person.

IV.

[*Permissive Provisions*]

Nothing in this Final Judgment shall be deemed to prevent consenting defendants from jointly or severally: (i) taking action to induce the government of the United States or of any state or of any political subdivision thereof, or any agency or instrumentality of any such government or any official of any such government, agency or instrumentality to take action or refrain from taking action; (ii) proposing, supporting or opposing legislation or regulation by any such government, agency, instrumentality or official; or (iii) doing anything required or refraining from doing anything prohibited by any law, regulation or order of the United States or of any agency or instrumentality thereof, or by any law, ordinance, regulation or order of a state or political subdivision thereof or of any agency or instrumentality of any thereof which is valid and within the competence of said state, subdivision, agency or instrumentality.

Within the meaning of this Section IV a defendant shall be deemed (a) to be required to take action even though it may have the alternative of not taking action and thereby incurring a penalty or sanction resulting from failure to comply with any law, ordinance, regulation or order of the government of the United States or any state, or any political subdivision, agency instrumentality or official thereof, and (b) to be prohibited from taking action even though it may have the alternative of taking action and thereby incurring a penalty or sanction resulting from failure to comply with any such law, ordinance, regulation or order.

V.

[*Association Membership—Production Control*]

(A) Each consenting defendant is enjoined from holding membership in or participating in the activities of any organization, association or group composed of crude oil producers or representatives of crude oil

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producers which sponsors, recommends or carries out any agreement or program to control the production of crude oil in the Pacific States Area with the objective of fixing or stabilizing the price of such crude oil sold in the Pacific States Area or the price of refined petroleum products refined and sold in said Area.

(B) Each consenting defendant is enjoined from agreeing with any other defendant to control the production of crude oil in the Pacific States Area with the objective of fixing the price of such crude oil sold in the Pacific States Area or the price of refined petroleum products refined and sold in the Pacfic States Area.

(C) Nothing in subsections (A) or (B) of this Section V shall prevent any consenting defendant from entering into or carrying out any agreements between or among two or more defendants, or between or among one or more defendants and any other person or persons, providing for the joint leasing, joint ownership or joint operation of lands or mineral interests therein, or for the control or limitation of production for economic or other reasons from a pool or connected pools in which all the parties to the agreement are producers or have a proprietary or other financial interest, including, but not limited to, unit plans, ratable taking plans, operating agreements, pool MER agreements, well spacing agreements, secondary recovery programs and pressure maintenance programs.

VI.

[*Price Fixing—Crude Oil*]

(A) Each consenting defendant is enjoined from agreeing with any other defendant to fix prices for crude oil produced in the Pacific States Area; provided that where any defendants are parties to any purchase or sale of crude oil or to any agreement for the purchase or sale of crude oil, with or without one or more other persons, the parties to any such purchase, sale, or agreement may agree upon the price of the crude oil covered thereby.

(B) Each consenting defendant is enjoined from agreeing or offering to buy crude oil produced in the Pacific States Area at prices referenced to those posted in said area by another named defendant, unless so requested by the seller; provided, however, that nothing in this subsection (B) shall: (i) prevent a defendant in the purchase of crude oil from offering or agreeing to pay for said crude oil a price which is referenced to, or is expressed to be based upon, the highest, lowest or average of the prices posted by any two or more persons, defendants or others, who may be named; or (ii) apply to contracts in effect upon the effective date of this Final Judgment or to contracts with the government of the United States or of any state or of any political subdivision thereof or with any agency or instrumentality of any such government.

(C) Each consenting defendant is enjoined from posting prices for crude oil in or for any field in the Pacific States Area in which said defendant is not at that time producing, receiving on exchange, purchasing or seeking to purchase crude oil.

VII.

[*Boycotting Other Producers*]

Each consenting defendant is enjoined from entering into any agreement with any other defendant

(i) to adopt or pursue any continuing system or practice of extending to other defendants discriminatory treatment as compared to that extended to nondefendants, or

(ii) to boycott any nondefendants

with respect to exchange agreements or other agreements for the use of pipelines or other facilities in the Pacific States Area for transportation, storage or loading of crude oil or refined petroleum products.

In the construction or application of this Section VII it shall be recognized that exchange agreements and agreements for the use of pipelines or other facilities do or may involve different types of crude oil or refined petroleum products, different types of pipelines and different transportation, storage or loading facilities, and that such agreements are entered into at different times when the situation of a party having pipelines or other facilities is or may be different with respect to its own needs or capacities, and that every such actual or suggested agreement and its terms involves complex elements of business judgment.

VIII.

[*Purchase Contracts—Time Period*]

(A) Each consenting defendant is enjoined from entering into or renewing any contract for the purchase of crude oil produced in the Pacific States Area the term

of which extends for a period of longer than one year unless such contract contains a provision giving the seller the right to terminate such contract upon written notice, the length of which shall be set forth in the contract, but no notice of more than twelve months shall be required except that a notice of up to five years may be required in a contract for the purchase of crude oil from one seller, or group of sellers having a common interest in the crude oil being sold, which obligates the buyer to accept more than 2,000 barrels of crude oil per day; provided: (i) that exercise of such rights of termination may be limited to cases in which the contract is terminated by the seller for the purpose of refining the crude oil himself or selling the crude oil covered thereby to a nondefendant; and (ii) that in any instance in which a consenting defendant is required by its crude oil purchase contract or another related contract to supply crude oil or petroleum products to or for the account of the seller or a subsidiary or affiliate of the seller the term of the crude oil purchase contract may continue as long as the obligation to supply such crude oil or petroleum products continues.

(B) The provisions of this Section VIII shall not apply to contracts: (i) between a consenting defendant and persons with whom said consenting defendant has a joint or concurrent proprietary or other financial interest in lands within a pool or field, or in crude oil produced from a pool or field, for the purchase or sale of crude oil produced within such pool or field, including but not limited to contracts with lessors of a consenting defendant, co-lessees, joint venturers, owners of royalty or overriding royalty interests or participating interests, and parties to unit and other operating agreements, "farm-out" arrangements and oil payment agreements; or (ii) with the government of the United States or of any state or of any political subdivision thereof or any agency or instrumentality of such government.

IX.

[*Production Control*]

(A) Each consenting defendant is enjoined from entering into any crude oil purchase contract, exchange agreement or transportation agreement which (a) requires the seller to curtail his production of crude oil in the Pacific States Area to any quota, allotment or production rate determined, suggested or recommended by any person or persons other than (i) the producer of said crude oil or (ii) any person or persons having a right, title or interest in said crude oil or the lands from which it was produced, or (b) permits a consenting defendant to refuse to accept crude oil produced in said Area in excess of any such quota, allotment or production rate.

(B) Each consenting defendant is enjoined from entering into or carrying out any agreement with any other person to refuse to purchase from transport for or exchange with a third person crude oil produced in the Pacific States Area in excess of any such quota, allotment, production rate or recommended production rate.

(C) Nothing in this Section IX shall prevent any consenting defendant (i) who is a producer or has any proprietary or other financial interest in any pool or connected pools from agreeing with any other person who is a producer or has any proprietary or other financial interest in such pool or connected pools to refuse (or from including in its crude oil purchase contracts, exchange agreements or transportation agreements provisions permitting it to refuse) to purchase, exchange or transport crude oil produced in excess of a seller's fair share of the MER of such pool or connected pools; or (ii) from agreeing in any contract upon the quantity of crude oil to be purchased, exchanged or transported by the parties thereunder.

X.

[*Price Fixing—Refined Products*]

Each consenting defendant is enjoined from agreeing with any other defendant (i) to fix prices for refined petroleum products sold in the Pacific States Area or (ii) that any defendant will post prices or will adhere to its posted prices for the sale of refined petroleum products in the Pacific States Area; provided that where any defendants are parties to any purchase or sale or any agreement for the purchase or sale of refined petroleum products, with or without one or more other persons, the parties to any such purchase, sale or agreement may agree upon the price of the refined petroleum products covered thereby.

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XI.

[*Resale Price Fixing*]

Each consenting defendant is enjoined from entering into or adhering to any agreement with any reseller by which said reseller agrees to resell, or from forcing any such reseller by threatening him with cancellation or nonrenewal of a supply agreement or lease to resell, in the Pacific States Area, any refined petroleum product at a price, or at not less than a minimum price, or at not more than a maximum price, designated by such defendant; provided that this Section XI shall not prevent a consenting defendant, in the absence of such a threat, from suggesting to a reseller of its petroleum products a resale price for any of such products, or from urging or persuading such reseller to resell any of such products at any price; nor shall anything in this Section XI limit in any way (i) the rights of a consenting defendant set forth in subsections (E), (G), and (H) of Section XII or (ii) the right of a consenting defendant to do business with resellers of its own selection whether as lessor, supplier, or otherwise.

Provided that as to all refined petroleum products other than gasoline, this Section XI shall not prevent any consenting defendant from exercising, and as to gasoline shall not prevent any consenting defendant after five years from the effective date of this judgment from exercising, any right it may have, but for this Section XI, (i) to fair trade any product, or (ii) to fix, maintain or enforce by agreement or otherwise the price, or the maximum or minimum price, at which any product may be resold; and

Provided further, that in view of pending litigation between the plaintiff and other parties which plaintiff believes to have a bearing on the legality of action of the type referred to in this further proviso, this Final Judgment shall not have any application to any consenting defendant's granting, increasing, decreasing or withdrawing an allowance or price reduction to a reseller, whether in the form of a rebate, subsidy or otherwise, which is based, calculated or conditioned by such consenting defendant upon the amount or level of a resale price established by such reseller in the exercise of his own decision and choice; and in any future suit, proceeding, or litigation instituted by plaintiff this Final Judgment shall not operate as a bar or estoppel against any charge that such action violates the antitrust laws except to the extent that such charge may fall within the provisions of subsection (A) of Section XVI of this Final Judgment.

XII.

[*"Dealer" Arrangements*]

As used in this Section XII the term "lease" means "lease or sublease," the term "lessee" means "lessee or sublessee," and "dealer" means a dealer as defined in Section II who sells gasoline under the brand of the consenting defendant supplying him.

(A) Each consenting defendant is required and directed (i) to offer to each dealer operating at any location in the Pacific States Area where he is being supplied with gasoline by such defendant or its consignee or other agent and not through a reseller distributor and (ii) to grant to each such dealer who accepts such offer a supply agreement wherein such defendant undertakes to supply such dealer with gasoline for sale at such location. Each such agreement shall be for a term of at least three years; provided that the term of any such agreement relating to any such location may be for less than three years if it is concurrent with the term of any lease of such location which may properly be made for a term of less than three years under paragraph (4) of subsection (B) of this Section XII; and provided, further, that each such agreement with a dealer who, with the consent of such defendant, as a dealer occupies premises owned or leased by such defendant, shall contain a provision granting to such dealer a right to terminate said agreement upon ninety days' written notice.

(B) Each consenting defendant is required and directed insofar as it has the right to do so (i) to offer or cause to be offered to each dealer who, with the consent of such defendant, as a dealer occupies premises owned or leased by such defendant in the Pacific States Area and (ii) to grant or cause to be granted to each such dealer who accepts such offer a lease of such premises having a term of at least three years, with provision for right of termination by such dealer upon ninety days' written notice; provided that no consenting defendant is required or directed:

(1) To offer or grant or cause to be offered or granted any lease of any premises to any dealer who is not required by such defendant to assume a rental obligation with respect to such premises;

(2) To make or cause to be made a lease with any dealer unless such dealer concurrently enters into an agreement with such defendant as contemplated by subsection (A) of this Section XII;

(3) To offer or grant or cause to be offered or granted a lease to a dealer supplied by a reseller distributor; or

(4) Where such defendant itself holds any such premises as lessee and not as owner, to offer or grant or cause to be offered or granted any lease of such premises for a term extending beyond the thirtieth day preceding the expiration of the term of the lease under which such defendant holds the premises at the time of such offer or grant; and in any such instance, such defendant may satisfy the requirements of this subsection (B) by offering or causing to be offered, and if the offer is accepted granting or causing to be granted, a lease for a term of less than three years, provided such term expires not earlier than such thirtieth day.

(C) In all instances where any consenting defendant offers or causes to be offered such an agreement or such a lease to any dealer and such dealer rejects such offer, or does not accept it within 15 days, or having accepted it fails within 5 days after such acceptance to enter into the agreement or lease offered to it, nothing herein shall require such defendant to renew said offer or cause it to be renewed at any time, or at any time to offer or cause to be offered to such dealer any other agreement or lease relating to said premises; and the preceding subsections (A) and (B) of this Section XII shall thereafter be inapplicable to any dealing between such defendant and such dealer at said premises.

(D) Each such agreement and each such lease may provide in substance or effect (i) that the supply obligation of the defendant party thereto need not exceed half the dealer's requirements as of the date of the agreement or lease for use or sale at the location to which it relates (subject to proration in case of shortage) and (ii) that deliveries thereunder may be suspended and/or that it may be terminated by the defendant party thereto at any time prior to the expiration of its stated term, upon written notice stating the grounds therefor given to the dealer in the manner specified in the agreement or lease (or automatically or without notice in such cases as death, incompetency or insolvency, for the breach of any provision thereof or upon the occurrence of any other event or condition specified therein not prohibited by Section XI or Section XIV of this Final Judgment. Where a dealer holds such an agreement and such a lease covering the same location each or either of them may provide in substance or effect that a breach of one shall constitute a breach of the other and/or that the cancellation or termination of one shall be effective to cancel or terminate the other.

(E) Each such lease and each such supply agreement with a dealer who has not been operating as a dealer in the gasoline of the defendant supplying him at the location therein referred to for a period of twelve months immediately prior to the execution of the same may contain a provision granting to the lessor or supplier the right to terminate the same without cause upon thirty days' written notice of termination at any time within twelve months after the date such dealer began operating as a dealer in the gasoline of said defendant at such location. For the purposes of this subsection (E) it shall be deemed there is a new dealer at the location whenever a new person commences operating at such location.

(F) Nothing in this Section XII shall require that the price or prices payable under or the commission rates provided for in any supply agreement shall remain constant throughout the term of such agreement; and nothing in this Section XII shall prevent the inclusion in any lease of a provision for changes in rental if the circumstances under which said changes in rental shall be made are specified in the lease and the amount of said changes in rental is determinable by the terms of the lease.

(G) The provisions of this Section XII shall not take effect until one year after the date of entry of this Final Judgment and shall apply only in respect of dealers who may be within the terms of this Section XII on or after the effective date of this Section XII. It is understood that each consenting defendant is now supplying many dealers on a spot basis, or under supply contracts having less than a three-year term, with whom such defendant may be unwill-

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ing to enter into a supply agreement or a lease having a three-year term.

(H) Nothing in this Section XII shall prevent any consenting defendant from: (i) declining or failing to renew or cause to be renewed for any reason any supply agreement or lease upon the expiration or termination thereof, or from advising the dealer of the reason or reasons therefor a reasonable time in advance of such expiration or termination; provided that if, after the expiration or termination of any such supply agreement or lease, a consenting defendant or its consignee or other agent continues thereafter for more than three months to supply such dealer with gasoline at such location or to permit such dealer to occupy premises owned or leased by such defendant, then this Section XII shall again apply to such dealer; or (ii) discontinuing to supply gasoline to any dealer for any reason or terminating any supply contract or lease for any reason within one year from the date of entry of this Final Judgment.

(I) The provisions of this Section XII shall terminate ten years after the date of entry of this Final Judgment, provided that this subsection (I) shall not be deemed to affect the terms of any agreement or lease executed prior to the end of such ten-year period.

XIII.

[*"Distributor" Agreements*]

Each consenting defendant is enjoined:

(A) From including in any supply contract or in any agreement executed in connection with the making of a supply contract with any reseller distributor in the Pacific States Area a provision granting to such defendant an option or right to purchase or rent from such distributor any of such distributor's properties, facilities or equipment used or usable in the handling or distribution of refined petroleum products, and from exercising after the effective date of this Final Judgment any such option or right in any such contract or agreement then existing; provided that a consenting defendant (i) may contract for and exercise a right of first refusal, with respect to offers made or received by a distributor while his supply contract is in effect, to purchase or lease any of such distributor's properties, facilities or equipment and (ii) may take and enforce security rights in properties, facilities or equipment of a distributor.

(B) From requiring any reseller distributor in the Pacific States Area to refrain, or agreeing with any such reseller distributor that such distributor shall refrain, from selling or offering to sell any refined petroleum products or tires, batteries, or accessories to any existing or prospective customer or customers or classes of customers or outside the limits of any prescribed territory, unless said defendant, by written agreement with said distributor, reserves or has reserved for itself or for others handling such defendant's products the right to make such sales of said products or any of them or unless said defendant or another distributor of said defendant is then selling or offering to sell said product or products to the customer or customers in question.

XIV.

[*Requirements Contracts—Exclusive Dealing*]

Each of the consenting defendants other than Standard Oil Company of California and Richfield Oil Corporation is enjoined:

(1) From entering into or enforcing the provisions of any agreement with any dealer reseller in the Pacific States Area, or forcing any such dealer to enter into any agreement, whereby such dealer agrees

(i) to purchase from said defendant or from a source designated by said defendant all or substantially all of such dealer's requirements of any refined petroleum product or of tires, batteries, or accessories, or

(ii) to refrain from handling refined petroleum products or tires, batteries or accessories obtained from any other person;

(2) From selling any refined petroleum product to any dealer in the Pacific States Area on the condition

(i) that said dealer shall purchase other petroleum products or tires, batteries or accessories from said defendant or a source designated by said defendant;

(ii) that said dealer shall not sell or handle refined petroleum products or tires, batteries or accessories obtained from any other person;

Provided that any consenting defendant may require that any pump or tank or other container or receptacle for refined petroleum products or for tires, batteries or accessories furnished by it and marked as such to a dealer shall be used solely for the storing, handling or dispensing of such

products supplied by such defendant or source designated by such defendant, and may prescribe by agreement or regulations not inconsistent with this Section XIV for the storage, handling or dispensing of such products.

Provided, further, that any consenting defendant may limit use of its credit cards to whatever merchandise it chooses.

XV.

[*Boycotting Dealers*]

Each consenting defendant is enjoined from agreeing with any other defendant to follow a policy or practice of refraining from entering into any lease or supply contract with a dealer in the Pacific States Area unless consent is obtained from another defendant who has been or is currently supplying refined petroleum products to such dealer; provided that this Final Judgment shall not prevent such a defendant who is considering the solicitation or acceptance of a dealer supplied by another defendant or other person from making inquiry of such defendant or person to ascertain the existence and terms of any lease, contract, liens, mortgages or the like to which the dealer is a party or to which he is subject.

XVI.

[*Estoppel*]

(A) This Final Judgment is based upon an accord and a full compromise and settlement between plaintiff and the consenting defendants as of the date of entry of this Final Judgment of all issues raised by the charges made in the amended complaint herein and by the Outline of Plaintiff's Contentions filed herein on January 10 and February 4, 1957. This Final Judgment shall operate (and it is a condition to the consent of the consenting defendants to this Final Judgment, and this condition is agreed to by plaintiff, that this Final Judgment shall operate) as an estoppel and bar to any charge in any suit, proceeding or litigation instituted by plaintiff based upon or alleging: (i) any combination, conspiracy or agreement between two or more defendants, or monopolization, charged in the amended complaint or alleged in the aforesaid Outline of Plaintiff's Contentions; (ii) any continuation of such combination, conspiracy, agreement or monopolization; (iii) the effects or continued effects of any such combination, conspiracy, agreement or monopolization; or (iv) that any acts were done in furtherance of or pursuant to any such combination, conspiracy, agreement or monopolization or in the exercise of or aided by the monopoly power resulting from such combination, conspiracy, agreement, or monopolization. This Final Judgment shall preclude evidence to support any claims or contentions that prior to the date of entry hereof any two or more defendants jointly possessed such monopoly power or were otherwise guilty of any of the several violations of section 1 and 2 of the Sherman Act referred to above.

(B) This Final Judgment shall not constitute a bar or estoppel (and it is a condition to the consent of plaintiff to this Final Judgment, and this condition is agreed to by consenting defendants, that this Final Judgment shall not constitute a bar or estoppel) other than the bar and estoppel referred to in subsection (A) of this Section XVI, to any suit, proceeding or litigation which may hereafter be instituted by plaintiff against any one or more of said defendants: (i) for activities occurring after the date of entry of this Final Judgment; (ii) for acts of any defendant individually or in conjunction with a nondefendant including but not limited to acts or practices in the retail marketing of refined petroleum products; or (iii) for acts of two or more defendants not within the scope of the charges made in the amended complaint or alleged in the aforesaid Outline of Plaintiff's Contentions.

XVII.

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on notice reasonable as to time and subject matter given to any consenting defendant at its principal office, be permitted, subject to any legally recognized privilege:

(A) Access in the presence of such defendant's counsel and other representatives, during the office hours of such defendant, to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant

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which relate to any matters contained in this Final Judgment.

(B) To interview officers or employees of such defendant, subject to the reasonable convenience of such officers and employees and of such defendant, and without interference or restraint from it, regarding any such matters, at which interviews counsel for the officer or employee interviewed and counsel for such defendant may be present.

(C) To require a consenting defendant to submit reports in writing with respect to any matters or activities of such consenting defendant as the Department of Justice considers may constitute a possible violation by said defendant of Section XI of this Final Judgment.

No information obtained by the means provided in this Section XVII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment.

XVIII.

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the enforcement of compliance therewith, for punishment of violations thereof, and for the purpose of enabling any consenting defendant to move the Court for a protective order in respect of any request and notice by plaintiff under Section XVII.

Should any consenting defendant, upon application for modification or termination of any provision of this Final Judgment, with due notice to plaintiff and opportunity to be heard thereon, show to the satisfaction of the Court that the ability of such consenting defendant to compete in the Pacific States Area with any nonsignatory defendant is substantially impaired by reason of any provision of this Final Judgment, the Court may grant such relief to said defendant as it finds proper.

XIX.

[*Effective Date—Continuation*]

Except as otherwise provided in Section XII, this Final Judgment shall take effect six months after date of entry and shall continue in effect for fifteen years thereafter.

[¶ 69,400] United States v. Wichita Eagle Publishing Company, Inc., and Wichita Eagle, Inc.

In the United States District Court for the District of Kansas. Civil Action No. W-1876. Entered June 29, 1959.

Case No. 1466 in the Antitrust Division of the Department of Justice.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—Exclusive Dealing—Consent Decree—Practices Prohibited—"Tying" Arrangements—"Combination" Sales of Newspapers and Advertising.—Two newspaper publishers were prohibited by a consent decree from (1) refusing to sell "display" advertising separately in their morning, evening, or Sunday newspapers, (2) refusing to sell "classified" advertising separately in their morning, evening, or Sunday newspapers, and (3) refusing to sell separately their morning, evening, and Sunday newspapers to home subscribers and carriers. However, the publishers could require their carriers to service subscribers to all three of the newspapers. In addition, the publishers were prohibited from coercing or requiring advertisers to purchase more space in the newspapers than the advertisers desired.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.848; Monopolies, Vol. 1, ¶ 2610.850; Exclusive Dealing, Vol. 1, ¶ 4009.925.

Combinations and Conspiracies—Monopolies—Exclusive Dealing—Consent Decree—Practices Prohibited—Exclusive Dealing Arrangements—Publishers' Restrictions on Advertisers' Use of Other Advertising Media.—Two newspaper publishers were prohibited

by a consent decree from (1) publishing advertisements on the condition that its advertisers would not use other advertising media, (2) refusing to sell advertising in their morning newspaper until their advertisers refrained from using other advertising media, (3) refusing advertisers certain space, location, or arrangement of advertisements until the advertisers refrained from using other advertising media, and (4) granting advertisers special space, location, or arrangement of advertisements on the condition that they would not use other advertising media. In addition, the publishers were prohibited from limiting or restricting advertisers' use of other advertising media by discriminating as to rates charged among advertisers of the same general category, or by discriminating as to space, location, or arrangement of advertisements.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690, 2005.825; Monopolies, Vol. 1, ¶ 2610.280, 2610.300; Exclusive Dealing, Vol. 1, ¶ 4009.050, 4009.100, 4009.280.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited—Refusal to Deal—Refusal to Publish Newspaper Advertisements.—Two newspaper publishers were prohibited by a consent decree from refusing to publish advertisements which, along with the advertiser, met reasonable standards uniformly applied by the publishers.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.785; Monopolies, Vol. 1, ¶ 2610.720.

Department of Justice Enforcement and Procedure—Consent Decrees—Specific Relief—Notice of Decree—Publication of Terms of Decree in Defendants' Newspapers.—Newspaper publishers charged with exclusive dealing and "tie-in" sales of their newspapers and advertisements published therein were ordered by a consent decree to publish once weekly, for three weeks, the full terms of the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.60, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; and William D. Kilgore, Jr., Charles Whittinghill, Earl A. Jinkinson, Raymond P. Hernacki, Robert L. Eisen, and Sam J. Betar, Jr., Attorneys, Department of Justice.

For the defendants: Wayne Coulson, Paul R. Kitch, and John Paul Stevens.

Final Judgment

[*Consent Decree*]

DELMAS C. HILL, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on June 29, 1959; defendants having appeared and filed their answer to said complaint denying the substantive allegations thereof, and the plaintiff and defendants by their respective attorneys having consented to the entry of this Final Judgment without adjudication of any issue of fact or law herein and without admission by any party with respect to any such issue,

Now, Therefore, before taking any testimony and without trial or adjudication of any facts or law herein, and upon consent as aforesaid of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

The Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states claims upon which relief may be granted against defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, as amended, and under Section 3 of the Act of Congress of October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes", commonly known as the Clayton Act.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Metropolitan Wichita" shall mean the Wichita City Zone, as defined by the Audit Bureau of Circulation;

(B) "Person" shall mean any individual, partnership, firm, corporation, association or other business or legal entity;

(C) "Display advertising" shall mean any advertising carried in a newspaper of a defendant except classified advertising;

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(D) "Classified advertising" shall mean any advertising carried in the classified columns of a newspaper of a defendant.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with such defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Refusal to Sell*]

Defendants are enjoined and restrained from:

(A) Refusing to contract to sell, or refusing to sell, display advertising separately in the morning, evening or Sunday newspapers published by any defendant; provided, however, that this subsection (A) shall not prohibit defendants from granting discounts on such advertising on multiple insertions (within a period not to exceed five days) of identical copy and size in said morning and evening newspapers which do not exceed twenty per cent (20%) of the sum of the rates for the same amount of advertising when purchased separately, provided that change of copy is not permitted;

(B) Refusing to contract to sell, or refusing to sell, classified advertising separately in the morning, evening or Sunday newspapers published by any defendants; provided, however, that this subsection (B) shall not prohibit defendants from granting discounts on such advertising on multiple successive insertions (without a time lag) of identical copy and size in said morning and evening newspapers which do not exceed twenty-five per cent (25%) of the sum of the rates for the same amount of advertising when purchased separately, provided that change of copy is not permitted;

(C) Refusing to contract to sell, or refusing to sell to home subscribers or to carriers of defendants *The Wichita Eagle, The Evening Eagle,* or *The Wichita Sunday Eagle,* separately, provided that defendants may require their carriers to service their morning and evening and Sunday subscribers. Defendants shall permit their subscribers in Metropolitan Wichita to purchase defendants' morning, evening and Sunday newspapers on the following options:

Option A Morning only . . . (6 newspapers)
Option B Evening only. . . . (6 newspapers)
Option C Sunday only. . . . . (1 newspaper)

Provided, however, that, for a period of two years following the date of entry of this Final Judgment:

(1) Each of defendants' prices for Option A, Option B and Option C to subscribers in Metropolitan Wichita shall be no lower than their current prices for the same options, except that if the subscription prices actually paid by persons who subscribe to the daily newspaper published by defendants' competitor in Metropolitan Wichita are lower than such prices in any area, or areas, defendants shall be entitled to meet such lower prices in such area or areas;

(2) Defendants may offer any combination of the three above specified options, however, the price for any such combination shall be no less than the total of the options forming the combination;

(3) Defendants' rates to their carriers for any combination of Options A, B, and C shall be not less than the total of the options forming the combination, and shall not be reduced with the effect of causing a reduction contrary to paragraph (1) of this subsection (C);

(4) Nothing contained in this subsection (C) shall prohibit defendants from offering prizes or awards to their carriers or some gratuity to new subscribers as a form of short-term promotional inducement customarily used in newspaper subscription campaigns, except that any reduction in price to such a subscriber shall not exceed a two-month period and provided that nothing in this subsection (C) shall prevent defendants from granting the same promotional inducements offered by defendants' competitor in the daily newspaper field in Metropolitan Wichita.

Following the expiration of the said two-year period, defendants may at any time apply to the Court, after reasonable notice to plaintiff, for approval to institute or reduce combination rates, and in seeking such court approval, defendants shall have the burden of proving:

(a) That there is no reasonable probability that said combination rates will sub-

stantially injure, destroy or prevent competition in the daily newspaper field in Metropolitan Wichita; and

(b) That there is sound justification, such as actual or anticipated cost savings in publication, sales or distribution, for any discount sought on any combination of Options A, B and/or C.

V

[*Exclusive Dealing*]

Defendants are jointly and severally enjoined and restrained from directly or indirectly:

(A) Limiting or restricting, or attempting to limit or restrict any advertiser's use of any other advertising medium by discriminating:

(1) As to rates charged for advertising among advertisers of the same general category; or

(2) As to the space, location or arrangement of advertisements except as such discrimination may be necessitated by the objective dictates of the makeup of the paper;

Provided, however, that nothing contained in this subsection (A) shall prohibit defendants from granting concessions as to rates, space, location or arrangement of advertising, which represent no more than the good faith meeting of like concessions afforded by competing advertising media;

(B) Refusing to publish or threatening to refuse to publish advertisements where the advertiser and the advertisements meet the reasonable standards uniformly applied by defendants;

(C) Coercing or requiring advertisers to purchase more advertising space in defendants' newspapers than they desire; provided, however, that the mere refusal to publish promotional material as requested by advertisers shall not be considered coercion;

(D) Negotiating for publication, accepting for publication, or publishing advertisements, or entering into contracts for the publication of advertisements, on or accompanied by the condition, agreement or understanding that the advertiser shall not use, or shall limit or restrict his use of other advertising media;

(E) Refusing to contract to sell, or refusing to sell, advertising in the morning newspaper published by defendants until such time as the advertiser refrains from using, or limits or restricts his use of, other advertising media;

(F) Refusing an advertiser certain space, location or arrangement of advertising, until such time as the advertiser refrains from using, or limits or restricts his use of, other advertising media, or granting an advertiser special space, location or arrangement of advertising on the condition, agreement or understanding that the advertiser shall not use, or shall limit or restrict his use of, other advertising media;

(G) Publishing classified advertising without designating it as classified advertising and without the use of sub-heads of the kind customarily used to designate divisions or classes of classified advertising.

VI

[*Notice of Decree*]

Defendant, Wichita Eagle Publishing Company, Inc., is ordered and directed upon entry of this Final Judgment:

(A) To publish for three weeks, once weekly in all editions of *The Morning Eagle, The Evening Eagle,* and *The Wichita Sunday Eagle* in a conspicuous location on the front page thereof, the new subscription rates for the defendants' newspapers, in the size of type used for general news;

(B) Publish for three weeks, once weekly in all editions of *The Morning Eagle, The Evening Eagle,* and *The Wichita Sunday Eagle* the full terms of this Final Judgment, in the size of type used for general news;

(C) Notify promptly all regular advertisers (except such as have already received such notice) the rates applicable to them in conformity with the terms and conditions of this Final Judgment;

(D) Advise promptly, in writing, all officers, advertising agents, advertising solicitors and employees in its advertising departments of the terms of this Final Judgment and of the fact that each and every such person is subject to the provisions of this Judgment; and it shall make readily available to such persons a copy of this Final Judgment and inform them of such availability.

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VII

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its or his principal office, be permitted:

(A) Access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it or him, to interview officers or employees of such defendant who may have counsel present regarding any such matters. Upon such request said defendants shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the carrying out of this Final Judgment or the modification of any of the provisions thereof and for the purpose of enforcement of compliance therewith and punishment for violation thereof.

IX

[*Duration of Judgment*]

This Final Judgment shall terminate twelve (12) years from the date of its entry.

[¶ 69,401] Allied Properties v. Board of Equalization of the State of California.

In the California District Court of Appeal for the First District, Division One. Civ. No. 18342. May 18, 1959, as corrected May 25, 1959, and June 9, 1959. Petition for rehearing denied, June 9, 1959.

Appeal from a judgment of the Superior Court of the City and County of San Francisco. ALBERT C. WOLLENBERG, Judge. Reversed.

Proceeding in mandamus to compel the Department of Alcoholic Beverage Control to vacate a liquor license suspension. Judgment granting writ, reversed.

California Alcoholic Beverages Act

Fair Trade—Mandatory Fair Trading of Liquor Under California Alcoholic Beverages Act—Constitutionality—Alleged Delegation of Legislative Power.—The California Alcoholic Beverages Act, in making it mandatory that liquor manufacturers fair trade their products and imposing penal sanctions on non-complying retailers, did not delegate legislative power to private individuals in violation of the California and United States Constitutions. The statute was not invalidated by the fact that it (1) required the fair trading of all brands, while the general Fair Trade Act left that decision to the discretion of each brand owner, (2) imposed disciplinary action by the state on non-complying retailers instead of granting, like the general Fair Trade Act, a right of action to those injured by violations, (3) gave wine producers an option of submitting retail price lists to the California Department of Alcoholic Beverage Control instead of entering into fair trade contracts, and (4) excluded the sale of beer and over-the-bar drinks from its fair trade provisions.

See Fair Trade, Vol. 1, ¶ 3480.05.

For the appellant: Stanley Mosk, Attorney General, and Charles A. Barrett, Deputy Attorney General.

Amici Curiae on behalf of the appellant: Athearn, Chandler, Hoffman, Emmett E. Doherty, Arden & Arden, Brobeck, Phleger & Harrison, Pillsbury, Madison & Sutro, Heller, Ehrman, White & McAuliffe and J. Albert Hutchinson.

For the respondent: Steinhart, Goldberg, Feigenbaum & Ladar.

Amicus Curiae on behalf of the respondent: Samuels, Jacobs & Sills.

[*Appeal*]

BRAY, Presiding Justice [*In full text*]: The Board of Equalization of the State of California and its constitutional successor, the Department of Alcoholic Beverage Control, appeal from a judgment of the superior court ordering the issuance of a writ of mandate commanding the department to vacate its decision imposing a 15-day suspension against the off-sale general licenses of petitioner Allied Properties and that certain accusations against said petitioner be dismissed.*†

QUESTIONS PRESENTED

[*Mandatory Fair Trading—Constitutionality*]

Are sections 24750, 24757, 24850 and 24881, Business and Professions Code (formerly §§ 55.5, 55.6 and 55.65 of the Alcoholic Beverage Control Act (Stats. 1935, p. 1123, as amended Stats. 1937, p. 2126)) and rule 99 of the Department of Alcoholic Beverage Control, which require the manufacturer or his agent, wholesaler or rectifier to file fair trade contracts, unconstitutional in that they delegate legislative power and authority in violation of article IV, section 1, California Constitution, and the due process clause of the Fourteenth Amendment of the United States Constitution and of article I of the California Constitution? Primarily the question is whether the state may lawfully provide that all distilled spirits and wines be sold at the retail level only pursuant to fair trade contracts or schedules filed with the department.

RECORD

[*Judgment Below*]

Petitioner Allied Properties owns the Plaza and Clift Hotels in San Francisco and the Santa Barbara Biltmore in Santa Barbara. In 1953 accusations were filed against petitioner charging it with violation of the then sections 55.5, 55.6 and 55.65, A. B. C. Act, and department rule 99. The sections prohibit the sale of distilled spirits by an off-sale license holder except at the prices established by fair trade contracts filed as therein required, and also prohibits the sale of wines unless sold at the fair trade contract prices or at the price set in price schedules filed as therein required. The wholesalers, distributors or rectifiers of the alcoholic beverages that are within the purview of the statute must file price schedules with the authority and the retailer to whom they sell must comply with these price schedules or be faced with the penal sanctions of the act. At the hearing of the accusation petitioner stipulated to the facts as charged in the accusations, and readily admitted the sale at less than the fair trade prices. Petitioner's licenses were suspended for 15 days. Thereupon petitioner filed a petition for writ of mandate in the superior court. That court held that the statute requiring retail sales of distilled spirits at fair trade prices is unconstitutional.

IS THERE AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER?

[*Price Fixing—Legislative Standards*]

Petitioner and the *amicus curiae* in support of petitioner concede that the Legislature, in the proper exercise of the police power of the state, has the right to fix retail prices of distilled liquors and wines for the protection of the general welfare. They contend that in doing so, however, (1) the Legislature cannot delegate the power to fix such prices to private individuals or groups, and (2) that it cannot delegate that power without establishing ascertainable standards as a guide for the exercise thereof. They further contend that the statute in

* Subsequent to the filing of the writ of mandate proceeding in the superior court against the Board of Equalization, the Department of Alcoholic Beverage Control, by constitutional amendment, succeeded the Board of Equalization. Herein "department" refers to whichever entity was acting at the time.

† Four *amici curiae* briefs were filed in support of appellant, one in support of respondent.

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question here violates both of those principles.

As said in *Scovill Mfg. Co. v. Skaggs etc. Drug Stores* [1955 TRADE CASES ¶ 68,234], 45 Cal. 2d 881, 887 [291 P. 2d 936],

> "It is beyond question that this state has aligned itself with the great majority of its sister states and with the decisions of the federal courts in sustaining the constitutionality of fair trade laws . . ."

In that case the defendant was selling products at retail below the fair trade prices established by the plaintiff manufacturer in contracts made by the plaintiff with its buyers and wholesalers. The contracts complied with section 16902, Business and Professions Code, the general fair trade contracts section. The defendant was not a party to any of these contracts. Section 16904, Business and Professions Code, provided:

> "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

The constitutionality of those sections was there attacked upon the same grounds that the constitutionality of the statute in question here is attacked. The court said (pp. 884-885):

> "All of the constitutional objections raised by the defendant have been expressly or by necessary implication decided against it. In *Max Factor & Co. v. Kunsman* (1936), 5 Cal. 2d 446 [55 P. 2d 177], this court held that the Fair Trade Act, and in particular the provision as to nonsigners, was a proper exercise of the police power; that it was not arbitrary nor unreasonable legislation, and that it was not a denial of due process of law nor of the equal protection of the laws. That decision (see also *Pyroil Sales Co., Inc. v. Pep Boys, M. M. & J.*, 5 Cal. 2d 784 [55 P. 2d 194]) was in effect affirmed unanimously by the United States Supreme Court in *Pep Boys, M. M. & J. v. Pyroil Sales Co.*, 299 U. S. 198 [57 S. Ct. 147, 81 L. Ed. 122], on the authority of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.* (1936), 299 U. S. 183 [57 S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476]. The last case cited upheld the validity of the Illinois Fair Trade Act, which is substantially identical with the California act."

It then discussed the California cases and those in other states and the federal cases on the subject, and said (pp. 885, 888):

> "From the foregoing it also appears that the question whether the Fair Trade Act is a reasonable and non-discriminatory exercise of the police power in the field of interstate commerce has been covered by the federal and state legislation and settled by court decisions. . . . Nor is there a delegation of legislative power to fix prices in the present case. The act is only a legislative declaration that contracts between private parties establishing certain retail prices is not against public policy.
>
> "Although the question of delegation of legislative power was not expressly considered in the *Max Factor* case, the United States Supreme Court in *Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra,* 299 U. S. 183, 194, rejected the contention that in fair trade acts 'there is an unlawful delegation of power to private persons to control the disposition of property of others.' The contention that such delegation does not accord due process of law or violates provisions of state constitutions which vest legislative power in the Legislature only (similar to Cal. Const., art. IV, § 1) has been rejected in several state courts. (*Triner Corp. v. McNeil,* 363 Ill. 559 [2 N. E. 2d 929]; *Goldsmith v. Mead Johnson & Co.,* 176 Md. 682 [7 A. 2d 176]; *Johnson & Johnson v. Weissbard,* 121 N. J. Eq. 585 [191 A. 873]; *Lilly & Co. v. Saunders,* 216 N. C. 163 [4 S. E. 2d 528, 125 A. L. R. 1308]; *Weco Products Co. v. Reed Drug Co. supra,* 225 Wis. 474; see also 11 Am. Jur., Const. Law, § 221, p. 933.) Here the acts of private parties in entering into contracts for the sale of commodities constitute the facts in contemplation of which the Legislature acted, and upon the existence of which the provisions of the enactment were to be applicable. The private contracts are no more legislative in character than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute. The consequence that the statute has become applicable, and conduct in violation thereof has become actionable is in no way due to the exercise of any assumed legislative power on the part of the contracting parties. (See *Weco Products v. Reed Drug Co., supra,* 225 Wis. 474 [224 N. W. 426].) We conclude that there is no delegation of the legislative function in violation of constitutional prohibitions."

(See also *Old Dearborn Distributing Co. v. Seagram Distillers Corp.* [1932-1939 TRADE CASES ¶ 55,141] (1936), 299 U. S. 183 [57

S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476], upholding an Illinois Fair Trade Act similar to the California one.)

People v. Dunn, 80 Cal. 211 [22 P. 140, 13 Am. St. Rep. 118] held that the provisions in an act giving the board of trustees of the California Home for the Feeble Minded and two citizens authority to select a site for such a public home did not constitute a delegation of legislative functions or powers. In *Trinity County v. Mendocino County,* 151 Cal. 279 [90 P. 685], an act declaring in advance of the work that the line which might be surveyed and marked by a surveyor selected in accordance with its provisions should be the boundary line between the two counties, was held not to be an unlawful delegation of legislative power, the court saying (p. 286):

> "The case is similar in principle to those cases where it is held it is not a delegation of legislative power to commit to some officer, person or board the power to determine the fact that an applicant for some license or privilege is or is not of good character, or possesses or does not possess some other qualification necessary to entitle him, under the law, to the license or privilege, and empowering such officer, person or board, if it shall determine that such person has the necessary qualifications, to forthwith issue the license. In such cases the law declares that a certain class of persons are entitled to the license. The determination of the fact that a particular applicant is of the class described in the law as so entitled, is not a legislative act, but one which is either ministerial or judicial, and, hence, to commit the power to make such determination to any other person or body is not a delegation of legislative power."

[*Promotion of Temperance*]

Under the other fair trade laws of the state (Bus. and Prof. Code, §§ 16900-16905) the Legislature has given to private parties the right to sue persons who wilfully and knowingly sell any commodity at less than the price stipulated in a fair trade contract, even though such persons are not parties to the contract. In the case of the A. B. C. Fair Trade Act the Legislature gives the department the right to discipline licensees violating the terms of such contract. As it has been held in *Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra* [1955 TRADE CASES ¶ 68,234], 45 Cal. 2d 881, 888, that there is no unlawful delegation of legislative power in the other fair trade laws, we can see no reason why the A. B. C. Fair Trade Act should be interpreted differently from the others. Petitioner contends that there is a difference in that in the other fair trade laws the contract between the manufacturer and the retailer is a voluntary one, whereas under the A. B. C. Act the contract is compulsory. But even under the other fair trade laws, so far as they affect nonsigners of contracts which have been entered into between the manufacturer and its buyers and wholesalers, there is a compulsory feature. The nonsigner, if he has knowledge of such contracts, is compelled to charge the prices listed therein. Moreover, the power of the Legislature to regulate the liquor business is much greater than its power to regulate types of business which are not regarded as possessing the possibilities for evil and ill effects upon the public welfare as is the liquor business. Section 22 of article XX of the California Constitution gives the state broad and comprehensive powers to regulate all phases of the liquor business. It provides: "The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages." The Legislature may even prohibit the manufacture and sale of intoxicating liquors. If the business is permitted, its regulation may be drastic, provided only that the regulations are reasonable. (See *Cooper v. State Board of Equalization,* 137 Cal. App. 2d 672, 679-680 [290 P. 2d 914].) Of course, it could not be reasonable if it were for any reason unconstitutional. The test of reasonableness is not that applicable to ordinary businesses but to the liquor business which requires far more restrictions than the former. (See *Cooper v. State Board of Equalization, supra,* 137 Cal. App. 2d 672, 679.) The courts presume that legislative acts are valid and will not declare them unconstitutional unless they are clearly repugnant to the organic law. (See 45 Cal. Jur. 2d 624.) Also a statute regulating commercial transactions does not violate the due process clause of either the federal or California Constitutions unless it is proved so unreasonable as to dispel the presumption that it rests upon some rational basis within the knowledge and experience of the legislators. (*United States v. Carolene Products Co.,* 304 U. S. 144, 154 [58 S. Ct. 778, 82 L. Ed. 1234]; *In re Fuller,* 15 Cal. 2d 425, 428 [102 P. 2d 321].) It is obvious that the purpose of

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the provisions requiring sale of distilled spirits and wines pursuant to fair trade contracts is to discourage price cutting at the retail level, and thereby prevent the attendant threat of overindulgence by the public who might be enticed into buying particular brands of liquor because of bargain prices offered by a retailer. One of the objects of the A. B. C. Act as set forth in section 1 (now Bus. and Prof. Code, § 23001) is "to promote temperance in the use and consumption of alcoholic beverages." Again it is to insure to the public the fact that when brand liquor is purchased the purchaser will know that his retailer is selling it at the same price as it is sold elsewhere and hence eliminates discrimination against the consumer. The section further states: "It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes." The restriction is one more aid in the promotion of temperance.

[*Police Power*]

In making the sale of distilled spirits pursuant to fair trade contracts mandatory the Legislature has acted within the police power of the state and within the authority granted by article XX, section 22, California Constitution. We cannot say that the legislative assumption that price stability at the retail level of comparable brands will prohibit price wars and bargain sales and thereby will encourage and promote moderation and temperance in the use of alcoholic beverages is unfounded. On the contrary, it appears that the restriction which prevents use of particular brands of distilled spirits as "loss leaders" which use might increase the consumption of such beverages is a reasonable one.

[*Compulsion*]

Petitioner relies heavily on *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436. There the Legislature created a State Board of Dry Cleaners, consisting of seven members, six of whom must be engaged in the dry cleaning business, the seventh a member of the general public. The board was empowered to establish minimum price schedules for the various items of cleaning, dyeing and pressing services. The act provided that violations of the minimum price schedule could be prevented by injunctive relief. The statute was held unconstitutional because it (1) dealt with a business which in nowise was affected with a public interest and the price fixing provision was in nowise an enactment providing for the public health, safety, morals or general welfare and hence there was an improper exercise of the police power; (2) attempted to delegate legislative powers to an administrative board comprised of persons directly interested in the operation of the regulatory rule with no guide for the exercise of the delegated authority. The court held that the delegation was clearly arbitrary. Obviously the first ground could not apply in our case as the liquor business is one affected with a public interest and the restriction here is for the public health, safety, morals and general welfare, and the regulation is a proper exercise of the police power. As the court in *Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra,* 45 Cal. 2d at p. 887, pointed out, the California Fair Trade Act is completely dissimilar to the price fixing statute of the *Thrift-D-Lux Cleaners* case. The court said (pp. 887-888):

> "As held in the *Max Factor* case and here confirmed the Fair Trade Act is a proper exercise of the police power by the Legislature in the protection of private contractual rights relating to the manufacture and sale of certain classified commodities deemed by the Legislature to require freedom from governmental interference in the economic field. The *Dry Cleaners* case expressly recognized that to be the basis for the decision in the *Max Factor* case (40 Cal. 2d 436 at p. 447). Nor is there a delegation of legislative power to fix prices in the present case. The act is only a legislative declaration that contracts between private parties establishing certain retail prices is not against public policy."

[*Testing Constitutionality—Method*]

The method of interpreting the A. B. C. Act cannot be the same as that used in interpreting the statute involved in the *Thrift-D-Lux* case. So long as some public interest is found (which of course it is in the liquor business) the method to be used in testing the statute's constitutionality is not that used in the *Thrift-D-Lux* case, but that used in such cases as *Serve Yourself Gas etc. Assn. v. Brock,* 39 Cal. 2d 813, and *In re Fuller, supra,* 15 Cal. 2d 425.

Under the California Fair Trade Act the manufacturer makes two decisions, (1) whether his product should be fair traded, and (2) what the price shall be. Under the A. B. C. Act he can make the second decision only. The Legislature has determined the first decision. As it has been held that there is no delegation of legislative authority to the manufacturer where he has two decisions to make, how can there be such delegation where he has only one of those decisions to make? While the voluntary aspect of the contract under the Fair Trade Act is stressed by petitioner, it should be remembered that it is compulsory that nonsigners of the contract comply with it. In holding such compulsion to be valid the principle of compulsion in fair trade contracts has been established. In the interests of the public welfare it is more important that compulsion be applied to the liquor business than to the ordinary business where strict regulation is not required. In *Levine v. O'Connell* (1949), 275 App. Div. 217 [88 N. Y. S. 2d 672], affirmed 300 N. Y. 658 [91 N. E. 2d 322], cited by petitioner, and which condemned a New York statute not because the Legislature required liquor to be fair traded, but because the Legislature had delegated to an administrative board the authority to determine whether resale prices should be determined by fair trade contracts, the court said (p. 674):

> "We assume, but without deciding, that it would be within the competence of the legislature to determine that mandatory price-fixing in the sale of alcoholic beverages would be a proper exercise of the police power. The important point for this case is that the legislature has not done so . . ."

[*Price Fixing*]

The A. B. C. Act does not fix, or authorize anyone to fix, uniform prices for alcoholic beverages, while the dry cleaners' statute did fix uniform prices for the services involved. Section 16720, Business and Professions Code, expressly forbids any agreement or combination to fix uniform prices. The fair trade provisions merely provide for the orderly marketing of distilled spirits by requiring that each brand be fair traded. Each brand owner sets the retail price for his brand alone and for no other brand. Such price is required to be fixed "in fair and open competition with alcoholic beverages of the same general class produced by others . . ."

[*Disciplinary Action by State*]

The fact that, as contended by petitioner, the general Fair Trade Laws leave the discretion of fair trade prices to each brand owner while the A. B. C. Act requires that all brands of distilled spirits be fair traded, and the fact that the general law gives a right of action to a person damaged by a violator's breach of the fair trade contract while the A. B. C. Act provides for disciplinary action of a licensee violating such contract, do not convert the legislative determination of policy in favor of fair trading liquor into a delegation of legislative power. As it has the right to do in regulating the liquor business, the Legislature provided mandatory price fixing by the distillers, etc., with disciplinary action by the state for failure to comply. The mandatory feature proves to some extent that there is no unlawful delegation of authority. The manufacturer has no discretion, as in the general fair trade situation, in determining whether fair trade prices shall prevail. Nor is the Legislature bound in dealing with the liquor business to apply the same penalties for violations of fair trade contracts as are applied to other types of business. Actually, suspension or revocation of a liquor license is not penal, but disciplinary. (*Cornell v. Reilly*, 127 Cal. App. 2d 178, 184 [273 P. 2d 572].) *Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra* [1955 TRADE CASES ¶ 68,234], 45 Cal. 2d 881, stated, in effect, that fair trade statutes were not primarily designed for the regulation of prices, but were principally designed to protect the property and contract rights of the manufacturer. In the A. B. C. Act this is not the primary purpose. As pointed out before, the primary purpose is to prevent price cutting in the interests of temperance, to regulate the liquor business. The fact that it also protects the property rights of the manufacturer does not make the statute unreasonable nor unconstitutional. Nor is it a price fixing statute any more than the general fair trade statutes are.

[*Free Competition*]

Nelson v. Reilly [1948-1949 TRADE CASES ¶ 62,326], 88 Cal. App. 2d 303 [198 P. 2d 694], assumed the legality of the then section 55.5, A. B. C. Act. (Apparently its

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legality was assumed by the parties as it was not challenged except as to the application of the Cartwright Law which the court held could not apply.) There it was contended that at the time rule 99 was amended to make fair trade contracts mandatory, section 55.5, A. B. C. Act, provided that they were permissory. The court pointed out that in 1947 said section 55.6 was added to make such contracts mandatory and held that as now a retailer's duty arose from the statute, and as the rule now imposed the same duty as the statute the question of its previous situation was moot, and the rule could now be enforced.

In *Levine v. O'Connell, supra,* 88 N. Y. S. 2d 672, affirmed 91 N. E. 2d 322, it was held that a legislative act which gave a liquor board the discretion to determine whether or not fair trade liquor contracts should be mandatory, was invalid. However, the court indicated that if the Legislature had made fair trading mandatory, the act would have been valid. Thus, the New York court felt that the exercise of the legislative function was in the making of fair trade contracts mandatory, and not in the setting of the price. See *Schwartz v. Kelly* [1953 TRADE CASES ¶ 67,559], 4 Conn. 176 [99 A. 2d 89], upholding a Connecticut statute requiring the manufacturer to place on its brand label a statement that a minimum consumer retail price had been filed with the liquor control commission, and which made a violation punishable by suspension or revocation of the violator's permit. Even though there were, as contended by petitioner, a delegation of power to the manufacturer, nevertheless such delegation would not be without standards provided by the Legislature. The price set by the manufacturer is what the market will bear, and is determined by the standards present in any market where goods are competing with each other. The standards are those which control prices in any free market. This distinguishes the "price fixing" in the *Thrift-D-Lux* case. There prices were fixed on a horizontal level for the whole industry. The cost to the consumer was predetermined and no matter to what dry cleaning shop he went the cost would be the same. Under the instant act the cost to the consumer of a bottle of a certain brand will be the same wherever he goes. But the consumer may find that the cost of a comparable brand is not the same as that of the first mentioned brand. The manufacturer of the latter brand may not control the price of the competing brand. The manufacturer's determination of the price of his product will, of course, be affected by other manufacturer's prices for comparable brands, but this is true in any free market, and, in fact, is the crux of free competition. Unquestionably, the Legislature could have set minimum prices for various types of alcoholic beverages. It did not do so. It undoubtedly felt that it is more in the public interest that the prices be not so strictly controlled, and that the prices set in open competition by the manufacturer will be of more benefit to the public than by the Legislature rigidly controlling the price. These standards have controlled our American economy in the past, and presumably have aided the economy in becoming as prosperous as it is. We see no reason why the Legislature may not adopt these standards in the regulation of the liquor business. Here there is no setting of prices multilaterally as in the *Thrift-D-Lux* case. In fact, the setting of prices among competing manufacturers is made illegal. Retailers are not permitted either under permissive fair trade, or under mandatory fair trade to set their own prices to compete with other retailers. One of the purposes of the regulation is to prevent monopoly by large liquor retailers, particularly multiple unit retailers ("chains") to the ultimate destruction of the smaller neighborhood store. This is in the interest of the public welfare.

While it is true that in leaving competition free at the manufacturing level and the manufacturers may cut prices, it is reasonable to assume that the Legislature believed that such competition would not cause such drastic reductions in prices as might occur at the retail level, there being vastly more retailers than manufacturers.

[*Means Adopted by Legislature*]

The means adopted by the Legislature to bring about an orderly distribution of liquor at the retail level and to obtain temperance is not arbitrary or discriminatory. For this purpose the Legislature has made mandatory the use of fair trade contracts. The Legislature knew the effect of fair trade contracts when it made fair trade contracts permissible. This legislation has been upheld by the California Supreme Court twice. (*Max Factor & Co. v. Kunsman* [1932-1939

TRADE CASES ¶ 55,100], 5 Cal. 2d 446 [55 P. 2d 177]; *Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra* [1955 TRADE CASES ¶ 68,234], 45 Cal. 2d 881.) The Legislature to accomplish the same effect, although perhaps for a different purpose (see *supra*), saw fit to make fair trade contracts mandatory in the liquor industry. It cannot be said that this course, to accomplish a desired result, was unreasonable.

[*Other State Courts*]

Other state courts faced with the problem of the constitutionality of price regulation in the liquor industry have generally held such statutes valid. See 14 A. L. R. 2d 699; *Gaine v. Burnett,* 122 N. J. L. 39 [4 A. 2d 37] (an administrative rule by the state liquor commissioner which required that alcoholic beverages be fair traded, and that retailers sell at the prices so established, held valid); *Nocera Bros. Liquor Mart v. Liquor Control Hear. Board,* 81 R. I. 186 [100 A. 2d 652] (statute allowing liquor board to fix prices on a cost plus percentage mark up, held valid); *Reeves v. Simons,* 289 Ky. 793 [160 S. W. 2d 149] (same); *Gipson v. Morley,* 217 Ark. 560 [233 S. W. 2d 79] (same).

In *Schwartz v. Kelly, supra* [1953 TRADE CASES ¶ 67,559], 99 A. 2d 89, contentions similar to most of those made in our case were made and well answered (pp. 91-93):

"In passing upon the constitutionality of a statute, a court is bound to make every presumption and intendment in favor of the statute and to sustain it unless it is clearly invalid. [Citations.] . . . The court's only function is to determine whether the object of the enactment is within the power of the legislature and, if so, whether the particular statute bears a reasonable and substantial relation to the object sought to be accomplished and is neither arbitrary nor discriminatory. (*Carroll v. Schwartz,* 127 Conn. 126, 129 [14 A. 2d 754].)

"Although the act here in question does not contain a statement of the objects sought to be accomplished, the purposes which the General Assembly had in mind in adopting it are easily discernible. They were both to promote temperance in the consumption of intoxicating liquor and, by stabilizing the industry, to encourage observance of the Liquor Control Act by those who are permitted to sell liquor not to be consumed on the premises. It may reasonably be presumed that, without the establishment of a minimum retail price for brand liquor, price wars among retail dealers are apt to occur. The cutting of prices which occurs during such wars may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained. Moreover, the cutthroat competition which ensues is apt to induce the retailers to commit such infractions of the law as selling to minors and keeping open after hours in order to withstand the economic pressure. To prevent the occurrence of such conditions promotes public health, safety and welfare. Like all reasonable restrictions on the liquor traffic, such a purpose is well within the police power of the state. [Citations.]

"To accomplish this purpose, the General Assembly has, in this instance, adopted the method of permitting wholesalers to fix minimum prices at which each brand of liquor may be sold at retail. Price fixing is well recognized as a method reasonably suited to effectuate such purpose and, therefore, is not a violation of due process. [Citations.] Clearly, the act which requires wholesalers as a condition of doing business in this state to schedule minimum prices at which their brands of liquor may be sold and prohibits permittees from selling at retail for less than those prices is within the police power of the state. . . .

"The second broad claim of the plaintiffs is that the act is unconstitutional because it delegates legislative powers both to the wholesalers of intoxicating liquor and to the liquor control commission without prescribing standards to control the exercise of those powers. [Citations.] The act affects the wholesalers in only two ways. In the first place, it prohibits their doing business in this state until they have filed their schedules of retail prices. In the second place, it protects the property rights which they have in their respective brand names by prohibiting the sale of their branded liquors at cut rates. In filing the schedule of minimum retail prices to be charged for their liquor, they are not legislating. They are merely complying with the law enacted by the General Assembly. Their fixing of prices, by itself, does not have the force of law. It is the General Assembly that has directed that retailers shall not sell for less than the established prices. There has been no delegation of legislative powers to the wholesalers. *Old Dearborn Distributing Co. v. Seagram Distillers Corporation,* 299 U. S. 183, 194 [57 S. Ct. 139, 81 L. Ed. 109, 106 A. L. R. 1476]."

Schwegmann Bros. v. Louisiana Board etc. Control (La.) [43 So. 2d 248, 14 A. L. R. 2d

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680], and *Scarborough v. Webb's Cut Rate Drug Co.*, 150 Fla. 754 [8 So. 2d 913], have held price regulation to be unconstitutional. They are against the weight of authority. Moreover, we deem the reasoning of the majority cases better, particularly in view of the attitude of the California Supreme Court as expressed in *Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra* [1955 TRADE CASES ¶ 68,234], 45 Cal. 2d 881.

[*Optional Requirement*]

Under Business and Professions Code, sections 24750 through 24757, manufacturers of distilled spirits (liquor) are required to enter fair trade contracts, whereas under sections 24850 through 24881 manufacturers and producers of wine have the option of submitting retail price lists with the Department of Alcoholic Beverage Control, rather than entering fair trade contracts. This difference would not seem controlling since under either scheme the manufacturers are the ones who "fix" the retail prices. If fair trading is legal (and it is concluded that it is), the optional requirement of submitting price lists would also seem allowable. The sections relating to beer (§§ 25000-25010) are inapposite to this litigation because petitioner was not charged with violations of these sections.

[*Exclusions*]

The fact that the Legislature has not seen fit to apply fair trade requirements to the sale of beer and over the bar drinks does not invalidate the restrictions which the Legislature did impose. Historically there has always been a distinction in the manner of regulating the sale of beer as compared to other alcoholic beverages. As far as fair trading over the bar drinks is concerned, the obviously many practical difficulties of making and enforcing such regulations could well have actuated the Legislature. The answer to somewhat similar contentions made in *Miller v. Wilson*, 236 U. S. 373, 383-384 [35 S. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F 829], is applicable here: "The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone v. Pennsylvania*, 232 U. S. 138, 144 [34 S. Ct. 281, 58 L. Ed. 539]. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.'"

[*Judgment Reversed*]

The judgment is reversed.

WOOD, (FRED B.), J., concurred.

[Dissenting Opinion]

HANSON, Justice *pro tem.* [*In full text*]: I dissent from the opinion and judgment of the court in this case, and wish simply to state the grounds of my dissent, with a few observations thereon, without any attempt to do more. I concede, of course, that the result reached by the majority of the court probably is a desirable one if the aim is to achieve temperance, but I have difficulty in understanding how it can be deduced that the ruling does not trench upon constitutional principles. We must never forget that decisions which are classed as desirable must nevertheless meet and square with those principles embodied in our Constitution—state and federal. In 1919 temperance was sought to be achieved by legislation taking the form of a constitutional amendment which made the manufacture, sale, or transportation of intoxicating liquors illegal. That amendment, the 18th, did not reach the objective, in the view of the majority of the citizens of our nation, and hence was repealed in 1933. We now have a statute before us for interpretation purporting to have much the same objective in view. That it restricts free enterprise cannot be gainsaid; that it may, if upheld, create a measure of greater temperance, as the Legislature hoped, is possible; but that we should not whittle down constitutional safeguards to achieve a single desirable result seems to me equally clear. What is more, or so it seems to me, is that our free enterprise system should not enrich a small minority at the expense of the great majority. In the statute before us the "brand" liquor dealer is benefited and the consumer is harmed so far as "price" is concerned.

[*Delegation of Price Fixing Power*]

Turning to the legal aspects of the case we find that under the statute here involved no distiller or brand owner of distilled liquors can sell his product in California unless he schedules the minimum price at which the retailer may sell his products within the state, and, having done so, a retailer must abide by the price so set. This then gives to the original purveyor a price monopoly; that is, he not only must set his own minimum price to the retailer on his product regardless of its intrinsic value but require the retailers to sell at or above the retail price he names as the minimum price. But this is not all; it is the further duty of the state through the Alcoholic Beverage Control Act to enforce the scheduled price through its penal sanctions, one of which is to suspend the retail dealer's liquor license, if and when he violates the act. Granted, for the sake of argument that the trend of judicial decisions in this state and elsewhere favors the view of the majority of this court, no decision is extant in this state that goes as far as the majority does in this case.

In the legislative act before us, for interpretation and decision, the Legislature has delegated the right to fix the minimum price at which a retail liquor dealer, with a valid license, can sell a "brand" or "non-brand" bottle of liquor, not to a board or officer of the state, but to a private individual. Thus, the very person or corporation that manufactures or distributes the product sets the price at which the retailer may and must sell without any right of any kind or character on the part of any representative of the state to challenge it for price, quality, or otherwise. This to me is uncontrolled monopoly run riot with state sanction.

[¶ 69,402] The American Securit Company v. Shatterproof Glass Corporation.

In the United States Court of Appeals for the Third Circuit. Nos. 12,706, 12,739. Argued February 17, 1959. Filed July 14, 1959. Amended August 3, 1959.

Appeal from the United States District Court for the District of Delaware. EDWIN D. STEEL, JR., District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Patents—Package Licensing—Payment of Royalties on Expired Patents—Patent Misuse and Violation of Government Consent Decree—Defense to Patent Infringement Suit.—A company's policy of compulsory package licensing constituted a violation of a Government antitrust consent decree entered against the company and constituted a misuse of patents of such a character as to prohibit the company from maintaining a suit for the alleged infringement of four patents owned by it and included among some thirty-five patents covered by the consent decree. There was no question that the company maintained a policy of requiring its licensees to accept package licensing. The defendant in the infringement suit, amounts of royalty for certain patents not being obtainable from the company, made a bona fide application to the company for licensing under the decree, which required the company to license any, some, or all of its patents covered in the litigation. The question of whether or not the defendant made a bona fide application for licensing was material only by way of corroboration of the company's policy. If the defendant's hands were unclean in that it made no bona fide application, that uncleanliness would not render the company's hands clean if it is unlawfully extending a patent monopoly. The court noted that none of the patents covered by the consent decree, which included the four patents sued on, was in the record, and that, therefore, it could not tell whether patents which the company had offered to the defendant as a package were dominant in the flat glass-making art. It appeared that some of the patents were apparatus or process patents in the art. However, the court further noted that it was not presently concerned with the issue of whether those patents offered by the company to the defendant would sustain a charge of violation of the antitrust laws. The conjoint licensing by mandate of the patentee of two or more apparatus or process patents in the same art, whatever the nature of their disclosures, whether for basic inventions or mere minor improvements, will sustain a charge of patent misuse.

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"Each patent gives its owner a monopoly in respect to its disclosures, so much and no more. It is a grant of the exclusive right to manufacture, use and sell the invention which is disclosed. That invention is what the patent grant protects by the monopoly, not that invention plus some embellishment, improvement, or alternate product or process, which also happens to be patented. * * * Each monoply must stand on its own footing. * * * Mandatory package licensing is no more than the exercise of the power created by a particular patent monopoly to condition the licensing of that patent upon the acceptance of another patent but that is too much. The protection, or monopoly, which is given to the first patent stops where the monopoly of the second begins." Also, a provision of the company's standard licensing agreement which provided that such agreement shall continue "in full force and effect to the expiration of the last to expire of any" of the company's patents set forth in the agreement constituted a patent misuse. It "extends the payment of royalties of patents under patents which may expire to the expiration date of that patent most recently granted to" the company. The company, therefore, misused its patents, and such misuse constituted a valid defense to the company's infringement suit.

Also, the company violated the Government consent decree, which prohibited the company from including any restriction or condition whatsoever in any license or sublicense granted by it and from granting any license which provided as a condition that the applicant should accept a license under another patent owned or controlled by the company. The company's actions demonstrated a violation of the decree's conditions. The court did not agree with a contrary ruling by the court which had entered the decree.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.460, 2013.500; Private Enforcement and Procedure, Vol. 2, ¶ 9041.

Department of Justice Enforcement and Procedure—Consent Decree—Patent Misuse and Violation of Decree—Jurisdiction of Court Which Did Not Enter Decree to Determine Issues—Power to Enjoin Relitigation of Issues in Court Which Entered Decree.—The United States District Court for the District of Delaware had the jurisdiction to construe and interpret, in a patent infringement action, the provisions of a Government consent decree entered in the United States District Court for the Northern District of Ohio, for the purpose of determining whether or not the plaintiff in the infringement action violated provisions of the decree. The defendant in the infringement action was not a party to the proceeding in the Ohio court when the consent decree was entered, and it did not subsequently become a party to that proceeding. The Delaware court had jurisdiction of the parties and of the subject matter and was entitled to adjudicate the issues presented. An order of the Ohio court, construing the provisions of the decree differently from the Delaware court, was entered after the Delaware court's rulings. The reviewing court noted that while the interpretation given to the decree by the Ohio court, which framed the decree, was entitled to great weight, it could not agree with that interpretation.

An order of the Delaware court enjoining the plaintiff in the infringement action from taking any action in the Ohio court (in the Government action) "which will seek a determination, finding or any other type of adjudication or judicial expression as against * * * [the defendant in the infringement suit] which is in conflict with any one or more of the * * * views" expressed by the Delaware court was affirmed.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8401, 8421; Private Enforcement and Procedure, Vol. 2, ¶ 9041.

Private Enforcement and Procedure—Antitrust Law Violations as Defense—Unfair Competition Claims—Misuse of Patents and Violation of Government Consent Decree—Relation Between Patent and Unfair Competition Claims.—The dismissal of unfair competition claims asserted by a patentee in its patent infringement suit, where it had been held that the patentee was not entitled to enforce its patents because of its misuse of the patents and actions in violation of a Government antitrust consent decree, was affirmed on the basis of the trial court's opinion. The trial court had held that the unfair competition claims were related to the patent claims, and that, since the patentee could not enforce its patents against the defendant, the defendant's alleged acts of unfair competition

with respect to those patents did not constitute actionable wrongs. In other words, unless the patentee was entitled to enforce is patents against the defendant, the defendant's alleged acts of unfair competition constituted no invasion of any right possessed by the patentee.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.640.

For the appellant: John L. Seymour and Joseph W. Burns, New York, N. Y.

For the appellee: William C. McCoy, Jr., Cleveland, Ohio.

Affirming decisions of the U. S. District Court, District of Delaware, 1959 Trade Cases ¶ 69,275 and 69,274 and 1957 Trade Cases ¶ 68,802.

Before Biggs, Chief Judge, and McLaughlin and Kalodner, Circuit Judges.

Opinion of the Court

[*Decree Against Plaintiff*]

By Biggs, Chief Judge [*In full text*]: The background of the appeals at bar is complicated.[1] We begin with facts relating to the so-called "Toledo decree" as follows. The United States charged The American Securit Company, the plaintiff in the case at bar, and certain other corporate defendants, with violations of the antitrust laws of the United States in connection with certain patents for the tempering of glass owned or controlled by them. This resulted, on October 30, 1948, in a final judgment by consent decree entered by Judge Kloeb in the United States District Court for the Northern District of Ohio, Western Division at Toledo, against Securit and other defendants named in that suit, Civil Action No. 5239 [1948-1949 Trade Cases ¶ 62,323], the Ohio suit.

[*Compulsory Licensing Provision*]

The consent decree provided that if a request for license was made to one of the patentees, defendants in the Ohio suit, including Securit, for use of "any, some, or all" of the patents covered by that litigation and an agreement as to the royalty to be paid by the applicant could not be reached between the patentee and the applicant for a license within sixty days of the request, the applicant could apply to the Ohio District Court to fix a reasonable royalty. In the meantime, pending the fixing of a royalty rate, the applicant should be entitled to make use of the patent or patents without being charged with infringement and without payment of royalties. The decree stated also that the burden of proof should rest on the owner of the patent to establish the reasonableness of the royalty demanded. The decree provided as well that either the applicant or the owner of the patent could apply to the Ohio court to fix an interim royalty rate, the decree stating further that:

> "Where an interim license or sublicense has been issued pursuant to this Subsection, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under the same patents to the date the applicant filed his application with the Court."

The Ohio court also retained jurisdiction for the purposes of making such further orders or directions as might be necessary to construe or carry out the purposes of the decree. Any party to the judgment, including, of course, Securit, could apply for a construction of the Toledo consent decree. Section XIV(B) of the consent decree provided in substance that each of the corporate defendants was restrained from including any restriction or condition in any license or sublicense granted by it subject to certain exceptions not pertinent here.

[*Negotiations for License*]

On March 20, 1951, negotiations were opened by Shatterproof Glass Corporation with an inquiry to Securit respecting the possibilities of obtaining a license under certain patents owned by Securit. Correspondence continued between the two corporations until February 1955. It appears from the correspondence between the two companies that Securit did not desire to license Shatterproof under any of the patents unless it licensed Shatterproof under all of them, as

[1] A factual history is set out in the opinion of Judge Steel of the court below. [1959 TRADE CASES ¶ 69,274, 69,275], 166 F. Supp. 813, 818-822. See also the opinion of Chief Judge Leahy, [1957 TRADE CASES ¶ 68,802], 154 F. Supp. 890 (1957).

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set out and described in "Schedule A" attached to Securit's Standard Licensing Agreement referred to more specifically hereafter. Securit offered to Shatterproof the Standard Licensing Agreement which Securit had employed with several other licensees. The royalty for the entire package of patents was to be two cents (2¢) per square foot of glass manufactured and sold by the licensee regardless of the number of patents actually used. Correspondence between Shatterproof and Securit ceased temporarily on July 12, 1951. About September 1952, it appears that Shatterproof installed equipment for the manufacture of tempered flat glass. On March 4, 1953, Shatterproof renewed the correspondence and in its letter to Securit requested licenses under the Toledo decree and asked for royalty under four different combinations of patents. Securit's reply of March 19, 1953, indicated that that company would issue licenses restricted to patents specified by Shatterproof but that the royalty would be the same, 2¢ per square foot, whether one or more patents would be used by the licensee.

It appears that Shatterproof commenced commercial production of glass in June 1953, and has not paid any royalty for the use of the patents to date.

[*Infringement Action—Defense*]

The suit at bar was commenced on March 7, 1955, and contained six counts. Counts I to IV, inclusive, *mutatis mutandis,* alleged that Shatterproof constructed apparatus infringing four individual patents[2] and thereby deprived Securit of profits. Counts V and VI of Securit's complaint in the court below were designed to state causes of action based on unfair competition growing out of the alleged infringements and asserted that the negotiations initiated and carried on by Shatterproof with Securit were spurious, not looking toward securing licenses but were instituted in order to make use of the patents without paying royalties to Securit. Securit sought an accounting, damages and an injunction. Shatterproof filed an answer to this complaint, denying the validity of the patents or their infringement, and by way of affirmative defenses, asserted that Securit was insisting on package licensing and thereby (1) was itself indulging in misuse of patents, and (2) was in violation of the Toledo decree. Shatterproof also counterclaimed for a declaratory judgment to have the patents adjudged invalid and not infringed.

Several affidavits were executed on behalf of the respective parties. Extensive depositions were taken. The Toledo consent decree was introduced, as were portions of the proceeding in the Ohio court. Some of these documents are referred to more particularly hereinafter.

On June 13, 1955, Securit filed motions in the instant case to dismiss the defenses of patent misuse and violation of the Toledo decree. These motions were denied on May 25, 1956, in an opinion letter by Judge Leahy. Appropriate orders were entered.[3]

[*Ohio Court Proceedings*]

On July 25, 1955, Shatterproof filed an application in the Ohio court seeking, *inter alia,* a determination of a reasonable royalty for the patents sued on in the court below and for an order requiring Securit to comply with the Toledo decree. On September 14, 1955, Securit filed a motion in the case at bar to enjoin Shatterproof from prosecuting its application to the Ohio court referred to in the preceding sentence. On October 6, 1955, the United States filed in the Ohio court a petition for an order to construe and enforce the consent decree, alleging that Securit's action in bringing the suit at bar against Shatterproof was instituted as an attempt to defeat the Toledo decree and was barred by it and prayed that Securit be permanently enjoined from taking action in any court to prevent any applicant for a license from exercising any rights conferred by the Toledo decree. On October 7, 1955, the

[2] The patents were: United States Patent No. 2,131,406, Mosmieri; United States Patent No. 2,167,294, Despret; United States Patent No. 2,093,040, Eckert, expired September 14, 1954; and United States Patent No. 2,303,749, Long.

[3] Addressing himself to the second defense, Judge Leahy stated: "This defense refers to the Toledo decree and asserts its [Shatterproof's] right to a royalty-free license. Under this defense defendant shows that it has attempted to negotiate for several years with plaintiff in order to fix some reasonable royalty base for a license from plaintiff to defendant. Under the original Toledo decree any party may operate under plaintiff's patents during the period of negotiations for a license and before the license is actually granted. Here, on the record before me, it would appear defendant has made a bona fide effort to obtain a license." These orders are also appealed from as appears at a later point in this opinion.

United States intervened in the suit at bar and filed a "Representation" in which it asked the court to refrain from taking any further action pending a decision by the Ohio court on the petition of the United States filed therein which we have referred to in this paragraph. On October 10, 1955, the court below entered an order denying Securit's motion to restrain Shatterproof from prosecuting its application in the Ohio court and staying the case at bar until after the determination by the Ohio court of the petition of the United States filed therein. On October 19, 1955, Judge Kloeb, of the Ohio court, delivered an oral opinion in which he stated his reasons for declining jurisdiction.[4] On December 13, 1955, Judge Kloeb dismissed the petition of the United States and the application of Shatterproof seeking respectively an injunction against Securit from taking any action in any court preventing an applicant for license from exercising any rights conferred by the Toledo decree and a determination of reasonable royalties. On January 20, 1956, Securit filed a motion in the court below entitled a "Motion to Proceed", based upon Judge Kloeb's actions in the Ohio suit.

[*Summary Judgment*]

On December 26, 1956, Shatterproof filed a motion in the court below for summary judgment to dismiss the patent infringement counts, Counts I through IV, urging misuse and violation of the Toledo decree as grounds for the dismissal. Securit opposed the motion for summary judgment. On February 20, 1957, the defendant Shatterproof moved for dismissal of Counts V and VI on the ground that they failed to state a claim upon which relief could have been granted. On July 19, 1957, Judge Leahy filed an opinion on the motion of December 26, 1956, concluding that Securit's policy of refusing to grant a license under one or more of its patents, unless a license was taken under all in the package for a fixed royalty, constituted (1) unlawful coercion and an illegal extension of patent monopoly and (2) a violation of the Toledo decree, and that for these reasons Securit was barred from enforcing its patent rights in the instant case.[5] Judge Leahy stated that he would grant summary judgment under Rule 56, Fed. R. Civ. Proc., 28 U. S. C., on Counts I through IV of the complaint. Judge Leahy, however, entered no order or decree.[6]

[*Other Ohio Court Proceedings*]

On July 9, 1958, Securit filed a petition to the Ohio court and referred to Judge Leahy's opinion which stated, as we have said, that the court below would grant Shatterproof's motion for summary judgment, and also to a suit brought by Securit against Hamilton Glass Company, Inc. in the United States District Court for the Southern District of Indiana (TH55-C-37) in which Securit alleged that Hamilton had infringed certain patents covered by the Toledo decree. In this suit Hamilton had filed a counterclaim and had alleged unfair competition, monopolization and restraint of trade by Securit. The Indiana district court found that Securit was barred from maintaining its suits against Hamilton because Securit had misused its patents and had violated the Toledo decree. The Court of Appeals for the Seventh Circuit reversed but took the position, however, that the Indiana District Court had the authority to construe the consent decree for the purpose of adjudicating a charge of misuse of patents based on alleged violation of the consent decree. In its petition of July 9, 1958, Securit alleged that both the Delaware and the Indiana courts misinterpreted the consent decree by holding that Securit's refusal to grant licenses except by way of the

[4] Judge Kloeb stated in part: "It [the action by Shatterproof in applying to the Ohio Court to fix a reasonable royalty rate] is somewhat like a little fellow who annoys his neighbor's boy, taunts and berates him, and finally puts a stick on his shoulder. When the other fellow knocks it off he runs to mamma and hides under her skirts.

"I don't believe I want to accept jurisdiction under these circumstances. It seems to me the Court is being used as an alternative recourse, as a last resort."

[5] Judge Leahy considered Securit's offer to license its patents individually, but stated that the result of such an offer was also an unlawful coercion on the licensee. He did not, however, consider the nature of the patents involved, *e.g.*, whether they were patents for alternate methods of manufacture of tempered flat glass or the impact of package licensing when all patents relate to manufacture of a single product, if such were the case.

[6] Judge Leahy stated: "For the foregoing reasons, defendant's motion for summary judgment as to Counts I through IV of the Complaint is granted. An appropriate order may be submitted but only after there is a determination by trial, or otherwise, of the remaining counts in plaintiff's complaint." [1957 TRADE CASES ¶ 68,802] 154 F. Supp. 890, 898.

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package was a violation of the Toledo decree.[7, 8] On August 19, 1958, Judge Kloeb, pursuant to Securit's petition issued an order to show cause to the Attorney General of the United States, Shatterproof, and the Hamilton Glass Company why Securit's petition should not be granted, and set the matter down for hearing on September 16, 1958.

On September 3, 1958, Shatterproof filed a motion in the court below to enjoin Securit from prosecuting further its petition in the Ohio court until termination of the action in the court below and the disposition of any appeal. On September 15, 1958, the court below, by Judge Steel, concluded that its power to grant injunctive relief was not negatived by *United States Gypsum Co. v. National Gypsum Co.* [1957 Trade Cases ¶ 68,627], 352 U. S. 457 (1957), though conceding that the Ohio court, having rendered the consent decree, was peculiarly competent to construe it. The court below was of the opinion that because Securit had selected the Delaware forum it should be restricted to it, and enjoined Securit from taking any action under its petition of July 8, 1958, to the Ohio court. Nonetheless a hearing was held before Judge Kloeb on September 16, 1958. Shatterproof came into court and offered the injunction issued by Judge Steel the preceding day for the information of Judge Kloeb but took no further part in the proceedings. Judge Kloeb delivered an oral opinion[9] in which he concluded that there was no violation of the consent decree by the package licensing plan followed by Securit for the preceding ten years.

[*Dismissal of Suit*]

On September 22, 1958, Judge Steel, finding that there was no just reason for delay, and acting on Judge Leahy's opinion[10] of July 19, 1957, filed on the motion for summary judgment, entered an order dismissing Securit's Counts I through IV, under Rule 54(b), Fed. R. Civ. Proc. Judge Steel, employing the procedure required by Rule 54(b), also dismissed Counts V and VI, the unfair competition counts, basing this dismissal on the point that the adjudication that Securit could not enforce its patents against Shatterproof was conclusive as to claims of unfair competition. Judge Steel also denied a motion by Securit to amend the complaint, the amendment being designed primarily to buttress the unfair competition counts. A motion by Securit to dismiss the counterclaim filed by Shatterproof is still pending, as are applications for counsel fees. The court below suggested that since, in its view, the misuse issue was settled by the judgment dismissing Counts I to IV inclusive that judgment made the invalidity and non-infringement issues of Shatterproof's counterclaim "probably moot".[11]

[*Appeals*]

The appeal at our No. 12,706 is taken from the order of September 15, 1958, granting an injunction against Securit. The appeal at our No. 12,739 is taken from the final judgment dismissing Counts I through IV and Counts V and VI, and from the following interim orders: (1) order of Judge Leahy of May 12, 1955, allowing Shatterproof to file an answer out of time, (2) order of Judge Leahy denying Securit's motion to dismiss Shatterproof's defense of misuse, (3) order of Judge Leahy denying Securit's motion to dismiss Shatterproof's second defense, non-compliance with the Toledo decree, and (4) order of Judge Steel denying Securit's motion to file an amended complaint.

[*Ohio Court Rulings*]

On September 29, 1958, the Ohio court by Judge Kloeb, following his oral opinion of September 16, 1958 [1958 Trade Cases ¶ 69,147], made findings of fact and conclusions of law, construed the consent decree

[7] The precise allegation was as follows: "The Delaware and Indiana Courts have misinterpreted this Court's decree and have ruled that Petitioner violated the decree by (1) licensing all its patents in a single package, and (2) refusing to license less than all the patents for less than the royalty charged for the package."

[8] The decision of the Indiana court was reversed by the Court of Appeals for the Seventh Circuit [1958 TRADE CASES ¶ 69,018], 254 F. (2d) 889 (1958), primarily on the ground that the case was not ripe for summary judgment.

[9] 119 U. S. P. Q. 86 (1958).

[10] See again 154 F. Supp. 890.

[11] The order and the judgments first referred to are appealable. The three considerations which would lead to a different conclusion, set out in *Panichella v. Pennsylvania Railroad Co.*, 252 F. 2d 452 (3 Cir. 1958) are absent in the case at bar. The interim orders are appealable also since they are incidental to the judgment and the order first referred to.

of October 30, 1948, and held that a grant by Securit of a license to use all of the patents in its package under a flat or single royalty for all patents licensed would not violate the consent decree whether such licensing was or was not called a "package"; that Securit did not violate the consent decree by advising "an applicant" that it would not license an individual patent for less than the royalty charged for all of its patents; that Sections XIV and XVII of the consent decree do not require Securit to set a royalty on each individual patent subject to the consent decree and that Securit could set a flat royalty on "any, some, or all of its patents", that any dissatisfied applicant for a patent might apply to the Ohio court for relief; that Securit's practice of granting to any applicant a license to use any, some, or all of its patents for a flat royalty of 2 cents per square foot of glass tempered was reasonable and nondiscriminatory; that Section XIV(C) and Section XIV(D) did not provide an applicant with a free license to use patents subject to the consent decree but did provide that if a bona fide written application for a license were made to the patent owner, the applicant could commence using the patents, and any royalty agreed to by the applicant and patent owner or fixed by the court should be retroactive to the date the applicant commenced to use the patents; and that the objective of the consent decree was to prevent practices which violated the antitrust laws. The Ohio court also ruled that none of Securit's licensing practices, as described in the petition, and that none of the provisions of Securit's standard licensing contract violated the consent decree. The Ohio court held also that despite the voluminous exchange of correspondence between Securit and Shatterproof in which Shatterproof ostensibly was applying for licenses, Shatterproof had not made a *bona fide* application for a license; *i. e.,* that Shatterproof's application was "not made in good faith."

The foregoing describes sufficiently the litigation in the court below and the proceedings in the Ohio court.

I

[*Basic Issue*]

The substantial issue presented by the appeals at bar is whether package licensing, compulsory, as distinguished from voluntary, insofar as the applicant for a license is concerned, is a violation of the consent decree entered by the United States District Court for the Northern District of Ohio, Western Division, on October 30, 1948 (*United States v. Libbey-Owens-Ford Glass Company, et al.,* Civil Action No. 5239), or constituted a misuse of patents of such a character as to prohibit American Securit Company from maintaining a suit in the court below for the alleged infringement of four patents owned by it and included among some thirty-five patents owned by Securit covered by the consent decree entered by the Ohio court. The court below resolved this major issue in favor of Shatterproof and against Securit on motion for summary judgment. Rule 56, Fed. R. Civ. Proc., 28 U. S. C.

[*Preliminary Issues*]

Prior to deciding the issue referred to, other preliminary questions require discussion and disposition. Is there present a genuine issue of material fact as to whether it was the policy of Securit to license only by way of package licensing? Rule 56(c). We conclude, as did the court below, that there was not. There is no doubt but that Securit has maintained the policy of requiring its licensees to accept package licensing. Ingouf, Vice-President and Treasurer of Securit, testifying by deposition on July 26, 1956, was asked on direct examination as to whether Securit would grant licenses for individual patents, and replied: "We do not grant a license on that basis." [12] The record shows that no licenses were granted to any company by Securit except under its Standard Licensing Agreement providing for package licensing. The correspondence between Securit and Shatterproof demonstrates the refusal of Securit to set royalties on specified groups of patents covered by the Toledo consent decree.[13] We are of the opinion, particularly in view of Securit's

[12] See Deposition of Mr. Robert Ingouf, Docket Item No. 102, pp. 121, 163-165. See also *id.* at pp. 309-310.

[13] See "Stipulation Re Certain Letters" and Securit's Standard Licensing Agreement, Docket Item No. 32. We conclude, as did the court below, that Securit's offer to license any patent at the rate of 2¢ per square foot of glass manufactured thereunder was a mere "catalyst" to compel Shatterproof to accept the package. 154 F. Supp. at p. 895.

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stated policy referred to in the preceding paragraph, that no genuine issue of material fact lurks in this phase of the case. *Cf. International Salt Co. v. United States* [1946-1947 Trade Cases ¶ 57,635], 332 U. S. 392 (1947), at pp. 396, 398. We are also of the view, as apparently was the court below, though it did not expressly determine this question, that Shatterproof, insofar as it could, amounts of royalty for specified groups of patents not being obtainable by it from Securit, made a *bona fide* application to Securit for licensing under the Toledo decree.[14, 15] Indeed, if we correctly apprehend the law, whether Shatterproof made a *bona fide* application to Securit for licensing is material only by way of corroboration of Securit's settled policy, as found by the court below, of licensing only by way of package. *Cf. Morton Salt Company v. Suppiger Co.* [1940-1943 Trade Cases ¶ 56,176], 314 U. S. 488, 494 (1942). Furthermore, if Shatterproof's hands be unclean in that it made no *bona fide* application to Securit for licensing, that uncleanliness will not render Securit's hands clean if it is unlawfully extending a patent monopoly.

[*Patents Involved*]

We come, therefore, finally, to the naked question: Whether Securit's mandatory package licensing *per se* constitutes a misuse of patents and a violation of the Toledo consent decree? We point out that not a single one of the patents covered by the consent decree, which includes the four patents sued on by Securit in the instant case, is in the record before us. An examination of "Schedule B.5.", attached to and made a part of the consent decree, demonstrates that at least thirty-one of the patents and one patent application owned by Securit and included in "Schedule A", attached to and made a part of Securit's Standard Licensing Agreement are included in the consent decree. From the descriptive titles of Securit's patents contained in the consent decree and Securit's Standard Licensing Agreement, it appears affirmatively that at least some of these patents are apparatus or process patents in the flat glass-making art. An examination of the consent decree and such portions of the record of the proceedings in the Ohio court as are before us, limited though they may be, nonetheless show that Securit's patents covered by the consent decree and included in the group of patents sought to be licensed by Securit to Shatterproof as a package, covered at least a portion of the flat glass-making art. We cannot tell on the present record whether the patents which Securit offered to Shatterproof as a package are dominant in that art but we are not presently concerned with the issue of whether those patents offered by Securit to Shatterproof licensed as a package, would sustain a charge of violation of the antitrust laws.

To put our problem in another form: Can it be said that the conjoint licensing by mandate of the patentee of two or more apparatus or process patents in the same art, whatever the nature of their disclosures, whether for basic inventions or mere minor improvements, will sustain a charge of a patent misuse? The following circumstances are present. It must be conceded that there are patents involved covered by the Toledo decree: that these patents are in the flat glass-making art and the patents are not in the record and that their nature is disclosed only by way of brief descriptive titles.

[*Patent Misuse*]

The control of a patent monopoly carries with it the power to fix royalties for the reward of the patentee, and the patentee may even refuse to license.[16] The power conferred by the patent monopoly may be great enough, assuming that the patented

[14] See Shatterproof's letter of March 4, 1953, and Securit's reply of March 19, 1953. See also the subsequent correspondence contained in the Stipulation referred to in note 13, *supra*.

[15] In so stating we are not unaware of the conclusion of the Ohio court to the contrary. See the oral opinion of Judge Kloeb, Finding of Fact No. 10. 119 U. S. P. Q. 86, 90. Judge Kloeb's opinion is, of course, entitled to great weight but we cannot concur in his view.

It may be noted parenthetically that the finding referred to presents no element of *res judicata* insofar as Shatterproof is concerned, for the following reasons: (1) When Shatterproof first appeared in the Ohio court Judge Kloeb declined jurisdiction, note 4, *supra;* (2) When Shatterproof offered the Delaware injunction to the Ohio court it did not "appear" therein as Judge Kloeb stated, 119 U. S. P. Q. 86, 89-90, or subject itself to that court's jurisdiction; and (3) Judge Kloeb's order of September 29, 1958, construing the consent decree, was later in time than that of Judge Steel, as stated at a later point in this opinion.

[16] We are now putting to one side the terms of the Toledo decree requiring Securit to grant licenses to applicants without discrimination. This issue is disposed of at a later point in the opinion.

process or product is a desirable one, to compel the licensee to submit to other conditions. See the conditions referred to in the cases cited and discussed below. The patent monopoly can be used, as Securit has employed it, to compel licensees to accept licenses under other patents in the same art. Indeed, what conditions can be imposed by the patentees in the exercise of patent monopoly are limited, legal barriers aside, only by the ingenuity employed by the patentees in their attempts to obtain the maximum return for the use of their patented properties.

In *Transwrap Corp. v. Stokes Co.* [1946-1947 TRADE CASES ¶ 57,532], 329 U. S. 637 (1947), the Supreme Court held lawful a requirement by the licensor that the licensee assign to the licensor improvement patents applicable to the patented and licensed machine. This was the use of "one legalized monopoly to acquire another legalized monopoly." *Id.* at p. 644. But use of a patent to restrain trade in unpatented articles was prohibited in *International Salt Co. v. United States, supra.* Even where control of the unpatented article may fall short of a prohibited restraint of trade, a court will not lend its aid to enforce the tying-in of an unpatented article to the patented article. *Morton Salt Co. v. Suppiger Co., supra; Transwrap Corp. v. Stokes Co., supra,* at p. 645. In determining whether the patents were lawfully used, the Supreme Court in the two cases last cited looked to the nature of patent monopolies. It is by the same inquiry that the boundary line of the lawful use of patents is discernible in the circumstances of the case at bar.

Each patent gives its owner a monopoly in respect to its disclosures, so much and no more. It is a grant of the exclusive right to manufacture, use and sell the invention which is disclosed. That invention is what the patent grant protects by the monopoly, not that invention plus some embellishment, improvement, or alternate product or process, which also happens to be patented. See *Motion Picture Co. v. Universal Film Co.,* 243 U. S. 502, 502-513 (1917). Each monopoly must stand on its own footing. *Cf. United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131, 158 (1948).[17] Mandatory package licensing is no more than the exercise of the power created by a particular patent monopoly to condition the licensing of that patent upon the acceptance of another patent but that is too much. The protection, or monopoly, which is given to the first patent stops where the monopoly of the second begins.

Whatever may be the asserted reason or justification of the patent owner, if he compels a licensee to accept a package of patents or none at all, he employs one patent as a lever to compel the acceptance of a license under another. Equity will not countenance such a result. We conclude that the court below committed no error in finding that the defense of misuse asserted by Shatterproof is a valid one.

We deem it unnecessary to discuss at length the application of the doctrine of licensee estoppel. It is sufficient to say here that this factor alone in our opinion is enough to render mandatory package licensing a patent misuse. See *Automatic Radio Co. v. Hazeltine* [1950-1951 TRADE CASES ¶ 62,634], 339 U. S. 827, 836 (1950).

We conclude also, and quite apart from all of the foregoing, that Paragraph 8(a) of Securit's Standard Licensing Agreement[18] which provides that that agreement shall continue "in full force and effect to the expiration of the last to expire of any" of Securit's patents set out in "Schedule A" constitutes a patent misuse for it extends the payment of royalties of patents under patents which may expire to the expiration date of that patent most recently granted to Securit. Indeed the expiration clause of the contract works an "aggravating hardship" on the licensee as Judge Leahy stated, in that it demands the renunciation of all patents, whether wanted or unwanted under the license.

We conclude for these reasons also that under the circumstances at bar the court below committed no error in ruling that Securit had misused its patents and that this misuse constituted a valid defense to the infringement suit.

[17] Compare *Ethyl Gasoline Corp. v. United States* [1940-1943 TRADE CASES ¶ 56,013], 309 U. S. 436, 459 (1940), where the Supreme Court stated that the patent monopoly of one invention may not be enlarged for the exploitation of another.

[18] Which provides: "Unless sooner terminated under the provisions of Articles 6 or 7 hereof, this agreement shall continue in full force and effect to the expiration of the last to expire of any of the Licensor's U. S. Letters Patent listed in Schedule A attached hereto."

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In so ruling we are not unaware of the principle enunciated in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 257 (1948), as follows:

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

We conclude nonetheless that the present record affords a sufficient basis to decide the ultimate and important issue involved in this case and that it is unnecessary to vacate the judgment of the court below to the end that the record may be enlarged. The techniques applicable under Rule 56 have been applied properly and are sufficient to afford a firm basis for our decision. *Cf. Morton Salt Co. v. Suppiger Co.; International Salt Co. v. United States,* and *Automatic Radio Co. v. Hazeltine, supra,* all decided under Rule 56.

II

[*Violation of Decree*]

We agree also with the ruling of the court below that Securit violated the Toledo consent decree. That it did so seems crystal clear despite Judge Kloeb's holding to the contrary as demonstrated by his oral opinion construing the consent decree, cited in note 9, *supra.* Paragraph XIV B. of the decree expressly provides, subject to other provisions not pertinent here, that Securit and the other corporate defendants in the Ohio court were enjoined and restrained "from including any restriction or condition whatsoever in any license or sublicense granted it . . ." Paragraph XVII(1)(a) of the decree enjoined Securit from granting any license which provided as a condition that the applicant should accept a license under another patent owned or controlled by Securit. Securit's actions in the case at bar demonstrates a violation of these conditions. We are aware, of course, that Judge Kloeb framed the consent decree and his views as to its interpretation are entitled to great weight but we cannot agree with them.

[*Jurisdiction of Court*]

We conclude also that the court below had the jurisdiction, the power, to construe and interpret the consent decree. As we have indicated, note 15, *supra,* Shatterproof was not a party to the proceedings in the Ohio court when the consent decree was entered, nor has it become such to this day. The court below had jurisdiction of the parties and of the subject matter and was entitled to adjudicate the issues presented. Moreover, as we have shown, the adjudication by the court below, by Judge Steel, preceded by several days the order of Judge Kloeb, construing the consent decree. Judge Leahy's opinion determining the scope and effect of the consent decree preceded by more than a year Judge Kloeb's opinion construing the consent decree.

III

[*Other Issues*]

Other points in the case, whether or not raised by the parties, do not require discussion.

We will make the following dispositions of the judgments and orders appealed from.

(1) The order of Judge Leahy allowing the filing of an answer by Shatterproof will be affirmed, no basis for reversal being present.

(2) The order of Judge Leahy denying Securit's motion to dismiss Shatterproof's defense of misuse will be affirmed for obvious reasons.

(3) The order of Judge Leahy denying Securit's motion to dismiss Shatterproof's second defense will be affirmed.

(4) The order of Judge Steel denying Securit's motion to file an amended complaint will be affirmed for the reasons stated by Judge Steel for denial of the motion.[19]

(5) The judgments dismissing counts I through IV and counts V and VI of Securit's complaint will be affirmed. Objection by Securit to the dismissal of Counts V and VI, the unfair competition counts, was not pressed before us, although of course, it was not abandoned, the dismissal having been complained of in Securit's brief. We affirm on the basis of Judge Steel's opinion.[20]

[19] See 166 F. Supp. at p. 827.

[20] See 166 F. Supp. 813.

(6) The order of Judge Steel enjoining Securit from taking any action in *United States v. Libbey-Owens-Ford Glass Company, et al.*, Civil Action No. 5239 in the Northern District of Ohio, Western Division, "which will seek a determination, finding or any other type of adjudication or judicial expression as against Shatterproof which is in conflict with any one or more of the . . . views" expressed by Judge Leahy at [1957 TRADE CASES ¶ 68,802] 154 F. Supp. 890, and specified in Judge Steel's order, will be affirmed.

[¶ 69,403] United States v. Ciba Company, Inc.; Geigy Chemical Corporation; Sandoz, Inc.; and Toms River-Cincinnati Chemical Corporation.

In the United States District Court for the Southern District of New York. Civil No. 134-90. Filed: July 9, 1959.

Case No. 1390 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Prohibited—Price Fixing—Circulating Price Lists.—A manufacturer of dyestuffs and three companies engaged in reselling those products to others were prohibited by a consent decree from agreeing among themselves or with any other person to fix the price or other terms or conditions for the sale of those products to third persons. The three resellers were also jointly and severally prohibited from disclosing to each other the price at which they would sell dyestuffs, prior to the time that such price was announced to the trade generally. In addition, the manufacturer was prohibited from (1) disclosing to any one of the resellers the price at which any of the other resellers sold or proposed to sell dyestuffs, (2) suggesting the price at which dyestuffs should be sold to third persons, or (3) selling dyestuffs at a discount or rebate from a list of prices for the sale of such products to ultimate consumers.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2011.218.

Department of Justice Enforcement and Procedure—Consent Decrees—Permissive Provisions—"Separate" Discussions of Resale Prices.—A consent decree which jointly and severally prohibited a manufacturer of dyestuffs and three resellers of its products from agreeing among themselves to fix the price for the sale of those products to third persons did not prohibit "separate" discussions between the manufacturer and any of the resellers concerning the price at which that reseller sold or proposed to sell the manufacturer's products to any third person.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; William D. Kilgore, Jr., Lewis Bernstein, Philip L. Roache, Jr., Charles F. B. McAleer, and Joseph J. O'Malley, Attorneys, Department of Justice.

For the defendants: Appleton, Rice & Perrin, by Gerhard R. Gerhard, for Ciba Co., Inc.; Cravath, Swaine & Moore, by Carlyle Maw, for Geigy Chemical Corp.; Handel & Stumpf, by Donald L. Stumpf, for Sandoz, Inc.; and Cahill, Gordon, Reindel & Ohl, by Robert G. Zeller, for Toms River-Cincinnati Chemical Corp.

Final Judgment

[*Consent Decree*]

SYLVESTER J. RYAN, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on May 29, 1958, the defendants having appeared and filed their answers to the complaint denying the substantive allegations thereof, and the parties hereto, by their respective attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without said judgment constituting evidence or an admission by any party hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein or admission by any party hereto in respect of any

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such issue, and upon consent of all parties hereto, it is hereby Ordered, Adjudged and Decreed, as follows:

I.

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "Person" shall mean an individual, partnership, firm, corporation or any other legal entity;

(B) "Toms River" shall mean the defendant, Toms River-Cincinnati Chemical Corporation;

(C) "Defendants" shall mean the defendants Toms River, Ciba Company, Inc., Geigy Chemical Corporation and Sandoz, Inc., and each of them;

(D) "Dyestuffs" shall mean any substance which when dissolved in a suitable bath, is capable of and is used to color vegetable, animal and artificial fibers and products. "Dyestuffs", as opposed to pigments, are soluble in the vehicle in which used.

III.

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its officers, directors, agents, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with any defendant who receives actual notice of this Final Judgment by personal service or otherwise, but shall not impose any obligation to take or omit any action outside the United States. This Final Judgment shall not apply to transactions between a defendant (other than Toms River) and its direct or indirect parent, or between a defendant and its subsidiaries (other than Toms River) or its directors, officers, agents and employees or any of them when acting in such capacity.

IV.

[*Price Fixing*]

(A) Defendants are jointly and severally enjoined and restrained from, directly or indirectly, entering into, adhering to, maintaining or enforcing any contract, agreement, understanding, plan or program, among themselves or with any other person, to fix, establish, maintain or determine the price or prices or other terms or conditions of the sale of dyestuffs manufactured in the United States to third persons;

(B) Defendants, Ciba Company, Inc., Geigy Chemical Corporation, and Sandoz, Inc., are jointly and severally enjoined and restrained from disclosing, directly or indirectly, to each other the price, or other terms or conditions of sale, at which it will sell dyestuffs, prior to the time such price or terms or conditions are announced to the trade generally;

(C) Defendants are enjoined and restrained from entering into, adhering to, maintaining or enforcing any contract, agreement or understanding among themselves which is contrary to or inconsistent with any of the provisions of this Final Judgment.

V.

[*Circulating Price Lists*]

Defendant Toms River is enjoined and restrained from, directly or indirectly:

(A) Disclosing to any one of the other defendants the prices, or other terms or conditions of sale, at which dyestuffs are, or are proposed to be, sold by any other defendant to any third person;

(B) Suggesting or attempting to suggest the price, or other terms or conditions of sale at which dyestuffs shall be sold to any third person;

(C) Communicating or otherwise disclosing to any officer, director, agent, employee or other representative of any other defendant the price or other terms or conditions of sale at which dyestuffs are, or are proposed to be, sold by any other defendant to any third person;

(D) Selling or offering to sell dyestuffs at a discount or rebate from a list of prices for the sale of dyestuffs to ultimate consumers.

VI.

[*Permissive Provision—Resale Prices*]

Nothing in subsections (A) or (C) of Section IV or subsection (B) of Section V shall be deemed to prohibit any separate discussions between Toms River and any other defendant or other customer, concerning the prices, or other terms or conditions of sale, at which dyestuffs manufactured by Toms River are, or are proposed to be, sold by any such defendant or customer to any third person.

VII.

[*Enforcement and Compliance*]

(A) For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(1) Access, during the office hours of said defendant, to those books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant which relate to any matter contained in this Final Judgment;

(2) Subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters.

(B) Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, said defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment;

(C) No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VIII.

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 69,404] Federal Trade Commission v. Douglas T. Orton, Secretary, The Borden Company.

In the United States District Court for the Southern District of New York. Misc. 18-304. Filed July 13, 1959.

Clayton and Federal Trade Commission Acts

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence Under FTC Act, Section 9—Subpoena *Duces Tecum*—Census Data—Privilege.—The Federal Trade Commission was denied an order to require a company, by subpoena *duces tecum*, to produce its "schedules submitted to the Bureau of the Census on Form MC 20C * * *." That census was taken pursuant to the provisions of Title 13, United States Code, which provides for the preparation of a census of manufactures in each fifth year. That Title also provides that the information furnished can only be used for the statistical purposes for which it was supplied. Also, the form on which the information was submitted stated that it was confidential and could not be used for purposes of taxation, investigation, or regulation. Further, the President of the United States, in a proclamation, announced that information furnished in that census was to be privileged and confidential. In view of the Government's assurances that the information would always remain con-

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fidential, the efforts of another branch of the Government to invoke the aid of the court in compelling the release of the information offended the court's sense of justice. Thus, the census data was privileged, and the company could not be compelled to produce it.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611, 8741.55.

Order denying a Federal Trade Commission petition to require production of documentary evidence in Dkt. 6652.

For the petitioner: Albert G. Seidman, Attorney in Charge, New York Office, Federal Trade Commission; Andrew C. Goodhope and F. P. Favarella, Attorneys, Federal Trade Commission.

For the respondent: Dewey, Ballantine, Bushby, Palmer & Wood, New York, N. Y. (John E. F. Wood, Charles E. Stewart, Jr., and C. Lamar Barnes, of counsel).

[*Subpoena Duces Tecum*]

DAWSON, District Judge [*In full text*]: This is a motion, pursuant to the provisions of § 9 of the Federal Trade Commission Act, 15 U. S. C. A. § 49, for an order requiring respondent to appear before the petitioner's hearing examiner and produce certain documentary material referred to in a *subpoena duces tecum* served upon the respondent.

[*Census Report*]

The only issue relates to that portion of the *subpoena duces tecum* which would require respondent to produce

> "All schedules submitted to the Bureau of the Census on Form MC 20C by all plants, manufacturing establishments or units owned or controlled by your concern in conjunction with the 1954 census of manufacturers together with copies of all correspondence clarifying or amending said schedules or reports."

It is to be noted that the *subpoena duces tecum* does not require the respondent to submit any work papers or other material used by the respondent in compiling the information submitted to the Bureau of the Census, or file copies thereof, but requires production of the actual schedules submitted to the Bureau, together with all correspondence clarifying or amending said schedules or reports.

[*Privilege*]

Respondent contends that this *subpoena duces tecum* calls for confidential and privileged data and it cannot be compelled to produce the documents required.

It is to be noted that Form MC 20C has at the top of it the following statement:

> "CONFIDENTIAL—This report should be returned within 30 days of its receipt. This report is required by Act of Congress (13 U. S. C. 131). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation."

[*FTC Powers*]

The *subpoena duces tecum* has been issued in connection with a proceeding now pending before the Federal Trade Commission in which the Federal Trade Commission alleges that The Borden Company and other companies have violated the provisions of the Federal Trade Commission Act and § 7 of the Clayton Act. This subpoena was issued in connection with this investigation by the Federal Trade Commission by virtue of the regulatory authority of the Federal Trade Commission.

The Federal Trade Commission has broad powers to secure information or data from companies subject to its regulatory authority. See 15 U. S. C. § 49. It cannot, however, require that the respondent produce the schedules submitted by it for the 1954 Census of Manufactures.

[*Governmental Assurances of Secrecy*]

The census was taken pursuant to the provisions of Title 13, U. S. C. § 131, providing for preparation by the Secretary of Commerce, in each fifth year, of a census of manufactures.

Section 9 of Title 13, U. S. C., provides that neither the Secretary of Commerce, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied, or "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified."

Where information is given under such a statute, the information so furnished is privileged. See 8 Wigmore, *Evidence*, § 2377 (3d ed. 1940):

> "The policy underlying the principle of § 2374 *ante*, is that where the Government needs information for the conduct of its functions, and the persons possessing the information need the encouragement of privacy in order to be induced freely to make full disclosure, the protection of a privilege should be accorded.
>
> "In that well-settled common-law application of this policy, the privilege concerned information relating to the conduct of third persons. But many situations exist where the information can best be obtained only from the person himself whose affairs are desired to be known by the Government. An attempt to do so by mere compulsion might be tedious and ineffective. And where the ultimate purpose to be served is *administrative*, and not penal, it may well be that the Government can afford to promise secrecy in respect to purposes penal or litigious, as the price of readily achieving its administrative purpose when it demands a report of the truth.
>
> * * *
>
> "(3) The most apt instance of this principle is the privilege, established in most jurisdictions, for *reports* of *commercial* and *industrial facts*, required by law to be "made by employers of various sorts, or by commercial houses, or by public utilities, to the appropriate administrative official, as well as for reports of *accidents* in carriage by rail, by motor, or by aircraft. Here the main object is to investigate conditions and causes with a view to future administrative action; hence the State can afford to abdicate the use of such reports for purposes of punishment or of private litigation, in case the facts reported reveal a legal liability or a commercial secret on the part of the person reporting." 8 Wigmore, *Evidence* § 2377 (3d ed. 1940).

One example of such reports cited by Wigmore is census data. *Id.* nn. 3 & 5.

That the information furnished to the Bureau of the Census in the Census of Manufactures was to be privileged and confidential was announced by the President of the United States on November 22, 1929, when he stated in a proclamation that

> "The sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration or with the enforcement of any national, state or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. . . ." See 36 Ops. Att'y Gen. 366 (1930).

In the present situation the petitioner seeks to invoke the processes of this Court to compel respondent to reveal data filed with the Government which the Government at the time stated would be confidential and not used for regulatory purposes, and which the President of the United States had indicated, in a proclamation, would never be used in connection with "the enforcement of any national, state or local law or ordinance." The information required by the Government in connection with the census had to be prepared in a particular manner and was not necessarily information which a business would furnish if it had an opportunity to check with its accounting records or its counsel.* The information was furnished for statistical purposes of the Government and was not furnished with any reservations which might have been placed upon it if it were known that the information would be used for regulatory purposes.

* The Director of the Bureau of the Census, in refusing to comply with a demand for copies of Forms MC 20C containing information submitted by one of the parties involved in the present investigation, pointed out that the 1954 Census of Manufactures was designed to secure confidential census reports and that the sections of Title 13, U. S. C., dealing with the confidentiality of those reports were enacted to protect companies against any harm which might result from their complying with a census reporting requirement. He then pointed out that this privileged relationship enabled the Census Bureau to require response to inquiries which were necessarily formulated on a uniform basis for all companies in a particular activity regardless of whether or not their books of record directly yield the requested information. He further pointed out that the rules governing the reporting permit the companies to authorize subordinate officials to furnish information directly, before formal clearance with comptrollers, auditors or company counsel, and that this information frequently is furnished before final figures have been developed in the company record system.

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The petitioner is seeking the data not in order to get the facts which underlie the statistics, but rather to get the compiled statistical data in the particular manner in which it was prepared by the respondent when the information was given upon the assurance of the Government that it would always remain confidential and could not be used for purposes of "taxation, investigation or regulation."

[*Relevance*]

Respondent contends that not alone is the information privileged but also that it is irrelevant. It is unnecessary for the Court to pass upon this contention. When one branch of the Government seeks to invoke the aid of the Court to compel the release of information which the Government itself has publicly announced will be confidential and not used for purposes of regulation, it is asking this Court to do something which offends its sense of justice. When the Government, the Congress and the President all stated that the information would be given on a confidential basis, and would never be released for the purposes of investigation or regulation, for another branch of this Government to come in and demand that this Court order the production of such information for the purposes of investigation, such action can only be characterized by the words which Mr. Justice Holmes so aptly used in referring to wire-tapping: "dirty business." *Olmstead v. United States,* 277 U. S. 438. The Court's assistance will not be given to any such attempt.

[*Petition Denied*]

The petition is denied. So ordered.

[¶ 69,405] Harry Brandt, d. b. a. University City House of Liquors, et al. v. Renfield Importers, Ltd., et al.

In the United States Court of Appeals for the Eighth Circuit. No. 16,157. Dated July 15, 1959.

Appeal from the United States District Court for the Eastern District of Missouri.

Sherman, Clayton, and Robinson-Patman Acts

Private Enforcement and Procedure—Suit for Civil Damages—Appeal and Error—Judgment Dismissing Action as to Some But Not All Defendants—Appealability.—A trial court's dismissal of a treble damage action as to three of fourteen defendants (for want of jurisdiction) was not an appealable final judgment under Rule 54(b) of the Federal Rules of Civil Procedure, because no more than a single claim for relief was presented in the action. Except where otherwise provided by statute, an action is not appealable in fragments. Rule 54(b) provides that "When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment upon one or more but less than all of the claims . . ." Thus, the Rule authorizing appeal is, on its face, limited to actions involving multiple claims. Here, there was no claim against any single defendant; instead, all of the fourteen defendants were charged, as joint tort-feasors, with conspiring together to violate the antitrust laws. For that alleged violation, the plaintiffs sought a single judgment as damages. Thus, there might have been multiple parties plaintiff or multiple parties defendant, but there was involved only a single claim for damages. The trial court's certification that multiple claims were involved could not transform a "multiple parties" action into a "multiple claims" action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.12.

For the appellants: J. L. London (Mortimer A. Rosecan and Irving M. Malnik were on the brief).

For the appellees: Richmond C. Coburn (Coburn & Croft were on the brief) for Renfield Importers, Ltd.; R. Walston Chubb (Lewis, Rice, Tucker, Allen & Chubb, Earl E. Pollock, Julius Lewis, Sonnenschein, Lautmann, Levinson, Rieser, Carlin & Nath were on the brief) for James B. Beam Distilling Co.; Lewis C. Green and Donald J. Meyer (Green, Hennings, Henry & Evans, and Walter D. Wile were on the brief) for Julius Wile Sons & Co., Inc.; and Earl E. Pollock for all appellees on motions to dismiss.

For a prior opinion of the U. S. Court of Appeals, Eighth Circuit, see 1954 Trade Cases ¶ 67,881.

Before GARDNER, Chief Judge, and JOHNSEN and VOGEL, Circuit Judges.

[*Treble Damage Action*]

GARDNER, Chief Judge [*In full text*]: This was an action brought by eighteen retail liquor dealers doing business in St. Louis, Missouri, and vicinity against fourteen distillers, distributors, wholesalers or retailers for certain alleged violations of the Sherman Anti-Trust Act, the Clayton Act, and the Robinson-Patman Act. The complaint alleged that the defendants created a monopoly in the retail liquor business in violation of the anti-trust laws; that they had conspired to monopolize and have monopolized the trade and commerce in said liquors and the retail distribution thereof in St. Louis, Missouri and vicinity. The complaint also contained allegations as to damages claimed by the individual plaintiffs, for which they prayed judgment, including treble damages in the amount of $1,329,300.00 and costs, including reasonable attorney's fees, and for an injunction restraining the defendants and enjoining them from continuing said alleged violations of the anti-trust laws.

[*Dismissal as to Three Defendants*]

Three of the defendants, to-wit: Renfield Importers, Ltd., James B. Beam Distilling Co., and Julius Wile Sons & Co., Inc., each filed a motion to quash the service of process and to dismiss on the grounds of improper venue and lack of jurisdiction over the person. In resisting these motions plaintiffs contended that the court acquired jurisdiction because these three defendants (now appellees) were "transacting business" in the State of Missouri. The court heard these motions and on the proofs adduced sustained them and entered orders of dismissal as to the three defendants. Each of these orders of dismissal contains recital that:

> "The Court further directs the entry of a final judgment on the claim as to said defendant, which is only one of several claims, and enters this order upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54 (b) of the Rules of Civil Procedure."

From the orders so entered plaintiffs have appealed, seeking reversal on substantially the following grounds. The court erred in holding that the three appellees were not "transacting business" in the Eastern Judicial District of Missouri within the meaning of Sec. 22, Title 15, U. S. C. (Sec. 12 of the Clayton Act) because under the anti-trust laws a corporation is engaged in transacting business for the purpose of venue, although it is not present by agent carrying on the business, if in fact in the ordinary and usual sense it transacts business therein of any substantial character.

[*Appealability of Dismissals*]

Simultaneously with the filing of their briefs, each appellee filed a motion to dismiss the appeal, with supporting brief, on substantially the following grounds. The order appealed from is not an appealable order in that, (1) the complaint in this case sets forth a single claim and does not set forth multiple claims, (2) the order appealed from does not dispose of the entire matter and is, therefore, not a final judgment, and (3) the order appealed from is not appealable under Rule 54(b) of the Federal Rules of Civil Procedure because no more than a single claim for relief was presented in this action. These motions to dismiss the appeal were presented and argued by counsel for the respective parties in connection with the issues raised by appellants by their appeal.

Manifestly, if the motions to dismiss the appeal are well-founded, it should not be necessary to consider the merits of appellants' appeal and for that reason we shall first consider these motions.

[*Appeals "in Fragments"*]

The complaint charged the fourteen named defendants with combining and conspiring together in restraint of trade and commerce, which alleged restraint, it is charged, resulted in a monopoly. Plaintiffs demanded money judgment for treble damages in the amount of $1,329,300.00, for an injunction against the defendants, restraining and enjoining them from continuing the alleged violations of the Acts, and for costs and attorney's fees. By this complaint all of the fourteen defendants were charged as joint tort-feasors. There was no claim against any single defendants but they were

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charged with combining and conspiring together to commit the acts alleged to be violative of the anti-trust laws. The complaint was dismissed as to the appellees, not on the ground that they had not combined and conspired with the other defendants, but because the court had not acquired jurisdiction over them, and the dismissal of the complaint on that ground confessedly would constitute no bar to an action against them on the same cause of action in a court which might acquire jurisdiction by proper service of process. The dismissal of the action as to appellees left undetermined the issues in the case, either as against them or the other defendants. It is a salutary rule, long adhered to by Federal courts, that, except where otherwise provided by statute, a cause of action must be treated as a unit, not triable piecemeal, nor appealable in fragments. *Arnold v. United States for Use of W. B. Guimarin & Co.*, 263 U. S. 427; *Hohorst v. Packet Co.*, 148 U. S. 262; *Standley v. Roberts*, 8 Cir., 59 Fed. 836; *Moss v. Kansas City Life Ins. Co.*, 8 Cir., 96 F. 2d 108; *Minnesota Min. & Mfg. Co. v. Technical Tape Corp.*, 7 Cir., 208 F. 2d 159; *Hunter v. Federal Life Ins. Co.*, 8 Cir., 103 F. 2d 192; *Brandt v. Renfield Importers, Ltd.*, 8 Cir. [1954 TRADE CASES ¶ 67,881], 216 F. 2d 206.

As early as 1894, in *Standley v. Roberts, supra*, the late Judge Walter H. Sanborn, speaking for this Court, said:

> "An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined—one which does not substantially and completely determine the rights of the parties affected by it in that suit—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit, appealable."

This rule has been consistently adhered to by this Court. Thus, in *Moss v. Kansas City Life Ins. Co., supra*, it is said:

> "Considering the rules announced in the above cases, it would seem that the application of the above rule announced in the *Rosenberg, Pesaro* and *Goldey* Cases should be limited to cases in which the void service of process attaches to all of the defendants. So construed, the rule is harmonious with the broad general rule that for an order, decree, or judgment to be final for appeal purposes such must completely dispose of the action."

The decisions of this Court are clearly in harmony with the views of the Supreme Court expressed in *Arnold v. United States for Use of W. B. Guimarin & Co., supra*, where it is said:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

[*Rule 54—Trial Court's Certification*]

It is, however, contended by appellants that the orders dismissing the action as to the appellees for want of jurisdiction are appealable because the trial court, pursuant to Rule 54(b), Federal Rules of Civil Procedure, directed the entry of a final judgment, "* * * upon an express determination that there is no just reason for delay and enters this order upon an express direction for the entry of judgment in accordance with Rule 54(b) of the Rules of Civil Procedure." It is therefore necessary to consider the provisions of Rule 54(b), Federal Rules of Civil Procedure. This Rule reads as follows:

> "Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

[*Single Claim Involved*]

As has been observed, all of the fourteen defendants named in the action including the appellees were charged with a combination and conspiracy in restraint of trade in violation of the anti-trust laws of the United States. For this alleged violation of the

law, plaintiffs sought a single judgment as damages. The rule authorizing appeals is, on its face, limited to one involving multiple claims. There may be said to be multiple parties plaintiff or multiple parties defendant, but there is involved only a single claim for damages alleged to have been suffered by reason of the combined action of the defendants constituting a conspiracy. We are of the view that this action did not involve multiple claims but rather a single claim as disclosed by the complaint. *Sears Roebuck & Co. v. Mackey* [1956 TRADE CASES ¶ 68,370], 351 U. S. 427; *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U. S. 445; *Steiner v. Twentieth Century-Fox Film Corp.*, 9 Cir. [1955 TRADE CASES ¶ 67,971], 220 F. 2d 105; *Carr v. City of Anchorage*, 9 Cir., 235 F. 2d 780; *Luria Bros. & Co. v. Rosenfeld*, 9 Cir., 244 F. 2d 192; *Reagan v. Traders & General Insurance Co.*, 5 Cir., 255 F. 2d 845; *Lee v. Porcelain Patch & Glaze Corp.*, 5 Cir., 240 F. 2d 763; *Meadows v. Greyhound Corp.*, 5 Cir., 235 F. 2d 233; *Nettles v. General Accident Fire & Life Assurance Corp.*, 5 Cir., 234 F. 2d 243; *Hardy v. Bankers Life & Casualty Co.*, 7 Cir., 222 F. 2d 827; *District 65 v. McKague*, 3 Cir., 216 F. 2d 153; *Youpe v. Moses*, D. C. Cir., 213 F. 2d 613. In *Steiner v. Twentieth Century-Fox Film Corp., supra,* plaintiff sought to recover judgment against seven defendants for alleged violations of the anti-trust laws. The action was dismissed as to six of the defendants and plaintiff sought to appeal as the trial court had certified under Rule 54 (b) that there was no just cause to delay an appeal by plaintiff from the judgments of dismissal. In the course of the opinion as to the appealability of the order of dismissal it is said, *inter alia:*

> "This judgment is not final. The appeal must therefore be dismissed without a consideration of the merits. Rule 54(b) applies only to a case in which multiple claims are asserted by or against one or more parties. In the absence of multiple claims no final judgment can be entered under the Rule."

Construing Rule 54(b), the Supreme Court in *Sears Roebuck & Co. v. Mackey, supra,* said in part:

> "The amended rule does not apply to a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal."

The inherent nature of the cause of action cannot be changed by a trial court's certification that multiple claims are involved. The mere signing of the formula prescribed by Rule 54(b) cannot, we think, have the magical effect of transforming a multiple parties action into a multiple claims action. As said in *Gold Seal Co. v. Weeks,* D. C. Cir., 209 F. 2d 802:

> "The fact that the motions judge, in the order sought to be reviewed, characterized the same as a final judgment upon a separate claim can not make the order such a judgment or the claim such a claim, if the claim fails to meet the standard of separateness or distinctness required by the law and the judgment fails to meet the standards of finality so required."

[*Appeal Dismissed*]

The appeal is therefore dismissed without consideration of the merits of appellants' contentions and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

[¶ 69,406] Elizabeth Hospital, Inc. v. Fount Richardson; Friedman Sisco; Ruth Ellis Lesh; Stanley Applegate, Individually and as President of Washington County Medical Society; and Washington County Medical Society.

In the United States Court of Appeals for the Eighth Circuit. No. 16,187. Dated July 10, 1959.

Appeal from the United States District Court for the Western District of Arkansas. JOHN E. MILLER, District Judge.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Necessary Averments to State Cause of Action—Interstate Commerce—Operation of Hospital.—A trial court properly dismissed an Arkansas hospital's complaint alleging

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that a local medical society and various individuals violated the Sherman Antitrust Act by conspiring to exclude the hospital's chief physician from membership in the society, thereby diminishing his professional standing and causing a reduction in the number of the hospital's out-of-state patients. The complaint was lacking in a jurisdictional essential in that it failed to show that the conspiracy had any restraining effect on interstate commerce within the meaning of the Sherman Act. The operation of the hospital, including the rendition of hospital services to some persons who came from outside the state, was no more "engaging in interstate commerce" than was the rendition of medical services to such persons by the hospital's chief physician. The fact that some of the hospital's patients might have travelled in interstate commerce did not alter the local character of the hospital. Interference with intrastate activity cannot constitute a violation of the Sherman Act unless its effect on interstate commerce is both substantial and direct. Here, the transportation of patients in interstate commerce was incidental. It was unnecessary to consider the hospital's further allegation that it purchased medical equipment and supplies from outside the state, since it was not asserted that the conspiracy interfered with those purchases.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.213; Private Enforcement and Procedure, Vol. 2, ¶ 9008.210, 9008.350, 9009.475, 9009.600.

Arkansas Antitrust Laws

Combinations and Conspiracies Under State Antitrust Laws—Procedure—Pleadings—Necessary Averments to State Cause of Action—Monopolies—Combinations—Price Fixing.—A trial court properly held that a hospital's complaint alleging that a local medical society and various individuals conspired to exclude the hospital's chief physician from membership in the society stated no cause of action under Arkansas statutes dealing with monopolies, combinations, and attempts to regulate or fix prices. The reviewing court affirmed the dismissal of the action on the basis of the trial court's opinion, 1958 TRADE CASES ¶ 69,182.

See Combinations and Conspiracies, Vol. 1, ¶ 2425.04.

For the appellant: James R. Hale, Fayetteville, Ark.

For the appellees: Eugene R. Warren (Warren and Bullion were on the brief), Little Rock, Ark.

Affirming a judgment of the U. S. District Court, Western District of Arkansas, Fayetteville Division, 1958 Trade Cases ¶ 69,182.

Before SANBORN, VOGEL and VAN OOSTERHOUT, Circuit Judges.

[*Parties*]

VOGEL, Circuit Judge [*In full text*]: Elizabeth Hospital, Inc., plaintiff, (appellant here) is a Delaware corporation authorized to do business in Arkansas, where it maintains and operates a hospital at Prairie Grove, Washington County. Its stockholders are Frank Riggall, Eva E. Riggall, Cecil Riggall and Robert Douglas Manning, each of whom owns 25% of the capital stock. The defendants are Fount Richardson; Friedman Sisco; Ruth Ellis Lesh; Stanley Applegate, individually and as president of Washington County Medical Society; Washington County Medical Society; and American Medical Association. The individual defendants are all physicians and surgeons and all defendants excepting the American Medical Association are citizens and residents of the State of Arkansas. The Washington County Medical Society is an unincorporated organization with at least 36 dues-paying or active members. The defendant Stanley Applegate is a member and president of such society and the other individual defendants are members thereof. A motion for dismissal as to the American Medical Association, a corporation organized under the laws of the State of Illinois, was granted by this court and it is accordingly not involved herein. For convenience, the parties will be designated as they were in the court below.

[*Treble Damage Action*]

Plaintiff brought this action to recover treble damages in the total amount of $300,000.00 for alleged violations of the Sherman Anti-Trust Act, 15 U. S. C. A., §§ 1, 2, 12 and 15, and to obtain an injunction requiring the Society and Association to admit Dr. Frank Riggall to membership therein. Plaintiff also alleged a violation of the constitution, statutes and common law of Arkansas, attempting thereby to create two grounds for federal court jurisdiction: First, under the Sherman Act; and, second, because of diversity of citizenship and amount involved.

In brief summary, plaintiff's complaint alleged that it was authorized to and did engage in the operation and maintenance of a hospital of which Dr. Frank Riggall was Chief of Staff; that it purchased medical equipment and supplies, etc., for its use in operating its hospital from outside the State of Arkansas. It alleged a conspiracy on the part of the defendants which interfered with the referral of patients to the plaintiff hospital from outside the State of Arkansas. The conspiracy was based upon the refusal of the Washington County Medical Society to admit Dr. Frank Riggall to membership therein, resulting in denial to him of membership in the Arkansas Medical Society and the American Medical Association.

[*Prior Proceedings*]

Excepting for the fact that Elizabeth Hospital, Inc., is the named plaintiff in the instant case and here alleged violations of the law of Arkansas as well as violations of the Sherman Anti-Trust Act, the complaint is virtually the same as that contained in a recent case wherein the plaintiff was Dr. Frank Riggall and wherein the defendants included all those named as defendants herein and in which this court, in *Riggall v. Washington County Medical Society, et al.*, 8 Cir., 1957 [1957 TRADE CASES ¶ 68,854], 249 F. 2d 266, certiorari denied 355 U. S. 954, sustained the District Court's dismissal of the complaint. The same District Court granted motions to dismiss here—*Elizabeth Hospital, Inc. v. Richardson, et al.*, D. C. W. D. Ark., 1958 [1958 TRADE CASES ¶ 69,182], 167 F. Supp. 155.

[*Arkansas Antitrust Laws*]

To sustain jurisdiction in the federal court it must be found that the allegations of the complaint, which for present purposes we must assume to be true, establish a claim under the law of Arkansas or that the complaint states a claim under the Sherman Anti-Trust Act. It has already been noted that the allegations of the instant complaint are, for all practical purposes, the same as the allegations contained in the complaint filed by Dr. Riggall in what might be termed the earlier case [1957 TRADE CASES ¶ 68,854], 249 F. 2d 266. Therein, Dr. Riggall was the sole plaintiff. He sought to recover treble damages in the same amount as is sought by Elizabeth Hospital, Inc., in the present case. There, Dr. Riggall sought recovery because of alleged wrongful refusal of the Washington County Medical Society to admit him to membership. The alleged damage to the plaintiff here is likewise based on the Society's refusal of membership to plaintiff's Chief of Staff—the same Dr. Frank Riggall. In addition to the allegation of a conspiracy or combination in violation of the Sherman Anti-Trust Act, it was alleged that there was a conspiracy under the law of Arkansas to injure or damage the plaintiff by refusing Dr. Riggall and certain members of his staff membership in the Washington County Medical Society. Dr. Riggall's application for membership in the Society was rejected by the membership by a secret vote of 34 to 2. The by-laws of the Society are set forth in plaintiff's complaint. Among other things, they provide that the Society shall be the judge of the qualifications of its members. They also provide that the members shall vote upon all applications and that the elections shall be by secret ballot and that three-fourths of the votes of the membership present and voting shall be necessary to elect. The opinion of the District Court ably demonstrates that under neither the common nor statutory law of Arkansas was there a right of action spelled out in plaintiff's complaint [1958 TRADE CASES ¶ 69,182], 167 F. Supp. 155. Citing Arkansas statutes dealing with monopolies, combinations and attempts to regulate or fix prices, it concluded, at page 162:

> "Since no monopoly or attempt at monopoly is alleged or shown by the facts in the complaint, and since it is likewise apparent that the plaintiff is not being driven from competition, these statutes have no application."

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And at page 163:

"The action of the medical society and its individual members, whatever their motive may have been, was not action to attain an unlawful purpose or to use unlawful means in attaining a lawful purpose, absent some specific statutory requirement that all persons be admitted to membership.

"It is true that the plaintiff alleges that the refusal of the defendants to admit Dr. Riggall to membership has resulted in a number of other conditions unfavorable to the plaintiff hospital as well as to Dr. Riggall. It may be seriously doubted whether any of the numerous conditions alleged to have been caused by the denial of membership are proximate results of that action by the medical society. Compare *Robinson v. Lull,* D. C. Ill. 1956, 145 F. Supp. 134, at page 137, where the court considered a series of facts similar to those presented here, and found no proximate connection between the acts of the defendants and the alleged injury.

"Assuming, however, that the conditions and injuries allegedly resulting from the medical society's denial of membership to Dr. Riggall were all proximate results of that action of the medical society, there is nevertheless no showing of any violation of state law in that action or any conspiracy to violate any state law. Most of the injuries said to result to the plaintiff and to Dr. Riggall from his inability to obtain membership in the medical society relate to the alleged loss of patients of the hospital. These assertions are in essence specifications of the allegation that the defendants, 'imposed a professional boycott upon the plaintiff, and thereby prevented the plaintiff from receiving great numbers of patients from outside the State of Arkansas and elsewhere.' These allegations, however, fall short of establishing a claim under Arkansas law."

Plaintiff here has utterly failed to demonstrate anything to the contrary and on this point cites but one case, *Southwestern Publishing Co. v. Ney,* 1957, 227 Ark. 852, 302 S. W. 2d 538. Such case is no support for plaintiff's contention. It is this court's well established rule to accept the considered judgment of the trial judge on any matter of doubtful or disputed local law. *Guyer v. Elger,* 8 Cir., 1954, 216 F. 2d 537, 540, certiorari denied 348 U. S. 929; *Barnard v. Wabash R. Co.,* 8 Cir., 1953, 208 F. 2d 489, 493; *Buder v. Becker,* 8 Cir., 1950, 185 F. 2d 311, 315-316; *Northern Liquid Gas Co. v. Hildreth,* 8 Cir., 1950, 180 F. 2d 330, 336. We concur in the trial judge's opinion that the complaint spelled out no right of action under the law of Arkansas.

[*Sherman Antitrust Act—Jurisdiction*]

Next for consideration is whether a claim under the Sherman Anti-Trust Act has been alleged. Essential to jurisdiction is that the conspiracy complained of be "in restraint of trade or commerce among the several states * * *." To establish this fact, plaintiff alleged that the wrongful exclusion of its Chief of Staff from the Washington County Medical Society so diminished his professional standing as to reduce the number of patients, both from within and without Arkansas, seeking treatment at plaintiff's hospital. Plaintiff also alleged that it purchases from outside the State of Arkansas medical equipment and supplies, etc., for its use in operating its hospital. However, this fact need not be considered here as plaintiff has failed to assert that the conspiracy complained of interfered with these purchases.

[*Interstate Commerce—Operation of Hospital*]

We think that the plaintiff's operation of a hospital, to include rendition of hospital services to some persons who came from outside the state, is no more engaging in interstate commerce than was Dr. Riggall in rendering medical services to persons who likewise came from other states. The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the state would be selling in interstate commerce. Uniformly, the courts have held to the contrary. *A. L. A. Schechter Poultry Corp. v. United States,* 1935 [1932-1939 Trade Cases ¶ 55,072], 295 U. S. 495; *Lawson v. Woodmere,* 4 Cir., 1954 [1954 Trade Cases ¶ 67,904], 217 F. 2d 148, 150; *Jewel Tea Co. v. Williams,* 10 Cir., 1941, 118 F. 2d 202, 207; *Lipson v. Socony-Vacuum Corp.,* 1 Cir., 1937 [1932-1939 Trade Cases ¶ 55,146], 87 F. 2d 265, 267, certiorari granted, 300 U. S. 651, certiorari dismissed, 310 U. S. 701.

[*Effect on Interstate Commerce*]

Interference with intrastate activity cannot constitute a violation of the Sherman

Act unless its effect on interstate commerce is both substantial and direct. *A. L. A. Schechter Poultry Corp. v. United States, supra; Mandeville Farms v. Sugar Co.,* 1947 [1948-1949 TRADE CASES ¶ 62,251], 334 U. S. 219; *Local 167 v. United States,* 1933 [1932-1939 TRADE CASES ¶ 55,043], 291 U. S. 293. We observed in the earlier case at page 268:

"There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce. *The mere fact that plaintiff at his location in Arkansas may be treating patients from other states who must travel interstate does not result in practicing his profession in interstate commerce, as the transportation of such patients is incidental.* The practice of his profession as disclosed by the allegations of his complaint is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act, nor are there any allegations in the complaint indicating that the actions of defendants here complained of resulted in a monopoly within the provisions of Section 2 of the Act. Plaintiff has not been prevented from practicing his profession, but in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants." (Italics supplied.)

The case of *Spears Free Clinic and Hospital for Poor Children v. Cleere, et al.,* 10 Cir. [1952 TRADE CASES ¶ 67,276], 1952, 197 F. 2d 125, is on almost all fours with the instant case. Therein the court stated, at page 126:

"The practice of the healing arts in Colorado, including chiropractic, is wholly local in character. The alleged conspiracy and the acts alleged to have been done in furtherance thereof had for their purpose and object the monopolization and restraint of purely local activities. No price fixing or price maintenance for professional or other services was involved. There was no intent to injure, obstruct or restrain interstate or foreign commerce. *The mere fact that a fortuitous and incidental effect of such conspiracy and acts may be to reduce the number of persons who will come from other states and countries to the Spears Hospital for chiropractic treatments does not create such a relation between interstate and foreign commerce and such local activities as to make them a part of such commerce.*

To come within the purview of the Sherman Act the restrain of commerce or the obstruction of commerce must be direct and substantial and not merely incidental or remote." (Italics supplied.)

[*Dismissal Affirmed*]

We think the complaint here is wholly lacking in a jurisdictional essential in that it fails to show that the conspiracy complained of had any restraining effect on interstate commerce within the meaning of the Sherman Anti-Trust Act.

Affirmed.

[¶ 69,407] Texaco, Inc. v. William J. O'Connell, individually and d.b.a. Bill O'Connell's Texaco Service Station, and Joan E. O'Connell.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 26601. Dated July 14, 1959.

Pennsylvania Fair Trade Act

Fair Trade—Fair Trade Pricing of Gasoline Under Pennsylvania Fair Trade Act—Enforcement—Temporary Injunction—Requirements—Irreparable Damage.—An oil refiner, in a fair trade enforcement action against a dealer which sold the refiner's branded gasoline at less than minimum fair trade prices established pursuant to the Pennsylvania Fair Trade Act, was refused a temporary injunction on the ground that there was no showing of irreparable damage to the refiner. Evidence was produced as to the amount of money spent by the refiner in advertising its trademarks, and there was testimony that a lowering of prices would have a serious effect on the refiner's business and would seriously hurt the good will it had built up over a long period of years. However, there was no attempt to place a dollar figure on the past and prospective damage which the refiner claimed. It might be able to establish the minimum jurisdictional amount and other essential elements at trial, but it had not, on the record before the court, shown enough to subject the dealer to the harsh remedy of a restrictive injunction.

See Fair Trade, Vol. 1, ¶ 3362.40.

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Fair Trade—Fair Trade Pricing Under Pennsylvania Fair Trade Act—Enforcement—Federal Court Action—Effect of State Court's Prior Finding on Same Point.—A Federal district court, in refusing an oil refiner a temporary injunction because it had failed to show that it was irreparably damaged by a dealer's sales below fair trade prices established under the Pennsylvania Fair Trade Act, noted that there was another facet of the case which, although not vital to the decision, merited comment. It appeared that the refiner had started an identical suit in a Pennsylvania court and that a judge of that court, in refusing a temporary injunction, had found that there was no showing of irreparable damage. That action was dropped and subsequently lodged in this court. Litigants in a Federal court because of diversity of citizenship should have no greater advantage than when in a state court. Thus, the finding of the Pennsylvania court might not have been *res adjudicata*, but it was entitled to a great deal of weight. Concluding, the court noted that there had been no showing of a dire emergency which would warrant interference with the State court's finding on the precise point.

See Fair Trade, Vol. 1, ¶ 3410.40.

For the plaintiff: Butler, Beatty, Greer & Johnson, Media, Pa.

For the defendant: Thomas A. Curran and Edward Kassab, Chester, Pa.

Opinion

[*Fair Trade Action*]

CLARY, District Judge [*In full text*]: This matter is presently before the Court on plaintiff's motion for a preliminary injunction to restrain the defendants from selling its trademarked products "Texaco" and two grades of gasoline "Fire Chief" and "Sky Chief" at less than the minimum prices fixed by it under the provisions of the Pennsylvania Fair Trade Act of 1935 as amended, 73 Purdon Statutes, Section 8.

[*Parties*]

Plaintiff corporation is incorporated under the laws of the State of Delaware, having its principal office in the City and State of New York, and is duly authorized to do business in the Commonwealth of Pennsylvania. It is engaged in the business of producing, refining and selling petroleum and petroleum products, including the two "brand" gasolines referred to above. Plaintiff does not sell its products at retail in the Commonwealth of Pennsylvania.

Defendants William J. O'Connell and Joan E. O'Connell are operators of a gasoline station at Baltimore Pike, Route U. S. #1, Borough of Chester Heights, Delaware County, Pennsylvania, at which station they have been selling, and have continued to sell, "Fire Chief" and "Sky Chief" gasoline, purchased by them from the plaintiff for resale to the public under the trade names and under a supply contract entered into between the plaintiff and the defendants.

[*Sales Below Fair Trade Prices*]

Early in January of 1959 plaintiff entered into a contract in the State of Pennsylvania with a retailer of its products, William F. Zuschnitt at Lancaster Pike and Greenwood Avenue, Paoli, Pennsylvania. This agreement entered into under the applicable provisions of the Pennsylvania Fair Trade Act of 1935 as amended (73 P. S. Sections 7 and 8) provided that said Zuschnitt would not resell plaintiff's products except at the stipulated minimum retail prices fixed by the plaintiff. On or about January 14, 1959, plaintiff notified all Pennsylvania retailers of its products that effective January 16, 1959 the plaintiff had stipulated minimum retail prices for its motor fuels in defendants' area, fixing the retail prices including State and Federal taxes at $.279 per gallon for Texaco Fire Chief and $.319 per gallon for Texaco Sky Chief. Receipt of this notice has been stipulated between the parties, together with notice from plaintiff to defendants on both February 3, 1959 and February 11, 1959, to cease and desist selling its gasoline products at less than minimum prices. It has been further stipulated that the defendants have continued subsequently to the notice and to the cease and desist warnings to sell the two brands of gasoline at less than the minimum prices provided in the Fair Trade Agreement above referred to.

[*Prior Proceedings*]

This action was filed on July 2, 1959, and on that date, without notice, a temporary

restraining order was entered restraining the defendants from selling plaintiff's two products at less than the stated minimum retail prices. Hearing on plaintiff's motion for a temporary injunction was fixed for July 8, 1959, on which date a hearing was held and testimony presented. At that time plaintiff established its ownership of the trade-marks in question and produced evidence that it had spent over twelve million dollars in the year 1958 advertising its trade-marks nationally. It attributes a substantial portion of this advertising to promotion in Pennsylvania. Plaintiff also produced testimony of its Division Manager covering this area that the lowering of prices below the minimum stated in the Fair Trade Agreement would have a serious effect upon its business and would seriously hurt the good will of the company built up over a long period of years. However, there was no attempt to place a dollar figure on the past and prospective damage which plaintiff claimed.

[*Companion Cases*]

This case and its three companion cases, *viz., Texaco, Inc. v. Ernest Harrison,* Civil Action No. 26602; *Texaco Inc. v. Michael Grassano,* Civil Action No. 26603, and *Texaco, Inc. v. Romeo Sangillo, et al.,* Civil Action No. 26604, are in this Court by reason of diversity of citizenship; the plaintiff, as aforesaid, being a resident of Delaware and all defendants being residents of the Commonwealth of Pennsylvania.

[*Suits in State Court—Discontinuance*]

On the basis of statements made by counsel for the defendants at the hearing, not contraverted by counsel for the plaintiff, it appears that the plaintiff here started identical suits in the Court of Common Pleas of Delaware County, Pennsylvania, In Equity, on April 21, 1959, titled as of March Term, 1959, Nos. 1504-1507 inclusive. These actions insofar as pleadings are concerned are essentially identical with the pleadings filed in this Court. A rule to show cause was issued out of that court against the several defendants, said rule requiring the defendants to show cause why a preliminary injunction should not issue against each of them. After a hearing before Honorable William R. Toal, Judge of that Court, the rules to show cause were denied and an order to that effect was entered on April 27, 1959. It was stated at the hearing in this Court by attorneys for the plaintiff that all of these actions had been discontinued as of July 7, 1959 for the reason that Texaco, doing business in each of the 10 counties of this district, had determined to centralize its Fair Trade enforcemnet actions in this Court rather than proceeding in the various courts of Common Pleas of the said 10 counties. Whatever its reason, it has in the instant cases dropped the actions in the Delaware County Court and the cases are now lodged in this Court.

[*Irreparable Damage*]

The primary question to be decided in this and the companion cases is whether the plaintiff has on the record presently before the Court made a showing of irreparable damage. The conclusion of the Court is that on the record presented, it has not. There is a pleading allegation that the damages in each case do exceed $10,000 which at this junction of the case is sufficient to vest apparent jurisdiction in this Court. It may well be that at trial on final hearing, plaintiff may be able to establish the minimum jurisdictional amount, and it may be that plaintiff upon proper showing will be entitled to a permanent injunction and possibly money damages. On these two points the Court expresses no opinion since the matter has not progressed sufficiently to establish these vital and essential elements. However, it is the feeling of the Court that more than has been shown here is required before a defendant should be subjected to the harsh remedy of a restrictive injunction, See, *Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc.,* — F. 2d —, and *Yakus v. United States,* 321 U. S. 414, 440.

[*Finding in State Court*]

There is another facet of this case which merits comment, although not vital to the Court's decision which is based on the record in this Court. The plaintiff here had its choice of forums originally. It chose the Court of Common Pleas of Delaware County. The right here involved is a state-created right and certainly a state court is primarily the proper place to secure an interpretation of state law, even though this Court in diversity cases may and does sit for all practical purposes as a State Court in determining state rights. A judge of a competent Pennsylvania Court which had jurisdiction of the parties and jurisdiction

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of the cause of action in refusing the temporary injunction made a determination that there had been no showing of irreparable damage. While this finding may not have the effect of *res adjudicata* as between the parties, it certainly is entitled to a great deal of weight when the identical issue is shortly thereafter presented to a Federal court. Litigants in a Federal court, because of diversity, should have no greater advantage because of the fact that the action is in a Federal court rather than a State court, and this is particularly true where a state-created right is involved. See the discussion of this problem in *Guarantee Trust Co. v. York*, 326 U. S. 99 (1945).

[*Temporary Injunction Refused*]

No showing of dire emergency has been made in this case which would warrant interference with a finding of a State court on the precise point. The temporary injunction, therefore, will be refused in this case as well as the three above-mentioned companion cases, and the cases will proceed to trial on the merits. The foregoing shall be deemed to be the Findings of Fact and Conclusions of Law of the Court.

[¶ 69,408] Texaco, Inc. v. Russell Haney.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 26,557. Filed July 7, 1959.

Pennsylvania Fair Trade Act

Fair Trade—Fair Trade Pricing of Gasoline Under Pennsylvania Fair Trade Act—Federal Court Action—Temporary Injunction—Requirements—Irreparable Injury—Jurisdictional Amount—Meritorious Claim.—In a Federal court action, an oil refiner was denied a temporary injunction to enjoin a dealer from selling gasoline below established fair trade prices because (1) it was not established that the refiner was threatened with irreparable injury, (2) it was not established that the matter in controversy exceeded $10,000, the jurisdictional amount, and (3) there were legal questions respecting the interpretation of the Pennsylvania Fair Trade Act which raised serious doubt as to the merits of the refiner's ultimate claim for relief. On the question of irreparable injury, it was relevant that the refiner had not proceeded with alacrity to prevent four of the dealer's competitors from selling below fair trade prices, but had delayed at least four months before taking any action. Also, there was the same lack of essential witnesses as there had been in a prior case where a court said: "The only witness for the plaintiff who testified to the extent . . . of harm done to plaintiff's good will . . . was neither an officer nor director of the plaintiff nor one who was in a position to have or who did have personal knowledge of the facts. . . ."

See Fair Trade, Vol. 1, ¶ 3362.40, 3410.40, 3440.40.

For the plaintiff: Duane, Morris & Heckscher, Philadelphia, Pa. (by John B. Martin and John M. Ross).

For the defendant: Schnader, Harrison, Segal & Lewis, Philadelphia, Pa. (by Jerome J. Shestack and James M. Richardson).

(Sur Motion for Preliminary Injunction)
Memorandum Opinion and Order

[*Fair Trade Action*]

EGAN, District Judge [*In full text*]: This is a diversity case in which plaintiff, a Delaware corporation, having its principal office without Pennsylvania, is seeking to enjoin defendant, a citizen of Pennsylvania, from violating the Pennsylvania Fair Trade Law.[1]

It came on for hearing in open Court after a temporary restraining order had issued on plaintiff's motion for a preliminary injunction and on defendant's motion to lift the temporary restraining order and to deny the preliminary injunction.

From the evidence and the admissions of the parties, the Court makes the following

[1] Act of June 5, 1935, P. L. 266, as amended by Act No. 859, May 25, 1956, 73 P. S., sections 7-11.

FINDINGS OF FACT

[*Plaintiff*]

1. Plaintiff is a Delaware corporation whose principal office and place of business is beyond the geographical limits of Pennsylvania.

2. At all times pertinent hereto, plaintiff was registered to do and was doing business in the Commonwealth of Pennsylvania. Effective May 1, 1959, plaintiff's corporate name was changed from "The Texas Company" to "Texaco, Inc." and its certificate of authority to do business in Pennsylvania was amended accordingly.

3. Plaintiff is engaged in the business of selling gasoline in Pennsylvania under valid, registered trade-marks covering the names Texaco "Fire Chief" and "Sky Chief."

4. Plaintiff has sold and now sells gasoline in Pennsylvania to dealers for resale to the public at retail.

[*Fair Trade Agreement*]

5. On January 12, 1959 plaintiff entered into a written agreement with one of its Pennsylvania dealers who sells its trade-named gasolines (Ex. P-1). Among other things, this agreement provided that said dealer would sell Texaco "Fire Chief" gasoline at 19.9¢ per gallon and Texaco "Sky Chief" at 23.9¢ per gallon, exclusive of all taxes imposed by federal, state and municipal governments, unless otherwise notified by plaintiff; and that said dealer would not sell such gasolines except at prices fixed by plaintiff.

[*"Non-Signer" Dealer*]

6. Defendant is a dealer who owns and operates his own station at McDade Boulevard and Springfield Avenue, Folsom, Delaware County, Pennsylvania, and who at all times pertinent hereto purchased from plaintiff and distributed at retail to the public the brand named gasolines referred to above.

7. There is no agreement, written or oral, between plaintiff and defendant.

8. On or about January 14, 1959, plaintiff notified all of its Pennsylvania dealers, including defendant, that effective January 16, 1959 plaintiff had established minimum prices for the resale of its products as aforesaid, within the Commonwealth of Pennsylvania, under the provisions of the Pennsylvania Fair Trade Act, together with a copy of the Fair Trade agreement. This notice was ultimately received and accepted by defendant who at first refused to accept it in the form of registered mail.

[*Violation*]

9. Defendant does not deny that from January 16, 1959 until the present he has at various times sold plaintiff's trade-named gasolines referred to above at less than the fair trade prices and that on two occasions he received written notice that if he failed to comply with the Fair Trade agreement, legal action would be taken.

10. Plaintiff seeks to prevent sales of its trade-named products by defendant at prices less than the minimum prices fixed by plaintiff from time to time, in accordance with the aforesaid agreement.

[*Irreparable Injury*]

11. There is no sufficient credible evidence on the present record before the Court from which a finding could be made that plaintiff is threatened with irreparable injury.

[*Jurisdiction*]

12. There is no sufficient credible evidence on the present record before the Court from which a finding could be made that the matter in controversy exceeds $10,000.00.

[*Merits of Action*]

13. There are a number of important questions existing in this litigation which raise serious doubt as to the extent of plaintiff's ultimate rights against the defendant.

DISCUSSION

[*Lack of Essential Witnesses*]

This case is somewhat similar to that of *The California Oil Company v. Travaline, et al.* [1957 TRADE CASES ¶ 68,672, *"California Oil Co. v. Fitzgerald"*], 147 F. Supp. 832 (1957) where Judge Kraft denied motions for a preliminary injunction against four separate vendors of plaintiff's gasoline at retail. The essential difference is that there the defendants had no direct dealings with the plaintiff. They bought plaintiff's trade-named gasolines from middlemen or distributors.

Since we have here the same lack of essential witnesses, what Judge Kraft said there is pertinent (p. 834):

> "The only witness for the plaintiff who testified to the extent of plaintiff's investment in promoting good will for its trade-

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mark, or to the extent of harm done to plaintiff's good will by the defendant's sales, was neither an officer nor director of the plaintiff nor one who was in a position to have or who did have personal knowledge of the facts to which he testified. Most of his testimony in this area was based on knowledge gleaned from reports by or conversations with others. While the testimony was admitted over objection, its probative value was for the court."

[*Delay in Enforcement*]

At the hearing it was not denied that plaintiff had not proceeded with alacrity to prevent four of its retail dealers who competed with defendant in the area defendant serves from selling its trade-named gasolines at less than the established minimum prices. A delay of at least four months was permitted before any action was taken. This certainly becomes relevant on the question of irreparable injury.

[*Discretion*]

Only recently our Court of Appeals for this Circuit, in *Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc.*, — Fed. 2d —, reversed the granting of an interlocutory injunction as an abuse of discretion because no irreparable injury could be foreseen. The case is important because it states the principles applicable to the granting or denying of a preliminary injunction in this Circuit. Judge Kalodner, who wrote the opinion for the Court, quotes from the opinion in *Yakus v. United States,* 321 U. S. 414, 440, the following:

"The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, *even though irreparable injury may otherwise result to the plaintiff* . . . Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, *in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction* . . ." (Emphasis supplied)

[*Legal Questions Raised*]

Finally it may be said that this case, like that of *The California Oil Company v. Travaline, et al., supra,* raises legal questions respecting the interpretation of the Pennsylvania Fair Trade Law of such a nature as to raise serious doubt as to the extent of plaintiff's ultimate rights against defendant. See *Henis v. Compania Agricola de Guatemala,* (D. C. Del. 1953), 116 F. Supp. 223, affirmed 210 F. 2d (C. A. 3), p. 950.

Conclusions of Law

1. Jurisdiction of this action on this record is debatable.

2. Plaintiff has not established on this record that it is threatened with irreparable injury.

3. Doubt exists on the present record as to the merits of plaintiff's ultimate claim for relief.

Order

And Now, July 7, 1959, plaintiff's motion for preliminary injunction is Denied, the temporary restraining order is lifted and dissolved, and the defendant's motion to dismiss plaintiff's application for a preliminary injunction is Granted.

[¶ 69,409] In the Matter of the Grand Jury Investigation (General Motors Corporation).

In the United States District Court for the Southern District of New York. M 11-188. Filed July 17, 1959.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Grand Jury Proceedings—Subpoena *Duces Tecum*—Scope—"Unlimited Exploratory Investigation"—Time Period of 30 Years.—A subpoena *duces tecum* commanding a manufacturer to appear before a grand jury (investigating "an alleged violation of the federal antitrust law") and produce "a vast volume of records covering in minute detail practically every internal and external aspect of the corporation's widespread activities except labor relations, for varying periods of which the shortest is 11 years and the longest is 30 years," in an "unlimited exploratory investigation," was quashed on the ground that it was unreasonable. The schedule of items demanded covered 13 legal size pages and consisted of

16 numbered paragraphs, most of which were subdivided into subparagraphs ranging in number from 2 to 18. Among the papers called for were "policy documents" which included every piece of paper, however informal, relating to any activity covered by the subpoena, which ever came to the attention of any member of the manufacturer's boards or committees. A search by responsible personnel of 30,000 file drawers would have been required to secure such documents from only one of the manufacturer's 44 divisions. The court noted that a subpoena *duces tecum* of such scope was unprecedented in its experience. Although it did not prescribe limits for the proposed investigation, the court questioned the necessity for producing proof of conduct 30 years ago and noted that whatever subpoenas were issued had to conform to constitutional standards.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.625.

For the United States: Willis L. Hotchkiss, George D. Reycraft, Larry L. Williams, E. Winslow Turner, William C. McPike, Robert A. Hammond, and Alan S. Ward, Attorneys, Department of Justice.

For the movant: Cravath, Swaine & Moore, New York, N. Y., for General Motors Corp. (Henry M. Hogan, Bruce Bromley, and George B. Turner, of counsel).

[*Subpoena Duces Tecum—Scope*]

McGohey, District Judge [*In full text*]: General Motors has moved to quash a subpoena *duces tecum* which was caused to be issued by Government attorneys commanding the corporation to appear before a grand jury in this district to testify and give evidence in regard to "an alleged violation of the federal antitrust law"; and to produce "documents and items" described in an attached schedule. The latter covers 13 legal size pages and consists of 16 numbered paragraphs most of which are subdivided into sub-paragraphs ranging in number from 2 to 18.

The motion is granted.

Whether, as counsel for the corporation asserts, a subpoena *duces tecum* of such scope as this is without precedent in antitrust litigation need not be decided. But certainly it is unprecedented in the experience of the writer. What is demanded is a vast volume of records covering in minute detail practically every internal and external aspect of the corporation's widespread activities except labor relations, for varying periods of which the shortest is 11 years and the longest is 30 years; and in addition extensive detailed data as to the production, financial standing and "profitability and prospects" of unidentified "competitors in each product field."

[*"Policy Documents"*]

Among the papers called for are what are designated as "policy documents," a term which is defined in the *subpoena* as follows:

"'Policy Documents' are all originals, copies, microfilms, tape recordings, and reproductions of any kind of:

1. Minutes and records of the Board of Directors and all committees and subcommittees thereof and all reports, minutes, recommendations, surveys, studies, financial records and communications and records of any kind going to, coming from or retained by such Board, or by any of its committees or subcommittees, or by any members thereof.

2. All reports, minutes, memoranda, recommendations, surveys, studies, financial records and communications of any kind received by, prepared by, for, or on behalf of, or transmitted by or on behalf of the general manager or president, as the case may be, of any division or subsidiary of the Corporation, the committees and subcommittees of each such division or subsidiary and the members thereof.

3. All reports, memoranda, recommendations, surveys, studies, financial records and communications and records of any kind received by, prepared by, for, or on behalf of, or transmitted by or on behalf of any officer of the Corporation who functions on behalf of the Corporation as a whole or who is a group executive."[1]

[1] Only one of unmarked multiple identical copies need be produced. But any such copies bearing notations relevant to the subject matter must be produced. Moreover, if any such documents have heretofore been produced in any of four named suits by the Government against General Motors beginning in 1941, they need not be produced. However, the corporation is left to discover what documents the Government has already received.

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On Argument, the Government's attorney consented to modify the foregoing by eliminating "members thereof" from paragraphs 1 and 2. It developed on argument that a "policy document" is every piece of paper, however informal, relating to any activity covered by the *subpoena,* which ever came to the attention of any member of the boards or committees or any of the officials named in the definition, without regard to whether the contents of the paper were approved or rejected. The corporation has 44 operating divisions and subsidiaries. Each of these has its own hierarchy of managing officials who from time to time serve on various standing or special committees formed to study matters of business policy and practice in their own or other divisions. The corporation's board of directors likewise work largely through several committees made up of board members and numerous corporate officers who are not directors.

[*Magnitude of Search Required*]

The *subpoena* itself must be read and studied to appreciate the extraordinary breadth of the demand for "policy documents." It includes, for example, those relating to "products" produced by the corporation or purchased by it from others. The corporation's "products" range from small mechanical parts such as screws, bolts and nuts through a wide range of machine tools to the following "products" and each of their multitudinous parts; engines, passenger cars, trucks, railroad locomotives, earth moving machinery, refrigerators and other electrical household appliances. The corporation's general counsel asserts under oath that, to secure the "policy documents" demanded for the specified period from its Pontiac Motor Division alone would require a search by responsible personnel of 30,000 file drawers. This assertion is not denied by Government counsel. They merely argue that they "hardly believe" top management officials would concern themselves with any but "major" products, a term they do not define. This argument, however, is contradicted by the *subpoena* which these same counsel have caused to be issued. That is not limited to "major" products. It includes all. I accept the sworn statement of the corporation's general counsel and find accordingly. It is a fair inference that searches of proportionate magnitude would be required in the other numerous divisions of the corporation, and I so find.

As appears from the *subpoena,* copies of many of the demanded documents have heretofore been produced in prior and even presently pending litigations. The Government, however, does not specify which of these are now excluded from the demand but puts on the corporation the burden of determining that.

[*"Unlimited Exploratory Investigation"*]

It is settled law that a demand for production of documents by *subpoena* must be reasonable.[2] I hold that this *subpoena* which requires production of practically every paper outside of routine correspondence relating to every phase of the corporation's affairs, in an unlimited exploratory investigation such as is here frankly proposed, "whose purposes and limits can be determined only as it proceeds,"[3] is unreasonable. It will be quashed.[4]

[*Misuse of Grand Jury Process*]

In view of what has been said, it is unnecessary to pass now on the corporation's contention that in any event the Government is misusing the grand jury process to discover evidence to support a civil suit.

[*Time Limits for Investigation*]

Government counsel assert they have received recent complaints of possibly illegal practices by the corporation in certain specified areas of business. The grand jury, of course, may investigate these as well as any other possible criminal violations. But surely it is not inevitably necessary in such investigations or for the prosecution of any criminal charges that may result, that proof of conduct 30 years ago be produced. There is, after all, a statute of limitations for criminal offenses against the antitrust laws. Moreover it is never necessary in order to prove a course of conduct, to show each and every act in one's history. This, of course, is as true of an antitrust prosecution as of any other.

The court will not now undertake to prescribe limits for the proposed investigation.

[2] *Boyd v. U. S.,* 116 U. S. 616; *Hale v. Henkle,* 201 U. S. 43.
[3] See *McMann v. Securities and Exchange Commission,* 2 Cir., 87 F. 2d 377, 379.
[4] See *In Re United Shoe Machinery Corporation,* [1946-1947 TRADE CASES ¶ 57,535], 6 F. R. D. 347.

But whatever *subpoenas* are issued must conform to constitutional standards. Moreover Government counsel are advised to consider Judge Wyzanski's observations and decision in *United States v. United Shoe Machinery Corporation*[5] with respect to what he described as "the type of extravagant presentation that has come to plague the field of antitrust law."

[*Subpoena Quashed*]

The motion is granted and the instant *subpoena* is quashed.

So Ordered.

[¶ 69,410] Service Stages, Inc. v. The Greyhound Corporation, et al.

In the United States Court of Appeals for the Fifth Circuit. No. 17612. Dated July 24, 1959.

Appeal from the United States District Court for the Northern District of Georgia. FRANK A. HOOPER, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Statute of Limitations.—A trial court's judgment holding that a plaintiff's treble damage action was barred by a Georgia four-year statute of limitations was affirmed on the basis of the trial court's opinion, 1959 TRADE CASES ¶ 69,351.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100, 9010.200.

For the appellant: Hal Lindsay, Ellis Arnall, H. Fred Gober, and Randolph Hayes, all of Atlanta, Ga.

For the appellee: E. Smythe Gambrell and Charles A. Moye, Jr., both of Atlanta, Ga.

Affirming a judgment of the U. S. District Court, Northern District of Georgia, 1959 Trade Cases ¶ 69,351.

Before JONES and BROWN, Circuit Judges, and WRIGHT, District Judge.

PER CURIAM [*In full text*]: We find ourselves in agreement with the opinion of the District Court, *Service Stages Inc. v. Greyhound Corporation* [1959 TRADE CASES ¶ 69,351], 170 F. Supp. 482. For the reasons which it has given its judgment is affirmed.

[¶ 69,411] United States v. Eli Lilly and Company; Allied Laboratories, Inc.; American Home Products Corporation; Merck & Co., Inc.; and Parke, Davis & Company.

In the United States District Court for the District of New Jersey. Criminal Action No. 173-58. July 8, 1959.

Case No. 1387 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Proof of Unlawful Price Fixing Conspiracy—Disparity Between Domestic and Foreign Prices—Disparate Costs But Uniform Prices in Domestic Sales—Production of "Costs" Documents—Subpoena *Duces Tecum*.—The Government, in a criminal action charging five pharmaceutical companies with conspiring to fix prices for the sale of Salk polio vaccine to public authorities in the United States, was granted a motion for the issuance of a subpoena *duces tecum* to compel the production of "documents that were prepared for the purpose of aiding in the pricing of the vaccine.

[5] [1953 TRADE CASES ¶ 67,436], 110 F. Supp. 295, 299.

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. . ." It sought those documents in order to show that the companies' "costs" were "disparate" and that their uniform prices were, therefore, the result of an unlawful agreement rather than the result of uniform costs. The court found that the documents had a "liminal relevancy" to the charges. In addition, the court rejected the companies' contentions that, even assuming relevancy, the probative value of their "costs" was insufficient to justify the disclosure of their trade secrets, the resulting delay in the trial, the confusion of the jury, and the prejudice to the companies by virtue of their having made a profit on Salk vaccine.

Also, the Government's "proffer of proof" that the companies offered vaccine to those not alleged to have been objects of the conspiracy (foreign public authorities), at "disparate" prices, was both relevant and material. That evidence was capable of properly influencing the result in the case because the jury might infer that "disparate" bidding between the companies might have occurred domestically except for the existence of a conspiracy to agree on prices as charged.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360, 2005.410.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Production of Records Under Rule 17(c), Federal Rules of Criminal Procedure—Rule's Availability to Government.—The Government, in a criminal action charging five pharmaceutical companies with conspiring to fix prices for the sale of Salk polio vaccine, was granted a motion under Rule 17(c) of the Federal Rules of Criminal Procedure for the issuance of a subpoena *duces tecum* to compel the companies to produce certain "costs" documents. Rule 17(c) permits the court to require the production of "the books, papers, documents, or other objects designated," reserving to the court the discretion to quash or modify the subpoena "if compliance would be unreasonable or oppressive." While research yielded no case in which the Government had utilized that Rule directly against a defendant, that fact did not mean that the Rule was not available to the Government. In a prior case, it had been found that no right of discovery existed in favor of the Government "since such discovery would probably be a violation of the defendant's constitutional rights." Corporations, however, enjoy no such privilege against self-incrimination. Therefore, there was no reason, in the instant case, to deny the Government the opportunity to employ the Rule.

The court found that the requirements of "good cause" for the production of the documents were met, in that (1) the documents had a "liminal relevancy," (2) the documents could not be procured elsewhere, (3) the Government could not properly prepare for trial without them, and (4) the Government was operating in "good faith" and was not embarking on a "fishing expedition."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.500.

For the plaintiff: Lewis Bernstein, Bernard M. Hollander, William P. Cassedy, William H. Copenhaver, and Stephen R. Lang, Attorneys, Department of Justice, for the Motion and the Proffer.

For the defendants: Richard J. Hughes, for Eli Lilly and Company; and Dewey, Ballantine, Bushby, Palmer & Wood by Thomas E. Dewey, Everett I. Willis, Leonard Joseph, Robert Pitofsky, and James T. Harris, of Counsel. Minton, Dinsmore & Bohlinger, for Allied Laboratories, Inc., by H. Colin Minton, Jr., and John R. Heher; and Sullivan & Cromwell by William Piel, Jr., and Blackmar, Swanson, Midgley, Jones & Eager by Kenneth E. Midgley, of Counsel. Pitney, Hardin & Ward, for American Home Products Corporation, by Frank C. O'Brien; and Donovan, Leisure, Newton & Irvine by Ralstone R. Irvine, Roy W. McDonald, and Robert M. Loeffler, of Counsel. Katzenbach, Gildea & Rudner, for Merck & Co., Inc., by George Gildea, and Richard M. Kohn; and Drinker, Biddle & Reath by Charles J. Biddle, John G. Williams, and Patrick Ryan, of Counsel. Thorn Lord, for Parke, Davis & Company; and Covington & Burling by Gerhard A. Gesell, Stephen Pollak, and James E. Tobin, of Counsel, contra the Motion and the Proffer.

Opinion

On Motion under Rule 17(c)
of Federal Rules of
Criminal Procedure
and

Ruling

On Government's Proffer of
Proof as to Foreign Sales

[*Price Fixing Charged—Salk Vaccine*]

FORMAN, Chief Judge [*In full text*]: In this prosecution for violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1952 ed.), Eli Lilly and Company, Allied Laboratories, Inc., American Home Products Corporation, Merck & Co., Inc., and Parke, Davis & Company, are charged with conspiring to fix the prices at which poliomyelitis vaccine, commonly known and referred to herein as Salk vaccine, was sold to public authorities within the United States. The Government now moves under Federal Rule of Criminal Procedure 17(c)[1] for the issuance of subpoenae *duces tecum* to compel the defendants to produce before trial certain documents having to do with the pricing of Salk vaccine to public authorities in the United States from January 1, 1955 to December 31, 1957.

[*Proffer of Proof*]

There is also before the court a proffer of proof by the Government of foreign sales of Salk vaccine by the defendants. The motion under Rule 17(c) will be considered first.

[*Rule 17(c)—Availability to Government*]

Although raised by but one defendant,[2] Allied Laboratories, and only indirectly by it, attention must first be given to the question of whether or not the Government may employ Rule 17(c) against these defendants. As pointed out by Allied, "The history of judicial construction of the provisions of the last sentence of Rule 17(c), under which this motion is made, is mainly a history of applications by *defendants* to compel production of documents by the Government." Indeed research yields not a single case in which the Government utilized this rule directly against a defendant. But the lack of its employment by the Government does not mean that it is not available. In *United States v. Carter*, 15 F. R. D. 367 (D. D. C. 1954) Judge Holtzoff quoted the following excerpt from the "Committee Notes to the Second Preliminary Draft of the Rules":

> "The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted in the interests of fairness and for the purpose of preventing delay during the trial, particularly in cases where numerous documents may have been subpoenaed."

Judge Holtzoff also found, however, that in the case of an individual defendant "no reciprocal right of discovery [exists] in favor of the Government, since such discovery would probably be a violation of defendant's constitutional rights." Corporations, however, enjoy no such privilege against self-incrimination and there is therefore, no reason to deny the Government the opportunity to employ the Rule in this case.

On its face the Rule permits the court to require production of "the books, papers, documents, or other objects designated [in the subpoena *duces tecum*]", reserving to the court discretion to quash or modify the subpoena "if compliance would be unreasonable or oppressive." As Judge Holtzoff held in *Carter, supra,* at page 371:

> "Rule 17(c) is applicable only to such documents or objects as would be admissible in evidence at the trial, or which may be used for impeachment purposes."

Considering both the plain language of the Rule itself and the *Carter* case, *supra,* I conclude that Rule 17(c) is available in a proper case to the Government as well as the defendant.

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[1] "(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys." Fed. Rules Cr. Proc. Rule 17(c), 18 U. S. C. A.

[2] Any argument urged by an individual defendant which has application to all defendants has been considered as if made by all defendants.

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[*Good Cause*]

In *Bowman Dairy Co. v. United States* [1950-1951 TRADE CASES ¶ 62,818], 341 U. S. 214 (1950), the Court held, at page 220:

"It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision that the court may direct the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. . . ."

Having quoted this very language, Judge Weinfield, in *United States v. Iozia,* 13 F. R. D. 335 (S. D. N. Y. 1952), at page 338, said:

"Good cause, in my opinion, requires a showing by the defendant,

(1) That the documents are evidentiary and relevant;

(2) That they are not otherwise procurable by the defendant reasonably in advance of trial by exercise of due diligence;

(3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;

(4) That the application is made in good faith and is not intended as a general fishing expedition."

[*"Pricing" Documents Sought*]

Originally the Government's motion was very broad and sweeping.[3] However, at oral argument the Government agreed that it was seeking only those "documents that were prepared for the purpose of aiding in the pricing of the vaccine * * * whether or not [they were] used." The affidavit filed in support of the motion reads in part, "Accordingly, the materials sought by the subpoena are for the purpose of evidencing (1) that costs were disparate, and (2) that profit margins for poliomyelitis vaccine were higher than such margins for other similar products marketed by the defendants." At oral argument the Government disavowed the second of these purposes. (See post, page 14.)

[3] "With reference to poliomyelitis vaccine:

"1. All books, papers or documents maintained by your company during the period January 1, 1954 through December 31, 1957, which contain entries in accounts which set forth net sales, costs of goods sold, research and development expenses, selling expenses, general and administrative expenses, and other income and expenses.

"2. All reports and memoranda prepared during the period January 1, 1955 through December 31, 1957, by your company's accounting personnel for the use of management officials or other corporate personnel showing your company's receipts and disbursement.

"3. All profit and loss statements prepared during the period January 1, 1954 through December 31, 1957, concerning poliomyelitis vaccine or any class of products within which poliomyelitis vaccine was included, when such statements were not specifically prepared for poliomyelitis vaccine.

"4. All books, papers or documents (e.g., chart of accounts or index of accounts, etc.) used by your company to index the names and numbers of the accounts regularly maintained by your company which during the period January 1, 1954 through December 31, 1957, contained entries relating to net sales, cost of goods sold, research and development expenses, selling expenses, general and administrative expenses, and other income and expenses.

"With reference to poliomyelitis vaccine and such other product which might be included therewith to form a class of products:

"5. All manuals or other designated books, papers or records maintained by your company during the period January 1, 1954 through December 31, 1957 which contained instructions to officers or employees concerning the manner in which receipts and disbursements for poliomyelitis vaccine or class of products within which poliomyelitis vaccine was included, were to be determined by allocation, whenever such receipts and disbursements were not specifically maintained for poliomyelitis vaccine.

"6. All schedules or work papers containing entries which indicate the sources from which were obtained the items and amounts set forth in tabular summaries which were prepared in behalf of your company in connection with the grand jury proceedings which resulted in the indictment filed in this action.

In its reply memorandum the Government conceded "that if all defendants agree to execute an appropriate stipulation the subpoenaed material is not needed to evidence disparate costs. Accordingly there would be no need for the Government to subpoena the books, manuals, and work sheets in items 1, 4, 5 and 6 of the proposed subpoena. The following is all that would be required:

"All papers or documents which contain reports, memoranda, financial statements, studies and analyses of sales and costs (including unit costs) for the development, manufacture, distribution and sale of poliomyelitis vaccine and which were prepared during the period January 1, 1955 through December 31, 1957, for use by:

"(a) officials who participated in the pricing of poliomyelitis vaccine;

"(b) other corporate personnel who, in the regular course of their employment, participated in the pricing of the company's products whether or not, in fact, they participated to the same extent, or at all, in the pricing of poliomyelitis vaccine;

"(c) the controller or treasurer and/or accounting personnel."

[*Relevancy*]

Applying the *Iozia* test, the Government's first hurdle is relevancy. To meet it the Government contends that "when disparate costs are evidenced in addition to numerous other circumstances, especially if those costs were accompanied by unusually high profit margins it may be inferred that the uniformity of price was the result of an illegal agreement and nothing else." And further that "if it should turn out that the cost levels of all defendants for the manufacture, sale and distribution of polio vaccine were well below the uniform prices set by defendants, a jury might well conclude that this, coupled with the Government's other evidence, indicates the existence of an illegal agreement to tamper with the price structure."

Lastly, the Government avers that since its case will be one of circumstantial evidence it must show disparate costs in order to eliminate the reasonable hypothesis of innocence that uniform prices were the result of uniform costs.

[*"Cost" as Determinant in Setting Prices*]

In reply the defendants contend that cost is not *the* determinant in establishing price and to that extent the Government's argument rests on a false premise; and that profit margins are irrelevant and immaterial to the issue of this case.

To support the economic theory that cost is not *the* determinant in the setting of a price the defendants have submitted the affidavits of corporate officers and economists who depose that such factors as homogeneity of product, estimated period of obsolescence, knowledge of competitors' prices, number of producers, desired rate of return on capital investment and the law of supply and demand all play important roles in the pricing of any product. Moreover, say the deponents, in the case of Salk vaccine other considerations in addition to the foregoing were present, e.g., the danger of corporate disaster, unprecedented governmental regulation, unequalled public interest and the probability of enormous demand followed by a rapid decline in the market.

Applying all of these influences to the pricing of Salk vaccine the defendants contend that the vaccine is necessarily homogeneous by virtue of governmental regulation and inspection and that in any series of inoculations an individual might be properly treated with the vaccine of different manufacturers.

At page 5 of its brief Eli Lilly and Company states:

> ". . . Sellers of homogeneous products must meet the price of competitors or risk injury to their competitive position in the market and to their reputation among customers. If a producer's costs are relatively high it is faced with the choice of meeting competitive prices and taking a smaller profit or abandoning the market."

The validity of this argument is seen say the defendants in the fact that an informed buyer will not pay more to one producer than to another for a homogeneous product, e.g., clothespins, soda ash, and therefore the fact that costs are disparate has no probative value and is as consistent with innocence as with guilt.

Defendants contend that normally the estimated period of obsolescence for drug products is five years, but that in the case of Salk vaccine it was estimated at three years, due in some measure to the fact that even at the time of initial production of the vaccine, drug houses other than defendants' had already embarked on a program leading to the marketing of a live virus vaccine designed to replace the Salk vaccine. This shortened estimated period of obsolescence necessitated a more rapid return of investment, and inferentially, at least, would appear to have resulted in a price somewhat higher than would have otherwise obtained, contend the defendants.

Defendants claim that there was complete access to the prices set by any one of them by reason of the limited number of producers and necessary disclosures to distributors, retailers and governmental agencies; that each knew the prices of the others almost immediately, but that responsibility to the public and shareholders alike precluded charging a price higher than that asked by any other producer-defendant; and that business acumen indicated no reason to set a price below that of a competitor. Admittedly, however, certain changes did occur and these according to the defendants were always a reduction in price because any other course of conduct would have incurred unanimous public disapproval.

In terms of the law of supply and demand it appears that a seller's market existed for Salk vaccine during the first years of pro-

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duction. This condition would seem to have resulted in high prices. But the defendants contend that this approach is invalid because it does not take into account that while a buyer may be forced to pay a high price in such a market he will retaliate by not buying a particular manufacturer's goods when the opportunity for choice arises. According to the defendants, price tampering would have incurred vigorous public criticism with a consequent loss of reputation, and would have been a breach of public responsibility.

The defendants further contend that the seller's market which obtained during the first two years of production of the vaccine was destined to diminish rapidly once mass immunization of the population was achieved and the public demand lessened; and that the danger of corporate disaster lurked in every batch of vaccine produced and distributed, for an impure shipment could result in great injury to the users, and liability to the defendants.

Undoubtedly the public exhibited a great interest in the production of the Salk vaccine. Indeed this interest resulted in its complete regulation by the federal government of the manufacture and distribution during the period of government control. The Government became the largest single customer for Salk vaccine. And in addition there existed between the Government and the defendants a most favored customer clause by virtue of which the Government became immediately entitled to any price reduction given to any public authority within the United States.

Based on these considerations the defendants assert that costs are irrelevant. That all of these factors bear on price need not be denied. But the Government does not contend that cost is the only yardstick by which the issue of this case is to be decided. Rather, says the Government, cost is one item which, when taken with other evidence, will justify the jury in finding the existence of an agreement to fix the price of Salk vaccine to public authorities within the United States. The other evidence proposed by the Government is:

"(a) three of the five defendants knew the original list price to be set for poliomyelitis vaccine prior to any public announcement thereof;

"(b) extremely rigid vertical price maintenance was undertaken by each defendant, in order to insure uniform prices to public authority;

"(c) different prices for polio vaccine prevailed among defendants in their sales to classes of customers other than public authority;

"(d) each defendant refused to sell polio vaccine to public authority on anything other than a delivered price basis;

"(e) each defendant refused to sell polio vaccine to public authority at prices which included quantity discounts;

"(f) each defendant refused to sell short-dated polio vaccine to public authority at reduced prices".

[*Liminal Relevancy*]

The defendants, however, contend that these varied factors militate conclusively against any finding that a price-fixing agreement existed among them. But that is the very issue in this case and cannot, therefore be resolved at this time. This is not to say that ultimately the defendants' contentions in this regard may not be found by the jury to be meritorious, if urged at trial, but only that at this stage of the proceedings they do not serve to disprove or overcome what I find on this motion to be the liminal relevancy of the documents.

[*Profits—Comparable Products*]

Having demonstrated the defendants' costs the Government would endeavor to establish that the profits realized on vaccine were unusually high and that this evidences an intent to set a uniform price. Defendants contend that if the Government is to be permitted to make this argument it must first produce proof of comparable products and the profits realized therefrom, but that there are no products comparable to the Salk vaccine and therefore no standard exists by which to measure those profits.

In support of their position the defendants cite *United States v. E. I. duPont de Nemours and Co.* [1956 Trade Cases ¶ 68,369], 351 U. S. 377 (1956) for the proposition that profit evidence is admissible only after a showing of profits on comparable products. However, in *duPont* which was a monopoly case, the Court said, at page 404:

". . . Nor can we say that du Pont's profits, while liberal . . . demonstrate the existence of a monopoly without proof of lack of *comparable profits* during those years *in other prosperous industries*. . . ." (Emphasis supplied.)

Thus the Court was requiring not proof of profits derived from comparable products, but proof of a lack of comparable profits from other profitable industries, in a monopoly case.

The Government has also stated that since this will be a case of circumstantial evidence it must demonstrate that uniform prices did not evolve from uniform costs, in order to negate a reasonable hypothesis of innocence. Defendants have agreed to stipulate that their costs were disparate and urge that this obviates any Government need for the documents themselves. While the stipulation supplies the fact of difference, the documents serve to delineate that difference among the defendants in the light of which the jury may be better able to evaluate the evidence.

[*Other Reasons*]

Defendants have advanced additional reasons for not granting this motion, even assuming relevancy. They contend that the probative value of their costs is insufficient to justify (1) the necessary disclosure of their highly valued and closely guarded trade secrets, traditionally confidential even within the corporation itself, (2) the delay in trial occasioned by the Government's presentation of the material and lengthened, necessarily, by their defense thereto, (3) confusing the jury and prejudicing the defendants by virtue of their having made a profit on the sale of Salk vaccine.

[*Delay*]

With regard to prolonging the proceedings the defendants contend that the introduction of this evidence by the Government will necessitate such extensive rebuttal as to outweigh the probative value of the documents sought by the Government, granting their relevance and admissibility. Specifically, Allied Laboratories, in its Supplemental Memorandum contemplates the necessary submission of "extensive factual proof as to the history of the development, production, promotion, merchandising, pricing and market conditions of many other products, in order to put management decisions as to polio vaccine in appropriate factual context for comparison, contrast and explanation", in order to meet the Government's evidence as to whether or not the cost levels of all defendants were well below the prices set.

Allied further represents in an accompanying offer of proof that this would entail an analysis of 72 new items and their 68 respective shelf costs to price ratios, which analysis would demonstrate first, that Allied's products are not susceptible of being categorized in terms of shelf costs to price, and second, that "polio vaccine has been well within [Allied's] normal range of such ratios."

Even the prospect of such complex and lengthy proof upon the part of the defense does not weigh sufficiently to deprive the Government of the opportunity it seeks to avail itself of what it deems crucial evidence in support of its case. On the other hand, no matter how time taking the defendants' counter proofs may be they must have full and ample opportunity to advance them. It can only be hoped that continued cooperation upon the part of counsel in appropriate pretrial stipulations may reduce the prolongation of the trial to a minimum.

[*Trade Secrets*]

As to the first of these contentions it should be noted that the material sought was designed for use during the period of January 1, 1955 to December 31, 1957, already a year and a half to four and a half years past. In view of this circumstance it seems unlikely that the defendants will sustain any appreciable loss of their trade secrets by virtue of the disclosure of this material. The law is clear "that a party has no absolute right to refuse to divulge information in the course of litigation upon the sole ground that the giving of the information will necessarily involve the disclosure of trade secrets. The privilege is conditioned upon the circumstances of the particular case, and the extent to which the disclosure of secrets will be compelled is a matter largely resting upon the court's discretion." *Cities Service Oil Co. v. Celanese Corp. of America,* 10 F. R. D. 458 (D. Del. 1950), cited in *International Nickel Co. v. Ford Motor Co.,* 15 F. R. D. 392 (S. D. N. Y. 1954). Cf. *Zenith Radio Corp. v. Radio Corp. of America* [1952 TRADE CASES ¶ 67,401], 106 F. Supp. 561 (D. Del. 1952), where the court observed in a footnote that

> "in the absence of a strong showing of relevance a party will not be required to disclose confidential information."

but also noted at page 576 that

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"There are differences between a government antitrust suit, a private one, and a misuse defense as to the holder of a patent. These differences are not merely doctrinal. They depend upon the facts of each case."

In the light of these cases, the potential probative value of the cost documents sought by the Government, and the fact that injury to the defendants by requiring the disclosure of this material appears to be slight, I find no merit in this objection.

[*Confusing Jury*]

The possibility of confusing the jury and prejudicing the defendants by admitting this evidence at trial presents a somewhat different problem. Essentially the defendants contend that the introduction of the cost documents by the Government will necessitate extensive rebuttal in that the methods of price determination will have to be put before the jury if that body is to properly pass upon the matter in issue. Undoubtedly this will be a time consuming process as presently contemplated by the defendants and one in which the possibility of confusing the jury cannot be lightly dismissed. But this consideration is outweighed by the potential probative value of that which is sought. Furthermore counsel on both sides and the court will be required to minimize the possibility of confusion.

[*Prejudice—Profits on Vaccine*]

The possibility of prejudicing the defendants in the minds of the jury is bottomed on the contention that the Government desires to place the profits realized on the vaccine before the jury in the hope that this evidence alone will inflame the panel to return an adverse finding. In its Supplemental Brief, American Home Products alleges that the Government's sole purpose in seeking the cost documents is "[to authorize] the jury to convict if in its opinion the prices set yielded an unreasonable profit."

But the Government has said that its purpose is to put to the jury the reasonableness of the pricing official's explanation as to how the price of Salk vaccine to public authorities within the United States was set, and not profit itself. Furthermore, the irrelevance of profits alone in this case will be a matter for instruction by the court.

The Government has further represented that it does not intend to compare the profit anticipated on Salk vaccine with the profit anticipated on other products. Indeed the Government explicitly denied any intention to introduce such evidence at oral argument on this motion.

[*Knowledge of Total Cost*]

Defendants contend further that they do not know, nor are they able to ascertain the total cost of the vaccine, and that partial cost is inadmissible.

It would seem that no pricing official would come to a determination as to price without knowledge within reason as to costs, lest a price disastrously under cost be arrived at and offered. The Government now seeks such documents as may have been prepared to aid each pricing official in fixing the price of his vaccine to public authorities in the United States, whether or not he used such documents. With this evidence the Government may seek to examine the pricing officials as to whether or not their determinations were based upon these documents. This now appears to be a relevant and material inquiry but of course would be subject to rulings upon objections which might be interposed.

I have not overlooked the contention of Allied that in the light of the unprecedented circumstances attending the initial marketing of the vaccine even if one or more defendants employed "normal" or "regular" mark-ups and even if the pricing of Salk vaccine departed therefrom, "this would only fairly tend to show that it was a special case for some reason" and that any departure from normal price setting therefore "is readily consistent with a non-collusive opportunity and motivation." But while this material may properly be for the jury it does not derogate from the potential probative value of the Government's present proffer.

[*Necessity for Documents*]

The next requirements which the Government must meet are that the material sought cannot be otherwise procured; that the Government cannot otherwise adequately prepare for trial and that production at trial will cause undue delay. It is obvious that there is no other source from which these documents may be obtained, and that production at trial will in fact result in undue delay.

Having accepted the Government's theory as to relevancy of these documents I am

constrained to conclude that it cannot adequately prepare for trial without them.

[*"Fishing Expedition"*]

The last consideration is whether the Government is operating in good faith or embarking on a fishing expedition in seeking these documents. It cannot be gainsaid that "Rule 17(c) was not intended to provide an additional method of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials." *Bowman Dairy Co. v. United States, supra,* page 220. Whether the movant in a particular case is attempting to obtain discovery under the guise of this rule is a question the answer to which depends on the facts of each case. Thus, "Rule 17(c) . . . has only the limited function of procuring the production of papers for use in evidence at trial." *United States v. O'Connor,* 118 F. Supp. 248 (D. Mass. 1953).

In the instant case the Government has represented that it fully expects to submit the cost documents in evidence at trial. The fact that the Government has not seen these particular documents might lead to the conclusion that it is engaged in a fishing expedition except that it has seen summaries apparently prepared from the documents now sought. Furthermore, there seems to be every probability that such documents exist. That fact together with the Government's announced intention to put this material before the jury operates to remove the element of a fishing expedition.

Based on the foregoing I am constrained to grant the Government's motion for the issuance of *subpoenae duces tecum* requiring the production by each defendant before trial of those documents relating to the cost of the vaccine, which were prepared for the purpose of aiding in the pricing of the vaccine, whether or not they were used. An order should be submitted on notice providing for the issuance and form of the *subpoenae.*

PROFFER OF PROOF

[*Deviations in Foreign Sales*]

The Government has made a proffer of proof that the defendants treated sales to foreign public authorities differently than they treated sales to domestic public authorities during the period August 1, 1956 to December 31, 1957. It contends that the contrasting treatment of foreign and domestic sales constitutes a circumstance which, when considered with other evidence in the case, furnishes the basis for a valid inference by the jury that the defendants conspired to agree to the prices at which the vaccine would be sold in the United States, as charged in the indictment.

The proffer is two pronged. First, the "Government proposes to prove that when the defendants offered poliomyelitis vaccine for sale to public authorities not alleged to be objects of the conspiracy, their prices were disparate;" and second "that three of the five defendants authorized the submission of quotations in their behalf below their established prices, to public authorities not alleged to be objects of the conspiracy, while at the same time they never deviated from their established prices in making quotations to the public authorities" in the United States.

The actual proffers are as follow:

CITED INSTANCES OF DISPARATE BIDDING

"August, 1956

"1. *Venezuela*

Lilly	$5.70	F. O. B. Indianapolis
Sharp & Dohme (Merck & Co.)	5.43	F. O. B. New York
Wyeth (American Home Products)	5.43	(Freight terms unknown)

"2. *Costa Rica*[4]

Parke, Davis	$5.73	(less 2%) C. I. F.
Lilly	5.63	(less 2%) C. I. F.
Sharp & Dohme	5.75	(discount unknown, if any) C. I. F.
Pitman-Moore (Allied)	5.46	(discount unknown, if any) C. I. F.
Wyeth	5.76	(discount unknown, if any) C. I. F.

[4] It appears that the first Costa Rican bid was not acted upon and that rebids were invited. These appear as group 3 under the heading Costa Rica.

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"3. *Costa Rica*

Sharp & Dohme	$5.45	C. I. F. (discount unknown, if any)
Pitman-Moore	5.61	C. I. F. (discount unknown, if any)
Wyeth	5.75	(discount unknown, if any) C. I. F.
Parke, Davis	5.73	(less 2%) C. I. F.
Lilly	5.63	(discount unknown, if any) C. I. F.

"December, 1956

"4. *Uruguay*

Pitman-Moore	$5.37	C. I. F. (discount unknown, if any)
Parke, Davis	5.71	C. I. F. (discount unknown, if any)
Sharp & Dohme	5.845	C. I. F. (discount unknown, if any)
Wyeth	5.71	C. I. F. (discount unknown, if any)
Lilly	5.77	C. I. F. (discount unknown, if any)

"August, 1957

"5. *Uruguay*

Sharp & Dohme	$5.0274	(discount unknown, if any) (freight terms unknown)
Lilly	5.13	(less 2%) (freight terms unknown)
Pitman-Moore	4.7274	(discount unknown, if any) (freight terms unknown)
Parke, Davis	4.79	(less 2%) (freight terms unknown)"

CITED INSTANCES OF BIDDING BELOW ESTABLISHED PRICES

"Established Price: $5.70 (less 2%), or $5.586 net.

Approximate Date	*Public Authority*	*Price Per 9—cc Vial*
(1) *Parke, Davis*		
8-25-56	Argentina	$4.50 *
10-5-56	Argentina	5.13 *

"Established Price: $5.13 (less 2%), or $5.0274 net.

(2) *Parke, Davis*		
7-26-57	Uruguay	$5.02 net
8-20-57	Brazil	5.025 net
11-5-57	Chile	4.62 *
(3) *Pitman-Moore*		
6-7-57	Brazil	$5.027 net
6-18-57	Brazil	5.027 net
6-18-57	Korea	5.027 net
8-22-57	Brazil	5.027 net
9-30-57	Brazil	5.027 net
11-8-57	Hungary and Bulgaria	4.50 (2%)
11-20-57	Austria	4.50 (2%)
11-22-57	South Africa	4.50 (2%)
11-27-57	Formosa	4.50 (2%)
11-27-57	Lebanon	4.50 (2%)
12-6-57	Germany	4.50 *
12-6-57	South Korea	4.50 (2%)
12-9-57	Netherlands Antilles	4.50 *

* Discount unknown, if any.

CITED INSTANCES OF BIDDING BELOW ESTABLISHED PRICES—(continued)

"Established Price: $5.13 (less 2%), or $5.0274 net.—(continued)

(3) *Pitman-Moore*—(continued) *Approximate Date*	*Public Authority*	*Price Per 9—cc Vial*
12-10-57	Germany	4.50 *
12-12-57	Egypt	4.50 (2%)
12-20-57	Okinawa	4.50 (2%)
12-26-57	South Korea	4.50 (2%)
12-26-57	Germany	4.50 (2%)
12-28-57	Brazil	4.50 (2%)
12-30-57	Brazil	4.50 (2%)
12-31-57	Italy	3.90 *
(4) *Sharp & Dohme*		
7-11-57	Brazil	$5.027 *
10-22-57	Finland	4.85 (2%)

"Established Price: $2.33 (less 2%), or $2.2834.

(5) *Pitman-Moore*		
9-12-56	Argentina	$1.31 *

* Discount unknown, if any.

The Government contends that the sales to foreign and domestic public authorities are comparable based on the following factors, which it asserts obtained in both markets during the period August 1, 1956, to December 31, 1957: (1) Homogeniety of product, (2) Enormous demand and short supply, (3) All pertinent sales were to public authorities, (4) Great public interest, (5) Immediate knowledge of competitors' prices, (6) Identity of manufacturing costs, (7) Equal applicability of most favored customer clause, (8) Absence of foreign producers until after summer of 1957, and (9) Absence of Government allocation program.

The defendants concede the application of factors (1) through (6), but deny that the markets are comparable because of other circumstances. As to (7), the applicability of the most favored customer clause, Allied Laboratories states in its brief[5] that until the expiration of its Government contract, June 30, 1957, it submitted its foreign bids on the assumption that this clause obtained as to those sales. Merck & Co., on the other hand, denies the application of that clause without indicating whether or not its foreign bidding was in any way affected thereby. As to (8), Allied maintains that foreign producers were active in the foreign market during the summer of 1957, although it does seem to agree that manufacturers were not in full production until after that time. The defendants state that a different number of producers were active in the foreign market than in the domestic, i.e., "the vaccine either was being produced or was in process of development for production in laboratories in Belgium, Canada, Denmark, England, Germany, Mexico, and the Union of South Africa," and "foreign-made vaccine was already being offered in the export markets prior to the partial lifting of United States export restrictions in August 1956."

Defendants maintain with regard to (9), that the Government's allocation program precluded exporting Salk vaccine except to those nations which had set up a form of distribution through public authorities as in the United States, although admittedly as among such countries there was no limit placed on the quantity exported.

In its brief Allied alleges that it was using Salk vaccine "as an entering wedge for the penetration of certain export markets.";

[5] All the defendants, except Parke, Davis & Company, have expressly joined in concurring with the contentions, opinions and conclusions expressed by Allied Laboratories in its brief. Eli Lilly and Company and Merck & Co., in addition have filed their own briefs, supplementing that of Allied.

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that it reduced its export price in November 1957 to meet competition abroad, as it allegedly did domestically on April 18, 1957, in order to meet a reduction by Merck & Co., and that this factor together with living standards and price levels abroad would necessarily have to receive consideration before any comparison of markets could be found or inferences permitted the jury.

[*Prejudice*]

The defendants next contend that this evidence of foreign sales will "arouse chauvinistic prejudice in the jury box or . . . suggest to the jury that the particular defendant in question 'could have afforded' to charge less in the domestic market."

Indeed it cannot be gainsaid that this is a real possibility. Nevertheless if otherwise admissible I would not exclude this evidence on this ground. Furthermore, if this material is admitted in evidence the defendants will be afforded ample opportunity to counteract any such effects and the jury will be instructed by the court on the irrelevance of profits.

[*Explanations for Disparity*]

At page 15 of its brief, Allied asserts that:

> "From the lifting of the export embargo in August 1956 until the expiration of [its] last contract with the Federal Government on June 30, 1957, [its] Export Department never deviated intentionally from a practice of quoting and selling to governmental agencies in foreign countries at a price equal to or above the price currently charged by [it] to governmental agencies in the United States."

According to Allied this practice in part resulted from a concern as to the applicability of the most favored customer clause in sales to foreign public authorities as noted heretofore. Thus argues Allied, while its Domestic Sales Department would not quote a price higher than that of a competitor for fear of adverse criticism its Export Department was under no such disability, but was only required to maintain its prices at the same or higher level than those at home. Allied contends that it was after the expiration of its contract with the Government on June 30, 1957, that its Export Department reduced its prices to meet competition as did the Domestic Department.

Three of the defendants, Eli Lilly and Company, Allied Laboratories, Inc. and Merck & Co., Inc., have submitted what each represents to be the basis upon which it made the foreign bids cited by the Government. American Home Products Corporation and Parke, Davis & Company, have not made any such submissions.

Lilly, which is cited by the Government only in those instances pertaining to disparate bidding, represents that in each cited instance it bid the then established domestic price with an adjustment for shipping terms and delivery costs. In the case of the December 1956 bid to Uruguay there was also a 1% statutory discount of which that government elected to avail itself rather than the usual 2% prompt payment discount, alternately available. On its face the Government's proffer supports these assertions.

The Government, however, contends that Lilly presented a choice of shipping terms to the foreign public authorities whereas it and the other defendants refused to quote non-delivered prices although requested to do so by domestic authorities.

Allied states in regard to the disparate bids that the first Costa Rican bid and both Uruguayan bids were unauthorized; and that the second Costa Rican bid was the domestic price plus an allowance for shipping. It further represents that although it refused to ship on the first Uruguayan bid, it nevertheless received a part of the order which it filled and for which it charged and was paid at its authorized price of $5.57 net C. I. F., i.e., the domestic price of $5.70 less 2% discount ($5.586) plus shipping adjustment.

The Government disputes Allied's assertion that it refused to ship on the allegedly unauthorized bids.

With regard to bidding below the established price to domestic public authorities, Allied contends that its bids of $5.027, as opposed to $5.0274 ($5.13 less 2%), while made when the Government contract was in effect were not to be delivered until after the expiration of that contract, and were made in order to meet "a particular local competitive situation."

Its bids of $4.50, beginning in November 1957 constituted a reduction made necessary by foreign competition according to Allied. The quotation of $3.90 in Italy it represents as "a special price extended to

a commercial concern in Italy with which Pitman-Moore had made financial plans and arrangements for the promotion of its general business, culminating in the acquisition of a majority stock interest."

The bid of $1.31 per 3 cc vial to Argentina in September 1956 involved, says Allied, short-dated vaccine, i.e., vaccine near its expiration date. Allied notes that it had made a similar sale to the State of Montana in August of 1956, for less than the established price. According to the Bill of Particulars the price to Montana was $1.91.

Merck & Co. submits that its Venezuelan bid was made to meet that of American Home Products; that its first Costa Rican bid was $5.70 F. O. B. or $5.75 C. I. F. less 2% discount; that its second Costa Rican bid of $5.45 was made in an effort to meet Allied's first Costa Rican bid of $5.46 which it apparently thought would be rebid; that its first Uruguayan bid was at the then established domestic price of $5.70 plus .145 cents for shipping (Merck & Co. makes no mention here of either the customary 2% discount or the 1% statutory discount referred to by Lilly); and that its second Uruguayan bid was at the domestic price of $5.13 less 2% ($5.0274).

With reference to the instances of foreign bidding below the then established price to domestic public authorities Merck & Co. contends that its bid in Brazil was submitted by Merck, Sharp & Dohme S. A., a Brazilian corporation with principal offices in Rio de Janeiro and Campinas, which originally quoted $5.0274 (the domestic price of $5.13 less 2%) but reduced that to $5.027 upon learning that another company had quoted the latter figure. Its Finland bid was made according to Merck & Co. by its International Division which quoted a price of $5.0274 C. I. F. net to Lejos Oy, "an independent distributor in Helsinki for sale to the Medicinal Board of Finland" but when the distributor learned of a competitor's bid of $4.85 less 2% he met it in order to gain distribution of the Merck product throughout Finland.

While these explanations may reveal the basis upon which each of three of the defendants acted in quoting the bids cited by the Government they do not deny or disprove either disparity bidding or bidding beneath the then established price to domestic public authorities, as the Government alleges. The fact of disparity and underbidding, for whatever reason, remains.

[*Materiality of Proffer*]

As to the materiality of the proffer Allied Laboratories represents that of a total of 4,500,000 cc of Salk vaccine exported by it during August 1956 to December 1957, only 30,000 cc, or ⅔ or 1% are involved in the four instances of price disparity in which it is cited by the Government. In view of its allegations that these bids are but four out of literally hundreds, Allied urges that they are immaterial.

Eli Lilly and Company also urges immateriality and states that only 145,760 cc or 1½% of its total vaccine exports are involved in the instances of disparity cited by the Government.

Furthermore, contend the defendants, the Government has admitted that instances of domestic price disparity did exist. Thus in Allied's brief it is alleged that the "Government's bill of particulars reveals several dozen instances of domestic public authority bidding situations in which there was disparity of bids by manufacturers and local bidders (who in many instances, as was also the case in export markets, were bidding as agents for manufacturers). In some 40 of these instances at least one of the bids was below what the Government in its Proffer of Proof has called 'the established price', . . ."

The full effect of the Government's proposal in the light of the foregoing says Allied, results in a conclusion that "If 'certain exceptions' to parity of price quotations at home do not confound a claim of conspiracy, then 'certain exceptions' abroad surely do not provide any meaningful contrast of conduct at home and conduct abroad." Eli Lilly phrases this same thought as follows: "Viewed fairly, the situation is not one of price disparity abroad and price uniformity at home, but rather one of a degree of price disparity both at home and abroad. It is therefore difficult to understand how instances of disparity abroad can evidence conspiracy at home. The Government could with equal validity assert that the instances of disparity at home evidence conspiracy abroad."

[*Quantity of Proof*]

To support these contentions Allied has cited certain instances of domestic bidding

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at prices below those then established, only one of which appears to have occurred during the period August 1, 1956 to December 31, 1957, covered by the proffer. I cannot agree that one instance of bidding below the then established price in Maryland on December 19, 1957, operates to defeat the Government's proffer. I therefore conclude that this proof is both relevant and material and in so doing I am not unmindful that the proffer extends to only a relatively small portion of the foreign market. But quantity of proof is not necessarily the criterion here. It is bromidic to dilate upon the proposition that conspiracies are rarely proven except upon circumstantial evidence. The smallness of the circumstances with which we are dealing here does not detract from its materiality or relevance. Whether it is so material as to justify lengthening the trial is another and more difficult question.

Defendants rely on *United States v. National City Lines* [1950-1951 TRADE CASES ¶ 62,757], 186 F. 2d 562 (7 Cir. 1951), a criminal prosecution for conspiring to monopolize certain portions of interstate commerce in violation of Section 2 of the Sherman Act, 15 U. S. C. § 2 (1952 ed.), in which the court excluded evidence which the defendants sought to introduce. In affirming the district court, Judge Lindley said, at page 573:

> "From an examination of the record, it seems apparent to us that the court, endowed with discretion as to the amount of collateral evidence proper, did not abuse its discretion. This is in line with what the Supreme Court said in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 at 230, 60 S. Ct. 811 at page 847, 84 L. Ed. 1129: 'While the offer was not wholly irrelevant to the issues, it was clearly collateral. The trial court has a wide range for discretion in the exclusion of such evidence. See *Golden Reward Mining Co. v. Buxton Mining Co.*, 8 Cir., 97 F. 413, 416, 417; *Chesterfield Mfg. Co. v. Leota Cotton Mills*, 8 Cir., 194 F. 358, 359. Admission of testimony showing the market conditions late in 1934 would have opened an inquiry into casual factors as involved and interrelated as those present during the indictment period. That might have confused rather than enlightened the jury. In any event it would not have eliminated the buying programs as contributory causes to the market rise and stability in 1935 and 1936. And it would have prolonged the inquiry and protracted the trial. As once stated by Mr. Justice Holmes, one objection to the introduction of collateral issues is a "purely practical one—a concession to the shortness of life." *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N. E. 938, 944. * * *' The jury's inquiry was not one as to customs or practices or as to what others had done on other times and occasions. The question before the jury was whether what defendants had done amounted to violation of law as charged. The mere fact, if it be a fact, that other suppliers had followed a similar course of conduct by doing what defendants are charged with doing, would in no wise excuse defendants for their acts if those acts were illegal."

The distinction between the proof proffered there and here is at once apparent. In *National City Lines* the defendants were trying to put before the court evidence of what others had done, as to which, the court said, at page 572:

> "We had thought it well established that evidence of customs and practices in an industry is irrevelant in determining whether there has been an attempted monopolization. This court, in *United States v. New York Great Atlantic & Pacific Tea Company*, 7 Cir., 173 F. 2d 79, 89, said: 'That others engaged in the same practices as the defendants certainly would not exonerate the defendants or tend to disprove their guilt. Certainly trade customs and practices not shown to have been practiced in the same manner as the defendants were shown to have practiced them would not be competent to show that the defendants' practices were not illegal.' . . ."

But in the case at bar the Government desires to show what the defendants themselves did under allegedly comparable circumstances. I do not see the application of *National City Lines* to this case.

[*Prettyman Report*]

Defendants point to the fact that with regard to disparity of bids only three countries are cited and that even within these there are three instances of uniformity. They note with regard to bidding beneath the then established domestic price, that only three of the five defendants are cited and these in 19 countries and that six of the instances are lower than the established price by only one twenty-fifth of a cent. Furthermore, say the defendants rebuttal will be extensive as evidenced by the fact that it may well be necessary for them to introduce their price determinations all over

the globe in order to properly refute the Government's proffered proof. In this connection the defendants also cite and rely on the Prettyman Report, 13 F. R. D. 62, 76, which states:

> "To hold evidence inadmissible because not necessary to a decision of the issues is somewhat of an expansion of the rule as to materiality, but is not a deviation from the principle of that rule. Whether or not the rule be logically a part of the law of evidence (See Wigmore, *Evidence,* § 2), it is an established rule in the conduct of trials. 'Materiality' is defined by Bouvier as 'The property of substantial importance or influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial.' To exclude that which is of no substantial importance in reaching a decision is well within established principles. Where the quantity of substantially important evidence is great, all proffered evidence not shown to be of that nature should be rejected."

The Prettyman Report, widely recognized for its authoritative suggestions of techniques to increase the efficiency of trial procedure in antitrust and other protracted cases, properly prescribes that the court make a prospective appraisal not of the proof itself standing alone, but of its impact on the jury—a difficult determination and one which in reality can only be approximated. To determine whether or not the proof proffered herein is capable "of properly influencing the result of the trial" attention must be given to the facts it tends to establish and to the potential materiality of those facts. As noted earlier the defendants do not deny the occurrence of the bids cited by the Government although they have characterized certain of them as unauthorized. The question then turns to a consideration of the defendants' replies in opposition to the proffer. These have been set out at length heretofore and are mainly contentions that the foreign and domestic markets are not comparable and therefore activities in the former do not give rise to any inference as to the activities in the latter; that the evidence will prejudice the jury against the defendants; that the evidence is immaterial because of its limited extent quantitatively, and because in both markets there were instances of disparity and uniformity; and that this lack of materiality or probative force does not justify a protraction of the trial which would involve receiving not only the proffered evidence but the defendants' extensive rebuttal thereto. My view of all these contentions has already been set out, except as to the last. As to it I am persuaded at this early stage that the Government's evidence is capable of properly influencing the result in this case, because, if, after hearing it and the other evidence of the Government, as well as the defendants' proofs, the jury should determine that the foreign and domestic markets were comparable it may infer therefrom that bidding such as that cited by the Government in foreign countries would have occurred domestically except for the existence of a conspiracy to agree as charged. And I am driven to this conclusion despite the hazards implicit in what the defendants now contemplate as necessary, lengthy rebuttal presentations.

[¶ 69,412] **Miles Laboratories, Inc. v. Family Bargain Center, Inc. Miles Laboratories, Inc. v. State Street Mill Bargain Center, Inc.**

In the New York Supreme Court, County of Onondaga, Special Term. Argued December 15, 1958. Decided February 13, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Fair Trade Pricing Under New York Fair Trade Act—Selling Below Fair Trade Prices—Noncontracting Dealer—Necessity for Signing Fair Trade Agreement.—A manufacturer's application for a temporary injunction restraining two retailers from selling its products below the minimum prices fixed in fair trade contracts was not defeated by the retailers' allegation that they had never executed any fair trade contract. It was not necessary that they sign fair trade agreements with the manufacturer in order to be bound thereby.

See Fair Trade, Vol. 1, ¶ 3258.34.

Fair Trade—Enforcement—Notice of Fair Trade Agreements—Absence of Notice as Affirmative Defense.—A manufacturer's application for a temporary injunction re-

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straining retailers from selling its products below fair trade prices was not defeated by a *bare* allegation, in an affidavit submitted by the retailers' president, that they had no knowledge of the fair trade prices at the time they purchased the merchandise. While such knowledge at the time of purchase, and not merely at the time of resale, is necessary before a fair trader can compel a retailer to abide by fair trade prices, the lack of actual knowledge is a matter of affirmative defense and need not be alleged or proven by the fair trader. Here, the manufacturer had submitted affidavits to the effect that on numerous occasions it had sent letters to the retailers advising them of its fair trade program and enclosing fair trade price lists. Those affidavits were supported by documentary evidence, including United States Post Office receipts for certified letters. Also, envelopes bearing the United States Post Office stamp "REFUSED" supported the statement that other warning letters had been sent.

See Fair Trade, Vol. 1, ¶ 3268.34, 3358.34.

Fair Trade—Defenses to Enforcement Action—Enforcement Activity or Policy—Alleged Abandonment of Fair Trade Program as Defense.—A manufacturer was entitled to a preliminary injunction restraining retailers from selling its products below fair trade prices where the retailers, while contending that the manufacturer's fair trade prices had been generally disregarded and violated by all persons selling its commodities in the area, failed to point out even a single instance of sales below fair trade prices which the manufacturer had not sought to prohibit. The manufacturer, on the other hand, furnished an affidavit naming four violators and describing the steps taken against each. The court was satisfied that the manufacturer had shown sufficient evidence of enforcement, uncontradicted by evidence from the retailers, to justify granting a temporary injunction.

See Fair Trade, Vol. 1, ¶ 3440.34.

Fair Trade—Fair Trade Pricing Under New York Fair Trade Act—Commodities Which May Be Fair Traded—Trade-mark, Brand, or Name—Registration of Trade-mark—Free and Open Competition.—A manufacturer's application for a temporary injunction restraining retailers from selling its products below fair trade prices was not defeated by the retailers' unsupported allegations that the products in question did not bear the trade-mark of the manufacturer and were not in fair and open competition with commodities of the same general class. The manufacturer set forth in detail facts regarding the long continued manufacture and sale of the products, as well as the registration of the appropriate trade-marks pursuant to the statutes of the United States. Included in the manufacturer's exhibits were cartons, all of them bearing registered trade-marks, in which some of the items in question were packaged.

See Fair Trade, Vol. 1, ¶ 3150, 3154, 3200.

Fair Trade—Enforcement—Scope of Temporary Injunction—Applicability to "All" of Fair Trader's Products.—A manufacturer's application for a temporary injunction restraining two retailers from selling "all" of its products below fair trade prices did not constitute "inequitable and unconscionable" action since it was apparent from the body of the complaints and the papers submitted on the application that the actions were concerned with only three items, all of which had been shown by substantial evidence to come within the New York Fair Trade Act.

See Fair Trade, Vol. 1, ¶ 3366.34.

For the plaintiff: MacKenzie, Smith, Lewis, Michell & Hughes, Syracuse, N. Y.

For the defendants: Rudd, Penberthy & Nelson, Utica, N. Y.

Motions for Injunctions Pendente Lite

Decision

[*Fair Trade Action*]

DEL VECCHIO, Justice [*In full text*]: These are motions for preliminary injunctions heard at the same time in two separate actions by which plaintiff seeks orders permanently enjoining defendants from advertising or selling any of plaintiff's products at less than the minimum price fixed in fair trade contracts alleged to have been entered into between plaintiff and many retailers within the state.

The complaints in these actions are substantially similar to that held legally sufficient as stating a cause of action for violation of fair trade restrictions in *Bourjois Sales Corp. v. Dorfman* [1932-1939 TRADE CASES ¶ 55,155], 273 N. Y. 167.

[*Answer*]

The answers deny that such contracts exist or that defendants have committed any violation thereof and plead as affirmative defenses (1) that defendants never executed any fair trade contract and had no knowledge of such contracts by which plaintiff sought to regulate or control the price of its commodities, and, further, that at the time they purchased plaintiff's products defendants had no notice of a fair trade program covering the articles; (2) that the prices fixed by the contracts have long been disregarded and violated by other sellers of plaintiff's products to the knowledge of plaintiff and without any steps toward enforcement being taken by plaintiff, such that there has been a waiver of plaintiff's rights under the contracts; (3) that the products in question do not bear the trademark of the plaintiff and are not in fair and open competition with commodities of the same general class produced by others; and (4) that plaintiff's conduct in seeking to enjoin the sales in question is inequitable and unconscionable.

[*Non-Signers*]

It is not necessary that defendants shall have signed fair trade agreements with plaintiff to be bound thereby. (General Business Law, § 369-b; *Ampex Corporation v. Goody Audio Center, Inc.* [1957 TRADE CASES ¶ 68,710], 5 Misc. 2d 1072, 1077.)

[*Temporary Injunction*]

The only question now before the Court is whether plaintiff has shown circumstances such as warrant the issuance of the temporary injunctions pending trial of the actions for permanent injunctions. "Preliminary injunction is a drastic remedy and is ordinarily not granted, except to maintain the *status quo,* and even then, only upon a very substantial and convincing showing that there has been unfair competition." (*Litwin v. Maddux,* 7 Misc. 2d 750, 759.) What was said in the *Litwin* case with regard to unfair competition in the field of literary publications applies also to unfair competition in the form of fair trade violations.

It is the view of the Court that plaintiff has met this burden and has furnished evidence of the facts set forth in its complaints sufficient to justify the granting of injunctions *pendente lite* with regard to defendants' sales of plaintiff's fair traded products.

[*Fair Trade Agreements*]

In support of the present motions, plaintiff has submitted (1) the original summonses and complaints with attached exhibits, (2) affidavits by its Associate Counsel Edward D. Downing, by its sales representatives Robert J. Morgan and Thomas L. McEvoy and by Raymond W. Hackbarth, Esq., a member of the law firm representing plaintiff in this litigation, and (3) a file of exhibits referred to in the affidavits.

The affidavits of Downing state that there are now in full force in excess of 6000 fair trade agreements executed between plaintiff and drug retailers within the state of New York. In support of this statement there is included in the file of exhibits and also attached to the complaints a copy of an executed form "Retailers Fair Trade Agreement". As evidence that plaintiff's products "Alka-Seltzer", "Bactine" and "One-A-Day (Brand) Multiple Vitamins" are the subject of fair trade prices, plaintiff has offered printed lists dated January 1, 1957 and March 15, 1958 indicating the package units of such products together with the manufacturer's price to dealers, the full retail price and the fair trade price.

[*Violations*]

The affidavits of the sales representatives Morgan and McEvoy set forth by date specific occasions on which they made purchases of "Alka-Seltzer", "Bactine" and "One-A-Day (Brand) Multiple Vitamins" from defendants' stores at less than the fair trade prices. As evidence of these purchases plaintiff has submitted outer cartons of the articles bought bearing sales prices below those fixed by plaintiff together with dated cash register slips of the transactions.

[*"Wisdom" of Fair Trade*]

The answering affidavits submitted by the president of defendant corporations (who is one and the same person) dwell

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at length on the claimed unfairness of a fair trade program and public disadvantage resulting from price fixing. These arguments however are inappropriate in this forum. As the courts have frequently pointed out, the wisdom and desirability of the system of fair trade is within the exclusive province of the Legislature which has seen fit to enact General Business Law §§ 369-a to 369-e in protection of prices of certain qualifying commodities. The only function of the courts is to enforce these sections when the requirements of the statute have been met. (*Nebbia v. New York,* 291 U. S. 502; *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.,* 166 Misc. 342; *Fogel v. Bolet* [1948-1949 Trade Cases ¶ 62,389], 194 Misc. 1019.)

[*Notice of Fair Trade Agreements*]

Defendants' president also states that "there is no proof or evidence whatsoever of notice to the defendant prior to its purchase of these products", and cites *Cluett, Peabody & Co., Inc. v. J. W. Mays, Inc.* [1958 Trade Cases ¶ 68,922], 5 App. Div. 2d 140, as authority that plaintiff is therefore barred from injunctive relief.

There is no question that the *Cluett, Peabody* decision makes it necessary for a defendant-retailer to have notice of fair trade prices at the time merchandise is purchased by him, and not merely at the time of resale, in order to entitle the manufacturer to compel the retailer to abide by such prices. A careful reading of the opinion however makes it clear that lack of knowledge of resale restrictions at the time of purchase is a matter of affirmative defense and that plaintiff is not bound to allege or prove defendants' actual notice of fair trade prices at the time of purchase. (5 App. Div. 2d 140, 149; see also Special Term opinion [1957 Trade Cases ¶ 68,711], 6 Misc. 2d 145, 147, rev'd on other grounds.)

[*Evidence of Notice*]

In this connection, defendants have failed to offer any proof in support of their claim that they did not know of plaintiff's fixed prices at the time they purchased plaintiff's products, other than the bare statement to that effect contained in the affidavits of defendants' president. Plaintiff, on the other hand, has submitted affidavits by its Associate Counsel to the effect that on numerous occasions the deponent sent letters to defendants advising them of plaintiff's fair trade program and enclosing current fair trade price lists, which affidavits are supported by documentary evidence. In the case of the defendant Family Bargain Center, Inc. receipt of such a letter dated October 31, 1957 and sent by certified mail is established by a U. S. Post Office receipt signed "Family Bargain Cntr—J. Lavine". In the case of the defendant State Street Mill Bargain Center Inc. a U. S. Post Office receipt for plaintiff's certified letter dated December 9, 1957 was signed "State St. Mill—Graziano". Both these receipts were presented to the court. Defendant's papers in the State Street Mill Bargain Center action include an affidavit by its employee and manager James Graziano which however makes no reference to the above postal receipt and does not deny delivery of the letter of December 9, 1957.

The affidavits of plaintiff's Associate Counsel state that five warning letters, in addition to the one dated October 31, 1957, were sent to defendant Family Bargain Center, Inc. by certified mail but that delivery of each was refused by the addressee. This statement is supported by three envelopes directed to Family Bargain, bearing the U. S. Post Office stamp "REFUSED", which are included in plaintiff's exhibits. It also appears that some of these same letters, together with others of like content, were forwarded to defendants by regular mail in envelopes bearing return addresses, none of which however were returned.

In spite of all this evidence of notice of plaintiff's fair trade program having been extended to them, defendants have offered nothing but their bare allegations that they had no knowledge of fixed prices at the time they purchased plaintiff's products. They have not explained the signed receipts for the warning letters of October 31, 1957 and December 9, 1957 nor have they made any attempt to show that plaintiff's products being sold by them were acquired on dates prior to the receipt of these letters.

On this state of the evidence, defendants have failed to make any showing to support a defense of lack of knowledge of plaintiff's fair trade program and are not entitled under the *Cluett, Peabody* case to defeat the present application for temporary injunctions on that ground.

[*Enforcement Policy*]

The evidence is also insufficient to sustain defendants' claim that plaintiff has waived or abandoned its fair trade program through failure to enforce the same.

Although defendants made a broad statement that "the alleged prices fixed by the contract set forth in plaintiff's complaint herein have for a long period of time prior to commencement of this action, been generally disregarded **and violated by all persons** selling these commodities in Utica and surrounding areas in the State of New York", they have failed to point out even a single instance of sales below fair trade prices which plaintiff has not sought to prohibit. Plaintiff, on the other hand, has furnished an affidavit by a member of the law firm representing it, naming four violators of plaintiff's fair trade program and describing the steps which it has taken against each (including lawsuits against the defendants herein and one other violator) to enforce compliance.

The questions of waiver and abandonment of fair trade programs have been discussed at length in *General Electric Co. v. Macy & Co.* [1950-1951 TRADE CASES ¶ 62,764], 199 Misc. 87, appeal dismissed 278 App. Div. 940. Concerning the requirement of reasonable and diligent enforcement of fixed prices, Justice Greenberg said at page 93:

> "In establishing this requirement the courts have held that it is not necessary that there be simultaneous enforcement against all violators nor that the price structure be perfect."

Further, in speaking of the principles of fair trade price enforcement, it was said:

> "These principles are not absolute nor are they applied mechanically by the courts. They are, rather, applied in the light of the facts of each case and in order to attain the objectives of the statute and an equitable result between the parties." (p. 93)

See also, *Calvert Distillers Corp. v. Nussbaum Liquor Store,* 166 Misc. 342.

In the cases at bar, this Court is satisfied that plaintiff has shown sufficient evidence of enforcement, uncontradicted by evidence from defendants, to justify granting a temporary injunction against violation of its fair trade program pending trial of the actions.

[*Trademarks*]

The third defense pleaded in the answers—that the products in question do not bear the trademark of the plaintiff and are not in fair and open competition with commodities of the same general class—is entirely without support in defendants' papers. Plaintiff, however, sets forth in detail facts regarding long continued manufacture and sale of the products as well as the registration of the appropriate trademarks pursuant to statutes of the United States. Included in the exhibits are cartons in which some of the items in question are packaged, all of which bear registered trademarks.

[*Items Involved*]

Finally, defendants assert that plaintiff is acting inequitably and unconscionably in seeking the present injunction for the reason that it seeks to enjoin the sale of "all" of its commodities. True it is that the "Wherefore clause" of the complaints ask for such relief. It is apparent, however, from the body of the complaints and from the papers submitted on this application that plaintiff's present action is concerned only with the items "Alka-Seltzer", "Bactine" and "One-A-Day (Brand) Multiple Vitamins", which have been shown by substantial evidence to come within the provisions of General Business Law §§ 369-a *et seq.*

[*Injunction Granted*]

Plaintiff is entitled to an injunction *pendente lite* as prayed for in the notice of motion with regard to its products "Alka-Seltzer", "Bactine" and "One-A-Day (Brand) Multiple Vitamins". The amount of the bond to be furnished will be fixed in the order.

Prepare order accordingly.

[¶ 69,413] Dave Fleischer, individually and as trustee in dissolution of Fleischer Studios, Incorporated, a Florida corporation v. A. A. P., Inc.; Associated Artists Productions, Inc.; U. M. & M. T. V. Corp.; W. P. I. X., Inc.; Paramount Pictures, Inc.; Paramount Pictures Corporation; Dumont Broadcasting Corporation; Flamingo Films, Inc.; King Features Syndicate, Inc.; Fleischer Studios, Incorporated, a New York corporation;

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and Max Fleischer, individually and as co-trustee with plaintiff of Fleischer Studios, Incorporated, a Florida corporation.

In the United States District Court for the Southern District of New York. Civil 125-309. Filed July 15, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit —Parties Plaintiff—Individual Shareholder—Trustees of Dissolved Corporation.—An individual shareholder, suing on behalf of himself and a dissolved Florida corporation which produced animated motion picture cartoons, in a treble damage action charging motion picture distributors with failing to release certain of the corporation's cartoons for television distribution, stated no cause of action under the antitrust laws because a shareholder is not entitled to recover, by individual suit, his share of the loss his corporation might have suffered because of a conspiracy to violate the antitrust laws. Also, whatever claim the trustees of the Florida corporation might have had, on its behalf, had abated under Florida law, because the corporation had been dissolved more than three years before the suit was commenced. No authority was cited for the proposition that the shareholder, or the dissolved corporation, would be deprived of property in violation of the 14th Amendment to the United States Constitution by the application of that rule.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.85, 9005.95.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Injury to Plaintiff—Corporate Loss as Injury to Individual Shareholder.—A shareholder, suing on behalf of himself and a dissolved Florida corporation which produced animated motion picture cartoons, in a treble damage action charging motion picture distributors with failing to release certain of the corporation's cartoons for television distribution, stated no cause of action under the antitrust laws because he alleged no facts tending to show any direct injury to his commerce as an individual.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275.

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Statute of Limitations—Accrual of Action—"Continuing" Conspiracy.—A treble damage action charging motion picture distributors with suppressing the distribution of animated motion picture cartoons over which they had acquired distribution rights by a 1941 agreement was barred, on its face, by the Federal four-year statute of limitations, Section 4B of the Clayton Act. The only injury alleged to have occurred within four years of the filing of the complaint in 1957 was occasioned by an alleged failure of the distributors to release certain cartoons for television distribution between 1949 and 1956. However, that failure was not the infliction of an injury, but the accrual of damages resulting from an earlier alleged invasion of the plaintiff's rights, namely, the 1941 agreement under which the distributors allegedly received the right to deal, in their discretion, with the distribution rights to the cartoons. While the plaintiff seemed to argue that his cause of action did not accrue until the defendants disposed of the cartoons for a sum of money in 1956, the injury under the antitrust laws, if any, was inflicted when the contract was made. The period of limitations was not extended by the fact that damages from that injury might have continued to accrue. Also, there was no merit in the contention that the statute of limitations had not run because the conspiracy was a continuing one.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.200.

Private Enforcement and Procedure—Suit for Civil Damages—Statute of Limitations —Tolling of Four-Year Period During Pendency of Government Action.—A plaintiff whose treble damage action was filed in 1957 would not have benefited from the suspension of the statute of limitations, under Section 5(b) of the Clayton Act, during the pendency, and for one year after the conclusion, of a Government action against one of the defendants, even assuming he was seeking damages for acts which were the subject of the Government suit. Section 5(b) provides for the suspension of the running of the four-year period as to private rights of action, during the pendency of Government actions and for one year

thereafter, and that "such cause of action shall be forever barred unless commenced within the period of suspension or within four years after the cause of action accrued." The plaintiff apparently construed the suspension provision to mean that the four-year period did not commence to run until one year after the conclusion of the Government's suit. Such a construction, however, is contrary to the plain wording of the statute. The Government's suit was pending until April 12, 1949. Thus, any cause of action which arose during the pendency of that suit was barred by April 12, 1950, or by the passage of four years from the date of the injury, whichever was later. Here, the injuries under the anti-trust laws, if any, were inflicted in 1941.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275.

For the plaintiff: Gustave B. Garfield, New York, N. Y.

For the defendants: Mendes & Mount, New York, N. Y., for W. P. I. X, Inc. (Daniel Huttenbrauck, of counsel); Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., for Paramount Pictures, Inc., Paramount Pictures Corp., and Flamingo Films, Inc. (Seymour Shainswit, of counsel); and McCauley, Henry & Brennan, New York, N. Y., for King Features Syndicate, Inc.

[*Motion to Strike*]

PALMIERI, District Judge [*In full text except for omissions indicated by asterisks*]:

* * *

The amended complaint is a thirty page document. It is hardly a model of the form of pleadings which should be utilized under the Federal Rules. It is neither "a short and plain statement of the claim", Fed. R. Civ. P. 8(a) (2), nor is it "simple, concise, and direct." Fed. R. Civ. P. 8(e) (1). It has been met by a notice of motion which requires more than twenty-two pages to set forth, in the main, the portions of the amended complaint which are sought to be stricken under Fed. R. Civ. P. 12(f). Such a motion is not favored, for "we are not conducting exercises in pleading. . . ." *Nagler v. Admiral Corp.* [1957 TRADE CASES ¶ 68,839], 248 F. 2d 319, 325 (2d Cir. 1957).

[*Materiality*]

The motion to strike may be conveniently divided into three categories. Portions of the amended complaint are sought to be stricken on the ground that they are verbose, conclusory, immaterial, or evidentiary. Before it may be determined that a portion of a complaint is immaterial it must clearly appear that the matter alleged can have no possible bearing on the issues of the trial, a question which is most difficult to determine from the face of the amended complaint.[7] Even if that determination is made, immaterial allegations, and likewise verbose, conclusory, or evidentiary allegations, need not be stricken unless their presence in the complaint prejudices the defendant. It would not be fruitful nor would it, in the long run, advance the interests of any of the parties to this litigation, for the Court to try to narrow and delimit the issues of this litigation at this point in the proceedings, see *Nagler v. Admiral Corp., supra,* nor is any prejudice shown because of the inclusion in the amended complaint of the verbose, immaterial, conclusory, or evidentiary matter. See, generally, 2 Moore, *Federal Practice* par. 12.21[2] (2d ed. 1948) and cases there cited.

[*"Falsity" of Matter*]

A second group of portions of the amended complaint is sought to be stricken on the ground that these portions are contradicted by documentary evidence. The defendants have confused the grounds for a motion to strike, however, which do not include falsity of the matter alleged, Fed. R. Civ. P. 12(f); *cf. United States v. Arnhold and S. Bleichroeder, Inc.,* 96 F. Supp. 240, 243 (S. D. N. Y. 1951), with a motion for summary judgment, which defendants insist their present motions are not.[8]

* * *

[7] Defendants buttress their claims of immateriality by references to the opinion in *Fleischer v. A. A. P., Inc., supra,* note 1. On a motion to strike, however, material outside the pleading may not be considered, *e. g., United States v. Arnhold and S. Bleichroeder, Inc.,* 96 F. Supp. 240, 243 (S. D. N. Y. 1951). And the opinion of Judge Herlands, on the motion to disqualify, to which defendants refer, examined the complaint for purposes which are not the same as those here relevant. See, *e. g.,* 163 F. Supp. at 559, 560, and 561.

[8] Defendants have moved to dismiss the second and third claims for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Such a motion may be treated as one for summary judgment, Fed. R. Civ. P. 12(b), but the defendants disavow any

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[*"Scandalous" Matter*]

Finally, portions of the amended complaint are sought to be stricken on the ground that they are scandalous. These portions refer to the alleged actions of counsel for some of the defendants and are relevant only to the motion to disqualify certain of the defendants' counsel previously mentioned. If such allegations were properly to be placed in a complaint I would hesitate to strike them, for the decision not to disqualify is "not of final character, and [is] subject to reconsideration or change as new facts may develop."[9] The disqualification of counsel is collateral to the issues to be litigated and allegations which deal with counsel's actions in the past have no place in the amended complaint. Accordingly, I have set forth in the margin[10] those portions of the amended complaint which are to be stricken. The motion to strike is in all other respects denied.

[*Motion to Dismiss*]

Defendants also move for dismissal on the ground that the amended complaint does not comply with the requirements of Fed. R. Civ. P. 8. We have been taught that such dismissals are not proper; and I can conceive of no distinction between a dismissal on the ground that too little is pleaded and a dismissal on the ground that too much is pleaded. *Cf. Nagler v. Admiral Corp., supra.* To the extent that the motion to dismiss is based on the presence in the amended complaint of scandalous and vituperative matter, the decision on the motion to strike cures that defect.

[*Antitrust Conspiracy—Injury to Plaintiff*]

I turn now to a discussion of the motions to dismiss on the merits, motions which are limited to the second and third causes of action set forth in the amended complaint. The second cause of action seeks damages arising from an alleged conspiracy to violate the antitrust laws. Clayton Act § 4, 38 Stat. 731 (1914), 15 U. S. C. § 15, (1952). Plaintiff seeks the recovery individually and on behalf of Fleischer Studios, Inc., a Florida corporation which was dissolved, as the complaint alleges, in 1946. The second cause of action does not contain however, any allegation of facts tending to show any direct injury to plaintiff's commerce as an individual, and it is well established that a shareholder is not entitled to recover, by individual suit, his share of the loss his corporation may have suffered because of a conspiracy to violate the antitrust laws. *E.g., Bookout v. Schine Chain Theatres, Inc.* [1958 TRADE CASES ¶ 68,987], 253 F. 2d 292 (2d Cir. 1958). Whatever claim the trustees of the Florida corporation may have had, on behalf of the corporation, has abated, the corporation having been dissolved more than three years before this suit was commenced. *Walder v. Paramount Publix Corp.* [1955 TRADE CASES ¶ 68,097], 132 F. Supp. 912, 917-919 (S. D. N. Y. 1955).[11] Plaintiff's attempt to

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intention to have the Court so treat their motion. See Defendants Paramount and Flamingo's Memorandum of Law 3-4.

[9] *Fleischer v. Phillips, supra,* note 1, at 516.

[10] All of paragraph 7 except for the first sentence thereof. The following portions of paragraph 8: from the word "under" in line 6 thereof to the word "Esqs." in line 10 thereof; and from the word "by" in line 12 thereof to the word "individually" in line 14 thereof. That portion of paragraph 12 that begins with the word "which" in the eighth line from the bottom of page 8 and continuing to the end of paragraph 12. All of the second line of paragraph 23(a) beginning with the word "by;" line 5, from the word "or," to the word "individually" in line 8; line 11, from the word "said" to the word "and." In paragraph 23(b) the name of the law firm "Philips [sic], Nizer, Benjamin & Krim" should be stricken each time it appears. Paragraph 23(c) from the first word in line 5 to the last word of line 8. The name of the law firm "Philips [sic], Nizer, Benjamin & Krim" should be stricken from paragraph 23(d), and 23(e). If there are any other references, by name, to the firm of Phillips, Nizer, Benjamin & Krim, or to members or associates thereof, which have escaped the attention of the Court, such references should be stricken. On the oral argument plaintiff's counsel consented to strike all references to the attorneys, by name, from the amended complaint References to defendants' "attorneys," without mention of their names, may remain.

Grammatical emendations, required by the directed excisions, may be made. If plaintiff desires to re-allege any of the matter herein ordered to be stricken, the order to be entered herein should specify the material desired to be re-alleged, should state the relevance of the allegation to the issues of the suit, and should state the exact phraseology of the desired re-allegation. In no instance should the name of any attorney or firm of attorneys be contained in such desired re-allegations.

[11] See also, *Walder v. Paramount Publix Corp.* [1955 TRADE CASES ¶ 68,170], 135 F. Supp. 228 (S. D. N. Y. 1955).

The Florida statutes which were the subject of decision in the *Walder* case cited in the text were repealed and the present statutes were enacted, effective October 1, 1953, by Fla. Laws

distinguish the Florida decisions on which the *Walder* holding was partially based, 132 F. Supp. at 919, n. 14, is without merit. Finally, plaintiff cites no authority, and I know of none, for the proposition he advances, that application of the *Walder* decision deprives him, or the dissolved corporation, of property in violation of U. S. Const. Amend. XIV.

[*Statute of Limitations*]

Furthermore, the second cause of action is, on its face, barred by the statute of limitations. 69 Stat. 283 (1955), 15 U. S. C. §§ 15b, 16(b) (Supp. V). Where the claim is for an injury inflicted by a civil conspiracy the statute begins to run at the time the injury is inflicted. *Rutkin v. Reinfeld,* 229 F. 2d 248, 252 (2d Cir.), cert. denied *sub nom. Kaplow v. Reinfeld,* 352 U. S. 844 (1956). The original complaint herein was filed October 14, 1957. The only injury alleged to have been inflicted since October 13, 1953 is that occasioned by the failure of the defendants to release certain cartoons for television distribution between 1949 and 1956. Aside from the fact that there is no allegation of facts tending to show that this failure injured the commerce of the plaintiff or of the Florida corporation, this failure, under the allegations of this complaint, was not the infliction of an injury but was the accrual of damages resulting from an earlier alleged invasion of plaintiff's rights. *Cf. Muskin Shoe Co. v. United Shoe Machinery Corp.* [1958 Trade Cases ¶ 69,179], 167 F. Supp. 106, 111-112 (D. Md. 1958); *Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc.* [1958 Trade Cases ¶ 68,949], 153 F. Supp. 589, 593 (D. N. J. 1957); *Pastor v. American Telephone & Telegraph Co.,* 76 F. Supp. 781, 784-785 (S. D. N. Y. 1940). It was the result of an agreement entered into between certain of the defendants and Fleischer Studios, Inc., in 1941. By that agreement, now immune from attack under the antitrust laws because of the statute of limitations, the defendants, as alleged in the amended complaint, received the right to deal with the distribution rights to the cartoons in their discretion. The injury under the antitrust laws, if any, was inflicted when the contract was made. The period of limitations is not extended by the fact that damages from that injury may have continued to accrue. *Steiner v. Twentieth Century-Fox Film Corp.* [1956 Trade Cases ¶ 68,304], 232 F. 2d 190, 194-195 (9th Cir. 1956). Under plaintiff's theory, the statute of limitations would not run so long as the films were not returned to his possession. I suppose that it would be possible to allege a claim under the antitrust laws based on the manner in which defendants dealt with the cartoons and that it would not matter in such a case, when or how defendants came into possession of the cartoons. But, as I have said, there are no facts alleged tending to show that the manner in which defendants dealt with the cartoons injured plaintiff's, or the dissolved corporation's, commerce. The 1941 contract, and the possession thereunder of the cartoons may be presumed, for present purposes, to have been a wrong for which plaintiff might have recovered in a timely suit. But the time for bringing that suit is not enlarged by the fact that the cartoons have not been returned to plantiff's possession. Restatement, Torts § 899, Comment *c.,* p. 526 (1939). Plaintiff seems to argue that his cause of action did not accrue until 1956 because it was then that defendants disposed of the cartoons, receiving in return, it is alleged, a sum of money to part of which plaintiff lays claim. That, of course, has no bearing, in this complaint, on any claim under the antitrust laws. It does bear on plaintiff's rights, if any, growing out of the sale of the cartoons and the alleged tortious failure, to plaintiff's damage, to realize profits from the cartoons while they were in the defendants' possession. These matters are cognizable under the first cause of action.

[*"Tolling" Statute of Limitations*]

Plaintiff's contention that the statute of limitations has not run because the conspiracy is a continuing one, is without merit. *Momand v. Universal Film Exchanges, Inc.* [1948-1949 Trade Cases ¶ 62,360], 172 F. 2d 37, 49 (1st Cir. 1948), cert. denied, 336 U. S. 967 (1949). Nor can I conceive of any benefit to the plaintiff from the fact that the statute of limitations was suspended during the pendency of the Government's suit against Paramount and for one year thereafter, even

1953, c. 28170. The statutes as they now exist are found in Fla. Stat. § 608.30 (1957). To the extent, if any, that the 1953 enactment might have extended the time within which trustees of a dissolved Florida corporation may institute suits, there is no indication that the 1953 law was meant to revive actions which had by then abated under the law as it previously existed. *Cf. Gerstel v. William Curry's Sons Co.,* 157 Fla. 216, 220-221, 25 So. 2d 560, 562 (1946).

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assuming that plaintiff is seeking damages for the actions which were the subject of the Government's suit. *Steiner v. Twentieth Century-Fox Film Corp., supra,* at 195-196. The Government's suit was pending until April 12, 1949.[12] Plaintiff apparently construes the suspension provision of 69 Stat. 283 (1955), 15 U. S. C. § 16(b) (Supp. V) to mean that the four-year period does not commence to run until one year after the conclusion of the Government's suit. This is contrary to the plain wording of the statute. Any cause of action which arose during the pendency of the Government's suit was barred by April 12, 1950 or by the passage of four years from the date of the injury, whichever was later. Accordingly, the second cause of action is dismissed.

* * *

[¶ 69,414] **United States v. Long Island Fence Association, Inc.; Ned P. Romano; Frank S. Bon Giorno; and George Hald.**

In the United States District Court for the Eastern District of New York. Criminal Action No. 45835. Dated June 29, 1959.

Case No. 1445 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Conspiracy Charged—Bill of Particulars—Identity of All Members—Time and Place.—An association composed of manufacturers and retailers of "wood fencing" and three individuals, in a criminal action charging them with conspiring to fix prices, were granted a motion for a bill of particulars to inform them of (1) the persons or corporations asserted to have been members of the alleged conspiracy, and (2) the time when, and the place where, the conspiracy was allegedly entered into. The defendants were entitled to know the identity of all who allegedly had the legal capacity to incur the legal responsibility which the indictment sought to visit upon them. Also, if the Government was sufficiently informed on the general subject to initiate the prosecution, it must have been sufficiently in possession of what it believed to be the facts to make a more specific statement of the time when the conspiracy was alleged to have been entered into than "about 1957." Further, if the agreement was entered into, it must have been entered into at one or more places. However, the Government was not required to disclose the evidence it would rely on at the trial, unless the identities of the alleged conspirators and the time and place of the alleged conspiracy could not otherwise be given.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

For the plaintiff: Richard B. O'Donnell, Special Assistant to the Attorney General; and Walter W. K. Bennett and Agnes T. Leen, Attorneys, Department of Justice.

For the defendants: Mervin C. Pollak.

[*Bill of Particulars*]

BYERS, Chief Judge [*In full text*]: This is a defendants' motion for a bill of particulars addressed to the indictment filed May 8, 1959 alleging a violation of Section 1 of the Sherman Act (15 U. S. C. § 1) as to wood fencing shipped interstate into certain counties lying within this district.

It is common ground that the disposition of the motion lies within the discretion of the court, which is to be exercised according to the court's understanding of the issues apparently tendered, and the requirements of fairness to enable the defendants to prepare for trial. Other cases which have been cited are helpful, without being dispositive of the problem here presented.

[*Members of Conspiracy*]

In passing upon the motion the court is of the view that the defendants are entitled to be informed with precision concerning the alleged conspiracy with which they are charged, namely:

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[12] See *Leonia Amusement Corp. v. Loew's, Inc.* [1954 TRADE CASES ¶ 67,649], 117 F. Supp. 747, 763-764 (S. D. N. Y. 1953).

(a) The persons or corporations who are said to have been members. Since the Government argues that all who were roughly partners in the alleged conspiracy had the authority to bind all other members, it must be manifest that the defendants are entitled to know the name and identity of each and every individual or business entity who is or are asserted to have been clothed with the legal capacity to incur the legal responsibility that it is the object of this indictment to visit upon these defendants.

That would seem to be so clear, that discussion of the subject is unnecessary.

[*Time and Place*]

(b) The time when and the place where the conspiracy as alleged was entered into. The language in paragraph 11 "Beginning about 1957 and continuing to the date" of indictment is indefinite as to the time period involved. If the Government is sufficiently informed on the general subject to initiate the prosecution, it must be sufficiently in possession of what it believes to be facts, to require a more specific statement than "about 1957."

If the agreement was entered into, it must have been at one or more places. In order to prepare to meet the issue, the defendants are entitled to know what the Government asserts to be the fact in this connection.

The memoranda in opposition to the motion make frequent references to what the defendants must know of their own actions during whatever period the Government has in mind, as the basis for this prosecution. That argument is not persuasive to this court, although it may be true in a general sense. The defendants are entitled to know what it is that the Government *asserts* that they did, constituting a violation of law. In preparing for trial the defendants are required to examine their own conduct with respect to distinct averments of asserted fact, rather than strive in a general way to review their several activities for the past three years or so as to matters with which this case may not be concerned.

[*Evidence*]

(c) Speaking generally, the Government in furnishing a bill of particulars is not to be required to disclose the evidence that it will rely upon at the trial, unless the matters referred to under (a) and (b) cannot be otherwise exposed to the defendants' view for adequate preparation.

[*Specific Demands*]

Within the foregoing, the demands of the defendants will now be dealt with, but without comment except as may be necessary to reveal the court's reasoning:

1. (a) denied in the form stated, but the membership of the alleged conspiracy is to be stated. (b) and (c) and (d) are covered by the foregoing.

2. Denied as stated. However the Government should give the names of the several States in the Union from which wood fencing is alleged to have been shipped into the counties in Long Island which the Government asserts to have been the subject-matter of the alleged conspiracy.

3. Not understood. If the request is intended to ask whether the wood fencing referred to in the foregoing paragraph was shipped F. O. B. the place of origin, the information should be provided by the Government. If not, that fact should be stated.

4. This is addressed to paragraph 11 and probably 12 of the indictment which describe the nature and purpose of the conspiracy. The demand is for the "manner in and means by which Plaintiff claims Defendants and their alleged co-conspirators were to effectuate their alleged agreement." If the "manner and means" were components of the conspiracy charged, the defendants cannot prepare their defense without knowing just what conspiracy as to all of its characteristics, they are charged with having entered into.

This demand therefore is granted.

5. Calls for the types or items of wood fencing said to be the subject matter of the conspiracy. The demand is proper and is granted.

6. Calls for a statement as to whether the alleged conspiracy was successful in its asserted purpose. For obvious legal reasons, it is denied.

7. Calls for items and names; it is unnecessary in view of what has been written above.

8. Calls for names of those who impeded, etc. and probably refers to paragraph 12 of the indictment. Overt acts are not necessary to be shown in this type of case which

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involves the alleged agreement to do, rather than the doing. Denied.

9. Is repetitious of 8, and in more diffuse form. Denied.

10. (a) and (b) Is a repetition of 4, and other requests, and seemingly calls for evidence. Denied.

11. Calls for a statement as to whether each defendant is charged as an individual or as a member of the trade-association named. Granted.

12. Calls for a list and clear identity of all writings constituting a part of the conspiracy. By this is understood the writings upon which the Government will rely to demonstrate the existence of the conspiracy as alleged. Granted, with reasonable opportunity to inspect and make copies.

13. This demand asks (a) the total annual sales volume of "the co-conspirator and Defendant wood fence retailers." This is clearly information known best to the defendants. Denied.

(b) "The number of wood fence retailers doing business in the Long Island area." It is not apparent how that information is germane to, or required for the purpose of defending against the matters alleged in paragraphs 11 and 12 of the indictment. Denied.

14. This demands that the Government "state the particular acts it is claimed each of the individual defendants did pursuant to the alleged conspiracy" etc. As to the acts which the Government asserts that each defendant did by way of entering into the alleged conspiracy, namely the individual conduct of each alleged conspirator as to which the Government expects to offer testimony, the demand is proper to enable the defendants to prepare for trial, and to that extent is granted. As to alleged acts which were not part of the conspiracy itself but which conceivably could have been committed after the alleged conspiracy was entered into, if it was, a different view is taken, because overt acts are not required to be shown in this type of case. The demand is denied as to its second supposed aspect.

15. This seems to be covered by the ruling number 12 above.

[*Ruling*]

Motion granted in part, and denied in part. Settle order in accordance with the foregoing.

[¶ 69,415] George S. Haas v. James C. Hodge.

In the California District Court of Appeal for the Second District, Division Two. Civ. No. 23577. Dated June 24, 1959.

Appeal from a judgment of the Superior Court of Los Angeles County. Joseph W. Vickers, Judge. Affirmed.

Action for an injunction, for damages and other relief. Judgment for defendant affirmed.

California Contracts in Restraint of Trade Statute

Combinations and Conspiracies—Contracts in Restraint of Trade Under State Law—Contract Not to Compete—Territorial Restriction on Practice of Medicine.—A California trial court properly ruled that a restrictive covenant whereby a physician agreed that he would not "maintain an office for the practice of his profession at any place within a radius of 25 miles" from the office of a physician with whom he had been associated was invalid under a California statute prohibiting contracts in restraint of trade. That statute provides that contracts "by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The plaintiff, seeking to enjoin the defendant from practicing medicine in an office some five miles from the plaintiff's office, contended that the defendant had sold "all the interest he had acquired in the good will of the medical practice involved," and that the restriction was therefore valid under the statute's further provision that "any person who sells the good will of a business . . . may agree with the buyer to refrain from carrying on a similar business within a specified county or counties, city or cities, or a part thereof. . . ." An analysis of the writing, however, disclosed that the defendant was an employee of the plaintiff,

or at least occupied a status akin to that of an employee, and therefore had no good will to sell. Whatever might have been his technical status, the contract contained a paragraph in which he disclaimed irrevocably any right to the professional practice and the good will thereof, which operated as a renouncement. Hence, the defendant could not have sold the present or future good will of the business, for it belonged to the plaintiff.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.05.

For the appellant: Robert M. Bushnell and Ralph R. Sleeper.

For the respondent: Alpern & Vallier and Robert Vallier.

[*Contract Action*]

ASHBURN, Justice [*In full text*]: This case arises from a contract for the association of two doctors in the practice of medicine. The relationship having terminated, plaintiff Dr. George S. Haas brought suit against defendant Dr. James C. Hodge to obtain an injunction against his practicing within 25 miles of plaintiff's offices, for damages and other relief. Judgment went for defendant and plaintiff appeals therefrom.

[*Territorial Restriction on Practice of Medicine*]

The contract (received in evidence as Exhibit 3) provides:

> "It is hereby stipulated and agreed by the parties that in the event this agreement is terminated for any reason whatsoever, that from and after the said termination, Dr. Hodge shall not maintain an office for the practice of his profession at any place within a radius of 25 miles from the said office of Dr. Haas." Also: "That Dr. Hodge expressly hereby disclaims, absolutely and irrevocably, any right or claim of right to any of the professional practice herein mentioned and referred to and to the good-will thereof."

Plaintiff's office is at 1200 West 80th Street in Los Angeles, and defendant, after the contract was terminated, opened an office for the practice of his profession in Inglewood, Los Angeles County, at a distance considerably less than 25 miles from plaintiff's location, some 5 miles therefrom.

[*Validity*]

Appellant's counsel has limited the appeal to the question whether defendant sold to plaintiff his interest in the good will of the business, thus falling within the validating effect of section 16601, Business and Professions Code, quoted *infra*. The trial court found: "That at no time during or after the association of plaintiff and defendant in their practice of medicine was there a sale of goodwill of the practice by either of the parties to the other." Appellant's brief says:

> "Plaintiff appeals and hereby limits the appeal to the question of the validity of the contract, Exhibit 3 introduced in evidence, that is to say, Appellant contends that the restrictive covenant in Exhibit 3 is valid and that the conclusion of the trial court to the contrary is erroneous as a matter of law. . . . This appeal is limited to a consideration of that point alone, *i. e.*, that Respondent Hodge by the terms of the contract, Exhibit 3, did lawfully transfer and sell to Appellant Haas all the interest he had acquired in the goodwill of the medical practice involved herein; that consequently, under the statutes, the restrictive covenant of Exhibit 3 [Par. 10] against opening an office near their West 80th Street office was valid and binding on both parties; that the ruling and finding of the trial court to the contrary is erroneous as a matter of law."

Respondent's counsel joins in this restricted submission.

The question whether defendant sold or had any good will to sell to plaintiff must be determined from the written contract, there being no parol evidence thereon. The parties undertook to define their relationship in these words:

> "IT IS EXPRESSLY AGREED AND STIPULATED by the parties that this association of these two practicing physicians and surgeons in the manner herein provided for is somewhat unique and unusual, and further, that it does not, as between the parties, in anywise constitute, nor shall it be deemed to constitute, a partnership, joint venture or contract of employment."

[*No "Good Will" to Sell*]

An analysis of the writing discloses the defendant became an employee of plaintiff, or at least occupied a status akin to that of employee, and hence had no good will to sell. The fact that the parties have undertaken to define the legal result of the contract and have applied a mistaken legal conclusion to it cannot prevail over the

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correct legal result which flows from the acts they have undertaken to perform. It is held in respect to partnerships that a mistaken appellation in a contract cannot control the result. (*San Joaquin L. & P. Corp. v. Costaloupes,* 96 Cal. App. 322, 332; *Constans v. Ross,* 106 Cal. App. 2d 381, 386; *Martyn v. Leslie,* 137 Cal. App. 2d 41, 61; *Singleton v. Fuller,* 118 Cal. App. 2d 733, 740. In the *San Joaquin* case it is said, at page 330:

> "The question thus presented hinges upon the construction of a written contract before us. . . . It may be stated that both parties concede that the determination of whether or not a partnership existed must result from a construction of the contract itself and the recitals therein contained." At page 332: "We may concede that a relationship of debtor and creditor is shown and also that the contract expressly declares that the parties thereto are not partners. However, this does not establish the fact that the parties did not intend to create a partnership between themselves or as to a third person. The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partners. Their intention in this respect is immaterial. Appellant and respondent here concede that if the contract by its terms establishes a partnership between the parties, the expressed intent that it should not be so classed would be of no avail. It is the intent to do these things which constitute a partnership that usually determines whether or not that relation exists between the parties."

The same principle is applicable here. (See 32 Cal. Jur. 2d, § 8, p. 402.)

The subject agreement made on September 13, 1955, recites that plaintiff, Dr. Haas, is practicing at 1200 West 80th Street, Los Angeles, that Dr. Hodge is also practicing at an unspecified address and the parties desire to associate in the practice. It is agreed that Dr. Hodge will devote his entire time and attention to such practice during the term of the agreement; the parties shall cooperate but in any case of disagreement the opinion or instructions of Dr. Haas shall be conclusive. The practice shall be conducted at Dr. Haas' offices and all expenses shall be borne by him. Dr. Hodge shall furnish his own automobile and shall receive $60 a month to defray the cost of its operation. All employees shall be paid by Dr. Haas and they shall be solely under his supervision and direction. All compensation paid by patients shall go to Dr. Haas and Dr. Hodge shall not participate in any division of same; nor shall Dr. Haas be required to make any accounting with respect to any monies received. All fees shall be fixed and adjustments made by Dr. Haas solely. Paragraph 4 says: "That it is not the intention of either of these parties to interfere with or dictate to the other how, any particular case shall be handled; nor to dictate the proper technique to pursue, nor to interfere in the diagnoses of cases, but nevertheless these parties may consult, one with the other, from time to time, as to all such matters." Dr. Hodge shall keep such records and make such reports as may be agreed upon but in case of any disagreement the discretion and instruction of Dr. Haas shall prevail. Dr. Hodge shall receive from Dr. Haas, until termination of agreement, "compensation for his services rendered hereunder" at the rate of $800 a month; unless the agreement is sooner terminated the compensation shall be increased on December 1, 1955, to $850 a month and gradually thereafter to and including the month of November, 1956, until the sum of $1,400 is reached; thereafter Dr. Hodge shall receive that monthly compensation until termination of the agreement whatsoever shall be paid him. Here follows paragraph 10 above quoted, which says that after the termination of such agreement Dr. Hodge shall not maintain an office within a radius of 25 miles from Dr. Haas' office. The contract is terminable by death or incapacity of either party or upon 30 days written notice given by either party. Then follows the provision to the effect that the contract shall not be deemed to constitute a partnership, joint venture or contract of employment, but that Dr. Haas may nevertheless procure Workmen's Compensation Insurance "against other liabilities or hazards which may arise by reason of these parties associating together in the manner herein provided," the matter of procuring such insurance being a matter of Dr. Haas' sole discretion. Finally, there is the paragraph to the effect that Dr. Hodge disclaims absolutely and irrevocably any right or claim to "any [of] the professional practice herein mentioned and referred to and to the good-will thereof."

This document bears most of the indicia of an employment agreement (*cf. Hamilton v. Salopek,* 71 Cal. App. 2d 104, 106; the only element lacking seems to be the right of

immediate discharge without cause (see 32 Cal. Jur. 2d, § 8, p. 405; § 9, p. 406). Of course, any contract can be terminated for substantial breach by one of the parties and this is true of an employment contract (Lab. Code, § 2924). If this is an employment contract defendant would acquire no part of the good will of the business. But it is not necessary to decide the specific question.

[*Renouncement*]

Whatever may be the technical status flowing from the contract it remains true that the last paragraph operates as a present renouncement of any interest in the "professional practice" of Dr. Haas or the good will thereof. This left Dr. Hodge with no inchoate right to future accruing good will, for the practice belonged to Dr. Haas and the good will belonged to him as an incident to ownership of the practice, present and future.

[*California Statute*]

Section 16600, Business and Professions Code, provides:

"Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Section 16601: "Any person who sells the good will of a business . . . may agree with the buyer to refrain from carrying on a similar business within a specified county or counties, city or cities, or a part thereof, in which the business so sold . . . has been carried on, so long as the buyer, or any person deriving title to the good will or shares from him, carries on a like business therein."

Defendant could not sell the present or future good will of the business in this instance, for the business and its good will belonged to plaintiff Haas. (See *Russell v. Russell*, 39 Cal. App. 174, 176-177.)

This does not imply that defendant could not have required a good will adhering to his own person and skill, one which would follow him to a new location; if in fact he did have such a personal good will he did not sell or undertake to sell it to plaintiff, and as matter of law could not do so.

[*Judgment Affirmed*]

The judgment is affirmed.

Fox, P. J. and, Herndon, J., concurred.

[¶ 69,416] McElhenney Co., Inc., W. F. Snipes, George Toole, Mac Toole, R. P. Swofford, Charles L. Gasque, and Harry Clinkscales v. Western Auto Supply Company.

In the United States Court of Appeals for the Fourth Circuit. No. 7813. Argued March 18, 1959. Decided July 16, 1959.

Appeal from the United States District Court for the Western District of South Carolina, at Spartanburg. Ashton H. Williams, District Judge.

Sherman and Clayton Antitrust Acts

Exclusive Dealing—Manufacturer's Cancellation of Dealers' Franchises for Dealing in Competitors' Products—Refusal to Deal with Retailer Who Will Not Enter Into Unlawful Agreement—Legality.—A trial court properly dismissed a complaint alleging that a manufacturer of home and automobile supplies violated Section 3 of the Clayton Act by an "implied understanding or course of dealing" in which it cancelled the franchises of dealers who handled competing products. The dealers incorrectly interpreted the ruling of the trial court as limiting the reach of section 3 to those instances where exclusive dealing was brought about by a contract expressly imposing a "legal" obligation on the part of the buyer not to handle the goods of others. The trial judge fully understood that the franchise agreements, although not unlawful on their face (they admittedly contained no provision requiring the franchisees to deal only in goods supplied by the

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manufacturer), could have been supplemented by an extrinsic course of conduct from which the illegal condition or understanding might have been found. The gravamen of section 3 is the forbidden "condition, agreement or understanding" of "exclusivity." It makes no difference whether this is voluntary or imposed by coercion, but without it there can be no statutory infraction. Here, the manufacturer threatened with cancellation, and actually cancelled, the franchise agreements of dealers who patronized its competitors to an undesired degree. But so far as the complaint showed, it "exacted no agreement" against the handling of competing merchandise. The complaint itself made it clear that the dealers actually handled competitive articles and did not handle the manufacturer's full line, thus tending to negate the existence of any such agreement.

The statute does not prohibit a unilateral refusal to sell. Absent a conspiracy or monopoly, a seller may normally refuse to deal with a buyer for any reason or no reason whatever. Thus, the courts have not held a seller liable for refusing to deal with one who was unwilling to enter into an unlawful exclusive dealing arrangement. Clothed with this privilege of customer selection, the manufacturer not only may, but ordinary fairness would require that he should, announce in advance the circumstances under which he would do business with others. While customer selection and "independent announcement of policy" might ripen into an implied agreement, the existence of such an agreement is always a question of fact to be determined when the case, on a properly pleaded complaint, is brought to trial. In accordance with the trend of the courts not to dispose finally of antitrust litigation on the pleadings, without giving the plaintiff a full opportunity to formulate his charges, the case was remanded to permit an application to the trial court for permission to amend the complaint.

See Exclusive Dealing, Vol. 1, ¶ 4005.175, 4007.275, 4007.300, 4009.050, 4009.100, 4009.420.

Monopolies—Monopolization—Attempt to Monopolize—Cancellation of Dealers' Franchises for Dealing in Competitors' Products—Monopoly Power—Intent.—A trial court properly dismissed a complaint alleging that a manufacturer of home and automobile supplies violated Section 2 of the Sherman Antitrust Act by cancelling the franchises of dealers who handled competing products. The dealers' argument was not that the manufacturer attempted to monopolize commerce in any particular product, but rather that it attempted to monopolize what they denominated "a method of doing business" by having its goods sold exclusively in the only stores in certain towns carrying a complete line of automobile and home supplies. It was not charged that those items were unavailable in other stores in each of the named towns, but simply that all of them could not be purchased in any other single store. Thus, the section 2 count of the complaint was bereft of any averment of (1) monopoly power in any defined market, (2) an intent to monopolize coupled with a dangerous possibility that a monopoly could be effectuated, and (3) the improper employment of the manufacturer's position to attain ends forbidden by law. While the court doubted that the dealers could replead effectively so as to allege a monopolization or attempt to monopolize under section 2, it nevertheless remanded the case to permit an application to the trial court for permission to amend the complaint.

See Monopolies, Vol. 1, ¶ 2510, 2510.400, 2515.40, 2530.40, 2580, 2610.300, 2610.720.

For the appellants: Chester D. Ward, Jr.

For the appellee: James C. Wilson and Alfred F. Burgess (Carl E. Enggas; Colvin A. Peterson, Jr.; Wyche, Burgess & Wyche, and Watson, Ess, Marshall & Enggas, on the brief).

Affirming and remanding a judgment of the U. S. District Court, Western District of South Carolina, 1959 Trade Cases ¶ 69,243.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

[*Treble Damage Action*]

SOBELOFF, Chief Judge [*In full text*]: A suit claiming various sums aggregating $2,241,000 as treble damages was brought against the Western Auto Supply Company charging it with having violated Section 3 of

the Clayton Act,[1] 15 U. S. C. A. 14, and Section 2 of the Sherman Act,[2] 15 U. S. C. A. 2.

[*Parties*]

The five individual plaintiffs are the owners of five stores in South Carolina and one in Georgia which in the past served as retail outlets for Western Auto merchandise, and the sixth plaintiff, McElhenny Co., Inc., is the former South Carolina distributor for Sylvania television sets who from time to time had made sales to the plaintiff-retailers. Western Auto is a nationwide distributor of products for automobile and home. Among the items which it sells are sporting goods, toys, electrical appliances, power and hand tools, lawn and garden equipment, radio and television sets, and, as its name suggests, automobile supplies.

[*Exclusive Dealing Charged*]

The amended complaint is quite long, containing over one hundred numbered paragraphs, dealing with defendant's actions in regard to each of the six plaintiffs. In essence, they allege that during varying periods prior to 1956 Western Auto threatened to stop selling to the plaintiff-retailers if they would continue to handle goods in competition with Western Auto lines, and that ultimately Western Auto carried out this threat and discontinued doing business with the plaintiff-retailers who did not abide by the defendant's wishes.

[*Dismissed in Lower Court*]

The District Court entered an order sustaining Western Auto's motion to dismiss on the ground that the amended complaint failed to state a claim for which relief could be granted. This is an appeal from that order.[3]

[*Distribution Agreements*]

Instead of making its merchandise available through a larger number of its own retail stores, or in hardware stores generally, Western Auto has in practice restricted its outlets to a network of some 350 company-owned stores and approximately 3600 independently owned and operated "associate" stores. The company-owned stores are generally located in the larger cities, while the "associate" stores are found in smaller communities. As of December 31, 1956, Western Auto had seven company-owned and ninety-one associate stores in South Carolina.

The contracts which Western Auto enters into with its associated stores authorize them to use the name "Western Auto Associate Store." This is considered a valuable right because of the good will which the Western Auto Supply Company has developed. The contracts are cancellable at will by either party upon sixty days written notice. Each contract requires only that the associate shall purchase a stipulated amount of merchandise for an opening stock. Nothing in the contract itself prohibits the purchase and sale of items from other sources, and there is no provision for minimum purchases from Western Auto after the opening order.

[*Coercion*]

Beginning in 1950, however, Western Auto's representatives, it is alleged, began to coerce certain of the associate stores in South Carolina and Georgia, including the plaintiff-retailers, to discontinue the sale of

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[1] Section 3 of the Clayton Act.
"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

[2] Section 2 of the Sherman Act.
"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." July 2, 1890, c. 647 § 2, 26 Stat. 209. As amended July 7, 1955, c. 28, 69 Stat. 282.

[3] Since we are reviewing an order sustaining the defendant's motion to dismiss, the recitals of the complaint which were well pleaded are treated as facts.

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merchandise supplied by competitors. The announcement was made that associate stores should not sell "outside" seat covers, television sets and certain other products. From 1950 to 1956 Western Auto's representatives continually threatened to cancel the franchises of dealers who did not handle Western Auto's "Wizard" seat covers and its "Truetone" television sets. The principal controversy appears to have been over television sets; pressure was applied to some of the plaintiff-retailers to give up selling all competing television sets, while others were told to restrict their handling of outside sets.

[*Cancellation*]

The plaintiff-retailers refused to accede fully to Western Auto's demands because they had found that outside television sets, particularly Sylvania sets, sold better than Western Auto's Truetone models. They did, however, limit their outside purchases to a degree in order to retain their franchises which were considered valuable because of Western Auto's other lines. As a result, the plaintiff-retailers purchased some Western Auto merchandise they did not want and otherwise would not have purchased. Notwithstanding these additional purchases from the defendant, the franchises of these associates were eventually cancelled because of their refusal to respect Western Auto's distribution policies.

[*Damages*]

In their complaint, the plaintiff-retailers claimed damages for losses said to have resulted from pressure applied by representatives of Western Auto during the period prior to the cancellation of their franchises. In particular they charged that they (1) lost profits because of their inability to sell outside merchandise unfettered by defendant's pressures, (2) lost profits as a result of being forced to stock and sell defendant's inferior products, and (3) lost cash discounts and freight allowances which would have been available from outside wholesalers.[4] The retailers also sought damages for (4) the ultimate cancellation of their contracts which was said to have resulted in (a) loss of good will and value attaching to their Western Auto franchises, and (b) loss of anticipated profits in the reasonable future. The plaintiff McElhenney Co., Inc., the former Sylvania distributor, claimed to have been damaged by the restrictions Western imposed upon its customers, as a result of which McElhenney's market among such customers for television sets, and replacement parts which it also handled, was materially reduced.

[*Refusal to Deal*]

Generally speaking, the right of customer selection is sanctioned by both statute and case law. Absent conspiracy or monopolization, a seller engaged in a private business may normally refuse to deal with a buyer for any reason or with no reason whatever. Thus, the courts have until now not held a seller liable in damages for refusing to deal with one who is unwilling to enter into an unawful vertical price agreement or an exclusive dealing arrangement. Clothed with this privilege, the seller not only may, but ordinary fairness would require that he should announce in advance the circumstances under which he will do business with others.

This is not to say however that the course of dealing between seller and buyer may not go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding. But whether there is such agreement is always a question of fact to be determined in light of all the circumstances when the case on a properly pleaded complaint is brought to trial (Cf. *United States v. Colgate & Co.*, 250 U. S. 300 (1919); *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85 (1920); *Frey & Son Inc. v. Cudahy Packing Co.*, 256 U. S. 208 (1921)). To support a right of action for treble damages, the challenged agreement must be violative of one of the provisions of the several antitrust laws. Here the claim is that the defendant infringed Section 3 of the Clayton Act and Section 2 of the Sherman Act.

Section 3 of the Clayton Act

In essence Section 3 of the Clayton Act prohibits leases, sales or contracts for the sale of goods and commodities made on the condition, agreement or understanding

[4] Certain of the plaintiff-retailers also claimed damages resulting from the closing of their stores which they attributed to the defendant's restrictive policies. All of the plaintiff-retailers are still in business. All those who closed their stores have opened new ones. Snipes who owned two stores has closed one of them, but continues to operate the other. Two of the plaintiff-retailers are now affiliated with Firestone.

that the purchaser shall not use or deal in the goods and commodities of the seller's competitors where the effect may be to substantially lessen competition or tend to create a monopoly. This section, like others of the Clayton Act, was intended to reach specific conduct which had been held by the courts to be outside the ambit of the Sherman Act and which the Congress felt must be proscribed in order to promote competition. The Congressional history, 51 Cong. Rec. 9161, indicates that while Congress was aware of other business practices which might also be harmful to the economy, it was attempting to outlaw only those with which the section expressly dealt.

Neither in terms nor inferentially does the statute prohibit a unilateral refusal to sell. Its condemnations are directed against executed transactions of lease, sale or contract containing the forbidden condition, agreement or understanding. Quite correctly the District Court pointed out that a mere refusal by a manufacturer to deal with a retailer who will not confine his dealings to the goods of the manufacturer does not run afoul of the section. The cases are unanimous in this: *Nelson Radio and Supply Co. v. Motorola, Inc.* [1952 TRADE CASES ¶ 67,386], 200 F. 2d 911 (5 cir., 1952), cert. den., 345 U. S. 925 (1953); *Leo J. Meyberg v. Eureka Williams Corp.* [1954 TRADE CASES ¶ 67,834], 215 F. 2d 100 (9 cir., 1954), cert. den., 348 U. S. 875 (1954); *Brosious v. Pepsi-Cola Co.* [1944-1945 TRADE CASES ¶ 57,343], 59 F. Supp. 429 (M. D. Pa., 1945), affirmed [1946-1947 TRADE CASES ¶ 57,459], 155 F. 2d 99 (3 cir., 1946); *Allied Equipment Co. v. Weber Engineered Products* [1956 TRADE CASES ¶ 68,502], 237 F. 2d 879 (4 cir., 1956).

[*No "Agreement"*]

Appellants incorrectly interpret the ruling of the court below as limiting the reach of Section 3 to those instances where exclusive dealing is brought about by contract expressly imposing a "legal" obligation on the part of the buyer not to handle the goods of others. The District Court's opinion will not sustain this reading. The court was differentiating between an agreement of exclusivity on the one hand, and a naked refusal to deal on the other. It did not suggest that the illegal condition, agreement or understanding may not be implied from a course of dealing between the parties. Probably nothing is more firmly settled in our antitrust jurisprudence than that an illegal contract may be inferred from all of the circumstances. Admittedly, the written agreement between the parties contains no provision requiring the franchisees to deal only in goods supplied by Western Auto. This, of course, merely means that the contract is not unlawful on its face. The writing could be supplemented by an extrinsic course of conduct from which the illegal condition or understanding might be found. This the trial judge fully understood.

We have carefully examined the facts and circumstances upon which the plaintiffs predicate their claim of contravention of Section 3 through an implied understanding or course of dealing. There is no dispute about the fact that it was Western Auto's policy to have its associated retail stores push its own products and that it frowned upon their handling of competing goods. Plainly enough Western Auto wanted its dealers to advance sales of its merchandise, and threatened with cancellation and actually cancelled dealers who patronized its competitors to an extent which it felt jeopardized the value to it of the franchises issued to associated stores. But so far as the complaint shows it exacted no agreement against the handling of competing merchandise. The complaint itself makes clear that the plaintiffs during the period when the asserted understanding was in effect actually handled competitive articles. While the plaintiffs in their brief and in oral argument earnestly contended that Western Auto compelled franchised retailers to handle its full line of products, we find no clear cut allegation in the complaint that this was pursuant to a condition, agreement or understanding violative of the Clayton Act. This omission is sharply pointed up by the paragraphs relating to the individual plaintiffs, which disclose that they did not buy the defendant's full line and, indeed, supplemented Western's products with goods obtained from other sources. In short, plaintiffs' own statement of claim not only fails directly to allege but actually tends to negate any condition, agreement or understanding that plaintiffs shall not use or deal in the goods, wares or merchandise of a competitor of Western Auto.

The gravamen of a Section 3 violation is the forbidden condition, agreement or un-

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derstanding of exclusivity, and a proper pleading should assert this ultimate fact. It makes no difference whether this is voluntary or is imposed by coercion, but without such agreement, condition or understanding, there can be no statutory infraction. It is only in the presence of this essential element that consideration must be given as to whether competition may be substantially lessened or whether there is any tendency toward monopoly. Cf. *Standard Oil Company v. United States* [1948-1949 Trade Cases ¶ 62,432], 337 U. S. 293 (1949); *Dictograph Products v. Federal Trade Commission* [1955 Trade Cases ¶ 67,932], 217 F. 2d 821 (2 cir., 1954). A wide latitude would be afforded plaintiffs at a trial to prove their claim through direct or circumstantial proof. Whether the proof would support a finding of implied agreement or understanding is a question which we do not reach in the present posture of the case.

[*Permission to Amend*]

We agree with the District Court that an obligation devolves upon the pleader to set out clearly and unambiguously the operative facts upon which he relies. Repeatedly the plaintiffs' brief asserts that their complaint contains express and "implied allegations" sufficient to meet the requirements of the statute. It is not too much even under the liberal rules of pleading to require that the allegations be expressed in plain language, without such complete reliance as we have here upon mere implication. The complaint has been once amended, and apparently there was no application for further amendment. Under the circumstances, we might appropriately affirm without affording the plaintiffs any additional opportunity to plead over. However, in view of their strong insistence that they can establish from the course of dealing of the parties the condition, agreement or understanding which is the heart of the violation, we deem it just to remand the case to permit an application, to be addressed to the sound discretion of the District Judge, for permission to amend the complaint to state a violation of Section 3. The proposed pleading should accompany the application. This accords with the trend of the courts not to dispose finally of antitrust litigation upon the pleadings, without giving the plaintiff full opportunity to formulate his charges. *Radovich v. Nat. Football League* [1957 Trade Cases ¶ 68,628], 352 U. S. 445 (1957). Should there be a reformulation of the complaint the customary pretrial procedures may still be availed of by the defendant to lay bare any deficiency in the plaintiffs' case.

Section 2 of the Sherman Act

[*Monopolizing "Method of Doing Business"*]

We agree with the District Court that the pleading is equally deficient in framing a violation of Section 2 of the Sherman Act. As we have seen, the plaintiffs have failed to meet the less exacting requirements of the Clayton Act; nevertheless they would have the Court accept the same essential facts as a statement of a case under Section 2 of the Sherman Act. Their argument on this count is not that the defendant attempted to monopolize commerce in any particular product, but rather that it attempted to monopolize what they denominated "a method of doing business" by having its goods sold exclusively in the only stores in certain towns carrying a complete line of automobile and home supplies. It is not charged that these items were unavailable in other stores in each of the named towns, but simply that all of them could not be purchased in any other single store. Such charges do not amount to a requisite allegation of monopolization or attempt to monopolize which Section 2 of the Sherman Act condemns.

[*Monopoly Power—"Intent"*]

This count of the complaint thus is bereft of any averment of monopoly power in any defined market, or an intent to monopolize coupled with a dangerous possibility that a monopoly could be effectuated, or the improper employment of the defendant's position to attain ends forbidden by law. *Lorain Journal v. United States* [1950-1951 Trade Cases ¶ 62,957], 342 U. S. 143, 153 (1951); *Swift & Co. v. United States,* 196 U. S. 375, 396 (1905). All that the plaintiffs have done is to apply the Sherman law label to the same facts which they charge constitute a Clayton Act transgression. While we doubt that they could replead effectively, nevertheless should the District Court see fit to permit a further amendment of the first count of the complaint, it may be disposed to allow a like opportunity in respect of the Sherman Act count as well.

[*Affirmed and Remanded*]

While the rulings of the District Court are affirmed, the case is nevertheless remanded to it to permit further application to be made by the plaintiffs in conformity with this opinion.

Affirmed and remanded.

[¶ 69,417] Loew's, Inc. v. Radio Hawaii, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 12, page 3. Dated July 16, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defense—Action for Money Due Under Alleged "Block Booking" Contract.—A motion picture distributor, in an action for money due under a contract by which it licensed a television station to show 752 of its films over a period of years, was granted a motion to strike an affirmative defense alleging that the contract was inherently illegal under the Federal antitrust laws. It was contended that the contract, by requiring the television station to take all or none of the 752 films ("block booking"), created an illegal restraint on trade in violation of the Sherman Antitrust Act. The court, in granting summary judgment for the distributor, relied on the United States Supreme Court decision in *Kelly v. Kosuga*, 1959 TRADE CASES ¶ 69,283, in which a dealer in onions was permitted to recover the purchase price of onions sold under an agreement wherein the parties allegedly agreed not to sell on the futures market (in order to fix the selling price and limit the market supply). In that case, the Court pointed out that the avoidance of private contracts could not be added to the Sherman Act's express remedies, that the allowance of the illegality defense as a collateral means of enforcing the antitrust laws would create "a very strange class of private attorneys general," and that it was not inappropriate or violative of the intent of the parties to give effect to the agreement "even though it furnished the occasion for a restrictive agreement. . . ."

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.475.

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Jurisdiction of State Court—Motion to Stay Proceedings in State Court Where Related Matters Pending in Federal Court.—A New York court, in a motion picture distributor's action to recover money due on a contract wherein it licensed a television station to show its films, denied a request to stay its proceedings until the determination of a subsequently filed Federal court action in which the television station sought a rescission of the contract on the grounds that it was illegal under the Federal antitrust laws. The court noted that the present action did not depend on the propriety of Federal priority in antitrust actions and was therefore quite distinct from the action in *General Aniline & Film Corp. v. Bayer Co.*, 1953 TRADE CASES ¶ 67,552, where a state court permitted an application to stay its proceedings while the legality of the agreement sued upon was decided by a Federal court which had previously entered a consent decree enjoining one of the parties from enforcing the agreement. In *American News Co., Inc. v. Avon Publishing Co., Inc.*, 1956 TRADE CASES ¶ 68,320, a state court refused to stay its proceedings where there was "doubt as to whether the defense is maintainable as a bar to plaintiff's claim. . . ." Here, under a recent United States Supreme Court decision, *Kelly v. Kosuga*, 1959 TRADE CASES ¶ 69,283, the distributor's claim would not be barred even if the agreement was illegal under the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9047.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies Under State Law—Procedure—Antitrust Violations as Defense to Contract Action—Applicability of Federal Rule to State Antitrust Statute.—A motion picture distributor, in an action for money due under a contract by which it licensed a Colorado television station to show its films, was granted a motion to strike an affirmative defense contending that the contract was an unenforceable "block booking" contract which violated the New York Antitrust (Donnelly) Act. The court, having relied

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on *Kelly v. Kosuga*, 1959 TRADE CASES ¶ 69,283, a recent United States Supreme Court decision, in granting a motion to strike the defense that the contract was illegal under the Sherman Antitrust Act, noted that the rule of the *Kelly* case (permitting recovery for goods sold although the agreement contained a provision assumed to be illegal) was equally applicable to the state statute. Thus, defenses which fail under that decision must also fail under the New York statute.

See Combinations and Conspiracies, Vol. 1, ¶ 2407.34.

Combinations and Conspiracies Under State Law—Conflicts in State and Federal Laws—Application of New York Antitrust Statute to "Wholly Interstate" Matter—Federal Pre-Emption.—A New York court, in rejecting the alleged illegality of a motion picture film licensing agreement under the New York antitrust statute as a defense to an action to recover money due on the agreement, noted that the case dealt with the licensing of pictures for television transmission over state lines from a Colorado station, that the State of New York had no overriding concern which would warrant the application of its statutes to a factual situation that was wholly interstate in character, and that Federal authority had understandably pre-empted the field of television regulation as "interstate commerce."

See Combinations and Conspiracies, Vol. 1, ¶ 2401.34.

[*Contract Action—Antitrust Violations as Defense*]

EPSTEIN, Justice [*In full text*]: Plaintiff moves in this action to strike the affirmative defenses set up in the answers and for summary judgment in the sum of $813,570.32, with interest. Plaintiff entered into a written agreement with KTVR, Inc., a Colorado corporation, thereby licensing a number of motion pictures for television showing by said KTVR. Defendants were the sole stockholders of said television station, and as such unconditionally guaranteed full performance by KTVR. The number of films from plaintiff's library (752) were contracted for by said station for television showing over a period of years. Plaintiff performed its obligations under the contract, but KTVR defaulted in its payments. Plaintiff seeks herein recovery from defendants as guarantors of the agreement by KTVR. Defendants admit the agreement and admit their unconditional guaranty of KTVR's performance, which, having failed, now brings this claim for the money due under defendants' guaranty.

[*Block Booking*]

In the separate answers filed by defendants (Gotham Broadcasting filed one and Radio Hawaii and Founders Corporation filed another) there are set up two affirmative defenses. On the validity of these defenses in this action on the guaranty depends the conclusion to be reached by this court. The first defense is based upon what is known as "block booking," an imposition of a condition on KTVR of the necessity to take all 752 films or get none—constituting what is said to be an illegal restraint of interstate commerce. There are variations of this defense in the factual allegations of the combined answer of Radio Hawaii and Founders Corporation. The substance is, however, the same—violation of the Sherman Act by creating an illegal restraint on interstate commerce. The second defense in each answer is based on the claimed anti-trust violation as constituting a violation of the New York State anti-restraint statute, section 340 of the New York General Business Law. Plaintiff herein moves to strike these defenses as inadequate at law under Rule 109 of the Rules of Civil Practice and for summary judgment under Rule 113 of the Rules of Civil Practice. The pleadings, affidavits and relevant documents set forth the essential facts, and on them there rests the basis for a legal conclusion decisive of the instant motions.

[*Jurisdiction of State Court—Kelly Case*]

There are certain facts set forth in the opposing papers which are considered and which this court does not believe warrant the withholding of action hereon asked for by defendants. In March, 1957, the United States instituted an action against Loew's in the Southern District of New York based on the claimed "block booking" licensing agreements as being in violation of the federal anti-trust laws. In January, 1959, the instant action was begun against these defendants on their guaranty of the now claimed illegal contract of KTVR and Loew's. It was after this action had been on its way

that KTVR (the wholly owned tool of defendants herein) commenced an action in the Federal Court in the Southern District of New York in May, 1959, seeking rescission of and escape from its contract and agreement, and thereby to escape its obligation in the sum of $813,570.32, for which Loew's therein set up its counterclaim. The action of KTVR in the federal court is identical with the substance and legal effect of the defenses herein interposed—an inherently illegal contract under the federal anti-trust laws. Defendants herein ask this court to stay its action and withhold its decision until the federal action shall have been determined. This action, however, is quite distinct from that in *General Aniline & Film Corporation v. Bayer Company* [1953 TRADE CASES ¶ 67,552], (305 N. Y. 479), in which Judge Fuld for our Court of Appeals wrote the opinion of the court. This action does not depend on the propriety of federal priority in antitrust actions as in the *Aniline* case. So, too, in *American News Company v. Avon Publishing Company* [1956 TRADE CASES ¶ 68,320], (152 N. Y. S. 2d 575, aff'd at 153 N. Y. S. 2d at 579). The leading original "Block Booking" case is *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244] (334 U. S. 131), which followed a number of compromise agreements by the film distributors and the United States in the matter of bulk film contracts for original showings in theatres of the country. The present controversy in this litigation and on the facts here undisputed will turn on the effect of the recent United States Supreme Court decision in *Kelly v. Kosuga* [1959 TRADE CASES ¶ 69,283], (358 U. S. 516, 3 L. Ed. 2d 475), decided February 24, 1959. Both sides in this case seem to recognize the impact of the *Kelly v. Kosuga* case on the instant action against defendants. Plaintiff feels it is in effect conclusive, while defendants, with some admitted difficulty, seek to restrict it to the facts there and not as setting forth any guide in law. We must therefore look with care at *Kelly v. Kosuga.*

[*"Illegality" Defense Rejected*]

A dealer in onions sought recovery of the balance of purchase price of onions sold to defendant. Defendant and other dealers purchased onions and agreed not to sell on futures—in order to fix the selling price and limit the market supply. The defense was that the agreement violated the Sherman Act and the sale was an indivisible part of the illegal contract. Summary judgment was granted in the Northern District of Illinois, and the Court of Appeals, Seventh Circuit (affirmed [1958 TRADE CASES ¶ 69,062] 257 Fed. 2d 48). The United States Supreme Court affirmed the summary judgments granted below. Justice Brennan wrote in part as follows:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court * * *. The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction * * * (cases cited). * * * If the defense of illegality is to be allowed as a collateral method of enforcement of the anti-trust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general * * * we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question" (358 U. S. 518-521).

In the instant case defendants are further removed than the defendant in the *Kelly v. Kosuga* case. The contention of defendants herein under their guaranty agreement is even less effective than that held ineffective as a defense in the *Kelly* case.

[*New York Antitrust Statute*]

There is no reason why the New York State statute (sec. 340, General Business Law) should receive more rigid application than that given by the Supreme Court of the United States. The rule of the *Kelly v. Kosuga* case is equally applicable to the New York statute, and the defenses which fail under the former must also fail under the state statute. In a recent state court decision the same reasoning resulted in summary judgment for the plaintiff (*Fleischman Distilling Corp'n v. Frontier Liquor Corp'n,* New York County, decision of Levey, J., reported page 13, New York Law Journal April 6, 1959, C. C. H. [1959] TRADE CASES, par. 69,324). Illegal restraint of trade was there pleaded as a defense (five separate defenses) under section 340 of the state's General Business Law. Sherman Act violation was also pleaded. A collateral attack on the alleged illegality was not recognized. Said Justice Levey:

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"Finally, it is well settled that where a provision of a contract of sale, even though it may be in violation of anti-trust laws, is not an inherent part of the contract and is separable from the promise or obligation to pay for the goods sold, such illegal provision does not bar the right to recover the price (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165; *General Aniline & Film Corp'n v. Bayer*, 305 N. Y. 479; *Jamaica Sash & Door, Inc., v. Prudential Imp. Service, Inc.*, 137 N. Y. S. 2d 593). Accordingly, the motion for summary judgment is granted."

[*Interstate Commerce*]

The cases cited by Justice Levey are those discussed by Justice Brennan, although the *Kelly v. Kosuga* case was not relied upon by Justice Levey. We are here dealing with licensing pictures for television transmission in Colorado over state lines from the Colorado station. New York State has no overriding concern in such a situation to warrant application of its General Business Law to a factual situation wholly interstate in character. Federal authority has understandably pre-empted the field of television regulation as "interstate commerce" (*Allen B. Dumont Laboratories v. Carroll*, 3d Circuit, 184 Fed. 2d 153, 154, cert. den. 340 U. S. 929). So, too, in the *Kelly v. Kosuga* case the state antitrust defense was stricken by the Seventh Circuit Court of Appeals (257 Fed. 2d 55).

[*Summary Judgment Granted*]

In this case all the pertinent facts and evidence are before this court. There is no factual issue left. This court on these pleadings and papers before it, and considering the rationale of recent state and federal cases hereinabove referred to, feels impelled to strike down the affirmative defenses pleaded in defendants' answers and to grant summary judgment as prayed for in the moving papers. Submit order and judgment.

[¶ 69,418] The Upjohn Company v. Peoples Service Drug Stores, Inc.

In the United States District Court for the District of Maryland. Civil Action No. 10092. Filed May 26, 1959.

Maryland Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Federal Court Actions—Motion to Refer Issues to State Court—Constitutionality of Fair Trade Act Under State Constitution.—A Federal District Court, in a drug manufacturer's fair trade action against a retailer who allegedly violated the Maryland Fair Trade Act by granting a "concession" (trading stamps) in connection with the retail sale of the manufacturer's products at the minimum retail prices, held the case in abeyance to permit the manufacturer to file a state court action for a determination of questions which arose under the Constitution and laws of Maryland. By way of separate defenses, the retailer had raised questions concerning the interpretation of the Maryland Fair Trade Act which had not been passed upon by the Maryland Court of Appeals, and questions arising under the Constitution and laws of the United States. The undesirability of a Federal court attempting to forecast the decision of a state court upon a point requiring the interpretation of state law or the state constitution, and the further undesirability of a Federal court passing upon questions involving the constitutionality of state laws under the Constitution of the United States, has often been recognized. The court allowed the manufacturer thirty days in which to commence an action in an appropriate state court. The action taken by the manufacturer, if any, would be reported to the Federal court on or before the expiration of the thirty day period.

See Fair Trade, Vol. 1, ¶ 3085.22, 3410.

Fair Trade—Defense to Enforcement Actions—Enforcement Activity or Policy.—A drug manufacturer, in successfully seeking to have a Federal court hold in abeyance a fair trade action to permit it to file a state court action for a determination of questions arising under the Maryland Constitution and Maryland Fair Trade Act, alleged that a state court, in another fair trade action brought by it, had stated that an interlocutory

injunction granted in that action might be dissolved unless the manufacturer proceeded forthwith, in that state court, against the defendant in the instant Federal court action.

See Fair Trade, Vol. 1, ¶ 3440.22.

For the plaintiff: J. Nicholas Shriver, Jr., J. Paul Bright, Jr., and Murray D. Welch.

For the defendant: F. Fulton Bramble and Harrison L. Winter.

[*Fair Trade Action—Trading Stamps*]

R. Dorsey Watkins, District Judge [*In full text*]: Plaintiff has sued defendant seeking an injunction and damages for alleged violation by defendant of the Maryland Fair Trade Act (Maryland Code of Public General Laws, 1957 Edition, Article 83, sections 102-110). The complaint, after proper jurisdictional allegations as to diversity of citizenship and statutory amount, contains the typical allegations found in similar complaints against non-signing retailers, including the ownership and use by plaintiff of various registered trademarks on drugs, medicines, toilet articles and other products sold and distributed by plaintiff; wide distribution and advertising of the goods and trademarks, resulting in the acquisition by plaintiff of a valuable goodwill therein; that such products are in "fair[1] and open competition with products[2] of the same general class produced by others"; that plaintiff has entered into fair trade contracts complying with and under the Maryland Act, with retailers in the State of Maryland whereby it was agreed that said retailers would not advertise, offer for sale or sell any of plaintiff's trademarked products at prices less than the then prevailing minimum retail price, and that in connection with any sale of plaintiff's products at such minimum resale prices the retailer would not offer or make "any concession of any kind whatsoever (either by the giving of coupons, trading stamps or otherwise)"; that notice of such contracts and of the minimum retail sales prices was given by plaintiff to the trade and to defendant; but that thereafter defendant, with knowledge of the provisions of such fair trade contracts including the provision against giving trading stamps, wilfully and knowingly instituted the practice of giving a concession, i. e., trading stamps, in connection with the retail sale of plaintiff's fair-traded products at the minimum retail prices, in violation of such fair trade contracts and the Maryland law; that plaintiff has "importuned" defendant to cease such alleged violations but defendant has continued such practices; that serious damage has been done to plaintiff and its goodwill by such practices and will continue unless defendant is restrained; and that plaintiff has no adequate remedy at law.

[*Answer*]

The court refused to sign a temporary restraining order, but did issue an order requiring cause to be shown why a preliminary injunction should not issue. Defendant filed a combined answer to the complaint, and to the show cause order. Defendant admits[3] notice that plaintiff had entered into a fair trade contract with a retailer in the State of Maryland and of the minimum retail prices from time to time established by plaintiff, but denied notice of the terms and conditions of such contract, including the purported prohibition against the giving of trading stamps. Defendant admitted the resumption of its former practice of giving to purchasers of all products[4] sold by it for cash, including plaintiff's fair-traded products when sold at minimum fair trade prices, trading stamps redeemable in merchandise, but denies that such stamps are "coupons" or that the giving of such stamps constitutes the giving of a "concession", or that its conduct is in violation of plaintiff's purported fair trade contract and the Maryland Fair Trade Act. Defendant also admitted plaintiff's "importunings" to cease the giving of trading stamps and that it declined to discontinue this practice.

[*Defenses Under Maryland Fair Trade Act*]

The answer then by way of separate defenses raises questions concerning the

[1] and [2] Section 103 of Article 83 of the Maryland Code uses the terms "free" and "commodities" in place of "fair" and "products". While the terms may not be synonymous, they are sufficiently similar to bring the claim within the Maryland Act.

[3] Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of some of the allegations of the complaint, and denies others. This is not important with respect to the pending motion.

[4] Except cigarettes, fountain sales and certain drug items.

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interpretation of the Maryland Fair Trade Act which have not heretofore been passed upon by the Maryland Court of Appeals, and questions under the Constitution and laws of the United States. The contentions as to Maryland law are as follows:

(1) Defendant's use of trading stamps is in effect only a "uniform store-wide discount for the immediate or prompt payment of cash", or 2.50% if stamps are redeemed in merchandise or 1.67% if stamps are redeemed in cash; and that this practice is not a violation of section 104 of Article 83 of the Maryland Code.

(2) Even if the use of stamps effects a reduction of the price of commodities sold, it is *de minimis*, and should not be considered by a court.

(3) The use of stamps by defendant does not constitute "an injurious and uneconomic practice in the distribution of" plaintiff's products.

(4) If the use of stamps by defendant constitutes a reduction in the price of commodities sold, such reduction was not "willfully and knowingly made" by defendant within the meaning of section 107 of Article 83 of the Maryland Code.

[*Constitutional Defenses*]

The defenses allegedly arising under the Constitution and laws of the United States are:

(1) To prohibit the allowance of a cash discount on the sale of plaintiff's products would violate the Sherman Anti-Trust Act (15 U. S. C. A. 1); and the Maryland Fair Trade Act, insofar as it purports to authorize the fixing of terms of sale, violates the Sherman Anti-Trust Act.

(2) If applied to compel defendant to cease issuing trading stamps with merchandise sold at prices fixed by plaintiff, the Maryland Fair Trade Act would be unconstitutional in that it would deprive defendant of its liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(3) The McGuire Act of July 14, 1952, constitutes an unconstitutional delegation to private persons of powers vested in the Congress of the United States by Article I, sections 1 and 8 of the Constitution of the United States; and the Maryland Fair Trade Act, insofar as it depends upon the McGuire Act, is likewise unconstitutional.

(4) If applied to compel defendant to cease issuing trading stamps with merchandise sold at prices fixed by plaintiff, the McGuire Act of July 14, 1952 would be unconstitutional in that it would deprive defendant of its liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(5) If applied to compel defendant to cease issuing trading stamps with merchandise sold at prices fixed by plaintiff, the Maryland Fair Trade Act would be unconstitutional in that it would constitute an unreasonable burden on interstate commerce in violation of Article I, section 8 of the Constitution of the United States.

(6) The McGuire Act is void for uncertainty, in that subsection (a)(3) (15 U. S. C. A. 45(a)(3)), which imposes on non-signers of price maintenance contracts the obligation to observe the terms of such contracts, authorizes horizontal price-fixing, thus conflicting with subsection (a)(5) (15 U. S. C. A. 45(a)(5)) which forbids horizontal agreements to effect such a result.

(7) The provision of section 104(b) of Article 83 of the Maryland Code of Public General Laws, prohibiting the "offering or the making of any concessions of any kind whatsoever (whether by the giving of coupons or otherwise)" in connection with the sale of fair-traded commodities, if applied so as to compel defendant to cease issuing trading stamps with plaintiff's fair-traded merchandise, but not applied to prohibit the extension of credit on sales thereof, would be an unconstitutional denial to defendant of the equal protection of the laws.

[*Stay of Proceedings*]

Thereafter a petition was filed by defendant [5] alleging that there had been raised by its answer divers questions of the validity and interpretation of the Maryland Fair Trade Act upon which there had been no adjudication by the trial courts or the

[5] A joint petition was filed by defendant in this and two other cases brought against it by drug manufacturers, and by another pharmacy sued by another drug manufacturer, all involving alleged fair trade violations in the issuance of trading stamps.

Court of Appeals of Maryland; that subsequent to the filing of the complaint herein, there had been filed and was pending in the Circuit Court of Baltimore City an action[6] brought by a drug manufacturer against this defendant, the purpose of which is to restrain and enjoin defendant from issuing trading stamps in connection with plaintiff's fair-traded products; and that the same questions of the validity and interpretation of the Maryland Fair Trade Act are raised in that case as are raised herein. The motion requested a stay of proceedings in this case pending an adjudication by the Circuit Court of Baltimore City of the above questions of the validity and interpretation of the Maryland Fair Trade Act.

[*Motion to "Remit" Action to State Court*]

No objection was made by plaintiff's counsel to the stay, which was granted for ninety days, with leave to plaintiff and defendant to move for any extension of the stay or, before the expiration of the stay, to apply for a lifting thereof. One extension was granted. Defendant applied for a further extension, which was opposed by plaintiff. At a conference attended by counsel in this and other related cases[7] held on May 11, 1959, it was stated that it was almost certain that because of discovery proceedings and pending motions, the Circuit Court case could not be decided for at least six months, and probably not for a year. Plaintiff then filed a motion,[8] with supporting memorandum, requesting this court not to grant a further extension of the stay, but to retain this case without final disposition and allow the plaintiff a reasonable time to commence action in the state courts for a determination therein of questions of state law. As reason for the institution of a new suit in the state courts, rather than awaiting the outcome of the pending litigation in the Circuit Court of Baltimore City, plaintiff's motion alleges that in a proceeding by plaintiff against another pharmacy in the Circuit Court for Montgomery County,[9] the court, in granting interlocutory injunction restraining the defendant therein from violating the fair trade laws of Maryland, including a prohibition against the use of "any allowance, gift, rebate or concession", stated that it might well dissolve the injunction unless plaintiff "proceeded against the defendant herein, Peoples Service Drug Stores, Inc., in the Circuit Court for Montgomery County forthwith with respect to the use by this defendant of trading stamps in the trading area . . ." Plaintiff's counsel also advised this court that the judge of the Circuit Court for Montgomery County had indicated that disposition of such a suit could be had in the matter of a few weeks.

The undesirability of a Federal court attempting to forecast the decision of a state court upon a point requiring the interpretation of state law or the state constitution, and the further undesirability of a Federal court passing upon questions involving the constitutionality, under the provision of the Constitution of the United States and the amendments thereto, of state laws, has often been recognized. *Railroad Commission of Texas v. Pullman Company*, 1941, 312 U. S. 496, 499-501, 61 S. Ct. 643, 85 L. Ed. 971; *Albertson v. Millard*, 1953, 345 U. S. 242, 244, 73 S. Ct. 600, 97 L. Ed. 983; *Leiter Minerals, Inc. v. United States*, 1957, 352 U. S. 220, 229, 77 S. Ct. 287, 1 L. Ed. 2d 267; *The Tungas v. Skovgaard*, 1959, 358 U. S. 588, 596, 79 S. Ct. 503, 3 L. Ed. 2d —.

In two instances, United States District Courts in cases involving state fair trade laws have held cases in abeyance to permit the institution of proceedings in the state courts. *Union Carbide & Carbon Corp. v. White River Distributors, Inc.* [1954 TRADE CASES ¶ 67,711], D. C. Ark. 1954, 118 F. Supp. 541; *Sterling Drug v. Anderson* [1955 TRADE CASES ¶ 67,991], D. C. Tenn. 1954, 127 F. Supp. 511.

[*Case Retained Pending State Court Action*]

The court will sign an order retaining this case on the docket without final dis-

[6] *Parke, Davis & Company v. People's Service Drug Stores, Inc.*, Case No. A-37886, Docket 1958A, folio 269.

[7] See footnote 5.

[8] The motion is entitled as one "For Remission of this Cause to the Maryland State Courts for Determination of Questions of State Law" and in the body of the motion it is requested that this court "remit" the cause, but retain jurisdiction and hold proceedings in abeyance for a reasonable time pending determination of questions of state law by the state courts. There can be no doubt, however, from the balance of the motion, and the cases cited in the memorandum, that plaintiff was really seeking the procedure summarized in the text of this opinion to which this footnote is appended.

[9] *The Upjohn Company v. Save-Mor Drugs, Bethesda, Inc.*, in the Circuit Court for Montgomery County, Equity No. 21790.

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position, and allow the plaintiff thirty days within which to commence appropriate action in the Circuit Court for Montgomery County for a determination therein of the questions arising under the Constitution and Laws of the State of Maryland which have been raised by the defendant herein in its answer, the plaintiff to report to the court at or before the expiration of said thirty-day period the action, if any, which it has taken with respect thereto.

[¶ 69,419] **Baldwin-Lima-Hamilton Corporation and Edward E. Simmons, Jr. v. Tatnall Measuring Systems Company and The Budd Company.**

In the United States Court of Appeals for the Third Circuit. No. 12,846. Filed August 5, 1959.

Appeal from the United States District Court for the Eastern District of Pennsylvania. STEEL, District Judge.

Sherman and Clayton Antitrust Acts

Exclusive Dealing—Clayton Act, Section 3—Patent Misuse as Bar to Infringement Action—"Tying" Other Apparatus to Sale of Patented Device.—An exclusive licensee of a "strain gage," a patented device for measuring "strain" in materials, was denied a petition for a rehearing on a ruling that it had "misused" the patent and was, therefore, barred from enforcing it against an infringer. The petition for rehearing, if anything, made it clearer than ever that (1) a product which was "tied" to the sale of the patented device was not an element thereof (and was not, therefore, within the monopoly of the patent), and (2) the licensee illegally limited the use of the patented device by refusing to sell it, by itself, to prospective customers who wished to use it with a strain sensitive apparatus of a type manufactured by the licensee and its "licensees."

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500; Exclusive Dealing, Vol. 1, ¶ 4007.275, 4007.550, 4007.725, 4009.100, 4009.475, 4009.600; Private Enforcement and Procedure, Vol. 2, ¶ 9040.05.

For the appellants: Walter J. Blenko, Pittsburgh, Pa.

For the appellees: Joseph W. Swain, Jr., Philadelphia, Pa.

Denying a petition for rehearing on a decision of the U. S. Court of Appeals, Third Circuit, 1959 Trade Cases ¶ 69,359.

Present: BIGGS, Chief Judge, and MCLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

SUR PETITION FOR REHEARING

Opinion of the Court

[*Patent Misuse—"Tying" Arrdngements*]

PER CURIAM [*In full text*]: The petition for rehearing, if anything, makes it clearer than ever that 1. the test body is not an element of the patent which is for a gage *per se*, and 2. that appellant Baldwin-Lima-Hamilton Corporation illegally limited the use of the Simmons gage by refusing to sell it by itself to prospective customers who wished to use it with strain sensitive apparatus of a type manufactured by appellant Baldwin-Lima-Hamilton Corporation and its licensees.

[*Petition Denied*]

The petition for rehearing will be denied.

[*Dissenting Opinion*]

BIGGS, Chief Judge, dissenting [*In full text*]: The court has extended greatly the patent misuse principle. This extension, applied full force, could prohibit a patentee from employing his invention as a component even in an apparatus of his own manufacture.

I conclude that the test body is a material element in the claimed invention, as the court below first held, and that Section 271, Title 35, U. S. C., may be applicable.

The issues involved are of such far-reaching importance as to render desirable rehearing before the court *en banc*.

For these reasons I must dissent from the order denying rehearing.

[¶ 69,420] Ordnance Gauge Company v. Jacquard Knitting Machine Co., Inc.

In the United States Court of Appeals for the Third Circuit. No. 12,577. Argued November 17, 1958. Filed February 18, 1959. Opinion on Petition for Rehearing filed April 9, 1959.

Appeal from the United States District Court for the Eastern District of Pennsylvania. KIRKPATRICK, Chief Judge.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Dismissal of Action for Failure to Prosecute—Five Year Delay.—A trial court's dismissal, without prejudice, of a private action which had been permitted to lay dormant for more than five years was affirmed. Under Rule 41(b) of the Federal Rules of Civil Procedure, a case may be dismissed for failure of the plaintiff to prosecute. Whether such a failure justified dismissal was within the discretion of the trial court. The plaintiff's contention that Rule 41(b) was not applicable at the pleading stage of the proceedings, but only at the trial stage, was rejected. Thus, the action stood dismissed under Rule 41(b), but the dismissal would not operate as a dismissal on the merits. In view of the plaintiff's failure to state when or where the acts complained of occurred and its failure to set out the applicable statute of limitations, it could not be stated with positiveness whether or not its action was now barred.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

For the appellant: Leonard L. Kalish, Philadelphia, Pa.

For the appellee: H. Francis DeLone, Philadelphia, Pa.

Affirming a judgment of the U. S. District Court, Eastern District of Pennsylvania, 1958 Trade Cases ¶ 68,933.

Before BIGGS, Chief Judge, and MCLAUGHLIN and KALODNER, Circuit Judges.

Opinion of the Court

[*Dismissal—Failure to Prosecute*]

By BIGGS, Chief Judge [*In full text*]: The court below dismissed without prejudice a suit filed by the appellant, Ordnance Gauge Company, against Jacquard Knitting Machine Company. Ordnance has appealed.

[*Patent Infringement Action*]

Extensive litigation between the parties commenced on April 19, 1950 when Jacquard, defendant-appellee in the instant case, filed a complaint against Ordnance, at Civil Action No. 10,850 in the court below, alleging infringement of the United States Patent No. 2,397,456. The patent discloses a method of transferring stitches from one needle to another in knitting machines or in a loop-receiving device. Ordnance filed an answer and a counterclaim denying infringement and sought to have the patent declared invalid and also prayed for an injunction restraining Jacquard from instituting or threatening suit against its, Ordnance's, customers alleging that they had infringed Jacquard's patent.

[*Antitrust Action*]

After the filing of the answer and counterclaim in Civil Action No. 10,850, but before the trial of that action, Ordnance on May 3, 1951, filed the suit at bar, Civil Action No. 12,206 in the court below. Ordnance's complaint alleges violation by Jacquard of the antitrust laws in connection with United States Patent No. 2,397,456, makes reference to the suit at Civil Action No. 10,850, alleges that Patent No. 2,397,456 is invalid and was not infringed, asserts that Jacquard was guilty of unfair competition, trade libel and slander, and seeks damages and other relief. An answer was filed by Jacquard on June 29, 1951, but no further action of any kind, insofar as the record shows, was taken in the suit for a period of more than five years, indeed not until November 8, 1956. The trial of Civil Action No. 10,850 was commenced on July 19, 1951 and was concluded April 16, 1952. The court below filed an opinion[1] and entered judgment on November 14, 1952, holding the patent invalid and denying relief to Ordnance on its counterclaim. Jacquard and Ordnance cross-

[1] *Jacquard Knitting Mach. Co. v. Ordnance Gauge Co.* [1952 TRADE CASES ¶ 67,340], 108 F. Supp. 59 (E. D. Pa. 1952).

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appealed to this court. We affirmed the judgment of the court below.[2]

[*Want of Prosecution*]

On November 8, 1956 the Clerk of the court below mailed to the attorneys for both Jacquard and Ordnance a notice[3] that Civil Action No. 12,206 would be dismissed under the local "Two-Year Rule",[4] unless application was made to the district court. Ordnance responded on November 21, 1956 by filing a praecipe directing the Clerk of the District Court to place the case on the jury trial calendar. The Clerk prepared a "calendar card"[5] and gave the case a number for the preparation of the list for preliminary call. Two days later, on November 23, 1956, Ordnance filed an application to the court that the action should not be "deemed [to be] abandoned nor dismissed."[6] Ordnance's application was listed for argument on December 16, 1956. There was a continuance, however, at Jacquard's request and on March 17, 1957 Jacquard filed a motion pursuant to Rule 41(b), Fed. R. Civ. Proc., 28 U. S. C., to dismiss the suit at bar for want of prosecution with due diligence. Affidavits were filed.[7]

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[2] [1954 TRADE CASES ¶ 67,871], 213 F. 2d 503 (1954).

[3] The notice was as follows: "The record in the above case indicates that no proceedings have been taken by the parties for a period of two consecutive years. Unless application is made to the Court within two weeks from the date of this letter, the case will be deemed abandoned and stand dismissed in accordance with a local rule of Court. Such dismissal shall be without prejudice and with costs against the plaintiff.

"If this case has been settled, a stipulation or order to dismiss filed by the parties in accordance with Rule 41 of the Federal Rules of Civil Procedure will preclude the necessity of entering a cost judgment on the judgment indexes."

[4] The "Two-Year Rule" under which the Clerk of Court acted was promulgated November 24, 1952, and is as follows:

"In every civil action, not answered 'Ready for Trial' upon a preliminary call, in which no proceeding has been taken for a period of two consecutive years, the Clerk shall, immediately upon the expiration of such two year period, send notice to counsel of record or, if none, to the parties that, unless the Court upon application made within two weeks after such notice shall otherwise order, the case will be deemed to be abandoned and stand dismissed and, in the absence of such application to or order by the Court the Clerk shall without special order enter upon the record 'Dismissed under the rule' and tax the costs against the plaintiff. Dismissal under this rule shall be without prejudice.

"This rule shall on and after December 1, 1952, be in full force in cases then pending or thereafter brought."

The rule of the court below which was effective until December 1, 1952, provided:

"Every Civil Action in which no proceeding has been taken for a period of two consecutive years shall, immedaitely upon the expiration of such two year period, be deemed to have been abandoned and stand dismissed, and the Clerk shall thereupon, without special order, enter upon the record 'Dismissed under the rule' and tax the costs against the plaintiff. Dismissals under this rule shall be without prejudice.

"This rule shall on and after the 2nd day of January, 1940, be in full force in all actions then pending or thereafter brought."

[5] A calendar card is an abbreviated record of the case in the district court, and is used principally to facilitate the preparation of trial lists.

[6] Ordnance's application of November 23, 1956 was as follows: "Plaintiff requests that this Action be not deemed abandoned nor dismissed, for lack of prosecution, because it is not plaintiff's intention to abandon this Action, and plaintiff has filed a Praecipe requesting that this Action be placed on the trial calendar."

[7] Two affidavits were filed by the defendant June 19, 1957. One affiant, Mr. Jerome G. Lee, was employed by the firm of J. Stanley Preston, counsel for Jacquard in Civil Action No. 10.850. See p. 1, *supra*. Lee stated, through his affidavit that it was his observation and belief that "all conferences, discussions, and correspondence" relating to Civil Action No. 10,850 and decisions leading up to the suit were conducted by and between Mr. Preston and Mr. Harry Albertman, the general manager of Jacquard: and that J. Stanley Preston died in October 1954.

The other affiant was Mr. Charles F. Miller, who, at the time of trial of Civil Action No. 10,850, was Chief Engineer of Jacquard. At the time of making the affidavit, Mr. Miller was Vice-President of Wildman-Jacquard Co., a successor company. In his affidavit Mr. Miller stated that Mr. Albertman was unable to testify in Civil Action No. 10,850 because of "serious physical and mental disabilities," and that "At the present time [June 18, 1957], Mr. Albertman is even more seriously disabled, both physically and mentally"; that on June 29, 1956, Jacquard merged with Wildman Mfg. Co. to form the Wildman-Jacquard Co. and that Jacquard's factory in Philadelphia was closed; that no one in the Wildman-Jacquard organization could testify that the files of J. Stanley Preston relating to litigation between Jacquard and Ordnance, transferred to Jacquard after Preston's death, are complete or that no documents had been lost.

A third affidavit was filed by defendant Jacquard on March 5, 1958. It was sworn to on June 20, 1957 by Mr. Robert D. Donley, the Secretary of Jacquard. Apparently it was before the court on June 24, 1957 but was not marked "filed" until March 5, 1958. The affiant stated in substance that defendant's assets and corporate affiliations had undergone a series of changes since June of 1954.

No affidavits were filed by plaintiff, Ordnance Gauge Co.

Ordnance's application that the suit should not be deemed to be abandoned or dismissed and Jacquard's motion to dismiss were argued together on June 24, 1957. On August 19, 1957 the court below granted Jacquard's motion to dismiss the suit at bar for failure to prosecute it diligently pursuant to Rule 41(b) and without opinion ordered the action at bar dismissed. Ordnance filed a petition for rehearing.[8] A hearing was had on this petition and on January 21, 1958, the court below filed an opinion,[9] ruling against Jacquard, vacated its judgment of August 19, 1957, but ordered Ordnance's action dismissed without prejudice under the Two-Year Rule. Ordnance now appeals from this judgment.

[*Statute of Limitations*]

Ordnance contends that the court below erred in dismissing its suit under the Two-Year Rule on January 21, 1958, as it had erred previously in dismissing the suit under Rule 41(b) on August 19, 1957. Ordnance asserts that the court below misconstrued the Two-Year Rule and applied it prejudicially contending that the court itself failed in its duty through the inaction of its Clerk's office in failing for more than three years to give notice to Ordnance that it would apply the Two-Year Rule when the rule itself required the Clerk to give notice "immediately" upon expiration of the prescribed two year period and that Ordnance's suit is now barred by the applicable statutes of limitations.[10] Quite aside from any of the foregoing, Ordnance asserts that the rule is inapplicable by its own terms to the case at bar and that the court has misconstrued it. There is no doubt that the court below dismissed the instant case by application of the Two-Year Rule for the final line of the opinion stated: "The case will . . . be dismissed without prejudice, under the local rule." 21 FRD at p. 577. We therefore must determine whether the court erred in applying this rule under the circumstances at bar.[11]

[*Interpretation of "Two-Year Rule"*]

The assertion that the court below misconstrued or misapplied the Two-Year Rule requires an examination of its provisions. Ordnance insists that the phrase "In every civil action not answered 'Ready for Trial' upon a preliminary call . . . shall . . ." be subject to the Rule's provisions, must be construed as if it read "In every civil action which shall have been on preliminary call and not answered 'Ready for Trial' . . . shall . . ." be subject to the Rule's provisions. This interpretation would exclude from the operation of the rule any case "not answered 'Ready for Trial' upon a preliminary call," such as the case at bar. We cannot accept this construction. The rule may not be as clear as it should be but its purpose as a successor to the former "Two-Year Dismissal Rule"[12] was to wipe dead cases from the court's civil docket. This interpretation sought by Ordnance would emasculate the rule and render it largely nugatory for it would not affect cases unless they had been on preliminary call. It cannot be supported. Under the local practice a case does not come up for preliminary call unless counsel "issues" a "trial order". If counsel for the defendant does not do so, and the burden of prosecuting an action is not on the defendant, the

[8] Ordnance's reasons in seeking a vacation of the judgment of dismissal were set out in its petition for rehearing. These reasons are that Civil Action No. 10,850 was not concluded until August 19, 1954, when the time for filing a petition for certiorari to the Supreme Court expired; that that suit by Jacquard, constituting a substantial drain on Ordnance's resources, made prosecution of the present suit impractical; that the incapacitating illness of Ordnance's president added to the difficulties of diligent prosecution; that the attorney for Ordnance had to curtail his activities during the period 1952-56 because of serious illnesses and death in his immediate family.

[9] See [1958 TRADE CASES ¶ 68,933], 21 F. R. D. 575 (E. D. Pa. 1958).

[10] It is not clear from the complaint when or where the acts complained of, alleged to be a conspiracy to monopolize trade, occurred. Other acts seem to be charged against Jacquard alone. Three causes of action are set out in the complaint, and none too clearly. Some of the events complained of are alleged to have occurred at or about the time of the Knitting & Allied Crafts Exposition in New York State on April 24, 1950, subsequent to the filing of the complaint at Civil Action No. 10,850 on April 19, 1950. Ordnance has not stated in its pleadings, in its brief, or in oral argument the applicable statutes of limitations which may have been those of States; some of the acts complained of certainly occurred prior to the Act of July 7, 1955, 69 Stat. 283, effective January 7, 1956, 15 U. S. C. A. § 15b. In view of the lack of more thorough explication by Ordnance as to the applicable statute or statutes of limitations we cannot state with positiveness whether or not Ordnance's actions are now barred.

[11] We cannot say that the Two-Year Rule has not been vigorously applied. In the two years immediately following its effective date 115 cases were dismissed under it.

[12] See note 4, *supra*.

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plaintiff could forever avoid a calendar call and thus avoid the impact of the Two-Year Rule by simply not issuing the "trial order" referred to.

Stated in its simplest terms the Two-Year Rule provides that if no action be taken in a suit for two consecutive years the Clerk shall "immediately" send notices to the counsel for the parties that unless the court, acting upon an application made within two weeks [13] orders the case restored, it shall stand dismissed. The latter part of the rule simply provides that if the court does not make an order restoring the case, the Clerk shall, acting for the court, enter an order upon the record phrased "Dismissed under the rule" and tax the costs against the plaintiff. Such a dismissal is without prejudice. The making of an application by the plaintiff, such as filing a praecipe or a petition that the action be deemed not dismissed, does not automatically save the suit from dismissal. If no application is made the Clerk, performing a ministerial duty, enters judgment against the plaintiff in the form just referred to. If an application is made to the court within the two weeks period, it then rests within the sound legal discretion of the court to grant the application and restore the case to the docket or to reject the application and refuse restoration.

[*Five Year Delay in Prosecuting Action*]

The case lay dormant for nearly five and a half years. No action of any kind was taken by Ordnance until after the Clerk's notices were sent on November 8, 1956. The petition for rehearing filed on behalf of Ordnance does not state any sound legally cognizable reason for delay in the prosecution. What is stated appeals to mercy rather than to reason. Jacquard by its affidavits sets out reasons why it believes it would be prejudiced if the case was to be tried. We find these reasons none too convincing. The issue is one which lies within the sound legal discretion of the court below. Cf. *Wholesale Supply Co. v. South Chester Tube Co.*, 20 FRD 310, 313 (E. D. Pa. 1957).

[*Delay in Giving Notice*]

But there is another issue. Ordnance insists that it was prejudiced because the Clerk did not give notice to its counsel "immediately" upon the expiration of the two year period, as the Two-Year Rule requires, *viz.*, on June 29, 1953, but waited over three years before doing so. This cannot be deemed to be compliance with the rule. We are not unmindful of the fact that the dismissal is without prejudice and we cannot say that Ordnance's claims are now barred by statutes of limitations. But where a suit is stricken from the docket of a court fairness would seem to require adherence to the strict terms of its own rule by the dismissing court. The sending of the notice three years after the expiration of the two year period does not meet the test of immediacy. The rule should be amended and should specify a period in which the notice must be sent.[14] We are of the opinion that it was properly applicable but improperly executed under the circumstances at bar.

[*Dismissal—Federal Rule*]

We must now discuss the application of Rule 41(b), Fed. R. Civ. Proc., 28 U. S. C. The Court below in its opinion [1958 TRADE CASES ¶68,933], 21 FRD 575 (E. D. Pa. 1958), disagreed with the ruling of *Russo v. Sofia Bros.*, 2 FRD 80 (S. D. N. Y. 1941), and held that Rule 41(b) authorized the dismissal of the suit. In the *Russo* case Judge Rifkind concluded that Rule 41(b) did not authorize the dismissal of a suit by a preliminary motion addressed to the pleading. In the *Russo* case a motion to dismiss a suit because the complaint had not stated a cause of action had been granted. When the suit was dismissed permission to amend the complaint had not been requested or granted. When the plaintiff later sought to file an amended complaint which did state a cause of action, Rule 41(b) was raised as a barrier. As we have said the court was of the view that Rule 41(b) was not applicable at the pleading stage. We think that the court in the *Russo* case was in error, at least insofar as it

[13] We assume that the two weeks period commences upon the dispatch of the Clerk's notice. This portion of the rule requires clarification. The date from which the two weeks period commences to run is not pertinent here for Ordnance's praecipe to restore the case was made within 13 days of the dispatch of the notices by the Clerk.

[14] Our statements are not intended to reflect on an overburdened and efficient court or its overburdened and efficient Clerk's office.

held that Rule 41(b) was inapplicable to dismissals for want of prosecution at the pleading stage. *Field v. American-West African Line, Inc.*, 154 F. 2d 652 (2 Cir. 1946); 2 Barron & Holtzoff, *Federal Practice* § 918 (1950). Rule 41(b) provides that a case may be dismissed "For failure of the plaintiff to prosecute. . . ." There certainly was failure to prosecute here. That failure had lasted for a period of over five years. Whether such failure justified dismissal was within the discretion of the trial court. See, *e. g., Russell v. Cunningham,* 233 F. 2d 806 (9 Cir. 1956), n. 3. A dismissal under Rule 41 (b) operates as a dismissal on the merits unless the court shall specify otherwise. See the last sentence of the rule. This provision apparently was overlooked by the court below. We hold that the suit at bar must stand dismissed under Rule 41(b) but that the dismissal should not operate as a dismissal on the merits.

We have ruled on the applicability of Rule 41(b) because of the well established doctrine that a judgment appealed from may be affirmed on a valid ground, even if the basis asserted by the court below as the basis of its decision is insufficient or invalid. *Parkway Baking Co. v. Freihofer Baking Co.,* 255 F. 2d 641, 647 (3 Cir. 1958); *Lanova Corp. v. National Supply Co.,* 116 F. 2d 235, 239 (3 Cir. 1941). The court below was correct in its first order dismissing the case at bar for want of prosecution under Rule 41(b). Since the court below was of the view that the case should be dismissed without prejudice and thought that it could not do so under Rule 41(b), and the provision of Rule 41(b) as to adjudication upon the merits can be treated, under the circumstances of the case at bar as the equivalent of a dismissal without prejudice, we can perceive no reason why the judgment of the court below should not be affirmed.

In view of our ruling we see no reason for passing upon the contentions of Jacquard that the issues presented by the case at bar were adjudicated by the judgment of the court below at Civil Action No. 10,850.

[*Judgment Affirmed*]

Accordingly, the judgment of the court below will be affirmed.

ON PETITION FOR REHEARING

Opinion of the Court

[*Pre-Trial Dismissal—Federal Rule*]

PER CURIAM [*In full text*]: Ordnance has filed a petition for rehearing based in part on the application of the so-called "Two Year" Rules of the court below and has filed also an extensive tabulation of cases dismissed by the court below under these rules. We did not affirm the dismissal of Ordnance's action under these rules and it follows that this portion of the petition for rehearing is irrelevant.

The real thrust of the petition for rehearing is directed to language in the opinion in *Societe Internationale v. Rogers,* 357 U. S. 197, 206-208 (1958). We had this decision before us at the time our opinion was handed down but we considered that it was not relevant to the issues presented. However, since Ordnance has laid so much emphasis upon this decision in its petition for rehearing we think it desirable to discuss the decision in this opinion.

In our prior opinion, as appears, we expressed our disagreement with the ruling in *Russo v. Sofia Bros.,* 2 F. R. D. 80 (S. D. N. Y. 1941), which concluded that Rule 41(b), Fed. R. Civ. Proc., 28 U. S. C., did not authorize the dismissal of a suit by a preliminary motion addressed to the sufficiency of the pleading.

[*Trials*]

In *Societe Internationale v. Rogers,* the Supreme Court held that Rule 41(b) could not serve as the basis for dismissal of an action when documents sought by the plaintiff had not been produced, and that the power of a court to dismiss a complaint because of non-compliance with a production order depended exclusively upon Rule 37. The Supreme Court, by Mr. Justice Harlan, after quoting the first sentence of Rule 41 (b), said *inter alia,*

> "There is no need to resort to Rule 41(b) which appears in that part of the Rules concerned with *trials* and which lacks . . . specific references to discovery."

Ordnance lays much emphasis on the use of the word *"trials"* italicized by the Supreme Court, and in effect contends that the provisions of Rule 41(b) authorize dismissal only at trial. We cannot agree. The substance of the Supreme Court's ruling in

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Societe Internationale was that Rule 41(b) was not available to dismiss an action when documents were not produced pursuant to a demand made under Rule 34.

We are of the view that Chapter VI of the Federal Rules of Civil Procedure, relating to "Trials", is an appropriate and natural heading for a rule authorizing a motion by a defendant designed to bring a case to trial or cause its dismissal for want of prosecution, and if a plaintiff fails to prosecute, the defendant is entitled to move under the first sentence of Rule 41(b) to dismiss the action "For failure of the plaintiff to prosecute . . .", as Jacquard did here. See *Burns Mortgage Co. v. Stoudt*, 2 F. R. D. 219, 220 (E. D. Pa. 1942).

We know of no other provision of the Federal Rules of Civil Procedure which authorizes dismissal for failure to prosecute. If the provisions of Rule 41(b) quoted above are not applicable, the only remedy available to a defendant to cause the dismissal of an action for want of prosecution would be the local rules of the respective United States district courts, such as the "Two Year" Rule of 1952 of the court below. We cannot believe that this was the result intended by the framers of the Civil Rules.

[*Rehearing Denied*]

For these reasons as well as for those stated in our principal opinion we conclude that we have applied correctly the provisions of Rule 41(b) in the case at bar. Accordingly the petition for rehearing will be denied.

[¶ 69,421] United States v. The Gemex Corporation.

In the United States District Court for the District of New Jersey. Civil Action No. 1350-58. Filed July 31, 1959.

Case No. 1426 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing—Fixing Prices for Sale of Watchbands.—A manufacturer of watchbands was prohibited by a consent decree from entering into any agreement with any wholesaler to fix prices for the sale of watchbands to third persons. The decree also enjoined the manufacturer from requiring any wholesaler to sell watchbands at list price or at any other specific price level.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2011.218.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing—Investigations and Penalties—Policing Adherence to Price Fixing Agreements.—A manufacturer of watchbands was prohibited from collecting, publishing, or disseminating information regarding price cutting or price deviation by wholesalers or retailers. The decree also enjoined the manufacturer from requiring any wholesaler to report to it regarding any such price deviation by retailers or other wholesalers.

See Price Fixing, Vol. 1, ¶ 2011.237.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Exclusive Dealing.—A manufacturer of watchbands was prohibited by a consent decree from selling to its wholesalers on the condition that they refrain from dealing in competitors' products.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690, 2005.825; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8421.

For the plaintiff: Robert A. Bicks, W. D. Kilgore, Jr., Raymond M. Carlson, Charles L. Beckler, Charles F. B. McAleer, Charles H. McEnerney, Jr., and John L. Wilson, Department of Justice.

For the defendant: Manning, Hollinger & Shea, New York, N. Y., by Bruce A. Hecker; and Platoff, Platoff & Heftler, Union City, N. J., by Robert G. Platoff.

Final Judgment

[*Consent Decree*]

REYNIER J. WORTENDYKE, JR., District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on December 16, 1958; the defendant, the Gemex Corporation, having appeared and filed its answer to the complaint denying the substantive allegations thereof; and the plaintiff and the defendant, by their attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by either of them in respect to any such issue;

Now, Therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a claim against the defendant, under which relief may be granted under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Watchbands" means attachments, whether of precious or non-precious metals, cord, fabric, leather or other materials, or combinations thereof, which are used to hold watches to the wrist;

(B) "Wholesaler" means a person who purchases watchbands from a manufacturer for resale to retailers;

(C) "Retailer" means a person who purchases watchbands from a wholesaler for resale to ultimate consumers;

(D) "Person" means any individual, partnership, firm, association, corporation or other business or legal entity;

(E) "Subsidiary" means any existing or future corporation whose stock is, directly or indirectly, wholly owned by defendant.

III

[*Applicability*]

The provisions of this Final Judgment shall apply to the defendant and to each of its subsidiaries, successors, assigns, officers, directors, employees and agents, and to those persons in active concert or participation with the defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Price Fixing—Exclusive Dealing*]

Defendant is enjoined and restrained from directly or indirectly:

(A) Entering into, adhering to, maintaining, enforcing or claiming any rights under any contract, agreement, understanding, plan or program, with any wholesaler to fix, establish, maintain, stabilize or adhere to prices for the sale of watch bands to third persons;

(B) Collecting, publishing or disseminating information regarding, or suggesting, soliciting or requiring that any wholesaler report to defendant, any price cutting or price deviation by any wholesaler or retailer;

(C) Requiring any wholesaler to sell any watchbands at list price or at any other specific price level;

(D) Selling or offering, or attempting to sell, any watchbands on the condition, agreement or understanding that any wholesaler shall not deal in watchbands manufactured by any person other than the defendant.

V

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during the office hours of the defendant, to all books, ledgers, ac-

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counts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant which relate to any matters contained in this Final Judgment;

(B) Subject to the reasonable convenience of the defendant and without restraint or interference from the defendant, to interview officers or employees of the defendant, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VI

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling either of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

[¶ 69,422] G. E. M. Sundries Company, Inc. v. Johnson & Johnson, Inc.

In the United States Court of Appeals for the Ninth Circuit. No. 16,396. Dated July 31, 1959.

Appeal from the Hawaii Supreme Court. STAINBACK, Justice.

Hawaii Fair Trade Act

Fair Trade—Constitutionality of Hawaii Fair Trade Act—Finality of Territorial Supreme Court's Decision—Impending Statehood—Prospective Mootness of Appeal.—A ruling of the Hawaii Supreme Court sustaining the constitutionality of the Hawaii Fair Trade Act constituted a final decision which was appealable to the United States Court of Appeals for the Ninth Circuit under 28 United States Code Section 1293. A fair trader, seeking a dismissal of the appeal, contended that (1) the judgment was not final because local procedure permitted the retailer, on remand, to file an answer and interpose defenses other than the invalidity of the Act, and (2) the appeal, as to contentions based upon Hawaii's status as a territory, would become moot upon Hawaii's admission as a state. As to the finality of the judgment, the retailer conceded that it had no defense other than the Act's invalidity. Thus, under the test that a decision is final if the rights of the parties have been so determined that nothing remains for the trial court to do but perform mechanical acts, the judgment was final. As to the second contention, there is no rule permitting dismissal for prospective mootness. Also, it was at least arguable that the validity of the territorial laws would not be automatically changed by statehood, inasmuch as Section 15 of the Hawaiian Statehood Act provides that "All Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force. . . ."

See Fair Trade, Vol. 1, ¶ 3035, 3040, 3080.13, 3085.13, 3130, 3258, 3420.

For the appellant: Heen, Kai & Dodge, and R. G. Dodge, Honolulu, Hawaii, and Marvin G. Burns, Beverly Hills, Cal.

For the appellee: Robertson, Castle & Anthony, and Frank D. Padgett, Honolulu, Hawaii.

ON MOTION TO DISMISS APPEAL

[*Hawaii Fair Trade Act—Constitutionality*]

POPE, Circuit Judge [*In full text*]: Appellee brought this action in the Circuit Court of the First Circuit, Territory of Hawaii, to enjoin the appellant from selling products produced by appellee and bearing the registered trade name of Johnson & Johnson at less than appellee's specified minimum fair trade price as authorized by the Hawaii Fair Trade Act (Revised Laws of Hawaii, 1955, c. 205).[1] All the facts alleged in the complaint were stipulated or found by the court to be true.

The only defense interposed by the appellant was its contention that the Hawaiian Fair Trade Act was invalid.[1a] Sustaining this defense of invalidity the trial court allowed a motion to dismiss and dismissed the complaint.

Upon appeal to the Supreme Court of Hawaii that court reversed the judgment of the Circuit Court, rejecting *in toto* all of the appellant's contentions, and holding the Fair Trade Act in question fully valid, saying in its opinion that "the Territory has just as much right and power to enact a Fair Trade Act as Illinois or New York or any of the other States whose Fair Trade Acts have been sustained by the Supreme Court of the United States."[2] Appellant has appealed to this court from that Supreme Court reversal.

[*Jurisdiction*]

Any jurisdiction of this court is necessarily based upon § 1293 of Title 28 U. S. C. which provides:

> "§ 1293. Final decisions of Puerto Rico and Hawaii Supreme Courts—The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

[*Finality of Judgment*]

Appellee has moved to dismiss the appeal on the ground that the judgment of the Supreme Court of Hawaii was not final. Says appellee:

> "Appellant had not even filed an answer and no trial of the case had been held. Thus, the order of the Supreme Court of Hawaii was neither in form nor in fact a final disposition of the case. Accordingly, the order appealed from does not fall within the scope of 28 U. S. C. § 1293 and the appeal must be dismissed. (cases cited) This rule is applicable whether the order of reversal expressly commands further proceedings or whether the necessity for further proceedings merely appears from the record in the case."

---

[1] The Act contains the following provisions: "Unfair competition may be actionable. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[1a] The contentions made in this respect were summarized by the Supreme Court of Hawaii as follows: "(2) the Hawaii Fair Trade Act was illegal at the time of its enactment for the reason that it was in violation of Sections 1 and 3 of the Sherman Act; (3) assuming the power of the legislature of the Territory of Hawaii to enact such a fair-trade act, following the amendment to § 1 of the Sherman Act by the Miller-Tydings Act no such reenactment has been accomplished; (4) the Hawaii Fair Trade Act, and more particularly the so-called 'nonsigner' provision thereof, is unconstitutional for the reason that the same is a price-fixing statute and the legislature is without power to fix prices at which commodities may be sold unless the business or property involved is affected with a public interest; (5) assuming the power of the legislature to fix prices and its authority to delegate that power, any such delegation to be valid must provide a primary standard or general rule to be followed in discharging the delegated power, and the Hawaii Fair Trade Act provides no such standard or rule; (6) the Hawaii Fair Trade Act is unconstitutional because it interferes with the right of the seller and the purchaser to freely contract and agree upon a price of their choice, and that this right to contract is a property right protected by the Fifth and Fourteenth Amendments to the Constitution of the United States; (7) the Hawaii Fair Trade Act is void as an invalid exercise of a police power, being an attempt to use that power for a private and not a public purpose; (8) the Hawaii Fair Trade Act is invalid and inoperative in so far as it purports to authorize the enforcement of minimum fair-trade resale prices against any person who is not a party to the contract by which the minimum resale prices were established."

[2] Also from the opinion: "We deem it unnecessary to review at length the many decisions upholding the constitutionality of Fair Trade Acts as to nonsigners and those holding to the contrary."

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[*Test of Finality*]

It is true that the judgment of the Hawaii Supreme Court did not, on its face, end the litigation. Local procedure would permit appellant, on remand, to file an answer and interpose some other defense. But appellant has no other defense to interpose. It expressly so concedes here, and appellee does not assert otherwise. Under these circumstances this court has held that the test of whether such a decision is final is whether by it the rights of the parties have been so determined that nothing remains for the trial court but to perform mechanical acts. The question is, whether any further proceedings could be had "pertaining to the merits of the controversy", *Hawaiian Pineapple Co. v. Saito,* 9 cir., 270 F. 749, 750, or whether there remained any occasion for "exercise of any judicial function", *De Fries v. Scott,* 9 cir., 268 F. 952, 953.

The test of finality to be applied here is the same as that employed by the Supreme Court of the United States in determining when judgments of state supreme courts are final and hence reviewable there. In *Pope v. Atlantic Coast Line R. Co.,* 345 U. S. 379, that court dealt with a situation similar to the one before us. Said the court (p. 382):

> "The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more. If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the the controlling question; 'there is nothing more to be decided.' Under these particular circumstances, we have jurisdiction over the cause. *Richfield Oil Corp. v. State Board,* 329 U. S. 69 (1946). . . ."

[*Judgment Final*]

Here, as in the case of *Clark v. Williard,* 292 U. S. 112, 118, there is "nothing more to be decided." The judgment was "an effective determination of the litigation" and "the final word of a final court." *Market Street R. Co. v. Comm'n,* 324 U. S. 548, 551. We hold that the judgment of the Supreme Court of Hawaii was final.

[*Mootness*]

Some, though not all, of the appellant's contentions as to invalidity of the Hawaii Fair Trade Act are based upon Hawaii's status as a territory. With respect to these, appellee argues that the appeal is bound to become moot on admission of Hawaii as a state. Hence, it argues, the appeal should be dismissed.

We must reject this contention for three reasons: First, it does not affect all contentions made by appellant, (see, *e. g.,* items (5), (6), (7) and (8) in footnote 1a, *supra*); second, we know of no rule permitting dismissal for prospective mootness, and third, it is at least arguable that the status of territorial laws would not automatically be changed as to their validity, by statehood.[3]

[*Motion Denied*]

The motion to dismiss the appeal is denied.

[¶ 69,423] World Publishing Co. v. E. J. Korvette, Inc.

In the New York Supreme Court, New York County, Special Term, Part 1. 141 N. Y. L. J., No. 93, page 13. Dated May 14, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Sales Which May Be Excepted from Price Restriction—Exemptions as Bar to Enforcement Action—Absence of Discrimination.—A fair trader did not remove itself from the protection of the New York Fair Trade (Feld-Crawford) Act by virtue of the fact that his fair trade agreements exempted retailers' (1) sales to certain organizations,

[3] See § 15 of the Hawaiian Statehood Act, Public Law 86-3, 86th Congress, March 18, 1959: "All Territorial laws *in force* in the Territory of Hawaii at the time of its admission into the Union shall continue in force in the State of Hawaii. . . ." (Italics added)

(2) single copy sales for promotional purposes to certain officials, (3) single sales, to a consumer, of fifty or more copies, (4) sales to his employees, or (5) sales to recognized retailers for resale. It was contended that the exemption provision violated the statute, and that the fair trade agreement was therefore invalid. Those exemptions, however, applied to all retailers equally and did not create or sanction any discrimination between them.

See Fair Trade, Vol. 1, ¶ 3220, 3226, 3230.34, 3232.34, 3420.

[*Exemptions in Fair Trade Agreement*]

GOLD, Justice [*In full text*]: Defendant moves for a dismissal of the complaint for insufficiency. The action is brought in enforcement of the Feld-Crawford Act. Plaintiff's fair trade agreement contains the following provision:

"2. Nothing in this agreement is intended to apply to the Retailer in making: (a) sales to governmental agencies, educational charitable or religious institutions or organizations, or school, college, church, public or institutional libraries; or (b) single copy sales for promotional purposes only to teachers or administrative officials attached to any accredited public or private educational institution; or (c) the single sale to a consumer of fifty or more copies; or (d) sales for personal use to his employees; or (e) sales to recognized retailers for resale."

Defendant contends that the quoted provision is in violation of section 369a of the General Business Law and the fair trade agreement is therefore invalid. The exemptions contained therein apply to all retailers equally and the minimum retail prices fixed by the plaintiff therefore apply equally to all retailers. The plaintiff does not remove itself from the protection of the statute by virtue of such exemptions since they do not create or sanction any discrimination as between retailers. The motion is denied.

[¶ 69,424] Lythe v. Thrifttown, U. S. A.

In the New York Supreme Court, Bronx County, Special Term, Part 1. 142 N. Y. L. J., No. 22, page 6. Dated July 30, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Preliminary Injunction—Mutual Charges of Fair Trade Violations—Absence of Irreparable Injury.—A seller of drugs and pharmaceuticals was denied a preliminary injunction to restrain another seller of those products from selling below manufacturers' fair trade prices where each of the parties alleged that the other had made sales in violation of the New York Fair Trade Act. In the absence of any showing of irreparable injury, such as a loss of sales and customers, issuance of a temporary restraining order would be equivalent to condemning the acts of the defendant while condoning those same acts committed by the plaintiff.

See Fair Trade, Vol. 1, ¶ 3362.34, 3452.34.

[*Fair Trade Action*]

CARNEY, Justice [*In full text*]: This is a motion for an injunction *pendente lite* to restrain the defendants from directly or indirectly selling or offering to sell or advertise for sale any commodities produced or distributed by manufacturers who have entered into fair trade agreements. Unless the plaintiffs show a clear-cut right to such relief which would be tantamount to a final judgment, a temporary injunction should not issue. Both parties are engaged in selling various drugs and pharmaceuticals. Each of the parties hereto alleges sales made by the other in violation of the Fair Trade Laws. In the absence of any showing of irreparable injury such as loss of sales and customers, to issue a temporary restraining order under the circumstances presented herein would be equivalent to condemning the acts of the defendants while condoning those same acts committed by the plaintiffs. The motion is denied in all respects.

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[¶ 69,425] Olin Mathieson Chemical Corporation v. Lindemann Pharmacy, Inc.

In the New York Supreme Court, Appellate Division, First Judicial Department. 141 N. Y. L. J., No. 121, page 8. Dated June 24, 1959.

Appeal from the New York Supreme Court, New York County, Special Term, Part I. KLEIN, Justice.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement—Contempt—Willful Disobedience of Injunctive Order—Fine—Attorney's Fee.—A defendant who permitted its employees to make four separate sales of a plaintiff's fair traded products below fair trade prices, within a few days after a trial court had warned it against "flouting" the court's injunctive order prohibiting such sales, was found guilty of contempt and fined $250. A further sum of $250 was assessed against the defendant as a reasonable attorney's fee in connection with the appeal from the trial court's order denying the plaintiff's application to hold the defendant in contempt. The reviewing court, disagreeing with the trial court's ruling and reversing on the law and the facts, held that the series of incidents described in the moving papers indicated a willful and deliberate flouting of the trial court's order, after the earlier warning.

See Fair Trade, Vol. 1, ¶ 3380.34.

For the plaintiff: Cravath, Swaine & Moore, New York, N. Y.

For the defendant: Nathan Finkelstein, New York, N. Y.

Reversing an Order of the New York Supreme Court, New York County, Special Term, Part I, 1958 Trade Cases ¶ 69,202.

[*Fair Trade Action—Contempt*]

BREITEL, Justice [*In full text*]: Order of December 18, 1958, unanimously reversed, on the law and on the facts, with $20 costs and disbursements to plaintiff-appellant, and the motion to punish defendant-respondent for contempt is granted, and the defendant-respondent is found guilty of contempt and fined the sum of $250. A further sum of $250 is assessed against defendant-respondent as a reasonable attorneys' fee in connection with the appeal from the order of December 18, 1958. We have two appeals from the denial of two separate motions to punish defendant-respondent for contempt for failure to obey an injunction order issued pursuant to section 369-a of the General Business Law. The order of August 14, 1958, denied the first application to hold defendant-respondent in contempt. In so doing, Special Term said

> "* * * defendant is warned that it must not flout the order of this Court * * *."

We have held that the decision of Special Term with respect to the order of August 14, 1958, was an appropriate exercise of discretion in the circumstances of this case and it will not be disturbed. Despite this admonition and within a few days after the publication of the order aforesaid, defendant-respondent permitted its employees to make four separate sales of the plaintiff-appellant's products at prices less than the minimum fair trade price. Defendant-respondent admits one sale but ascribes it to an "honest mistake" on the part of its clerk. Special Term in its memorandum decision [1958 TRADE CASES ¶ 69,202] on which the order of December 18, 1958, was based said

> "* * * [t]here is no proof * * * that the defendant willfully disobeyed the injunctive order * * *."

With this disposition we do not agree. The series of incidents described in the moving papers in support of the second application indicate a willful and deliberate flouting of the court's order after the previous warning contained in the order of August 14, 1958. Settle order on notice.

[¶ 69,426] Barclay Pharmacy, Inc. v. Par Specialties, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 141 N. Y. L. J., No. 108, page 13. Dated June 4, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices by Retailer—Temporary Injunction—Defenses—Price Violation by Enforcing Party.—A retailer which denied selling below

fair trade prices was granted a temporary injunction against another retailer which did not deny making such offending sales. In granting the injunction, the court cited *Librandi v. Berner's Pharmacy, Inc.*, 1955 TRADE CASES ¶ 67,966, a case in which it was held that a defendant could not attempt to justify its illegal acts by alleging that the plaintiffs were committing the same acts. In the instant case, the court also noted that a retailer's right to maintain a fair trade enforcement action against another retailer was well established.

See Fair Trade, Vol. 1, ¶ 3330.34, 3452.34.

[*Fair Trade Action*]

SPECTOR, Justice [*In full text*]: Plaintiff moves for temporary injunction in enforcement of the Feld-Crawford Act. The offending sales by the defendant are not denied. It is well established that suits may be maintained in enforcement of the act by retailer against retailer and no good reason appears or is sufficiently established to deny relief in the circumstances here. Plaintiff denies any claimed offending sales by it (see *Librandi v. Berner's Pharmacy, Inc.*, [1955 TRADE CASES ¶ 67,966], N. Y. L. J., January 25, 1955, Dineen, J., Special Term, Part III). The motion is granted. Bond is fixed in the sum of $250. Settle order.

[¶ 69,427] Crown Village Chemists, Inc. v. Dobin.

In the New York Supreme Court, Nassau County. 142 N. Y. L. J., No. 21, page 8. Dated July 29, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses—Enforcement Activity or Policy—Failure to Notice Case for Trial as Basis for Vacating Temporary Injunction.—A plaintiff's failure to "notice" a fair trade action for trial for more than a year after the issuance of a temporary injunction restraining a defendant from selling below fair trade prices was insufficient to warrant a dismissal of the complaint for lack of prosecution or a *vacatur* of the injunction. It was established, on the motion for the temporary injunction, that there was merit to the action. Also, the court was satisfied that the defendant had acquiesced in the plaintiff's dilatory conduct and had not been injured by the delay. However, the plaintiff was directed to notice the case for trial at the next term of court.

See Fair Trade, Vol. 1, ¶ 3366.34, 3440.34.

For a prior opinion of the New York Supreme Court, Nassau County, see 1958 Trade Cases ¶ 68,947.

[*Fair Trade Action—Delay*]

PITTONI, Justice [*In full text*]: Motion (1) to dismiss the complaint for lack of prosecution, and (2) for a vacatur of the order (March 3, 1958) restraining the defendants from selling at retail certain products below the minimum price fixed by the producers, owners, and distributors of those products pursuant to the provisions of the Fair Trade Law. It appears that this cause has not been noticed for trial, and no legal step in the prosecution of the action has taken place since the joinder of issue on March 26, 1958. The movant defendants contend that they have been prejudiced in the delay in the trial because other stores have been selling the products below the established price. In support of that contention affidavits are submitted to show purchases at Farmers' Markets located in Amityville. Farmingdale and Bay Shore. The court is satisfied that the defendants not only acquiesced in the plaintiff's dilatory conduct, but they have not suffered any injury by the delay. Merit to the action was established on the motion for a temporary injunction. Accordingly, the motion is *denied* in its entirety. The plaintiff is directed however to serve and file a note of issue for the October, 1959, term. Settle order on notice.

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[¶ 69,428] Dickinson, Inc., and Dickinson Operating Company, Inc. v. The Kansas City Star Company and Emil A. Sees.

In the United States District Court for the Western District of Missouri, Western Division. No. 12134. Filed June 3, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Government Judgment as *Prima Facie* Evidence in Private Action—"Evidentiary" and "Tolling" Provisions of Clayton Act, Sections 5(a) and (b), Complementary to Each Other.—Plaintiffs who commenced a treble damage action approximately one year and five months after the termination of a criminal antitrust action against the defendants, but less than one year after the termination of a civil action which the Government had brought simultaneously with the bringing of the criminal action, were permitted, under Section 5(a) of the Clayton Act, to use the judgment entered in the criminal action as *prima facie* evidence of their monopolization charges against the defendants. It was not contended that the plaintiffs' action was barred by the statute of limitations, inasmuch as the running of the limitations period, under Section 5(b), had been tolled or suspended; instead, the defendants contended only that the plaintiffs' action had been brought too late to rely upon the judgment entered in the *criminal* action because more than one year had passed since the termination of that action. The court held, however, that the plaintiffs were not required to bring their action within one year after the termination of the Government's criminal action in order to take advantage of the evidentiary provision of Section 5(a).

When both of the Government actions were commenced, the statute of limitations applicable to the plaintiffs' right to bring the action was *concurrently* "suspended during the pendency" of *both* such actions "and for one year thereafter." It is a rule in the law of the limitations of actions that when there are two or more "coexisting disabilities" in the same person when his right of action accrues, he is not obliged to act until the last is removed. Though that rule speaks of disabilities, the court considered it logical to rationalize it to the "privileges" granted by Section 5(b). Section 5(a), the evidentiary provision, is complementary to the application of the tolling provision of Section 5(b). The court noted that the defendants' argument would have been logical only if the Government's actions had been successively brought.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275, 9012.

For the plaintiffs: Dietrich, Tyler, Davis, Burrell & Dicus, Kansas City, Mo.

For the defendants: Watson, Ess, Marshall & Enggas, Kansas City, Mo.

Memorandum and Order on Motion to Strike

[*Treble Damage Action*]

RIDGE, District Judge [*In full text*]: The United States, on January 7, 1950, simultaneously commenced a criminal and a civil action against defendants for violation of Section 2 of the Sherman Act. (15 U. S. C. A. 2.) The former resulted in verdicts of guilty against both defendants [1957 TRADE CASES ¶ 68,601] and remained "pending" on the docket of this Court until June 17, 1957. The civil action was terminated by a consent decree [1957 TRADE CASES ¶ 68,857] and was "pending" until November 15, 1957. The instant private action, seeking treble damages from defendants because of impact on their businesses of the monopoly adjudicated in the above Government actions, was commenced November 13, 1958; i.e. approximately one (1) year and five (5) months after the termination of the criminal action, *supra*, and within one (1) year after termination of the above-mentioned civil action.

[*Government Decree as Prima Facie Evidence*]

In their complaint, plaintiffs plead that the judgment in the Government criminal suit against defendants constitutes *prima facie* evidence of the charges made against defendants in the instant complaint. Defendants have filed motion to strike such allegations from the complaint, contending that plaintiffs have filed the instant action too late to rely upon the Government criminal suit as *prima facie* evidence under the provisions

of Section 5 of the Clayton Act, as amended (15 U. S. C. A. § 16), and that plaintiffs must rely solely upon the pendency of the civil suit filed by the Government against defendants, if plaintiffs are to maintain this action; hence defendants assert that the civil suit being terminated by a consent decree, the same is not available to plaintiffs as *prima facie* evidence under Section 5(a), *supra,* and the above mentioned allegation should be stricken from the complaint.

[*"Concurrent Disabilities"*]

The parties have extensively briefed the above proposition. It does not seem necessary for the Court to follow them in their labyrinthine arguments, nor sound the legislative history of Section 5, *supra,* as they have done, so as to be able to rule the instant motion. The rule of "concurrent disabilities" applicable to statutes of limitation generally, when rationalized with the Congressional objective stated in Section 5 of the Clayton Act, *supra,* seemingly provides an answer to that matter.

> "§ 5 reflect(s) a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions. * * * The intended application and extent of such evidentiary benefits is not revealed by legislative materials, except that they should follow equally from prior criminal prosecutions and equity proceedings by the Government." *Emich Motors Corp., et al. v. General Motors Corp., et al.* [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558, 568 (1951).

That being so, then the instant matter seemingly should be ruled by resort to recognized principles ancient in law of limitation of actions.

[*Tolling Statute of Limitations*]

As above stated, the instant action was commenced November 13, 1958. But for the tolling provisions of Section 5(b) of the Clayton Act (15 U. S. C. A. 16(b)) the 4-year limitation for the bringing of this action, as contained in Section 4(b) of such Act, would be applicable thereto. (15 U. S. C. A. 15(b).) Because of the tolling provision, *supra,* plaintiffs' right to bring this action remained in repose until November 15, 1958, i.e. until one (1) year after the termination of Civil Action No. 7989, (W. D. Mo.) [1957 TRADE CASES ¶ 68,857], instituted by the Government against these defendants.

Notwithstanding the fact that Criminal Action No. 18444, (W. D. Mo.) commenced against defendants was terminated on June 17, 1957, the plaintiffs were not required to bring this action within one (1) year thereafter so as to position themselves to take advantage of the "salutary legislation" enacted by the Congress in Section 5(a) of the Clayton Act. (15 U. S. C. A. 16(a)).

When both the above Government actions were commenced, the statute of limitations applicable to plaintiffs' right to bring this action was concurrently "suspended during the pendency" of both such actions "and for one year thereafter." (15 U. S. C. A. 16(a)).

> "It is an acknowledged rule that when there are two or more coexisting disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. This is the rule under the Statute of Limitation." *Sims v. Everhardt,* 102 U. S. 300, 310 (1880).

Though such rule speaks of "disabilities" we think it logical to rationalize it to the "privilege", such as granted by the Congress to ptivate plaintiffs by Section 5(b) of the Clayton Act. Section 5(a) of said Act is complementary to the application of Section 5(b) thereof. *Sun Theatre Corp. v. RKO Radio Pictures, Inc.,* [1954 TRADE CASES ¶ 67,722], 213 F. (2d) 284 (7 Cir. 1954).

At the time of the original enactment of Section 5 of the Clayton Act, *supra,* and the amendment made thereto on July 7, 1955, the aforesaid rule of coexisting disabilities was well grounded in the law. 54 C. J. S., p. 255, § 219; 34 Am. Jur., p. 157, § 195. When Congress enacted the evidentiary and tolling provisions of Section 5, *supra,* it is manifest that they made the provisions thereof applicable to both criminal and civil actions brought by the Government. The only assumption to be made therefrom is that the Congress knew that in some instances both such types of action would be commenced simultaneously by the Government—one to punish for past violations of the Anti-Trust Laws and the other to prevent future violations in respect to an identical plan or scheme of violation. There is no legislative history of Section 4 or 5 of the Clayton Act from which it may be inferred that the Congress intended the evidentiary or tolling provisions in question to be made applicable only to the first action terminated, where they were concurrently so brought.

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[*"Successive Disabilities"*]

In the law of Limitation of Action, and seemingly within the ambit of Section 5, *supra,* defendants' reasoning that plaintiffs may not take advantage of the *"prima facie"* effect of the judgment in the criminal case, because it was terminated first, would only be logical if the two actions commenced by the Government were successively brought. The rule is, that "successive disabilities may not be tacked to one another so as to bring a party within an exception to the statute of limitations." 54 C. J. S. § 219, p. 254. It is the "tacking" of one limitation to another that would create the intolerable condition that defendants argue in the instant case. No such condition here exists, because the beneficent provisions of Section 5 of the Clayton Act concurrently accrued to plaintiffs. Such must be the premise of the admission of defendants when they assert, we "do not contend that plaintiffs' cause or causes of action, if any, are barred by the statute of limitations and accordingly have not moved to dismiss the complaint." (P. 2, suggestions in support of motion to strike.) If the tolling provisions of Section 5, *supra,* prevented the statute of limitations from running against plaintiffs' claim, then the evidentiary provisions of said statute must be held to be complementary thereto during the effective period of said section. Manifestly, that is the only intent of the Congress expressed in said section.

[*Motion Overruled*]

For the reasons aforesaid, defendants' motion to strike should be overruled.

It Is So Ordered.

[¶ 69,429] State of Kansas, ex rel. J. John Marshall, County Attorney of Crawford County v. Consumers Warehouse Market, Inc.

In the Kansas Supreme Court. No. 41,494. Opinion filed August 3, 1959.

Appeal from the Crawford District Court. L. M. Resler, Judge. Reversed.

Kansas Unfair Practices Act

Sales Below Cost—Constitutionality of Kansas Unfair Practices Act—Exemption of Grain and Feed Dealers from Operation of Statute—Severability of Invalid Provision—Entire Statute Unconstitutional.—The Kansas Unfair Practices Act, which prohibited, with certain exceptions, the sale of any merchandise at less than cost, with a specified intent and result, was held unconstitutional and void in its entirety. The statute, by its definition of "sales," defined the class to be regulated as all sellers, both retailers and wholesalers, of "tangible personal property." However, the Act contained a further provision that "The provisions of this act shall not apply to grain and feed dealers." The statute purported to regulate all sellers falling within a broad classification and then arbitrarily exempted grain and feed dealers. Since it did not operate uniformly on all members of the classification created, the Act did not have a "uniform operation throughout the state" as required by Section 17 of Article 2 of the Kansas Constitution. In addition, the statutory exemption of grain and feed dealers from the operation of the Act, thus singling them out as a closed class receiving special privileges, amounted to an arbitrary and unreasonable statutory discrimination having no relation to the expressed purpose of the Act. That discrimination deprived the defendant, a seller of groceries, of the "equal protection of the laws" as guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States.

Further, that exemption provision invalidated the entire Act. Although the Act contained a "severability" provision, the invalid portion of the statute was not a separate and independent provision, but was such an integral and inseparable part of the whole scheme and purpose of the law that it could not be severed. Elimination of that objectionable exemption would have changed the scope of the Act by making it applicable to grain and feed dealers, whereas the legislature had expressly declared that they were not to be included.

See Sales Below Cost, Vol. 2, ¶ 7111.18.

For the appellant: H. Gorden Angwin, Pittsburg, Kan., argued the cause (Ben W. Weir, Pittsburg, Kan., was with him on the briefs).

For the appellee: Charles H. Henson, Jr., Assistant Attorney General, argued the cause (John Anderson, Jr., Attorney General, and J. John Marshall, County Attorney, were with him on the briefs).

Syllabus by The Court

[*Kansas Unfair Practices Act—Constitutionality*]

1. In the exercise of its powers of regulation, a state possesses broad discretion in the matter of classification, but discrimination in a regulatory statute must be based on differences and distinctions that have a reasonable and substantial relation to the purposes of the statute and the subject matter thereof.

2. Where parts of a statute or section thereof can readily be separated, that part which is constitutional may stand, while that which is unconstitutional will be rejected as being without legal efficacy. Where, however, the valid and void parts are not separate and independent of each other, but are so connected in the general scheme and purpose of the statute that they cannot be separated without violence to the evident intent of the legislature, the entire statute must fall.

3. The state brought an action to enjoin defendant business firm from violating the provisions of G. S. 1949, 50-401 to 408, known as the Unfair Practices Act. Defendant demurred to the petition on the ground it failed to state facts sufficient to constitute a cause of action for the reason that certain provisions of the Act discriminate against defendant and violate the "equal protection" clause of the 14th Amendment to the Constitution of the United States, and Sec. 17 of Art. 2 of the Constitution of the State of Kansas. The demurrer was overruled and defendant appealed, specifying such ruling as error. The record and statutes in question are examined and considered, and, as fully set forth in the opinion, it is *held*:

(A) That portion of G. S. 1949, 50-405, which exempts "grain and feed dealers" from the scope and operation of the Act constitutes an unreasonable, arbitrary and fictitious classification having no reasonable and substantial relation to the purposes of the Act and the subject matter thereof, is discriminatory as to defendant, and violates the "equal protection of the laws" clause of Sec. 1 of the 14th Amendment to the Constitution of the United States, and also violates Sec. 17 of Art. 2 of the Constitution of the State of Kansas which requires that "all laws of a general nature shall have a uniform operation throughout the state."

(B) That portion of G. S. 1949, 50-405, above referred to, is not severable from the remainder of the Act under the provisions of G. S. 1949, 50-407, the result being that the entire Act is unconstitutional and void.

4. A typographical error appearing in the opinion in *State v. Consumers Warehouse Market* [1958 Trade Cases ¶ 69,133], 183 Kan. 502, 329 P. 2d 638, is noted and is hereby corrected.

[*Opinion*]

The opinion of the court was delivered by Price, Justice [*In full text*]: This case is an action by the State, on the relation of the county attorney of Crawford county, to enjoin defendant business firm, Consumers Warehouse Market, Inc., from violating the provisions of G. S. 1949, 50-401 to 408, known as the Unfair Practices Act.

Defendant appeals from an order overruling its demurrer to the State's petition.

The questions involved are such that the constitutionality of the entire Act is in issue.

[*Sales Below Cost Charged*]

The action was commenced on April 6, 1956, by the filing of a verified petition which, omitting formal parts and description of real estate, reads:

"Comes now the State of Kansas, on relation of J. John Marshall, County Attorney of Crawford County, Kansas, and for its cause of action against the defendant above named, alleges and states:

"That the said J. John Marshall is the duly elected, qualified and acting County Attorney in and for the County of Crawford, State of Kansas, and as such County Attorney is authorized and empowered to prosecute this action for and on behalf of the people of the State of Kansas; that defendant is a corporation for profit deriving its origin and existence under and by virtue of the laws of the State of Kansas, and as such is authorized to engage in and transact business in said State; that defendant corporation's resident agent for service of process is A. W. Mc Nulty and his correct post office address is

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502 East 20th Street, Pittsburg, Crawford County, Kansas.

"That defendant corporation is engaged in the field of commerce, more particularly a retail outlet operated for the purpose of selling groceries and other food and household commodities to the general public; that the defendant corporation is the owner or lessee of and in fact is in possession of the following described real estate and building located at 2506 North Broadway, R. R. No. 1, Pittsburg, Kansas, being more particularly described as follows, to-wit:

* * *

"That on or about the 25th day of March, 1956, in the County of Crawford, and State of Kansas, defendant corporation above named, by and through its various agents or employees, caused to be published a paid advertisement in the Pittsburg Sun, a daily newspaper published in Pittsburg, Kansas, wherein certain goods and merchandise were advertised and offered for sale at a price less than the minimum charge as provided by G. S. 1949, 50-401; that said advertisement and offering to sell at less than cost as defined in said act was so advertised and offered for sale with the intent of said defendant corporation to unfairly divert trade from competitors in the same general business and was for a purpose of impairing and preventing fair competition and for the purpose of injuring public welfare and as such is unfair competition and contrary to public policy, resulting in an unreasonable restraint of trade and further resulting in substantially lessening competition with a tendency to create a monopoly in its own particular line of commerce; that said advertisement and offer to sell was not such as to be an exemption as defined in G. S. 1949, 50-405.

"Plaintiff further alleges that said advertising, offering for sale or selling of said merchandise is contrary to the form of the statutes made and provided and as such constitutes a common nuisance to the people of the State of Kansas and that said nuisance is now in existence and should be abated.

"That the plaintiff should be allowed a reasonable attorney's fee for the prosecution of this action and the sum of Five Hundred Dollars ($500.00) is a reasonable attorney's fee.

"WHEREFORE, plaintiff prays that an injunction be granted forthwith against the defendant corporation, its agents, servants, employees, successors or assigns, restraining and enjoining them, and each of them from keeping and maintaining a common nuisance as herein alleged in or upon said premises and that said defendant corporation be specifically and perpetually enjoined and restrained from advertising, offering to sell or selling at retail any commodity or item of merchandise at less than cost as defined by G. S. 1949, 50-401, and that the premises above described and the buildings located thereon be adjudged a common nuisance.

"Plaintiff further prays that a temporary injunction be granted at the commencement of this action, without notice, to be in effect until the final determination of this matter or until further order of this Court, and that upon the final adjudication of this matter, the temporary injunction heretofore referred to be made permanent and that the costs of this action, together with a reasonable attorney's fee be allowed the plaintiff and that the same be adjudged a lien upon said real estate and that said real estate be ordered sold to satisfy all such costs and attorney's fees, and such other and further relief as to the Court may seem equitable and just."

We are told that a temporary injunction in accordance with the prayer of the petition was granted on the same day and that it is still in effect.

[*Demurrer—Constitutionality of Statute*]

For reasons not shown by the record, defendant filed no pleading in response to the petition until January 8, 1959, on which date it filed a demurrer as follows:

"Comes now the Defendant and demurs to the Petition of Plaintiff on the ground that said Petition does not state facts sufficient to constitute a cause of action for the reason, among others, that the Statutes, G. S. 1949, 50-401 to 50-405, inclusive, on which the action is predicated, are discriminatory to this Defendant and are in conflict with and violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and Section 17 of Article 2 of the Constitution of Kansas."

[*Demurrer Overruled—Appeal*]

This demurrer was overruled on the date it was filed, and defendant has appealed, specifying such ruling as error. The appeal was heard at the regular June session of this court.

Portions of the Act in question, pertinent by virtue of the questions raised, will either be quoted or referred to, and all references are to G. S. 1949.

[*Purpose of Statute*]

The purpose of the Act—to safeguard the public against the creation of monopolies and to foster and encourage competition by prohibition of unfair practices—is found in 50-402, which reads:

"It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."

[*"Cost"*]

50-401 contains definitions of numerous terms and provisions in the Act. "Cost" is generally defined to mean invoice or replacement cost, whichever is lower, less all trade discounts except discounts for cash, plus freight charges, excise taxes, cartage, and an allowance for markup to cover a proportionate part of the cost of doing business fixed at six per cent for retailers and two per cent for wholesalers, absent proof of a lesser cost.

Subsections (f), (g), (h) and (i) of 50-401, read in part:

"(f) The term 'sell at retail,' 'sales at retail,' and 'retail sale' shall mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. . . .

"(g) The terms 'sell at wholesale,' 'sales at wholesale,' and 'wholesale sales' shall mean and include any transfer for a valuable consideration made in ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing. . . .

"(h) The term 'retailer' shall mean and include every person, partnership, corporation or association engaged in the business of making sales at retail within this state: . . .

"(i) The term 'wholesaler' shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this state: . . ."

[*Remedies*]

50-403 makes violation of the Act by either a retailer or wholesaler a misdemeanor and provides a penalty for such a violation.

50-404 authorizes proceedings in equity to prevent or restrain violations of the Act.

[*"Crux" of Lawsuit—Exemption*]

50-405 states that the provisions of the Act shall not apply to sales at retail or sales at wholesale in a number of instances such as where merchandise is sold in good-faith clearance sales if advertised, marked and sold as such, or where perishable merchandise must be sold promptly in order to forestall loss, and in other instances not here material. This section contains a further provision which is the real crux of this lawsuit:

"*Provided further*, The provisions of this act shall not apply to grain and feed dealers."

[*Severability Provision*]

50-407 reads:

"If any section, sentence, clause or provisions of this act shall for any reason be held invalid or unconstitutional, the validity of the remaining parts hereof shall not be affected thereby."

[*Contentions*]

Defendant contends the exemption of grain and feed dealers from the provisions of the Act is an unreasonable and arbitrary statutory discrimination and is in violation of the "equal protection of the laws" clause of Sec. 1 of the 14th amendment to the Constitution of the United States; that such exemption of grain and feed dealers violates Sec. 17 of Art. 2 of our own constitution, pertinent portions of which read:

"All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted; and whether or not a law enacted is repugnant to this provision of the constitution shall be construed and determined by the courts of the state. . . ."

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and that the exemption in question is not severable under 50-407, above, and therefore the entire Act is unconstitutional and void.

The State, on the other hand, contends the exemption of grain and feed dealers is a reasonable classification; that the Act is a general law operating uniformly on all within the classification created by its terms, and that even though the exemption provision in question is held to be unconstitutional, as contended by defendant, it nevertheless is severable under 50-407, above, and does not affect the validity of the remainder of the Act.

[*Prior Cases*]

Since its enactment in 1941 only three cases involving the Act have reached this court. In the first two of them (*State, ex rel., v. Fleming Co.*, [1948-1949 Trade Cases ¶ 62,239], 164 Kan. 723, 192 P. 2d 207, and *State, ex rel., v. Commercial Candy Co.*, [1948-1949 Trade Cases ¶ 62,358], 166 Kan. 432, 201 P. 2d 1034) it was unnecessary that we determine questions relating to its constitutionality.

State v. Consumers Warehouse Market [1958 Trade Cases ¶ 69,133], 183 Kan. 502, 329 P. 2d 638, hereafter referred to as the *Consumers* case, was a criminal prosecution against this defendant firm for alleged violations of the provisions of the Act. The information under which that prosecution was commenced is set out in the opinion of this court. A motion to quash the information on the ground it failed to allege an offense because sections 50-401, 402, 403, 404 and 405 of the Act violated both the federal and state constitutions and amendments thereto, was sustained. The State appealed. In support of the lower court's ruling the defendant's principal contention was that the Act is a price-fixing statute and therefore violates the *due process* guarantee of the 14th Amendment to the Constitution of the United States and Sec. 18 of our Bill of Rights. This court held such contention to be without merit and upheld the Act insofar as the due process feature was concerned. Several other challenges to the constitutionality of various provisions of the Act were made, all of which, with one exception, were held to be without merit. That exception was this: It was held that the particular portion of 50-401(e) which reads:

> ". . .; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler."

is so indefinite and uncertain that it is unreasonable and arbitrary, and therefore unconstitutional (see syl. 7 of the opinion). It was further held, however, that such invalid provision was severable and did not affect the remainder of the Act.

(In passing, it should be noted that at the end of line three in the next to the last paragraph of the opinion in the *Consumers* case, the reference to "50-405(e)" is a typographical error. The reference should have been to 50-401(e), and the same is hereby corrected.)

At this point attention should be called to the fact that in the *Consumers* case the question of unconstitutionality of the Act because of the exemption of grain and feed dealers from its provisions—was not before this court for decision, and was neither considered nor decided. (*State, ex rel., v. Fadely*, 180 Kan. 652, syl. 3, 308 P. 2d 537.) In other words, the extent of our holding in that case was that the Act, with the exception of the one provision above noted, was not unconstitutional on any of the grounds urged. Therefore, our decision in that case is not controlling on the question now before us.

[*"Equal Protection" of the Laws*]

The questions in this appeal are whether the exemption of grain and feed dealers from the scope and operation of the Act violates the "equal protection" clause of Sec. 1 of the 14th Amendment to the Constitution of the United States, and violates Sec. 17 of Art. 2 of our own constitution, above, and, if so, is such provision severable from the remainder of the Act.

For reasons hereafter stated, we hold the exemption provision in question violates both of the mentioned constitutional provisions; that it is not severable, and therefore the entire Act is unconstitutional and void.

Under Sec. 1 of the 14th Amendment to the Constitution of the United States a state is forbidden to make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws.

[*Class to be Regulated*]

The purpose of the Act in question, as previously stated, is to prevent the sale—

with certain specified exceptions—of merchandise at below cost, either by a retailer or a wholesaler, where such sale or offer to sell is made with the intent and with the result stated in 50-402, above. Also, as previously noted in the quotations from 50-401, above, defining "sales at retail," "sales at wholesale," "retailer" and "wholesaler," the class to be regulated constitutes all sellers at retail and wholesale of tangible personal property. Concededly, this is a broad classification, but, nevertheless, it is that fixed by statute. Grain and feed dealers who sell grain and feed at retail and wholesale of course would be under the Act were it not for the fact they are specifically exempted. This, the defendant contends, amounts to an arbitrary, fictitious and unreasonable statutory discrimination.

We agree.

[*Justifying Distinctions*]

Concededly, a state has a broad discretion in classification in the exercise of its power of regulation, and the Constitution of the United States does not require that things which are different in fact are to be treated in law as though they were the same, but discrimination in a state regulatory statute must be based on differences that are reasonably related to the purpose of the statute, and the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. Distinctions cannot be justified if the discrimination has no reasonable relation to the differences. (*The State v. Haun,* 61 Kan. 146, 59 *Pac.* 340, 47 L. R. A. 369; *McCulley v. City of Wichita,* 151 Kan. 214, 222, 223, syl. 2, 98 P. 2d 192, 127 A. L. R. 312; *Cotting v. Kansas City Stock Yards Co.,* 183 U. S. 79, 46 L. ed. 92, 22 S. Ct. 30; *Smith v. Cahoon,* 283 U. S. 553, 75 L. ed. 1264, 51 S. Ct. 582; *Morey v. Doud,* 354 U. S. 457, 1 L. ed. 2d 1485, 77 S. Ct. 1344 [1957].) In the last-mentioned case the Supreme Court of the United States had before it an Illinois statute which excepted money orders of the American Express Company from the requirement that any firm selling or issuing money orders in the state must secure a license and submit to state regulation. A competing firm attacked the law on the ground the exception stated in the statute worked a denial of the "equal protection of the laws" clause in the 14th Amendment. In upholding this contention the court said:

> "Taking all of these factors in conjunction—the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by the singling out of the money orders of a named company, with accompanying economic advantages—we hold that the application of the Act to appellees deprives them of equal protection of the laws." (p. 469.)

[*Special Privileges*]

The Act before us purports to be in part for the protection of the public. None has been pointed out, and we know of no reason why that segment of the public buying grain and feed should not be protected against a monopoly in that line of products. By the same token, should not grain and feed dealers be protected from unfair competition —the same as the retailer or wholesaler of groceries, for example? Insofar as this defendant—a retail firm engaged in selling groceries and other food and household commodities to the general public—is concerned, the Act regulates it, but permits the grain and feed dealer across the street to carry on his business in any manner he sees fit—even to the extent of bringing about the results denounced by the Act.

Taking all factors into consideration, we are of the opinion the statutory exemption of grain and feed dealers from the operation of the Act, thus singling them out as a closed class to receive special privileges, amounts to an arbitrary and unreasonable statutory discrimination having no relation to the expressed purpose of the Act—the practical effect of which deprives defendant of the equal protection of the laws as guaranteed by Sec. 1 of the 14th Amendment to the Constitution of the United States.

[*Kansas Constitution*]

Does the Act—which we think must be conceded to be a law of a "general nature" —have a "uniform operation throughout the state" as required by Sec. 17 of Art. 2 of our own constitution?

[*Classification Created*]

Much of what has been said may well apply to this question. The Act defines a class—*all retailers and wholesalers of tangible personal property within the state*—and purports to regulate all falling within this broad classification. It then, by the proviso

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in question, arbitrarily exempts "grain and feed dealers." The Act, therefore, does not operate uniformly on all members of the broad classification so created—that is, its operation is not uniform as to the class defined—and therefore may not be said to have a uniform operation throughout the state. In *Gustafson v. McPherson County*, 88 Kan. 335, 128 Pac. 186, this court considered a statute which authorized the allowance of a sum for hire of an undersheriff in counties having a population of between 18,000 and 25,000, except McPherson county. In declaring the statute bad, it was held:

> "Where the subject of an act of the legislature is one of common interest to all members of a group of counties and no difference in situation or circumstance exists justifying difference in treatment and preventing the framing of an applicable general law of uniform operation upon all the members of the group alike, the exclusion of one of the counties from the benefit of the act renders it void." (syl. 1.)

and said:

> "Interpreted by its title, the law is one of a general nature covering all counties of a specified class. It does not, however, have uniform operation upon all the counties of the class throughout the state. McPherson county is excluded, and the exclusion of McPherson county renders the act invalid." (pp. 336, 337.)
>
> ". . . No difference in circumstance or other valid reason existed for difference in regulation. No obstacle existed to the framing of an applicable general law of uniform operation upon all the members of the group alike. Instead of enacting such a law the legislature undertook to dispense special privileges to some of them. In so doing it stepped outside its constitutional province as a lawmaking body and the product of its action lacks the force and quality of a statute." (p. 337.)

(See also *Rambo v. Larrabee*, 67 Kan. 634, syl. 1, 2 and 5, 73 Pac. 915.)

[*Kansas Constitution Violated*]

The foregoing is applicable to the matter before us and the statutory exemption in question is held to violate the mentioned provision of our own constitution.

[*Severability*]

Does the fact the provision exempting grain and feed dealers is held to be bad, invalidate the entire Act, or is such provision severable under 50-407, above, thus leaving the remainder of the Act in full force and effect?

The rule is stated very clearly in the early case of *Central Branch U. P. R. Co. v. Atchison, T & S. F. R. Co.*, 28 Kan. 453, in which it was held:

> "While it is undoubtedly true that a statute may be constitutional in one part, and unconstitutional in another, yet this rule obtains only where the two parts are separate and independent; and where they are so related that the latter is a condition of, a compensation for, or an inducement to, the former, or where it is obvious that the legislature, having respect to opposing rights and interests, would not have enacted one but for the other, then the unconstitutionality of the latter avoids the entire statute." (syl. 1.)

In *The State v. Smiley*, 65 Kan. 340, 69 Pac. 199, 67 L. R. A. 903, it was said:

> "The general doctrine is that only the invalid parts of a statute are without legal efficacy. This is qualified by the further rule that if the void and valid parts of the statute are so connected with each other in the general scheme of the act that they cannot be separated without violence to the evident intent of the legislature, the whole must fall. These rules are of every-day enforcement in the courts." (p. 247.)

In *Voran v. Wright*, 129 Kan. 601, 284 Pac. 807, it was held:

> "Where parts of a statute or section thereof can be readily separated, that part which is constitutional may stand while that which is unconstitutional will be rejected." (syl. 6.)

(See also *Felten Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, at pp. 300, 301, 327 P. 2d 836.)

Tested by the foregoing statements of the rule, the answer to the question is obvious. The invalid portion of the statute is not a separate and independent provision of the Act, but rather is such an integral and inseparable part of the whole scheme and purpose of the law that it may not be severed therefrom and thus leave the remainder in full force and effect. In other words, to eliminate the objectionable exemption would change the scope of the Act and make it applicable to grain and feed dealers, whereas the legislature expressly declared they are not to be included. The question of severability here is readily distinguishable from that in the *Consumers* case, heretofore referred to. There it was

held that a portion of 50-401(e), which was merely one of a series of tests as to what is less than cost, was invalid, but, being severable, its invalidity did not affect the remainder of the Act.

Not so here, and we refer again to the *Gustafson* case in which, on the question of severability, it was held:

> "The exception of McPherson county is not a separate and independent provision which may be disregarded and leave the remainder of the act effective, since to eliminate the exception would change the scope of the law and make it applicable in territory where the legislature expressly declared it should not operate." (syl. 3.)

and said:

> "The declared purpose of the legislature is that the undersheriffs of McPherson county shall not receive the benefit of the law. This purpose informs the entire act, and the portion concerning McPherson county can not be eliminated without changing the whole scheme of the statute, even to the extent of making it applicable in territory where the legislature expressly said it should not operate." (p. 336.)

[*Entire Statute Unconstitutional*]

For the reasons stated, we therefore hold that the provision of 50-405, exempting grain and feed dealers from the scope and operation of the Unfair Practices Act, violates the "equal protection of the laws" clause of Sec. 1 of the 14th Amendment to the Constitution of the United States; that it violates Sec. 17 of Art. 2 of our own constitution, and, such provision not being severable, the entire Act is unconstitutional and void.

[*Judgment Reversed*]

The judgment is reversed with directions to sustain the demurrer to the petition.

[¶ 69,430] Blake v. Frick.

In the New York Supreme Court, New York County, Special Term, Part 1. 142 N. Y. L. J., No. 31, page 3. Dated August 12, 1959.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies—New York Antitrust Law—Restraint on Baseball Players—Legality of Uniform Player's Contract—Representative Suit.—A complaint in which two professional baseball players charged that they and all other players in a league were required, as a condition of employment as professional baseball players, to execute a "uniform player contract" that unlawfully restrained and monopolized trade in violation of the New York antitrust laws could not be treated as one stating a representative or "class" action. The existence of a similarity of contract relationships does not, in itself, permit a representative action. Here, the common interest of all the players was found only in the uniform contract and, once it was declared void, their common interest would end. Also, all players of the league would be bound by the remedy selected and the result reached in the case, although they were not before the court. Thus, the two players were not entitled to an injunction restraining the alleged violations as to *all* players in the league. Such relief could only be granted at the behest of the attorney general and could not be the subject of a separate suit by individual plaintiffs on behalf of others not parties thereto. If the two players seek to have the contracts declared illegal, they should separately state the causes to be pleaded in their own behalf.

See Combinations and Conspiracies, Vol. 1, ¶ 2339.34, 2425.34.

[*Restraint of Trade—Baseball*]

LORETO, Justice [*In full text*]: Defendants move for an order requiring the plaintiffs to separately, state and number causes of action to eliminate from the complaint references to the plaintiffs, that they are acting in a representative capacity, and for a dismissal of the complaint pursuant to Rules 106, 107 and 212 of the Rules of Civil Practice.

The plaintiffs are two professional baseball players in the International League, suing both on "behalf of themselves and of all members of the International League Baseball Players' Association."

The moving defendants (the only ones served) are Ford C. Frick, individually and as commissioner of baseball, Buffalo Bisons Baseball Club, Inc., and Rochester Community Baseball, Inc. Neither of the plain-

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tiffs is employed by a defendant served in the action.

[*Declaratory Judgment Sought*]

This action is for declaratory judgment decreeing that the uniform player's contract in the international league be adjudged void and unlawful, that the defendants be enjoined in New York from monopolizing the baseball business enforcing salary limitations and taking disciplinary action against the plaintiffs for alleged violations of provisions of the uniform contract described as "reserve clause," "termination clause" and "involuntary assignment clause."

[*Class Action*]

This complaint, based on contract asserted to be similar for both plaintiffs as well as all baseball players in the international league, cannot be treated as one stating a representative or class action. The common interest of all the players is found only in the uniform contract. Once declared void, their common interest would end. And all players of the international league not before the court would be bound by the remedy selected and the result reached in this action (*Brenner v. Title Guarantee & Trust Co.*, 276 N. Y. 230, 236). The mere fact that there exists a similarity of contract relationship on the part of numerous parties with other parties in itself does not permit a representative action (*Society Milion Athena v. National Bank of Greece*, 281 N. Y. 282; *Noel Holding Corp'n v. Carvel Dari Freeze Stores*, 140 N. Y. S. 2d 640, aff'd without opinion, 286 App. Div. 1066). Therefore, all reference to the representative character of the suing plaintiffs should be deleted from the complaint.

The complaint alleges that the plaintiffs are professional baseball players, rendering services in the international league, that the defendants (baseball clubs) present for profit public exhibitions of professional baseball in New York and the individual defendants are engaged in the supervision and administration of such exhibitions and that the international league is a member of the National Association of Professional Baseball Leagues and is governed by certain agreements called "The Professional Baseball Agreement and Rules," "The National Association Agreement" and "The Constitution, By-Laws, and Laws of International League of Professional Baseball Clubs."

[*New York Antitrust Laws*]

It is further alleged that the plaintiffs are among 90 per cent of all professional baseball players, trainers and coaches employed by one of the member clubs of the International League, and were and are members of the International League Baseball Players, an association, that as a condition of employment as professional baseball players, plaintiffs and all other international league baseball players are required to execute a uniform player contract, a copy of which is annexed to the complaint. Plaintiffs also allege that the question which is the subject of this action is one of common and general interest to all such baseball members. Extracts of the documents are set forth indicating the control exercised over the baseball player by virtue of the agreements, which are asserted to constitute unlawful practices. It is charged that such practices and restrictions imposed upon the plaintiffs a form of involuntary servitude, in violation of the State and National Constitutions. In paragraph 17 of the complaint it is alleged that the aforesaid documents are violations of section 340 of the General Business Law of the State of New York and of the common law of the State of New York, in that they unlawfully restrict and monopolize trade and business activities of the plaintiffs and all members of the International League, and unlawfully restrain competition and the free exercise by plaintiffs as such baseball players in the conduct of their business and in the furnishing of their services.

[*Labor Dispute*]

Particular consideration must be given to paragraph 32 of the complaint, which reads as follows:

> "32. That the plaintiffs and other players of the International League are unable to bargain with the defendants for matters such as pension plans, welfare benefits and improved conditions by reason of the fact that the defendants have refused to so bargain, and, in fact, have stated that they will 'trade' the players out of the International League to lower classifications or will eliminate them from organized baseball if the players persist in such requests."

It might be well to consider this first, as defendants argue that in this paragraph plaintiffs really set forth the gravamen of their complaint which constitutes a labor

dispute over which the State Labor Relations Board, and not this Court, has exclusive and initial jurisdiction. Plaintiffs' attorneys argue that the State Labor Relations Board has no jurisdiction over the subject matter alleged in paragraph 32 of the complaint because it relates to interstate commerce, and that the National Labor Relations Board has declined to exercise jurisdiction over professional sports. In *Guss v. Utah Labor Relations Board* (353 U. S. 1), the Supreme Court held that where the National Labor Relations Board declines to exercise jurisdiction which it has, states may not exercise jurisdiction. Therefore, the grievances set forth in paragraph 32 of the complaint do not present a controversy over which the Court may exercise jurisdiction and absent contract controlling these subjects, they are not justiciable. In this regard the remedy of the professional baseball players lies in remedial legislation. The fact of the matter is that professional baseball regulation is under study by Congress.

[*Attorney General*]

Taking next the charge that the uniform professional baseball contracts constitute violation of section 340 of the General Business Law of the State of New York in unlawfully restricting and monopolizing the trade and business activities of the baseball players, and the prayer that the defendants should be restrained because of such violation as to all baseball players in the International League, it must be held that such relief may be granted only at the behest of the attorney-general, and may not be the subject of separate suit by individual plaintiffs on behalf of others not parties thereto (*Payne Lumber Co. v. Neal,* 212 Fed. 259, 266, 267).

What remains of the complaint for consideration are allegations which tend to support the conclusion that these contracts are illegal. There has been in the past strong judicial denunciation of the system of organized baseball under which the players are required to pursue their profession. In *American League Club of Chicago v. Chase* (86 Misc. 441, 465) the Court stated:

> "The quasi peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States . . . . The system created by 'organized baseball' in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever they will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the national agreement . . . The court will not assist in enforcing an agreement which is a part of a general plan having for its object the maintenance of a monopoly, interference with the personal liberty of a citizen and the control of his free right to labor wherever and for whom he pleases; and will not extend its aid to further the purposes and practices of an unlawful combination, by restraining the defendant from working for any one but the plaintiff."

[*Restrictions May Be Illegal*]

As alleged the restrictive provisions of these contracts and the system under which the players are required to render their services are oppressive and deprive them of rights and freedom usually granted to and enjoyed by employees. It may well be held that the contracts should be declared illegal and void.

[*Pleading*]

The causes intended to be pleaded in behalf of the two plaintiffs should be separately stated if they seek such relief in this case.

[*Disciplinary Action*]

The Court's attention has been called to the fact that since the submission of this motion and because of the prosecution of this suit, disciplinary action has been taken against one of the plaintiffs by this baseball club. The Court expresses its regret that this has happened and unfortunately can do nothing about it.

[*Ruling*]

The motion is granted to the extent herein indicated and otherwise denied, with leave to plaintiffs to replead if so advised.

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[¶ 69,431] Duchen v. Milliken Woolens, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 141 N. Y. L. J., No. 103, page 12.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies—New York Antitrust Law—Practices—Refusal to Sell—Legality.—A garment manufacturer's allegation, in an amended complaint, that its supplier conspired with the manufacturer's competitors to refuse to sell it a certain yarn was dismissed for failure to state a cause of action under the New York antitrust law. The alleged refusal to sell involved a single product rather than the supplier's entire line, and there was no showing of any resultant destruction of business or prevention of competition.

See Combinations and Conspiracies, Vol. 1, ¶ 2337.34.

For a prior opinion of the N. Y. Supreme Court, see 1959 Trade Cases ¶ 69,292.

[*Refusal to Sell*]

Gold, Justice [*In full text*]: Defendants move for dismissal of the first and third causes as stated in the amended complaint pursuant to Rule 106(4). The first cause in *prima facie* tort as contained in the original complaint was dismissed for the reason that it appeared on the face thereof that the conduct complained of arose from self interest. The added allegations in the present pleading do not remove but rather relate to the same self interest and, accordingly, the refusal to sell does not constitute *prima facie* tort. The third cause rests upon the Donnelly Act. It is alleged that other manufacturers of garments have conspired with the defendants that the latter will not manufacture and sell a certain yarn to plaintiff to enable it to manufacture the yarn into garments in competition with the defendants' co-conspirators. Plaintiffs rely on *Alexander's Dept. Store v. Ohrbach's* [1940-1943 Trade Cases ¶ 56,285], (266 App. Div. 535) appeal dismissed 291 N. Y. 707). There,

> "Ohrbach's, using its superior economic buying power finally prevailed upon other manufacturers to refuse to sell to Alexander's not merely one line or fabric, but any merchandise whatever, and that the object and effect of such arrangement was to destroy Alexander's as a competitor of Ohrbach's and in defendant's products which Alexander's had been selling for years."

Here, the alleged conspiracy is by persons in competition with plaintiffs and who, together with defendants, conspired to refuse to sell to plaintiffs a single product which defendants had the right to do and not its entire line and without any showing of resultant destruction of business or prevention of competition. Actually, the statement of the third cause is an attempt to expand upon the first cause and it has failed. The motion is granted dismissing the first and third causes of action.

[¶ 69,432] Independent Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., et al.

In the United States District Court for the Southern District of New York. Civil 142-278. Filed June 23, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Transfer of Venue—"Balance of Convenience."—New York and Delaware corporations engaged in various phases of the motion picture industry were denied a motion to transfer a Tennessee exhibitor's treble damage action from the Southern District of New York to the Northern District of Georgia, Atlanta Division, or, in the alternative, to the Eastern District of Tennessee. The transfer depended upon the defendants' showing that a "balance of convenience" was strongly in favor of the transfer, a burden they failed to carry. Their inconvenience in having to bring their possible employee witnesses

and records to New York from Georgia or Tennessee was not sufficient to overcome the venue privilege of the plaintiff under Section 4 of the Clayton Act, especially where it was apparent that the plaintiff had not abused that privilege (the plaintiff's averment that New York was the only district in which it could obtain jurisdiction over all of the defendants negatived any claim of such abuse). Also, the plaintiff's contention that the transfer would cause it to lose the power to subpoena, as witnesses, certain of the defendants' officials in New York deserved particular consideration, especially since the plaintiff also claimed that New York was the situs of the alleged conspiracy's origination, that New York was the principal base of its operations, and that the proposed witnesses were the principal actors.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.600.

For the plaintiff: William Gold, New York, N. Y.

For the defendants: Leonard Kaufman; White & Case. New York, N. Y.

Memorandum

[*Conspiracy in Motion Picture Industry*]

MURPHY, District Judge [*In full text*]: Plaintiff, a Tennessee corporation, alleges a conspiracy on the part of defendants violative of the Federal Anti-Trust Laws involving the exhibition of first-run motion pictures. It owns some five theatres in Chattanooga, Tennessee, and an equal number of drive-in theatres around its perimeter. Defendants are all New York or Delaware corporations, and with the exception of one of them, all do business in New York City (the other is a wholly owned subsidiary of one of the New York corporate defendants). For the most part they are distributors and exhibitors of motion pictures, and one is a producer. Two defendants have not as yet been served.

[*Motion to Transfer*]

Defendants have moved to transfer this cause pursuant to 28 U. S. C. § 1404(a) to the Northern District of Georgia, Atlanta Division (three defendants seek in the alternative a transfer to the Eastern District of Tennessee). All proceedings have been stayed pending determination of this motion. Defendants also move to take the deposition of plaintiff's vice president in aid of its motion to transfer. Plaintiff moves to vacate the stay to the extent that it may proceed with the taking of depositions in accordance with its prior notice thereof.

[*Convenience of Parties*]

Defendants' argument in support of their motion to transfer is as follows:

Plaintiff's injury as alleged is that it was deprived of the opportunity to exhibit first-run pictures at its theatres in Tennessee at earlier dates than actually made available to it, and that defendants discriminated against plaintiff and in favor of defendant Wilby-Kincey Service Corp., a wholly owned subsidiary of defendant American Broadcasting-Paramount Theatres, Inc., which operates a number of theatres in the City of Chattanooga (plaintiff claims Wilby-Kincey is the only other theatre operator in that city); that these theatres are serviced by the distributor defendants through branch offices located in Atlanta, Georgia; that negotiations for the licensing of pictures to those theatres are conducted principally in Atlanta; that the persons most familiar with the matters here in issue live and work there; that, in the main, the documents relating to the transactions here in question are located in Atlanta; that it would be inconvenient for the witnesses to come to New York and for records to be shipped here, and that during the trial expert witnesses may be necessary to testify with relation to geographical, statistical and other local matters. Finally, defendant argues that plaintiff has no connection apparently with this forum.

In opposition to the motion plaintiff asserts that this is a national conspiracy

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and that the persons (officials and officers of defendants') who alone are responsible for the actions and conditions of which plaintiff complains, are all located in New York City; that the Georgia personnel referred to by defendants are but incidental and ministerial actors and representatives who are subject to the discretion and authority of managing personnel located in New York City; that all essential business records of defendants' are located and available at their New York home offices; and finally and most important, hostile witnesses essential to the establishment of plaintiff's case would become unavailable to plaintiff in the event of a transfer, by reason of plaintiff's loss of power to subpoena.

[*Jurisdiction—Abuse of Venue Privilege*]

Plaintiff sued here in New York because, it avers, this is the only district in which it could obtain jurisdiction over all defendants. This fact finds support in the affidavits submitted on this motion, and while it may not be in itself an argument for the retention of the suit here, it does negative any claim of abuse by plaintiff of its venue privilege under 15 U. S. C. § 15, which privilege is entitled to respectable consideration on motions of this nature. *Ford Motor Co. v. Ryan,* 182 F. 2d 329 (2d Cir., 1950).

If plaintiff had brought this motion to transfer to Tennessee or Georgia it could not succeed against defendants' opposition (*Foster-Milburn Co. v. Knight,* 181 F. 2d 949, 952 (2d Cir., 1950), while defendants' motion may not be similarly stymied, for their consent waives any venue impediment that might originally have existed against their being sued in those districts. *Anthony v. Kaufman,* 193 F. 2d 85 (2d Cir., 1951).

[*Balance of Convenience*]

Nevertheless, defendants' success upon this motion depends upon their establishing that the balance of convenience is strongly in favor of transfer. *Ford Motor Co. v. Ryan, supra.* This burden we feel they have failed to carry. The inconvenience to defendants necessitated by having to bring their possible employee witnesses and records to New York from Georgia or Tennessee would not be considered, in the light of the *Ford Motor Co.* case, as sufficient to overcome the venue privilege of plaintiff, especially where it is apparent that it has not been abused. Moreover, there is some truth to plaintiff's rebuttal that by the time this case is reached for trial defendants' records will be long since considered "current" and necessary to the day-to-day operations of defendants' business.

On the whole we cannot say that the balance of convenience is strongly in favor of transfer. Plaintiff's rights with regard to the availability of certain of defendants' officials as witnesses on the trial by means of compulsory process here in New York, which it would lose by transfer, deserves particular consideration, especially where as here the plaintiff claims New York to be the situs of the alleged conspiracy's origination, and its principal base of operations with the proposed witnesses as the principal actors.

[*Motion Denied*]

The motion to transfer must be denied. This renders moot defendants' companion motion to examine plaintiff's vice president and, since the stay of proceedings will necessarily be vacated herewith, plaintiff's relative motion need not be considered.

Settle order.

[¶ 69,433] Republic Productions, Inc.; Republic Pictures Corporation; and Hollywood Television Service, Inc. v. American Federation of Musicians of the United States and Canada; James C. Petrillo, Samuel R. Rosenbaum, as Trustee; C. L. Bagley; Leo Cluesmann; Harry J. Steeper; Herman D. Kenin; George V. Clancy; Stanley Ballard; William J. Harris; W. M. Murdoch; and Does 1 to 100, inclusive.

In the United States District Court for the Southern District of New York. Civil 129-354. Filed June 25, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Service of Process—Exemption of Non-resident Witness—Motion to Vacate Service—Reargument.—A Federal District Court in New York denied a motion for reargument on its ruling that an individual had

failed to sustain his claim that he was immune from service of process in New York by reason of the fact that, when he was served, his deposition as a witness was being taken there in connection with actions pending in a California court.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008, 9008.450.

For the plaintiffs: Baer, Marks, Friedman, Berliner & Klein (W. Barnard Richland, of counsel), New York, N. Y.

Appearing specially for Leo Cluesmann: Emanuel L. Gordon (Louis Lauer, of counsel), New York, N. Y.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1959 Trade Cases ¶ 69,279.

Memorandum

[*Service of Process—Motion to Vacate*]

BRYAN, District Judge [*In full text*]: Defendant Cluesmann moves to reargue his motion to vacate service of process upon him which was denied, with an opinion [1959 TRADE CASES ¶ 69,279], by my order of January 29, 1959.

[*Reargument—Additional Facts*]

Cluesmann's motion for reargument is grounded principally upon an affidavit which purports to present additional facts which were not before me on the original motion. All of these facts were fully available to Cluesmann when his original motion was made and he could have presented them then or during the rather lengthy consideration which I gave to his motion.

He was content to rest on the moving and reply affidavits which he elected to submit and made no request for a hearing. These affidavits, as I stated in my opinion, were "cryptic to a degree" on the vital question of the frequency regularity and extent of Cluesmann's business activities in New York and "seemed designed to conceal rather than reveal the extent" of his usual activities here.

A motion for reargument under Rule 9(h) of the General Rules of this Court must be predicated on matters which were before the court on the original motion or on controlling decisions which the court has overlooked.

As Judge Dimock said in *Avon Publishing Co., Inc. v. The American News Company, Inc.* [1955 TRADE CASES ¶ 68,168], D. C. S. D. N. Y., 137 F. Supp. 896, a motion for reargument "is not meant to be a device by which a party may add arguments or information which the party had available at the original hearing but which, for some reason, he did not offer."

As the moving party Cluesmann had the burden of showing that service upon him was invalid. He had ample opportunity both in his original moving papers and in his reply affidavits to present on the original motion the matters contained in the affidavit which he now submits. He did not do so. This affidavit comes too late to affect my decision on the original motion made on the facts presented to me.

[*Trivial Mistake in Opinion*]

The fact that in the opinion which I rendered I may have mistakenly referred to Cluesmann as Executive Secretary of the American Federation of Musicians instead of Secretary and member of the Executive Board, as the affidavit now submitted indicates, is a triviality and in no way affected the result reached.

Cluesmann has not pointed to any controlling decision which I overlooked in my decision of the original motion.

[*Motion to Reargue Denied*]

The motion to reargue is denied.

So ordered.

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[¶ 69,434] John L. Lewis and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund v. James M. Pennington, et al.

In the United States District Court for the Eastern District of Tennessee, Northern Division. Civil Action No. 3431. Filed July 1, 1959.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Labor Unions Under Antitrust Laws—Activities Which Are Not Exempted—Conspiracy with Non-labor Groups.—An employer's charges that a labor union conspired with one or more businesses to raise the wages of employees to a point where he could not pay stated a *prima facie* cause of action under the antitrust laws, namely, Sections 1, 2, and 3 of the Sherman Act and Section 4 of the Clayton Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063.

For the plaintiffs: R. R. Kramer, Knoxville, Tenn.; and Val J. Mitch, Harold H. Bacon, and Charles L. Widman, Washington, D. C.

For the defendants: Jerome G. Taylor, Jerome Templeton, Harley Fowler, and Fowler, Rowntree & Fowler, Knoxville, Tenn.

Memorandum

(Delivered from the bench)

[*Labor Unions Under Antitrust Laws*]

Robert L. Taylor, District Judge [*In full text*]: This case is before the Court on various motions of cross-defendant, United Mine Workers of America, which, for convenience, will be referred to as UMW, and motion to amend the answer, counter-claim and cross-claim by James M. Pennington, Ralph E. Phillips and Bruce Phillips, individually, and as Phillips Brothers Coal Company, a partnership, the original defendants. Reference will be made first to the motion of cross-defendant, UMW, found on page 41 of the record.

[*Service of Process*]

This motion states, in substance, that the process was served on the individual members of the unincorporated association in an effort to bring the association before the court through the class device. The Second Ground states that substituted service is inadequate under Section 20-223, Tennessee Code Annotated.

These questions were passed upon by this Court in the case of *Love & Amos Coal Company v. United Mine Workers of America et al.*, in which case it was held that the service was proper. The Court is of the opinion, and holds, that the decision in the *Love & Amos* case is controlling of these questions in the present case.

[*Conspiring With Non-Labor Groups*]

It is further urged in this motion that Rule 13 is insufficient to bring the UMW before the Court by cross action. The cross complaint avers, among other things, that the UMW and the Trustees of the Union fund conspired to raise wages to such an extent that the defendants and cross-plaintiff could not pay such wages and that the alleged conspirators committed one or more overt acts towards that end; that UMW conspired with one or more businesses to raise the wages of employees to a point that cross-plaintiff could not pay and that these conspiracies were in violation of the Sherman Anti-Trust laws.

It is the theory of cross-plantiff that UMW should be brought in the suit in order for all questions to be decided in one suit.

[*Dismissal Denied*]

The Court overrules the motion to dismiss the cross action as being improperly brought under Rule 13(h), without prejudice to the cross-defendants to renew the motion at the pre-trial.

[*Jurisdiction*]

Ground No. 4 of the motion asserts that the Court is without jurisdiction in that no substanial or colorable cause of action is stated under the Constitution, laws or treaties of the United States. The Court likewise overrules this ground with the right of cross-defendants to renew at the pre-trial hearing.

Ground No. 5 is sustained as cross-plaintiff concedes that this ground is well taken.

Ground No. 6 states that no colorable action is stated under Title 15, U. S. C., Sections 1, 2, 3 and 15 of the Sherman Act. The Court at this time is of the opinion that the charges that the Union conspired with one or more employers to violate the anti-trust laws, particularly, Title 15, U. S. C., Sections 1, 2, 3 and 15 of the Sherman Act, states a *prima facie* cause of action, and for that reason cross-defendants' motion is overruled without prejudice to its right to renew at the time of the pre-trial.

[*Other Matters*]

Ground No. 7 asserts that a cause of action is not stated under Title 29, U. S. C., Section 185, which is the breach of contract section. This motion is likewise overruled with the right of the cross-defendants to renew it at the pre-trial.

Ground No. 8 relates to the common law action. The Court is of the opinion that this ground must be overruled under the authority of *United Mine Workers of America v. Meadow Creek Coal Co., Inc.*, 263 F. 2d 52, USCA 6 Cir., January 21, 1959.

Ground No. 9 must be overruled for the same reasons.

The ruling in the case of *Love & Amos v. United Mine Workers of America et al.*, a case recently pending in this court, is controlling of the questions urged in support of Ground No. 10. For the reasons stated in the memorandum opinion in that case, Ground No. 10 is overruled.

Ground No. 11 is sustained as cross-plaintiff concedes that this ground is well taken.

We direct our attention at this time to the motion to vacate the order issued under Rule 13(h) and to dismiss the cross-claim as to cross-defendants' Trustees. This motion is to be found on pages 42 and 43 of the record. For the reasons heretofore indicated above, this motion is denied at the present time with the right to movants to renew at the pre-trial hearing.

[*Amendments*]

We now turn to the motion to amend counter-claim and cross-claim filed by the defendants which is found on pages 48-51 of the record. As is well known, the Federal Rules of Civil Procedure are very liberal in permitting amendments. A party may amend his pleadings once as a matter of course before a responsive pleading is filed under Rule 15. After pleadings are made up, the party can only amend with the consent of the adverse party or on leave of the Court. Rule 15 states, that leave of the court shall be "freely given when justice so requires."

The Court is of the opinion that justice requires the allowance of the amendments in this case. The Court, in making this ruling, is not to be understood as agreeing that the contentions of cross-plaintiff as set forth in the amendments with respect to some of the highly technical questions of law are sound.

A motion to amend was also filed on June 26, 1959, which appears on pages 129-134 of the record. This motion is likewise sustained with the right of the Union and the Trustees to renew their opposition to the legal points contained in the amendments at the pre-trial hearing.

[*Production of Documents*]

This brings us to the motion of the defendants and cross-plaintiff for production of documents for inspection, copying and photographing, which is found on pages 127-128 of the record.

Mr. Combs, one of the attorneys for UMW, stated to the Court during the hearing that he had been in Judge Ford's court for several days and for that reason had not been to his office in Washington and was not prepared to argue the merits or demerits of said motion and would like argument or consideration of it to be passed until he has had an opportunity to discuss the problems involved in this motion with his clients, and after doing so that he and his colleagues will make every reasonable effort to stipulate with counsel for cross-plaintiff concerning the matters that are sought in the documents that cross-plaintiff seeks to have produced.

The Court grants this motion by Mr. Combs and gives him fifteen days in which to attempt to work out the matter by stipulation. If it is possible to do so he will try to stipulate with opposing counsel within ten days from date, or sooner.

[*Interrogatories*]

Counsel for both parties agree that there is nothing for the Court to pass on at the present time under the title "Objections to

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Interrogatories Propounded by Defendant to Plaintiff Trustees, etc.," which interrogatories are to be found on pages 86-98 of the record.

Let an order be presented in conformity with the above views.

[¶ 69,435] United States v. The Rubber Manufacturers Association, Incorporated, et al.

In the United States District Court for the Southern District of New York. Cr. 158-159. Filed August 7, 1959.

Case No. 1433 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Defendants' Plea of Nolo Contendere.—Manufacturers of rubber belting, charged with fixing prices in violation of Section 1 of the Sherman Antitrust Act, were permitted to substitute pleas of *nolo contendere* in place of their pleas of "not guilty." In permitting the substitution of pleas, the court followed the reasoning in *U. S. v. Safeway Stores,* 1957 Trade Cases ¶ 68,770, where it was held that Congress did not intend that a plea of *nolo contendere* should be refused in criminal antitrust cases for the purpose of aiding private litigants under Section 5(a) of the Clayton Act. In the instant case, the court also noted that, because of the Government's policy of opposing all attempts to enter pleas of *nolo contendere,* it was necessary "to determine whether or not the opposition is seriously offered or whether it is merely the carrying out of the aforementioned policy."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.860.

For the plaintiff: S. Hazard Gillespie, Jr., United States Attorney.

For the defendants: Marion & Lowthorp, New York, N. Y.

Memorandum

[*Nolo Contendere*]

Noonan, District Judge [*In full text*]: The defendants have moved this court for an order permitting them to substitute pleas of *nolo contendere* in place of their previously entered pleas of not guilty.

[*Government Opposition*]

The Government has interposed strong opposition to this application.

In dealing with this motion addressed to the discretionary power of the court, I do not believe it is incumbent upon me to review at great length the myriad of decisions on this point. Suffice it to say that I follow the reasoning of Judge Estes in *U. S. v. Safeway Stores* [1957 Trade Cases ¶ 68,770], 20 F. R. D. 451.

Since the Government's opposition relies heavily on Judge Weinfeld's learned opinion in *U. S. v. Standard Ultramarine & Color Co.,* [1955 Trade Cases ¶ 68,237], 137 Fed. Supp. 167, I believe it is necessary to point out that this represents a minority viewpoint.

[*Government Policy*]

In deciding this motion I have taken into account the Government's policy of opposing all attempts to enter a plea of *nolo contendere.* This policy makes it necessary for the court to determine whether or not the opposition is seriously offered or whether it is merely the carrying out of the aforementioned policy.

[*Motion Granted*]

Accordingly, the defendants' motion is granted in all respects and the pleas of *nolo contendere* shall be entered on September 28, 1959 at 10:15 A. M. in Room 506 at which time sentence will be imposed.

So ordered.

[¶ 69,436] **Goldlawr, Incorporated v. Milton Shubert, William Klein, Sylvia W. Golde, Marcus Heiman, Select Operating Corporation, and United Booking Office, Inc.**

In the United States District Court for the Southern District of New York. Civil 144-244. Filed August 10, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction—Extra-territorial Service of Process on Corporations—Necessity for Proper Venue.—A Federal District Court in New York, in a treble damage action transferred there from a Federal District Court in Pennsylvania, did not, by reason of that transfer, acquire personal jurisdiction over two New York corporations which had been served, in New York, by extra-territorial service of process, because the court in Pennsylvania never had jurisdiction. The extra-territorial service of process was invalid because venue was improperly laid in Pennsylvania (the corporations were not inhabitants of, found in, or transacting business in Pennsylvania). In order to sustain jurisdiction in the court in Pennsylvania, the "process" clause of Section 12 of the Clayton Act would have to be read as wholly independent of the "venue" clause. That section provides that antitrust actions against corporations "may be brought not only in the judicial district of which it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." By "the phrase 'all process *in such cases*' (italics supplied), the privilege of extra-territorial service is expressly confined to actions brought in a district in which the corporation is an inhabitant, found, or transacting business," that is, actions in which venue is properly laid.

In addition, the fact that the summons had been delivered in New York did not give the court in New York personal jurisdiction over the corporations. Section 12 could not be invoked to legitimatize the extra-territorial service, and service without statutory authority is of no effect, regardless of actual notice.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.350.

Private Enforcement and Procedure—Suit for Civil Damages—Service of Process on Individuals—Substitution of Executors for Deceased Defendant.—A Federal District Court in New York, in a treble damage action transferred there from a Federal District Court in Pennsylvania, dismissed the action as to a deceased New York resident who was never served personally in Pennsylvania, was not found there, and had no agents there. Since the court in Pennsylvania lacked personal jurisdiction over that individual, the court in New York acquired no jurisdiction by reason of the transfer. In addition, it was doubtful whether Rule 25(a)(1) of the Federal Rules of Civil Procedure (providing that, where an action is not extinguished by a party's death, the proper parties may be substituted therefor) could be invoked to authorize a substitution of the executors for a defendant who had not appeared or had not been served with process. Substitution at this late date would have been particularly anomalous, since the motion to transfer from Pennsylvania was interposed for the first time after the individual's death. Therefore, the individual had not been amenable to service of process in the action at any time during his life.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.450.

Private Enforcement and Procedure—Suit for Civil Damages—Where Suit May Be Brought—Proper Judicial District—Transfer of Venue—Power of Transfer Where Court Lacks Jurisdiction.—A Federal District Court in New York, in a treble damage action transferred there from a Federal District Court in Pennsylvania, dismissed the action as to a deceased New York resident and two New York corporations, because the transfer, as to those parties, was unauthorized. If the court in Pennsylvania had had jurisdiction over them, then the court in New York would have acquired such jurisdiction by the transfer. However, the former court never acquired jurisdiction because those parties were never effectively served with process.

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Although the present court (in New York) lacked jurisdiction, the plaintiff might have still been in a position to avoid dismissal, as to the corporations, by making proper service upon them without further delay, if the transfer had been authorized. Therefore, the court considered the question of whether a court, while lacking in jurisdiction over a defendant, can nevertheless transfer an action to a district where service can be effected. Interpreting the transfer provisions of the Judicial Code, Title 28, United States Code, § 1404(a) (authorizing a transfer when venue is *proper* but the forum in which the action is brought is *inconvenient*) and § 1406(a) (authorizing a transfer when venue is *improperly* laid), the court noted that § 1404(a) was not applicable and that "Section 1406(a), which by its terms speaks to defective venue only, cannot be made to do service when there is also a jurisdictional defect." Jurisdiction is the more basic requirement. It was unlikely that the drafters of the Judicial Code, since they made an express provision for a transfer in the event of improper venue but not in the event of a lack of jurisdiction, relied upon a venue section to carry along an implicit provision for a transfer to cure a jurisdictional defect.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.

For the plaintiff: Dilworth, Paxson, Kalish, Kohn & Dilks, Philadelphia, Pa. (Harold E. Kohn and Dolores Korman, of counsel), and Curtis, Mallet-Prevost, Colt & Mosle. New York, N. Y.

For the defendants: Donovan, Leisure, Newton & Irvine, New York, N. Y. (Francis A. Brick, Jr., of counsel), for Milton Shubert; Hess, Mela, Segall, Popkin & Guterman, New York, N. Y. (Lionel S. Popkin, of counsel), for William Klein; Perkins, Daniels, McCormack & Collins, New York, N. Y. (Freeman J. Daniels, of counsel), for Sylvia W. Golde; Lipper, Shinn & Keeley, New York, N. Y. (Aaron Lipper, of counsel), for the Estate of Marcus Heiman; Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa. (C. Russell Phillips and Hugh Molter, of counsel), and Gerald Schoenfeld and Bernard B. Jacobs, New York, N. Y., for Select Operating Corporation and United Booking Office, Inc.

For a prior opinion of the U. S. District Court, Eastern District of Pennsylvania, see 1958 Trade Cases ¶ 69,227.

[*Treble Damage Action—Jurisdiction*]

PALMIERI, District Judge [*In full text*]: This is an antitrust action originally instituted on October 17, 1956 by plaintiff against various persons and corporations in the Federal District Court for the Eastern District of Pennsylvania. That Court retained the action as to defendants found to be properly before it and, on March 3, 1959, ordered the action transferred to this Court as to the above-named defendants for lack of proper venue in Pennsylvania. Motions filed here by defendants subsequent to transfer will be discussed *seriatim*.

I

Motion of Defendants Select Operating Corporation and United Booking Office, Inc., to dismiss for lack of jurisdiction

[*Extra-territorial Service of Process*]

Select Operating Corporation and United Booking Office, Inc. are incorporated and have their offices in New York. Plaintiff, claiming the right to extraterritorial process under Section 12 of the Clayton Act, 38 Stat. 736 (1914), 15 U. S. C. § 22 (1958), served these defendants in New York, by alias summons, in February and March of 1957. Defendants immediately moved to quash the returns of service of the summons and to dismiss for lack of jurisdiction and improper venue. In an opinion dated December 22, 1958 [1958 TRADE CASES ¶ 69,227], 169 F. Supp. 677, the Court in Pennsylvania held that venue was improper, finding that defendants were not inhabitants of or found in Pennsylvania, and did not transact business there as required by Section 12 of the Clayton Act. Transfer was ordered without ruling upon the motions to dismiss for lack of personal jurisdiction.

[*Jurisdiction—Transfer of Action*]

Service of the alias summons was the only service of process ever received by either defendant in this District. Therefore, the first question presented is whether, under Section 12 of the Clayton Act, the extra-

territorial service of process while the action was pending in Pennsylvania had the effect of giving this Court, on transfer, personal jurisdiction over the defendants.

Section 12 provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

If the service purported to be made under this section was effective to give the Court in Pennsylvania personal jurisdiction, such jurisdiction would continue after transfer. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949). In order to sustain jurisdiction in Pennsylvania, however, the clause of Section 12 dealing with process would have to be read as wholly independent of the clause dealing with venue. If so read, the extraterritorial service would give the Court in Pennsylvania jurisdiction; the only defect would be improper venue. *Petroleum Financial Corp. v. Stone,* 116 F. Supp. 426, 428 (S. D. N. Y. 1953) (dictum), Note, 38 Minn. L. Rev. 874 (1954).

The language of the section itself precludes the interpretation set forth above. By the phrase "all process *in such cases*" (italics supplied), the privilege of extraterritorial service is expressly confined to actions brought in a district in which the corporation is an inhabitant, found, or transacting business. *Dazian's, Inc. v. Switzer Bros.,* 111 F. Supp. 648 (N. D. Ohio 1951); *Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n* [1952 TRADE CASES ¶ 67,272], 102 F. Supp. 649 (D. Minn. 1951); *Reid v. University of Minnesota* [1953 TRADE CASES ¶ 67,418], 107 F. Supp. 439 (N. D. Ohio 1952); *cf. Greenberg v. Giannini,* 140 F. 2d 550 (2d Cir. 1944); *Lavin v. Lavin,* 182 F. 2d 870, 873 (2d Cir. 1950) (dictum). That the Pennsylvania forum is not such a District is no longer in dispute. Therefore plaintiff cannot invoke Section 12 of the Clayton Act to legitimatize the extraterritorial service. The Court in Pennsylvania never acquired personal jurisdiction over the defendants, and this Court did not acquire personal jurisdiction as a result of the transfer.

Nor was personal jurisdiction obtained in this District by virtue of the fact that the alias summons was delivered in New York. Service made without statutory authority is of no effect regardless of actual notice to defendants. *Cf. Wuchter v. Pizzuti,* 276 U. S. 13 (1928).

[*Authority for Transfer*]

This Court now lacks personal jurisdiction over the defendants since effective service of process has never been accomplished. However, if the transfer to this District were authorized, plaintiff might still be in a position to avoid dismissal by making proper service upon defendants without further delay. See *UNRRA v. The Mormacpine,* 99 F. Supp. 552 (S. D. N. Y. 1951); 5 Moore, *Federal Practice* § 41.11 at p. 1039 (2d ed. 1951). Therefore, the second question to be determined on this motion is whether a Court, lacking jurisdiction over defendants, may nonetheless transfer the action to a District where service can be effected.

This issue, requiring interpretation of the transfer provisions of the Judicial Code, 28 U. S. C. §§ 1404(a), 1406(a) (1952), is one on which the Courts are in disagreement. *Independent Productions Corp. v. Loew's, Inc.,* [1957 TRADE CASES ¶ 68,615], 148 F. Supp. 460 (S. D. N. Y. 1957); *McDaniel v. Drotman,* 103 F. Supp. 643 (W. D. Ky. 1952); *Wilson v. Kansas City So. Ry.,* 101 F. Supp. 56 (W. D. Mo. 1951): *Fistel v. Beaver Trust Co.,* 94 F. Supp. 974 (S. D. N. Y. 1950) (transfer may be made only by a court which has personal jurisdiction). *Internatio-Rotterdam, Inc. v. Thomsen,* 218 F. 2d 514 (4th Cir.), 68 Harv. L. Rev. 1069 (1955) (admiralty); *Orzulak v. Federal Commerce and Navigation Co.,* 168 F. Supp. 15 (E. D. Pa. 1958) (admiralty); *United States v. Welch,* 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp. v. Stone,* 116 F. Supp. 426 (S. D. N. Y. 1953); *Lumbermens Mut. Cas. Co v. Mohr,* 87 F. Supp. 727 (S. D. Texas 1949) (transfer may be made by a court which lacks personal jurisdiction). Section 1406(a), authorizing transfer when venue is improperly laid, provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, tranfer such

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case to any district or division in which it could have been brought."

Section 1404(a), since it applies when venue is proper but the forum in which the action is brought is inconvenient, is not directly involved in this action. It is appropriate to note, however, that the Courts have not drawn a distinction between the two sections in regard to the propriety of transfer by a Court which lacks jurisdiction. *E. g., Petroleum Financial Corp. v. Stone, supra,* 42 Geo. L. J. 315, 318 (1954).

This Court is of the view that Section 1406(a), which by its terms speaks to defective venue only, cannot be made to do service when there is also a jurisdictional defect. Proper jurisdiction is the more basic requirement. See *Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 308 U. S. 165, 167-68 (1939). The drafters of the Judicial Code made an express provision for transfer in the event of improper venue. They made no express provision for transfer in the event of lack of jurisdiction. It is unlikely that the drafters relied upon a venue section to carry along an implicit provision for transfer to cure a jurisdictional defect. See Sen. Rep. No. 303, 81st Cong., 1st Sess., U. S. Code Cong. Serv. 1253 (1949); Notes 38 Minn. L. Rev. 874, 23 U. Cinn. L. Rev. 357, 359 (1954).

It should be noted that *Schiller v. Mit-Clip Co.* [1950-1951 Trade Cases ¶ 62,585], 180 F. 2d 654 (2d Cir. 1950), which has been cited as authority for the propriety of transfer when jurisdiction *in personam* could not be had in the transferor forum, *United States v. Welch,* 151 F. Supp. 899 (S. D. N. Y. 1957); *Petroleum Financial Corp. v. Stone, supra;* 68 Harv. L. Rev. 1069, 1070 (1955), never reached the question. In that case plaintiff resisted and defendant argued in support of transfer. The Court of Appeals, in denying plaintiff's petition for a mandamus to compel the district judge to revoke the transfer order, stated:

> ". . . [T]he plaintiff cannot complain because he has not suffered the dismissal which he so richly deserved . . . Whether we should have any jurisdiction, either by appeal or by mandamus, to review such an order, we need not decide." 180 F. 2d at 655.

On the reasoning set forth above it is concluded that the Court in Pennsylvania improperly transferred the action as to defendants Select Operating Corporation and United Booking Office, Inc. to this Court. Since there is nothing to support the pendency of the action here, it must be dismissed. *E. g., Wilson v. Kansas City So. Ry.,* 101 F. Supp. 56 (W. D. Mo. 1951). The alternative, remand to the transferor district, would serve no useful purpose because plaintiff's inability to proceed against these defendants in the Pennsylvania forum has already been established. See *Goldlawr v. Shubert,* [1958 Trade Cases ¶ 69,227], 169 F. Supp. 677, 686 (1958).

II

Motion to Substitute the Executors of the Estate of Defendant Heiman

Cross-Motion to Dismiss as to Heiman for Lack of Jurisdiction

[*Lack of Personal Service*]

Marcus Heiman, a New York resident, was named as an original defendant in the action instituted in Pennsylvania. Although he died in September of 1957, the order of March 1959 included Heiman among the defendants as to whom the action was transferred for lack of venue.

Heiman was not found in and had no agents in Pennsylvania. *Goldlawr v. Shubert* [1958 Trade Cases ¶ 69,227], 169 F. Supp. 677, 682 (1958). See Clayton Act § 7, 38 Stat. 731 (1914), 15 U. S. C. § 15 (1958). He was never served personally in Pennsylvania or any other place. The obvious lack of personal jurisdiction over Heiman and the resulting invalidity of the transfer under 28 U. S. C. § 1406(a) would alone impel this Court to grant the cross-motion to dismiss.

[*Substitution of Executors for Deceased Defendant*]

In addition, passing consideration of the cross-motion, it is doubtful whether Rule 25(a)(1), Fed. R. Civ. P., may be invoked to authorize substitution of the executors for a defendant who neither appeared nor was served with process. See *United States v. Field,* 25 Fed. Cas. 1067, No. 15,089 (C. C. S. D. N. Y. 1859), Note on Revivor, 14 Fed. 392 (1882); *cf. Carnes v. Strait,* 270 S. W. 2d 920 (Ark. 1954). Substitution at this late date would be particularly anomalous since the motion to transfer from Pennsylvania was interposed for the first

time after Heiman's death. Therefore at no time during his life was he amenable to service of process in this action.

III

Motions to Dismiss for Pendency of Another Action

[*Actions Consolidated*]

The original complaint in this action was filed in October of 1956. In February of 1957 plaintiff, who was unable to obtain a prompt hearing on its motion to amend, filed a second complaint. This second complaint added certain defendants and extended the period for which damages were claimed but was otherwise identical with the first complaint. Therefore when the Court in Pennsylvania ordered severance and transfer, two actions, identical in all respects, were docketed in this District, the first of the Pennsylvania complaints having, in the meantime, been amended.

The three remaining defendants, William Klein, Milton Shubert, and Sylvia W. Golde have moved for a dismissal of one of these actions on the ground that there is a similar action pending. Plaintiff opposes the motion on the ground that its rights under the Statute of Limitations can best be protected by preserving both actions.

In order to protect plaintiff's interest and, at the same time, spare defendants the burden of duplicating their efforts in this cause, the two actions will be consolidated for the purpose of all further proceedings. See Rule 42(a), Fed. R. Civ. P.

[*Orders*]

Settle appropriate orders on notice for dismissal as to defendants Select Operating Corporation, United Booking Office, Inc., and Marcus Heiman and for consolidation of the actions against Milton Shubert, William Klein and Sylvia W. Golde.

[¶ 69,437] Federal Trade Commission v. Douglas T. Orton, Secretary, The Borden Company.

In the United States District Court for the Southern District of New York. Misc. 18-304. Dated July 30, 1959.

Clayton and Federal Trade Commission Acts

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence Under FTC Act, Section 9—Subpoena *Duces Tecum*—Census Data—File Copies—Privilege.—A petition for a rehearing of an order denying a Federal Trade Commission motion to compel a company, by subpoena *duces tecum,* to produce its "schedules submitted to the Bureau of the Census on Form MC 20C" was denied. The petition urged that the court, in its opinion denying the motion, 1958 Trade Cases ¶ 69,404, did not decide the issue as to whether the company's "file copies" of Census Form 20C must be produced. In denying the petition for rehearing, the court pointed out that the Commission's subpoena had not called for "file copies," that the opinion noted that fact, and that a determination of that issue could not be reached until it was presented by properly drawn documents.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611, 8741.55.

Denying a petition for a rehearing of an order of the U. S. District Court, Southern District of New York, 1959 Trade Cases ¶ 69,404, denying a Federal Trade Commission petition to require production of documentary evidence in Dkt. 6652.

For the petitioner: Albert G. Seidman, Attorney in Charge, New York Office, Federal Trade Commission; Andrew C. Goodhope and F. P. Favarella, Attorneys, Federal Trade Commission.

For the respondent: Dewey, Ballantine, Bushby, Palmer & Wood, New York, N. Y. (John E. F. Wood, Charles E. Stewart, Jr., and C. Lamar Barnes, of counsel).

[*Subpoena Duces Tecum—Census Reports*]

Dawson, District Judge [*In full text*]: This petition for rehearing urges that the opinion of the Court [1959 Trade Cases ¶ 69,404] "does not decide the issue as to whether respondent's file copies of Census Form MC 20C must be produced pur-

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suant to petitioner's subpoena *duces tecum.*" The subpoena *duces tecum* did not call for file copies. It called for "All schedules submitted to the Bureau of the Census on Form MC 20C by all plants. . . ." The Court in its opinion noted that the subpoena did not relate to file copies thereof.

There is nothing in the opinion which needs clarification. Possibly the procedure of petitioner in drawing its subpoena needs clarification.

The Court passed upon the subpoena in the form issued by the petitioner; that was the only issue before the Court. In effect the petition for rehearing seeks to have the Court issue a declaratory judgment on a hypothetical set of facts. This is not consonant with good judicial procedure. When the issue is presented by properly drawn documents a determination can then be reached by the Court.

[*Rehearing Denied*]

The petition for rehearing is denied. So ordered.

[¶ 69,438] Minniola O. Miller v. Russell L. Gillette, Rose M. Gillette, et al.

In the United States Court of Appeals for the Second Circuit. No. 316—October Term, 1958. Docket No. 25469. Argued June 2, 1959. Decided June 15, 1959.

Appeal from the United States District Court for the District of Connecticut. J. Joseph Smith, Judge.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Dismissal—Dissolution of Attachment *Pendente Lite* Against Defendants' Property.—A Federal appellate court which had affirmed the dismissal of a plaintiff's "fantastic claims of fraud and conspiracy" in the "guise of a treble-damage antitrust suit" (it was alleged that a town, a bank, and certain individuals had conspired to deprive the plaintiff of her patrimony in certain farms), also affirmed the trial court's subsequent dissolution of an attachment *pendente lite* upon the defendants' property. The plaintiff, on appeal from the dissolution of that attachment, showed no reason why the order was not only within the power of the trial court, but also required upon the termination of her action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

For a prior opinion of the U. S. Court of Appeals, Second Circuit, see 1957 Trade Cases ¶ 68,835.

For the plaintiff: Minniola O. Miller, *pro se.*

For the defendants: Howard J. Maxwell of Steele, Collins & Maxwell, Hartford, Conn., and Bernard E. Francis, West Hartford, Conn.

Before: Clark, Chief Judge, and Lumbard and Waterman, Circuit Judges.

Minniola O. Miller appeals from an order dissolving an attachment against property of Russell L. Gillette and Rose M. Gillette in her antitrust action which has been finally dismissed.

[*Dismissal—Dissolution of Attachment*]

Per Curiam [*In full text*]: In *Miller v. Town of Suffield* [1957 Trade Cases ¶ 68,835], 2 Cir., 249 F. 2d 16, we affirmed Judge Smith's dismissal of plaintiff's antitrust action which we characterized as an attempt to revive certain "fantastic claims of fraud and conspiracy" rejected in earlier litigation. The Supreme Court denied certiorari, 356 U. S. 978, and then a motion for rehearing, 358 U. S. 859. After our affirmance Judge Smith, on motion of certain defendants, dissolved an attachment *pendente lite* upon their property and plaintiff has appealed. She has failed, however, to show any reason why the order was not only within the power of the district court, but also required upon the termination of her action. Affirmed.

[¶ 69,439] Jewel Tea Company v. Local Unions Nos. 189, 262, 320, 546, 547 and 638, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 58 C 1415. Filed May 19, 1959.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Labor Unions Under Antitrust Laws—Combining with Non-Labor Groups—Interlocutory Appeal from Denial of Motion to Dismiss.— "Locals" of a meat-cutters' labor union, in an action charging that they conspired with an association of food retailers to suppress competition among retail meat markets, to prevent the sale of fresh meat before 9 A. M. or after 6 P. M. Mondays through Saturdays, and to monopolize, for members of the union, the retail trade in such meats, were permitted to file an interlocutory appeal from a trial court's denial of a motion to dismiss the action. In its memorandum opinion denying that motion, 1959 TRADE CASES ¶ 69,329, the trial court found that the complaint stated a valid cause of action under the antitrust laws, in that it alleged a joinder of purpose between the union and independent employers, and adverse effects on interstate commerce. Here, the court concluded that an interlocutory appeal under Title 28 of the United States Code, § 1292(b), should be granted because the matter involved controlling questions of law as to which there were substantial grounds for a difference of opinion, and an immediate appeal would materially advance the ultimate termination of the litigation.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063, 2101.110, 2101.248, 2101.265, 2111.102; Private Enforcement and Procedure, Vol. 2, ¶ 9015, 9022.20, 9022.75, 9042.350.

For the plaintiff: George B. Christensen and Fred H. Daugherty of Winston, Strawn, Smith & Patterson, Chicago, Ill.

For the defendants: Asher, Gubbins & Segall; Libit, Lindauer & Henry; and Eardley & Ward, all of Chicago, Ill.

For a prior opinion of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1959 Trade Cases ¶ 69,329.

[*Motion to Vacate Order*]

WALTER J. LA BUY, District Judge [*In full text*]: The Court has considered defendants' motion to vacate the order of March 31, 1959 overruling defendants' motion to dismiss the complaint in the above cause and is of the opinion said motion should be and hereby is denied.

[*Opinion Corrected*]

During the course of oral arguments on the motion to vacate, defendants' counsel called the attention of the Court to an erroneous statement contained in the Court's memorandum [1959 TRADE CASES ¶ 69,329] regarding the allegations of the complaint. On page 5 in the first full paragraph, last sentence, the Court said:

> "The allegations of the complaint aver that customers purchase less meats due to the market hour restriction and that the interstate supply and shipment thereof is affected."

This appears in plaintiff's brief pages 23-24 and was mistakenly stated to be contained in the complaint. The sentence is hereby ordered deleted from the memorandum of the Court.

[*Interlocutory Appeal*]

The Court is further of the opinion that defendants' oral request for an order permitting an interlocutory appeal from the orders of this Court should be allowed. Accordingly, the Court has entered such an order, copy of which is attached hereto.

Order

This cause came on to be heard on the motion of defendants to vacate the order of this Court entered March 31, 1959, and for permission to file an interlocutory appeal therefrom;

The Court being of the opinion that the orders denying defendants' motion to dismiss and motion to vacate said order involve controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate

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appeal from these orders will materially advance the ultimate termination of the litigation concludes that an appeal should be permitted to be taken from the orders at this time pursuant to Sec. 1292(b), 28 U. S. C. A.;

It is therefore ordered that the defendants be granted leave to file their interlocutory appeal, and said order shall suspend and stay all further proceedings in this Court pending consideration of this matter by the Court of Appeals.

[¶ 69,440] **Afran Transport Company; Calendar Navigation Corp.; California Transport Corporation; Carib Marine Company; Grand Bassa Tankers, Inc.; Hemisphere Transportation Corporation; Kupan Transport Company; Mobil Tankers Company; S. A. Norness Shipping Company, Inc.; Panama Transport Company; Seatankers, Inc.; Tanker Transport, Inc.; Theater Navigation Corp.; Trans-Atlantic Navigation Corporation; and Universe Tankships, Inc. v. National Maritime Union; Seafarers International Union of North America; Joseph Curran, individually and as an officer and member representative of all the members of the National Maritime Union; and Joseph Algina, individually and as an officer and member representative of all the members of the Seafarers International Union of North America.**

In the United States District Court for the Southern District of New York. Civil 140-156. Filed June 9, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Injunctive Relief from Violations of Antitrust Laws—Pretrial Procedures—Summary Judgment—Issues of Fact—Interlocutory Appeal —"Controlling Question of Law."—A Federal District Court, in an action by foreign shippers to enjoin two seamen's labor unions from picketing and boycotting their ships, granted the unions' motion for reargument but, on reargument, adhered to its earlier decision, 1959 TRADE CASES ¶ 69,323, denying the unions' motion for summary judgment. The court also denied the unions' application for the certification necessary to an interlocutory appeal under Title 28, United States Code, § 1292(b). The narrow question presented by the court's order denying summary judgment, namely, whether there were *any* material issues of fact to be tried in the case, did not present such a "controlling question of law" as the statute contemplates should be certified for interlocutory appeal.

See Private Enforcement and Procedure, Vol. 2, ¶ 9026, 9026.60.

For the plaintiffs: Mailay, Morgan & Williams, New York, N. Y.

For the defendants: Seymour W. Miller, Brooklyn, N. Y., for Seafarers International Union of North America; Cooper, Ostrin & DeVarco, New York, N. Y., for National Maritime Union and Joseph Curran; and Bigham, Englar, Jones & Houston, New York, N. Y., for the Republic of Panama.

For prior opinions of the U. S. District Court, Southern District of New York, see 1959 Trade Cases ¶ 69,323 and 1958 Trade Cases ¶ 69,220.

Memorandum

[*Summary Judgment—Reargument*]

BRYAN, District Judge [*In full text*]: Defendants' motion for reargument is granted.

On reargument I have considered the defendants' contentions that their motion for summary judgment, which I denied in my decision of February 20, 1959 [1959 TRADE CASES ¶ 69,323], should have been granted. It is the burden of the party who moves for summary judgment to establish that there are no material issues of fact which require a trial. I am not persuaded that the defendants have met that burden.

[*Interlocutory Appeal*]

Nor am I persuaded that my order denying summary judgment "involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation" within the meaning of 28 U. S. C. § 1292(b).

The view of the Court of Appeals of this circuit as to the proper basis on which motions for summary judgment should be determined (see *Arnstein v. Porter,* 2 Cir., 154 F. 2d 464; *Doehler Metal Furniture Co. v. United States,* 2 Cir., 149 F. 2d 130) makes it plain to me that the narrow question as to whether there are *any* material issues of fact to be tried in this case does not present such "a controlling question of law" as the statute contemplates should be certified for interlocutory appeal.

[*Ruling*]

On reargument I adhere to my decision of February 20, 1959 denying defendants' motion for summary judgment and deny defendants' application for an order pursuant to 28 U. S. C. § 1292(b).

It is so ordered.

[¶ 69,441] United States v. True Temper Corporation.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 58 C 1158. Dated August 20, 1959.

Case No. 1402 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited—Price Fixing—Golf Club "Shafts."—A manufacturer of steel shafts for golf clubs was prohibited by a consent decree from entering into or enforcing any agreement with any other person to fix prices, terms, or conditions for the sale of such steel shafts to or by any third person.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181; Monopolies, Vol. 1, ¶ 2610.600.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited—Allocation of Territories, Markets, or Customers.—A manufacturer of steel shafts for golf clubs was prohibited by a consent decree from entering into or enforcing any agreement with any other person to allocate or divide territories, markets, or customers for the manufacture, sale, or distribution of such steel shafts.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468; Monopolies, Vol. 1, ¶ 2610.240.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Prohibited—Export and Import Control.—A manufacturer of steel shafts for golf clubs was prohibited by a consent decree from entering into or enforcing any agreement with any other person to restrict or limit imports into, or exports from, the United States of such steel shafts. The manufacturer was also enjoined from limiting, restricting, or preventing any other person from (1) importing into the United States steel shafts manufactured outside the United States, or (2) exporting outside the United States steel shafts manufactured in the United States.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.718; Monopolies, Vol. 1, ¶ 2610.340.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Interlocking Directorates.—A manufacturer of steel shafts for golf clubs was prohibited by a consent decree from permitting any of its officers, directors, or employees to serve, at the same time, as an officer, director, or employee of any other company or person engaged in the manufacture, sale, or distribution of such steel shafts.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.735; Monopolies, Vol. 1, ¶ 2610.420.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Stock or Asset Holdings in Related or Competing Companies.—A manufacturer of steel shafts for golf clubs was prohibited by a consent decree from acquiring, by purchase, merger, or otherwise, any stock, financial, or managerial interest in certain British and Australian producers and distributors of steel shafts. The manufacturer was also prohibited from (1) disposing of any of the stock required to be divested by the decree to any of its subsidiaries, officers, principal stockholders, individuals affiliated with the manu-

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facturer or related to any of its officers or directors, or companies in which any officer or director of the manufacturer is a principal stockholder, or (2) reacquiring any stock or financial interest required to be divested under the decree. After the expiration of the seven months' period within which the divestiture was to be accomplished, the manufacturer was enjoined from exercising the voting power of any stock or financial interest which it might have in any of those British and Australian companies.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.833; Monopolies, Vol. 1, ¶ 2610.340.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Divestiture of Stock Holdings in Foreign Companies—Resignation of Employees from "Interlocking" Positions.—A manufacturer of steel shafts for golf clubs was ordered by a consent decree to divest itself of all stock or financial interest which it might have in certain British and Australian producers and distributors of steel shafts. If the divestiture was not accomplished within a designated period, the court would enter an order providing for (1) the transfer, by the manufacturer, of such stock or financial interest to a trustee to be appointed by the court, and (2) authority in such trustee to sell or otherwise dispose of such stock or financial interest upon such terms as may appear appropriate to the court after the parties have had an opportunity to be heard. In addition, the decree ordered the resignation of each of the manufacturer's officers, directors, or employees from any position held by them, at the time of the entry of the decree, with any of those British and Australian companies.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10, 8301.60.

Department of Justice Enforcement and Procedure—Consent Decree—Permissive Provisions—Patent and Trade-mark Rights.—A consent decree which prohibited a manufacturer of steel shafts for golf clubs from restricting or preventing the importation into, or exportation from, the United States of such steel shafts provided that the manufacturer was not prohibited from exercising such lawful rights as it might have under the Federal patent and trade-mark laws.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.33, 8321.40, 8321.48, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; and W. D. Kilgore, Jr., George H. Schueller, Earl A. Jinkinson, Harry N. Burgess, Willis L. Hotchkiss, Thomas J. Rooney, and Samuel J. Betar, Jr., Attorneys, Department of Justice.

For the defendant: John C. Butler, Robert H. Bork, and John H. Watson, Jr.

Final Judgment

[*Consent Decree*]

CAMPBELL, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on June 30, 1958, and the defendant herein, True Temper Corporation, having appeared by its attorneys, and said plaintiff and defendant having severally consented to the entry of this Final Judgment herein, without trial or adjudication of any issue of fact or law herein and without admission by any party in respect to any such issue;

Now, Therefore, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of the parties hereto, it is hereby,

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states claims for relief under Sections 1 and 2 of the Act of Congress of July 2, 1890 (15 U. S. C. §§ 1 and 2), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Defendant" shall mean True Temper Corporation, a corporation which is organ-

ized and existing under the laws of the State of Ohio (and which prior to 1949 operated under the name of The American Fork and Hoe Company), having its principal place of business at 1623 Euclid Avenue, Cleveland, Ohio;

(B) "Foreign Company" or "Foreign Companies" shall mean any, some, or all of the following:

1. Accles and Pollock Limited, a company organized under the laws of the United Kingdom, having an office in Oldbury, England;

2. Australian Steel Golf Shafts Proprietary Limited, a corporation organized under and pursuant to the Companies Act (South Australia) 1936, having an office in Adelaide, Australia;

3. British Steel Golf Shafts Limited, a company organized under the laws of the United Kingdom, having an office in Oldbury, England;

4. British Tube Mills (Australia) Proprietary Limited, a corporation organized under and pursuant to the Companies Act (South Australia) 1936, having an office in Adelaide, Australia;

5. Stewarts & Lloyds (Australia) Proprietary Limited, a company incorporated in Australia with offices in Adelaide, Australia.

6. Tube Investments Limited, a company organized under the laws of the United Kingdom;

(C) "Person" shall mean any individual, partnership, firm, association, corporation or other legal entity.

(D) "Principal Stockholder" of a corporation shall mean any person who owns of record or beneficially 5 per cent or more of the outstanding voting stock of such corporation.

(E) "Steel Shafts" shall mean tubular steel shafts produced for use as a component part of golf clubs.

(F) "Subsidiary" of Defendant shall mean any corporation 50% or more of the voting stock of which is owned or, directly or indirectly, controlled by Defendant.

III

[*Applicability*]

The provisions of this Final Judgment applicable to Defendant shall apply to its officers, directors, agents, employees, subsidiaries, successors and assigns, and to those persons in active concert or participation with it who receive notice of this Final Judgement by personal service or otherwise. For the purposes of this Final Judgment Defendant and its directors, agents, employees, subsidiaries, or any of them, when acting in such capacity, shall be deemed to be one person.

IV

[*Cancellation of Agreements*]

Defendant is hereby:

(A) Ordered and directed to terminate and cancel, to the extent not heretofore cancelled, expired, terminated or suspended, the following agreements:

(1) Agreement, dated January 13, 1930, between Accles and Pollock Limited and The American Fork and Hoe Company;

(2) Agreement, dated July 16, 1930, between Accles and Pollock Limited and The American Fork and Hoe Company;

(3) Agreement, dated June 1, 1931, among The American Fork and Hoe Company, Accles and Pollock Limited, and British Steel Golf Shafts Limited;

(4) License Agreement, dated December 12, 1931, between The American Fork and Hoe Company and Accles and Pollock Limited;

(5) License Agreement, dated October 13, 1932, between The American Fork and Hoe Company and Accles and Pollock Limited;

(6) Agreement, dated November 5, 1948, among The American Fork and Hoe Company, Accles and Pollock Limited, and British Steel Golf Shafts Limited;

(7) Agreement, dated February 15, 1949, between Accles and Pollock Limited and The American Fork and Hoe Company;

(8) Agreement, dated September 4, 1956, among Defendant, Accles and Pollock Limited, and British Steel Golf Shafts Limited;

(B) Ordered and directed to terminate and cancel, within ninety (90) days from the date of entry of this Final Judgment, each of the following agreements which shall not theretofore have been terminated or cancelled:

(1) License Agreement, dated September 14, 1939, between The American Fork and Hoe Company and British Tube Mills (Australia) Proprietary Limited;

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(2) Agreement, dated December 16, 1938, between The American Fork and Hoe Company and Accles and Pollock Limited;

(3) Agreement, dated September 14, 1939, among The American Fork and Hoe Company, Accles and Pollock Limited, British Steel Golf Shafts Limited, British Tube Mills (Australia) Proprietary Limited, and Australian Steel Golf Shafts Proprietary Limited;

(4) Agreement, dated September 14, 1939, between The American Fork and Hoe Company and British Tube Mills (Australia) Proprietary Limited;

provided, however, that Defendant may receive payment of any amounts which shall have accrued for payment under any of said agreements prior to the date of the termination required by this subsection (B);

(C) Enjoined and restrained from adhering to, performing, reviving or enforcing any agreement cancelled pursuant to subsection (A) or (B) of this Section IV, and from entering into adhering to any other agreement, contract or understanding which contains any provision contrary to or inconsistent with any provision of this Final Judgment.

V.

[*Notice of Judgment*]

Defendant is ordered and directed to furnish within ninety (90) days after the entry of this Final Judgment a true copy thereof to each Foreign Company which is a party to any agreement the termination or cancellation of which is ordered by Section IV of this Final Judgment.

VI.

[*Allocation of Markets—Price Fixing*]

Defendant is enjoined and restrained from entering into, adhering to, maintaining or enforcing any contract, agreement or understanding with any other person, the purpose or effect of which is, or may be, to:

(A) Allocate or divide territories, markets or customers for the manufacture, sale or distribution of Steel Shafts;

(B) Restrict or limit imports into or exports from the United States of Steel Shafts;

(C) Fix prices, terms or conditions for the sale of Steel Shafts to or by any third person.

VII.

[*Import and Export Controls*]

Defendant is enjoined and restrained from, directly or indirectly, limiting, restricting or preventing or attempting to limit, restrict or prevent any other person from importing into the United States Steel Shafts manufactured outside the United States or from exporting outside the United States Steel Shafts manufactured in the United States provided, however, that nothing in this Final Judgment shall be deemed to prohibit Defendant from exercising such lawful rights as it may have under the laws of the United States relating to patents and trade-marks to prevent the unauthorized use, by others, of any patent or trade-mark issued to Defendant.

VIII.

[*Divestiture Ordered*]

(A) Upon expiration of seven months after entry of this Final Judgment, Defendant is enjoined and restrained from exercising, directly or indirectly, voting power of any stock or financial interest which Defendant may then own in any Foreign Company.

(B) Defendant is ordered and directed within thirty (30) days after entry of this Final Judgment to initiate such steps as may be necessary to divest itself, within seven (7) months after entry of this Final Judgment, of all stock or financial interest which it may have in any Foreign Company, and shall thereafter divest itself of such stock or financial interest.

(C) Defendant is enjoined and restrained from:

(1) Disposing of any of the stock required to be divested under the provisions of this Section VIII to any subsidiary of Defendant, or any officer or principal stockholder of Defendant or of its subsidiaries, or any individual directly or indirectly affiliated with Defendant or related to any of its officers or directors, or any company in which any officer or director of Defendant is a principal stockholder.

(2) Reacquiring any stock or financial interest required to be divested under the provisions of this Section VIII;

(3) Hereafter acquiring, by purchase, merger or otherwise, any stock, financial or

managerial interest in and to any Foreign Company;

(4) Permitting any of its officers, directors, or employees to serve, at the same time, as an officer, director, or employee of any Foreign Company, or any other person engaged in the manufacture, sale or distribution of Steel Shafts.

(D) Defendant is ordered and directed within ninety (90) days after the date of this Final Judgment to file with this Court and serve upon the plaintiff conformed copies of the resignation of each of its officers, directors, or employees from any position held by them at the time of entry of this Final Judgment with any Foreign Company.

(E) If within a period of seven months after the entry of this Final Judgment Defendant has sold or otherwise divested itself of such stock or financial interest in any Foreign Company, Defendant is ordered and directed to file with this Court and serve upon plaintiff a report showing the fact and manner of Defendant's compliance with this requirement.

(F) If, at the end of such period of seven months after entry of this Final Judgment, Defendant shall not have sold or divested itself of such stock or financial interest in each Foreign Company then, and in that event, Defendant is ordered and directed to file with this Court and serve upon plaintiff a report of such fact. This Court shall then, and in that event, enter a further order herein providing for (1) transfer by Defendant of such stock or financial interest in such Foreign Companies to a trustee to be appointed by this Court and (2) authority in such trustee to sell or otherwise dispose of such stock or financial interest of Defendant in such Foreign Companies upon such terms and conditions as to this Court may appear appropriate after notice and opportunity by the parties to be heard. Such trustee shall have power to hold such stock or financial interest of Defendant, to receive and pay to Defendant any dividends accruing thereon and shall be paid such compensation as may be directed by this Court and such trustee shall submit to this Court and to plaintiff such reports as may be directed by this Court regarding the performance of his trust.

IX.

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant made to its principal office, be permitted:

(A) Access, during the office hours of Defendant, to the books, ledgers, accounts, correspondence, memoranda and other records or documents in the possession or under the control of Defendant relating to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of Defendant and without restraint or interference from it, to interview officers or employees of Defendant, who may have counsel present, regarding any such matters.

Upon such written request Defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary for the enforcement of said Judgment. No information obtained by means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X.

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

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[¶ 69,442] Pepper Motors, Inc. v. American Motors Sales Corp. and Lloyd C. Cota.

In the United States District Court for the Eastern District of New York. Civil No. 18742. Dated June 30, 1959.

Automobile Dealer Franchise Act

Private Enforcement and Procedure—Suits for Civil Damages Under Automobile Dealer Franchise Act—Scope of Act—Franchises—Oral Franchise Agreement.—An automobile distributor, in an action brought under the Automobile Dealer Franchise Act by a dealer which claimed that it had been *orally* appointed as a franchised dealer by the distributor's district manager, was denied a motion for summary judgment. The case could not be disposed of by summary judgment because there were issues of fact to be tried, namely, the sharply disputed issue of the district manager's authority to bind the distributor to an oral franchise contract and the conflicting versions of the events which took place when the oral agreement was allegedly made.

The action was dismissed, however, as to the district manager. He was an agent for a disclosed principal at all times and never acted on his own behalf. If there was a valid oral contract, the distributor was liable. If there was no contract, the district manager could not be liable.

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.20.

For the plaintiff: Edward G. Wolff, by Morris Hass, of counsel.

For the defendants: Sullivan & Cromwell, by William E. Willis, of counsel.

[*Motions*]

Rayfiel, District Judge [*In full text*]: There are two motions before me. The first, by the defendant American Motors Sales Corporation, hereinafter called American, is for judgment on the pleadings, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment pursuant to Rule 56 (b) of the said Rules. The second, by the defendant Lloyd C. Cota, hereinafter called Cota, was made under Rule 12(b) of said Rules for an order dismissing the second amended complaint on the ground that the Court lacks jurisdiction over the subject matter, or, in the alternative, dismissing the said complaint as against him for failure of the complaint to state a claim on which relief can be granted.

[*Automobile Dealer Franchise Act*]

This action was brought by the plaintiff, an automobile dealer, against the defendant American, the distributor of Nash automobiles, and Cota, one of its District Managers, pursuant to the Automobile Dealer Franchise Act, Title 15 U. S. § 1221-1225.

[*Agreements*]

The second amended complaint alleges that the defendant American appointed plaintiff as its franchised dealer. The defendant American contends that plaintiff's said claim is controverted by the "Application for Dealer Franchise" signed by an officer of the plaintiff, which contains the following provisions:

> "I understand that this application in no way constitutes any liability on my part, or on the part of American Motor Sales Corporation and that any Dealer Franchise Agreement that I may sign is not binding on the part of American Motor Sales Corporation until it has been approved and signed by the Vice President in charge of Sales, General or Assistant General Sales Manager of the Manufacturer or an executive designated by any of them at the Manufacturer's central office, Detroit, Michigan."

It also points out that the Dealer Franchise Agreement, which was signed by the same official of the plaintiff, contained this provision:

> "7. This Dealer Franchise Agreement shall not be valid or in effect unless executed by a Zone Manager of American Motors Sales Corporation and approved by the Vice President in Charge of Sales, General, or Assistant General Sales Manager of the Manufacturer or an Executive designated by any of them."

[*Alleged Oral Agreement*]

The plaintiff argues, however, that it does *not* rely on the written documents, but

rather, on an *oral* agreement entered into when, it claims, Cota, on behalf of the defendant, *appointed* it as a franchised dealer in the Village of Valley Stream. The affidavit submitted on behalf of the plaintiff alleges that Cota accepted from it a written order for 13 cars and received its check for $3,754.00, drawn to the order of American, as a deposit thereon, after telling the plaintiff's president that the written applications were mere formalities only.

[*Summary Judgment Denied*]

Since it is clear that there are issues of fact to be tried herein this case cannot be disposed of by summary judgment. We have the sharply disputed issue of Cota's authority to bind the defendant American to an oral franchise contract as well as the conflicting versions of the events which took place on April 10, 1958, when, according to the plaintiff, the oral agreement was made. American's motion is, therefore, denied.

[*Dismissal as to Agent*]

Cota's motion to dismiss is granted. He was at all times an agent for a disclosed principal. He never acted on his own behalf, nor does the complaint so allege. If there was a valid oral contract American is liable to plaintiff thereunder. If the trial Court should find, however, that there was no contract, then, of course, Cota cannot be liable. Cota's motion is granted.

Settle order on notice.

[¶ 69,443] **Titial V. De Candido, d. b. a. Rex Pharmacy v. Harry Wagonfeld, Louis Wagonfeld, and Max Wagonfeld, d.b.a. World Merchandise Exchange and World Merchandise Exchange Trading Company, Inc.**

In the New York Supreme Court, New York County, Special and Trial Term, Part V. 141 N. Y. L. J., No. 38, page 1. Decided August 11, 1959. Dated August 21, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement Action—Who May Maintain Suit—Retailer's Suit Sponsored by Trade Association—Retail and Wholesale Prices—Defenses—Lack of Enforcement Activity.—A retail pharmacist, in a fair trade action against defendants who were engaged in the wholesale as well as the retail business, was denied an injunction where, among other things, the evidence indicated that the suit was sponsored by an association of retail pharmacists, all of whom competed with each other. The plaintiff testified that he had never complained to the defendants, but had asked the association to bring the suit for him. A fair trade "booklet" and letters were not sent by any manufacturer, but by the association of retailers with a view to fixing prices at the retail level of competition. Also, the plaintiff never notified the defendants of any alleged damage to its business; the evidence indicated that the defendants were licensed drug wholesalers as well as licensed retail pharmacists, and although the plaintiff complained to the association about the "competitive" prices of other stores, apparently no action was taken against those others.

See Fair Trade, Vol. 1, ¶ 3186.34, 3330.34, 3362.34, 3440.34.

Fair Trade—Defenses to Enforcement Action—Price Violations by Enforcing Party—Size of Price Reduction—*De Minimis* Not Applicable.—In a fair trade enforcement action, a retail pharmacist who had himself resorted to practices that were "within the ambit of condemnation as unfair competition" was denied an injunction to restrain defendants from selling below fair trade prices. There was testimony that the plaintiff, on at least two occasions, gave discounts and failed to collect the applicable sales and excise taxes. The plaintiff was not permitted to urge that the sums were trifling and that the principle of *de minimis* applied, because the principal amounts in these transactions are not large frequently, and the diminution in price which gives rise to the claim of unfair practice is even more trifling.

See Fair Trade, Vol. 1, ¶ 3452.34.

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Fair Trade—Person Who May Establish Fair Trade Prices—Suit by Retailer—Manufacturers Listed in Complaint—Authority of Manufacturers to Enforce Fair Trade Contracts.—A retail pharmacist who sought to enforce the fair trade contracts of manufacturers listed in his complaint was denied an injunction to restrain defendants from selling below fair trade prices where he failed to prove that those manufacturers were authorized or empowered to enforce fair trade contracts in the State of New York or that they fell within the category of those firms permitted to enforce fair trade contracts.

See Fair Trade, Vol. 1, ¶ 3172.34.

For the plaintiff: Walsh, Aarons, Salonger & Fleishaber.

For the defendants: W. Edward Woods.

[*Fair Trade Action*]

HOFSTADTER, Justice [*In full text*]: Plaintiff's complaint is by a pharmacist-retailer against defendants, likewise engaged in retail as well as wholesale business, under sections 369-a and 369-b of the General Business Law. It seeks to enforce the fair trade contract of the manufacturers listed in the complaint.

[*Economic and Political Issues*]

It would seem desirable to hold decision within narrow compass, to avoid judicial involvement in an underlying basic issue essentially economic, with overtones of a nature political in a broad sense. For there is a fundamental clash of interests between the producer and distributor of merchandise on the one hand, and the consumer on the other.

The latter is interested in purchasing goods at the lowest price possible; he is not concerned with whether the manufacturer or dealer makes a normal profit, or any. The manufacturer and middleman, however, are concerned that the production and distribution sequence should provide a margin of profit; and should as well afford scope for machinery replacement, research and experiment, as well as for retailing facilities. The contest has been transferred to the national stage at this session of Congress. A federal "fair trade" bill has been proposed as indeed favoring fair trade, and as an aid to small business. But it is opposed by executive and administrative agencies as a device to restrain trade and divide the market.

Those opposed to the fair trade principle and practice maintain that such laws are not salutary and that "fair trading" is in effect "unfair pricing," i. e., price fixing. Their opponents, however, insist that this is not price fixing by government; and that in free enterprise, manufacturer and retailer deserve the same protection enjoyed by labor and agriculture.

Doubtless, these sharp differences in attitudes have contributed to the variance in determining the constitutional competency of these enactments. Though invalidated in some jurisdictions they have been held constitutional in others, including our own state. The matter, then, is for application of our statutes. But it seems indicated that the statute be strictly applied and within the traditional framework of equitable principles when drastic injunctive relief is sought. Thus viewed, the record here will not justify intervention by the court.

[*Sponsor of Suit*]

The evidence indicated that the suit was sponsored by the New York State Pharmacy Association; an association comprised of retailers, all of whom compete with each other. The plaintiff testified that he never complained to the defendants, but he had asked the association to bring this suit for him. The fair trade booklet as well as the fair trade letters were sent not by any manufacturer, but by an association of retailers with a view to fixing prices at the retail level of competition.

[*Enforcement Activity*]

The evidence, too, reveals that defendants are licensed drug wholesalers as well as having a pharmacy license. Their place of business is located in a commerical area over one mile from plaintiff's place of business. Though plaintiff complained to the association of which he is a member about other stores located on Seventeenth Street —in closer proximity to defendant's place of business than that of plaintiff—with respect to their sales at competitive rather

than alleged fair trade prices, apparently no action was taken. It is noteworthy that plaintiff never notified the defendants of any alleged damages to his business.

[*Violations by Enforcing Party*]

Among other issues raised, is that plaintiff himself sold the products of manufacturers listed in the complaint at prices less than the alleged fair trade prices mentioned therein, and that plaintiff was therefore barred from obtaining any relief under the General Business Law. This defense is a valid bar to relief.

Defendant's witness, Dwoskin testified that the plaintiff himself on at least two occasions gave discounts and failed to collect the applicable sales and excise taxes. It is reasonably inferable that this was all in the course of the day's work and not isolated transactions. Thus, it may be concluded that this particular (nominal) plaintiff himself resorted to practices that are within the ambit of condemnation as unfair competition. It will not lie in his mouth to urge that the sum or sums were trifling and of marginal measure—and that the principle of *de minimis* is operative. For, indeed, in these and similar transactions, the principal amounts themselves are not large frequently; and the diminution in price which gives rise to the claim of unfair practice is even more trifling.

In this view the plaintiff may not have the drastic equitable relief of injunction (*Modin Chemists, Inc., v. Howard & Linder Drug Co., Inc.,* New York County, N. Y. L. J., April 6, 1959, Aurelio, J.; *Mandell v. Lowerre's Pharmacy, Inc.* [1959 TRADE CASES ¶ 69,296], Kings County, N. Y. L. J., March 9, 1959, Rabin, J.; *Anderson v. Senbec Sales Corp'n* [1959 TRADE CASES ¶ 69,287], Kings County, N. Y. L. J., February 10, 1959, Friedman, J.; *Center Lane Pharmacy, Inc., v. Stein* [1959 TRADE CASES ¶ 69,288], Nassau County, N. Y. L. J., February 20, 1959, Meyer, J.; see also *Fogel v. Bolet* [1948-1949 TRADE CASES ¶ 62,389], 194 Misc. 1019; *Wesinger v. Rae,* Supreme Court, Queens County, N. Y. L. J., May 20, 1959, at p. 14, Pette, J.; *Pordes v. Lythe* [1955 TRADE CASES ¶ 67,999], 2 Misc. 2d 323).

[*Persons Authorized to Enforce Fair Trade Contracts*]

Moreover, plaintiff failed to prove that the manufacturers listed in the complaint are authorized or empowered to enforce fair trade contracts in the State of New York or that they fall within the category of those firms permitted to enforce fair trade contracts (see *Automotive Electric Service Corp'n v. Times Square Stores Corp'n,* 175 Misc. 865; *Faber Co. & Greg, Inc., v. Korvette, Inc.* [1956 TRADE CASES ¶ 68,491], Supreme Court, New York County, Special Term, Part III, N. Y. L. J., September 28, 1956, Hecht, J.).

[*Complaint Dismissed*]

Complaint dismissed and judgment for the defendants accordingly. The foregoing constitutes the decision of the court under section 440 of the Civil Practice Act. Settle judgment.

[¶ 69,444] Bertha Building Corporation v. National Theatres Corporation.

In the United States Court of Appeals for the Second Circuit. No. 288—October Term, 1958. Docket No. 25485. Argued May 12, 1959. Decided August 24, 1959.

Appeal from an order of the United States District Court for the Eastern District of New York, HON. JOSEPH ZAVATT, Judge, which denied defendant's motion for summary judgment. Affirmed.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Appeal—Remand—Right to Raise Question of Law Not Raised on Appeal—"Law of the Case"—Waiver and Estoppel.—A defendant was not estopped from urging, on remand, the applicability of a New York three-year statute of limitations, although (1) the defendant, in earlier proceedings before a trial court, had conceded, and the trial court had concluded, that "the Statute of Limitations of New York . . . is six years," and (2) the defendant, on an earlier appeal, had not urged the applicability of the New York three-year statute. While the problem involved is sometimes described as governed by "the law of the case,"

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the question was not one of overruling an earlier decision by another judge of the same court but, rather, whether the defendant was precluded by waiver and estoppel from contending that the action was barred by the three-year New York statute. Distinguishing a case in which a defendant had tardily presented a *factual* defense after the case had been tried on the merits, appealed, reversed, and remanded for a determination of the plaintiff's damages, the court noted that here the defendant's motion for summary judgment, based on the three-year New York statute of limitations, raised a question of *law* which, if sustained, would prevent any litigation on the merits of the plaintiff's cause. Under those particular circumstances, the defendant should not be estopped.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.45.

Private Enforcement and Procedure—Suit for Civil Damages—Statute of Limitations—Applicable Statute—Treble Damage Action Not One for "Penalty or Forfeiture."—In a treble damage action brought in a Federal District Court sitting in New York, the Federal four-year statute of limitations was not applicable because it was not enacted until several years after the action was commenced. In the absence of an applicable Federal statute of limitations, the Federal courts look to the statute of the forum. Therefore, the court was required to determine whether a New York six-year or three-year statute applied to the plaintiff's federally created cause of action. The six-year statute applies to actions "to recover upon a liability created by statute, except a penalty or forfeiture," while the three-year statute applies to actions "upon a statute for a penalty or forfeiture." The choice of the appropriate statute turned upon an interplay of Federal and state law. It was for the New York courts to determine what was meant by the word "penalty" in the New York three-year statute, but the purposes attributable to the Federal antitrust laws were governed by Federal law. The problem, as was stated in *Leonia Amusement Corp. v. Loew's Inc.*, 1953 Trade Cases ¶ 67,592, involved a determination, under Federal law, of the essential nature of a claim based on Section 4 of the Clayton Act, and a determination, under state law, of the statute of limitations which the New York courts would hold applicable to that type or class of claim. Applying those principles, the court concluded that the six-year New York statute was applicable, because (1) under Federal law, a suit for treble damages is one for civil damages that are exemplary *in part only*, and (2) the New York Court of Appeals does not regard an action of such character as one for a "penalty or forfeiture."

The court noted, however, that the issue as to the applicability of the New York statute would become moot if it were found that the action was barred in California (where the cause of action arose), and therefore barred in New York by virtue of a New York "borrowing" statute.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100.

For the plaintiff: Corcoran, Kostelanetz, Gladstone & Lowell (Boris Kostelanetz and Nick C. Spanos, of counsel).

For the defendant: Royall, Koegel, Harris & Caskey (John F. Caskey, Frederick W. R. Pride, and Charles F. Young, of counsel).

Affirming an order of the U. S. District Court, Eastern District of New York, 1958 Trade Cases ¶ 69,166. For a prior decision of the U. S. Court of Appeals for the Second Circuit, see 1957 Trade Cases ¶ 68,818; for prior opinions of the U. S. District Court, Eastern District of New York, see 1956 Trade Cases ¶ 68,308, 1954 Trade Cases ¶ 67,897 and 67,793, and 1952 Trade Cases ¶ 67,271.

Before: Swan, Hincks and Moore, Circuit Judges.

[*Treble Damage Action—Statute of Limitations*]

Swan, Circuit Judge [*In full text*]: National Theatres Corporation has appealed from an order which denied its motion for summary judgment in this action for treble damages under section 4 of the Clayton Act, 15 U. S. C. A. § 15. The motion was based on the ground that the New York three year statute of limitations, prescribed by § 49(3) of the Civil Practice Act, barred the action. Without reaching the merits

of the motion, Judge Zavatt denied it on the theory that defendant was precluded from relying on the three year statute by the doctrine of "the law of the case." His opinion is reported in [1958 TRADE CASES ¶ 69,166] 166 F. Supp. 805. Leave to appeal was granted under the Interlocutory Appeals Act, 28 U. S. C. A. § 1292(b).

[*Prior Proceedings*]

For an understanding of the matters to be subsequently discussed, it is desirable to give a brief statement of what had occurred in the case prior to the making of defendant's motion for summary judgment.

[*Accrual of Cause of Action*]

The complaint was filed in the court below on September 5, 1951. It alleged that plaintiff is a California corporation which owned and operated a theatre in Los Angeles until forced to dispose of it by reason of violations by defendant of the anti-trust laws. Concededly plaintiff's alleged cause of action arose in California and accrued no later than July 4, 1935—more than 16 years before the present action was commenced. Defendant's answer, filed December 26, 1951, pleaded three statutes of limitations: (1) The California three year statute, made applicable by New York's "borrowing statute," § 13 of the Civil Practice Act; (2) the New York three year statute, applicable to "An action upon a statute for a penalty or forfeiture where the action is given to the person aggrieved * * *," § 49(3) of the Civil Practice Act; and (3) the New York six year statute, applicable to "An action to recover upon a liability created by statute, except a penalty or forfeiture," § 48(2) of the Civil Practice Act.

In December 1955 a separate trial of defendant's limitation defenses in this case and in the companion case of *Gumbiner Theatrical Enterprises, Inc. v. National Theatres Corporation* [1956 TRADE CASES ¶ 68,308], was had before Judge Galston. In a brief submitted to him defendant stated:

> "If this court finds, as we believe it must, that the substantial and continuous business activities of National in California made it amenable to suit there, the three-year California statute is applicable by virtue of section 13 of the New York Civil Practice Act. Both claims would then be barred by the California statute without consideration of the questions whether the New York statute is six years or three years,* or whether the institution of *United States v. Paramount* on July 20, 1938, operated to toll the New York statute during some or all of the time it was pending."

It was in this setting that there was submitted to and adopted by Judge Galston the following conclusion of law:

> "Plaintiffs and defendant concede for the purposes of these cases, and the court concludes that the Statute of Limitations of New York, where these actions were instituted, is six years. Civil Practice Act of New York, Section 48."

[*Remand—Contention Not Urged on Appeal*]

However, his decision was that the California three year statute barred the actions. Accordingly he dismissed the complaints. His opinion is reported in [1956 TRADE CASES ¶ 68,308], 140 F. Supp. 909. On appeal this court reversed and remanded in the case of *Bertha Building Corporation* on the ground that the plaintiff was entitled to a jury trial of the issue raised by defendant's plea of the California statute, namely, whether defendant was suable there. *Bertha Building Corp. v. National Theatres Corp.* [1957 TRADE CASES ¶ 68,818], 248 F. 2d 833, 836, 841, cert. den. 356 U. S. 936. On the appeal the defendant did not urge the applicability of the New York three year statute. It was after the remand that defendant moved for summary judgment.

["*Law of the Case*"]

We agree with appellant that the doctrine of "the law of the case" does not preclude consideration of the merits of the motion. That doctrine was discussed at length in *Dictograph Products Company v. Sonotone Corporation*, 2 Cir. 230 F. 2d 131, and the rigidity of the rule expressed in *Commercial Union of America v. Anglo-South American Bank*, 2 Cir. 10 F. 2d 937 was expressly overruled. As explained in the *Dictograph* case, even when an issue has been decided by a district judge, another judge of the same court may nevertheless come to a different conclusion. Since Judge Galston decided that the Cali-

* "We concede that the cases seem to hold that the New York statute is six years * * *"

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fornia statute was a bar, he had no need to consider whether the three year or six year New York statute was applicable in the case of *Bertha Building Corporation,* and appellant's concession before him that the six year statute applied should not be regarded as conclusive in the motion subsequently brought on before Judge Zavatt. However, the doctrine of the law of the case, in the sense discussed in the *Dictograph* opinion, does not really fit these circumstances. The question is not one of overruling an earlier decision by another judge of the same court.

[*Waiver and Estoppel*]

The question presented is really whether defendant is precluded by waiver and estoppel from contending that the action is barred by the three year New York statute of limitations. This question involves the public policy against piecemeal litigation and the timeliness of the motion. The problem is sometimes described as governed by "the law of the case." It was so described in *Sorensen v. Pyrate Corporation,* 9 Cir. 65 F. 2d 982, 984-5. Judge Zavatt cited that case in support of his conclusion that

> "The defendant should not now be permitted to ground a motion for summary judgment upon a contention which might have been presented, and which is contrary to its concession upon the trial and the appeal."

The *Sorensen* case is distinguishable. There, after trial on the merits and an appeal, in which the judgment was reversed and the cause remanded for determination of the plaintiff's damages, the defendant tried to plead that the contract was void because of the plaintiff's fraud—a defense which might have been raised when the case was tried on the merits. The court held that the law of the case precluded the tardy presentation of such factual defense. Here, defendant's motion raises a question of law only which, if sustained, would prevent the necessity of a jury trial on the suability of defendant in California as well as any litigation on the merits of plaintiff's cause. Under the particular circumstances of this case, we do not think that the defendant should be estopped. Cf. *Emich v. General Motors Corp.* [1956 Trade Cases ¶ 68,249], 7 Cir., 229 F. 2d 714, 718. Plaintiff has cited no authority for estopping a party from raising a question of law under such circumstances.

[*Applicable State Statute*]

We now pass to a consideration of the merits of the motion. The present federal statute of limitations, 15 U. S. C. A. § 15 (b), is not applicable because it was enacted several years after the present action was brought. In the absence of an applicable federal statute of limitations, federal courts look to the statute of the forum.[1] Hence we must ascertain whether, if it shall be found that the three year California statute has been tolled,* the six year or three year New York statute applies to plaintiff's federally created cause of action. The choice of the appropriate New York statute turns on an interplay of federal and state law. Whether the three year or six year statute is to be applied by the federal court, the latter must accept the statutes as construed and interpreted by the New York courts. It is for them to determine what is meant by the word "penalty" in the three year statute. But the purposes attributable to the federal anti-trust laws must be governed by federal law. Accordingly, to determine whether a suit for treble damages under section 4 of the Clayton Act has the characteristics of actions encompassed by the three year New York statute federal decisions must be examined. The problem was well stated by Judge Ryan in *Leonia Amusement Corp. v. Loew's Inc.* [1953 Trade Cases ¶ 67,592], (S. D. N. Y.), 117 F. Supp. 747 at 752.[2] See also *Rawlings v. Ray,* 312 U. S. 96, 98.

["*Penalty*"]

Considered in the light of these principles, the Supreme Court's decision in *Chattanooga Foundry and Pipe Works v. Atlanta,* 203 U. S. 390, is not decisive of this case. There the Supreme Court held that an action for

[1] *Chattanooga Foundry & Pipe Works v. Atlanta,* 203 U. S. 390, 397; *Cope v. Anderson,* 331 U. S. 461, 463.

* Unless it shall be found that the California statute has been tolled, it will be applicable under the New York borrowing statute and whether the three year or six year New York statute would otherwise be applicable will become moot for purposes of this case.

[2] "The problem, therefore, is two-fold: (a) what in federal law is the essential nature of a claim arising under Section 4 of the Clayton Act as amended [15 U. S. C. A. § 15]; and (b) what New York statute of limitations would the New York courts hold applicable to this type or class of claim."

treble damages under the anti-trust laws was not an action for a penalty within the meaning of the federal statute of limitations for penal suits.[3] But the word "penalty" in a federal statute has a different meaning than the same word in the New York statute. The federal statute of limitations for penal actions applies only to actions on behalf of the United States and *qui tam* actions. *Huntington v. Attrill,* 146 U. S. 657, 668, 673. The New York three year statute by its express terms applies to actions "by the person aggrieved" and thus, unlike the federal statute, applies to private actions. *Huntington v. Attrill,* 146, *supra,* 677-78.

[*New York Decisions*]

After an extensive review of New York decisions, Judge Ryan concluded that the New York three year statute did not apply to private suits for damages which are exemplary in part but not wholly unrelated to actual loss. Accordingly, he held on the basis of appropriate federal decisions, that the six year New York statute and not its three year statute was applicable to an action for treble damages under the anti-trust laws. Four years later in *Banana Distributors v. United Fruit Company* [1957 TRADE CASES ¶ 68,881] (D. C. S. D. N. Y.), 158 F. Supp. 160, after a thorough review of authorities, Judge Levet concluded that the three year statute should be applied.[4]

Both this appeal and the appeal in *Banana Distributors* have been ably argued with extensive citation of authorities. We have examined these cases but do not find it necessary here to discuss them. Whatever doubt might have been entertained prior to the Court of Appeals decision in *Sicolo v. Prudential Savings Bank of Brooklyn,* 5 N. Y. 2d 254, decided subsequent to Judge Levet's decision, that decision makes it plain that *Leonia* correctly anticipated the trend of New York law. Sicolo, a member of the New York City Fire Department, was injured on December 23, 1951 while helping to put out a fire in a building owned by the Prudential Savings Bank of Brooklyn. More than four years after the accident he filed an amended complaint based on § 205a of the General Municipal Law. That statute provides in substance that the injured fireman was entitled to recover his actual damages, but in no event less than $1,000, regardless of actual loss.[5] The defendant moved to dismiss the action because it was not begun within three years from the accrual of the action. The Court of Appeals said that the question for decision was whether the three year limitation of § 49(3) of the Civil Practice Act or the six year limitation of § 48(2) was applicable. After reviewing numerous authorities, both state and federal, it held that the action was not one for a "penalty or forfeiture" and that the six year statute applied. The views expressed therein and the treatment of the cases cited make it plain that the New York Court of Appeals does not regard actions for civil damages which are made exemplary in part only, as falling within § 49(3). A suit for treble damages under the anti-trust laws is plainly of this character.

[*Three Year Statute Applicable*]

Accordingly, the six year and not the three year New York statute is applicable to anti-trust actions brought in a federal court sitting in New York, at least unless under New York's "borrowing statute" a shorter period of limitations is applicable under the law of the State where the cause of action arose. The denial of the motion for summary judgment was correct and the order is affirmed on this ground.

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[3] At the time of the *Chattanooga* decision section 1047 of the Rev. Stat. provided a five year limitation on any "suit for a penalty or forfeiture * * * accruing under the law of the United States." That limitation is now embodied in 28 U. S. C. A. § 2462 which applies to "an action * * * for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise."

[4] This case is pending on appeal and the decision therein will be handed down herewith [1959 TRADE CASES ¶ 69,445].

[5] So far as material this section provided: "* * * in the event any accident, causing injury * * *, occurs directly or indirectly as a result of any neglect, omission, wilful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments * * *, the person or persons guilty of said neglect * * * shall be liable to pay any officer, member, agent or employee of a fire department injured * * * while in the discharge or performance of any duty imposed by the * * * superior officer of the fire department * * * not less than one thousand dollars * * * such liability to be determined and such sums recovered in an action by any person injured * * * as aforesaid."

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[¶ 69,445] Banana Distributors, Inc. v. United Fruit Company and Fruit Dispatch Company.

In the United States Court of Appeals for the Second Circuit. No. 289—October Term, 1958. Docket No. 25457. Argued May 12, 1959. Decided August 24, 1959.

Cross-appeals from an interlocutory order of the United States District Court for the Southern District of New York, Hon. Richard H. Levet, Judge, involving rulings as to the applicable statute of limitations in an action for treble damages under section 4 of the Clayton Act, 15 U. S. C. A. § 15. Reversed and Remanded.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Defenses—Statute of Limitations—Applicable Statute—Test as to Whether Defendant "Without the State" Under State Tolling Provision.—In a treble damage action brought in a Federal District Court in New York, on a cause of action that arose in Connecticut, the Connecticut statutes of limitation were applicable by virtue of a New York "borrowing statute." The Connecticut statutes were not "tolled," under a Connecticut statute excluding periods in which defendants are "without the state," because the defendant was "transacting business" in Connecticut and was, therefore, subject to suit there under Section 12 of the Clayton Act. The purpose of that tolling statute is "to preserve the right of action during the absence of the defendant when it was impossible to serve him with process." Here, under Section 12 of the Clayton Act, the action could have been filed in a Federal court in Connecticut and process could have been served on the defendants in another district. Thus, it was consonant with the purpose of the Connecticut tolling statute to hold that, as a matter of Connecticut law, the state's statute of limitations was not suspended where the defendant was subject to suit in Connecticut under Section 12 of the Clayton Act.

Regardless of how the Connecticut courts would decide the question, the present court would hold, as a matter of Federal law, that in a suit to enforce a Federal claim, the existence of a Federal statute rendering the defendant subject to suit in Connecticut precluded the adoption of "state service of process rules" to determine whether the defendant was "without the state" within the meaning of a state tolling statute. State law may not be adopted where it supplants or conflicts with existing Federal law.

The court refused to grant a directed verdict in favor of another defendant, the corporation's "parent," since the evidence was conflicting as to whether its subsidiary was "transacting business" in Connecticut as its agent or as an independent contractor.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.150, 9010.100, 9010.200.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Defenses—Statute of Limitations—Applicable State Statute.—For reasons set out in *Bertha Building Corp. v. National Theatres Corp.*, 1959 Trade Cases ¶ 69,444, a Federal appellate court reversed a trial court's ruling that a New York three-year statute of limitations, covering any action upon a statute for a penalty or forfeiture, rather than a New York six-year statute of limitations, covering any action to recover upon a liability created by statute (except a penalty or forfeiture), was applicable to a private treble damage antitrust action brought in a Federal District Court in New York. However, the question as to the applicable New York statute was rendered moot, as to one of the defendants, by the court's finding that the Connecticut statutes of limitations (the cause of action arose in Connecticut) controlled the case against it. As to another defendant, the applicability of the Connecticut statutes was yet to be determined.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Proper Judicial District—Where Suit May Be Brought—"Transacting Business"—Instructions to Jury.—A Delaware corporation which solicited orders for the purchase of bananas in Connecticut and maintained a permanent office there, staffed with personnel

who (1) collected the proceeds of local sales, (2) maintained local bank accounts, (3) received and investigated claims by local purchasers, (4) arranged for customers to use the trademark of the corporation's "parent," and (5) arranged for the service departments of the corporation's jobbers and dealers to provide customers with technical and promotional assistance was "transacting business" in Connecticut within the meaning of Section 12 of the Clayton Act. The test of venue under that section is "the practical, every-day business or commercial concept of doing business or carrying on business 'of any substantial character' . . . ." Technical criteria, such as "mere solicitation" or "solicitation plus," are not determinative. Thus, a trial court which told a jury that "the mere solicitation of business and the mere presence of a soliciting agent of a foreign corporation will not suffice to bring the corporation within the terms of 'doing business' and to make it present in the state so as to subject it to process" defined "transacting business" to require a greater degree of business conduct than that demanded by the Clayton Act.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210, 9014.35.

For the plaintiff: Austin, Burns, Appel & Smith, New York, N. Y. Of counsel: Arnold, Fortas & Porter, Washington, D. C. (Thurman Arnold, Abe Krash and Stuart J. Land); Robert E. Nickerson, Greenwich, Conn.; Blackwell Smith, New York, N. Y.; and Ernest Leff, Colchester, Conn.

For the defendants: Davis, Polk, Wardwell, Sunderland & Kiendl, New York, N. Y. Of counsel: Theodore Kiendl, Ralph M. Carson, Edwin J. Jacob, and Hal F. Reynolds.

Reversing and remanding an order of the U. S. District Court, Southern District of New York, pursuant to 1957 Trade Cases ¶ 68,881. For prior opinions of the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 69,057; 1957 Trade Cases ¶ 68,876; 1956 Trade Cases ¶ 68,532, 68,446, 68,445, and 68,343; and 1955 Trade Cases ¶ 68,232.

Before: SWAN, HINCKS and MOORE, Circuit Judges.

[*Appeals*]

SWAN, Circuit Judge [*In full text*]: This is an appeal by plaintiff and cross-appeal by defendants from different paragraphs of an interlocutory order entered October 14, 1958 which involved rulings with respect to the statute of limitations applicable in this action for treble damages under § 4 of the Clayton Act. Leave to appeal was granted to both parties under the recently enacted Interlocutory Appeals Act, 28 U. S. C. A. § 1292(b).

Plaintiff, a Connecticut corporation, was engaged in the business of selling in that state bananas purchased from defendants. Defendant United Fruit Company, a New Jersey corporation, is a producer of bananas grown in Central and South America and transported by vessel to the United States. Defendant Fruit Dispatch Company, a Delaware corporation, is a wholly owned subsidiary of United Fruit and is the importer and distributor of United Fruit's bananas. On September 3, 1953 plaintiff filed its complaint in the Southern District of New York, alleging violations by defendants of the federal anti-trust laws from 1946 to the date of suit and seeking recovery of treble damages. Concededly plaintiff's cause of action, if any, arose in Connecticut.

[*Statutes of Limitations*]

There being no applicable federal statute of limitations,[1] it was conceded that the federal courts look to the New York statutes of limitation. See *Bertha Building Corp. v. National Theatres Corp.* [1959 TRADE CASES ¶ 69,444] filed herewith. Pursuant to the so-called "borrowing statute" of New York, section 13 of the Civil Practice Act,[2] defendants pleaded the Connecticut one year statute[3] and in the alternative the three year statute.[4] Defendants also pleaded the three year New York statute of § 49(3) Civil Practice Act and in the alternative

[1] The federal statute, 15 U. S. C. A. § 15(b), was not enacted until July 1955.

[2] Section 13 Civil Practice Act provides: "Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of this state or of the state or country where the cause of action arose * * *"

[3] Conn. Gen. Stats. § 8325.

[4] Conn. Gen. Stats. § 8316.

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the six year statute of § 48(2) Civil Practice Act. In December 1957 a preliminary jury trial was held in accordance with the opinion in *Bertha Building Corp. v. National Theatres Corp.* [1957 TRADE CASES ¶ 68,818], 2 Cir. 248 F. 2d 833, cert. den. 356 U. S. 936, to determine whether the defendants were "without the state" of Connecticut, as contended by plaintiff, during each of the six years preceding the commencement of this action.

The Connecticut tolling statute provides that the time during which a defendant is "without the state" shall be excluded in computing the Connecticut period of limitations.[5] Judge Levet ruled that the "transacting business test" of section 12 of the Clayton Act, 15 U. S. C. A. § 22, was not applicable to the issue of whether defendants were "without the state" for purposes of the Connecticut tolling provision. Judge Levet's opinion embodying that ruling is reported in [1957 TRADE CASES ¶ 68,876] 158 F. Supp. 153. The jury's verdict on the preliminary trial found that both defendants were without the state of Connecticut during the entire period in question.

Following the preliminary jury trial, Judge Levet filed an opinion, reported in [1957 TRADE CASES ¶ 68,881] 158 F. Supp. 160, holding that the applicable statute of limitations is the three year limitation prescribed by § 49(3) Civil Practice Act rather than the six year period of § 48(2), as claimed by plaintiff. This ruling precluded plaintiff from recovering any damages for the period prior to September 3, 1950. A jury trial was then had on the merits of plaintiff's cause. When the jury was unable to agree on a verdict, a mistrial was declared and a new trial ordered. For the purposes of this new trial, pursuant to Rule 16 of the Fed. Rules Civ. Proc., Judge Levet entered the order which is before us on appeal. His ruling on the New York statute of limitations is set out in the first paragraph of this order and plaintiff's appeal challenges its correctness. For the reasons stated in our opinion in *Bertha Building Corp. v. National Theatres Corp.* [1959 TRADE CASES ¶ 69,444], filed herewith, Judge Levet's ruling that the New York three year statute rather than the New York six year statute is applicable if the Connecticut statutes of limitation are tolled, must be reversed.*

[*Issues*]

Defendants' appeal challenges the second and third paragraphs of the aforesaid order. The second paragraph incorporates Judge Levet's ruling as to the non-applicability of the "transacting business" test of section 12 of the Clayton Act. The third paragraph denied defendants' several motions to set aside the jury's verdict in the preliminary trial as contrary to the weight of the evidence and contrary to law, and for a directed verdict n.o.v.

[*Tolling of Statute*]

On the defendants' appeal it is necessary to construe the Connecticut tolling statute in order to determine as to each defendant whether the pertinent Connecticut statute of limitations has been tolled; if so the pertinent New York statute will be applicable. The first question presented is the correctness of Judge Levet's ruling that the defendants' presence in Connecticut for purposes of applying the Connecticut tolling statute is to be measured by whether they were sufficiently transacting business there to sustain service of process upon them under the law of Connecticut rather than by whether they were transacting business there under the broader standards of section 12 of the Clayton Act which govern the propriety of venue in a federal anti-trust suit.[6] This section of the Clayton Act was considered at length in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359. At pages 372-373 the opinion states:

> "And we think it clear that, as applied to suits against corporations for injuries sustained by violations of the Anti-Trust Act, its necessary effect was to enlarge

[5] Conn. Gen. Stats. § 8330.

* The pertinent New York statute will become applicable only if a shorter Connecticut statute has been tolled. As we hold in a later part of this opinion, the defendant Fruit Dispatch is entitled to a ruling, by way of a directed special verdict in the trial of the limitations issue, that as to it the Connecticut statute has not been tolled. Consequently the case against it will be controlled by the pertinent Connecticut statute.

[6] 15 U. S. C. A. § 22 reads as follows: "§ 22. District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

the local jurisdiction of the district courts so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is 'found,' but also in any district in which it 'transacts business'—although neither residing nor 'found' therein—in which case the process may be issued to and served in a district in which the corporation either resides or is 'found'; and, further, that a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character. * * *"

"We are further of opinion that a corporation is none the less engaged in transacting business in a district, within the meaning of this section—which deals with suits respecting unlawful restraints upon interstate trade—because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district. * * *"

And at page 374, the court added:

"To construe the words 'or transacts business' as adding nothing of substance to the meaning of the words 'or is found,' as used in the Anti-Trust Act, and as still requiring that the suit be brought in a district in which the corporation resides or is 'found,' would to that extent defeat the plain purpose of this section and leave no occasion for the provision that the process might be served in a district in which the corporation resides or is found. And we find nothing in the legislative proceedings leading to its enactment which requires or justifies such a construction."

See also *United States v. Scophony Corp.* [1948-1949 TRADE CASES ¶ 62,238], 333 U. S. 795, 807-808; *United States v. National City Lines* [1948-1949 TRADE CASES ¶ 62,259], 334 U. S. 573, 583.

It seems clear, therefore, that plaintiff could have filed its complaint in the federal court in Connecticut, if the defendants were "transacting business" there within the meaning of that phrase as construed in the *Eastman Kodak* decision, and could have had process served upon them in another district. Plaintiff, however, contends that Connecticut would nevertheless hold that the running of its statutes of limitations was suspended because under Connecticut law the defendants could not have been served with process.

[*Controlling Law*]

Since an action for treble damages under the anti-trust laws can be brought only in a federal court, there is of course no Connecticut decision which decides the precise point in issue here. The purpose of the Connecticut tolling statute, however, as clearly stated in *Dorus v. Lyon,* 92 Conn. 55, 57, 101 A. 490, 491 is "to preserve the plaintiff's right of action during a period when, by reason of the defendant's absence, it was impossible to commence an action *in personam* against the defendant." Accord *Sage v. Hawley,* 16 Conn. 106, 114-115. Although it is stated in *Clegg v. Bishop,* 105 Conn. 564, 136 A. 102, 104, that the object of the tolling statute is "to preserve the right of action during the absence of the defendant when it was impossible to serve him with process" we cannot regard that statement as supporting the plaintiff's position here. In the *Clegg* case, unlike the present case, service of process was required to subject the defendant to suit in Connecticut.

Consequently, we think it consonant with the purpose of the Connecticut tolling statute to hold that as a matter of Connecticut law the state's statutes of limitations were not suspended if the defendants were subject to suit in Connecticut under section 12 of the Clayton Act. Certainly we cannot see that any discernible policy of the Connecticut tolling statute or of the state would be furthered by holding otherwise. See *Bauserman v. Blunt,* 147 U. S. 647, 657, wherein the court said:

"In the absence of express statute or controlling adjudication to the contrary, two general rules are well settled * * * 2d. The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."

See also *Bertha Building Corp. v. National Theatres Corp.* [1957 TRADE CASES ¶ 68,818], 248 F. 2d 835, 836; *Hansen Packing Co. v. Swift & Co.* (S. D. N. Y.), 27 F. Supp. 364.

However, we need not rest our holding here entirely on our view of how the Connecticut courts would decide this question

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if it could come before them. Even should the plaintiff's interpretation of Connecticut law be correct, we would nevertheless be constrained to hold as a matter of federal law that in a suit to enforce a federal claim, the existence of a federal statute rendering the defendant subject to suit in Connecticut precludes the adoption of state service of process rules to determine whether the defendant was without the state within the meaning of a state tolling statute. Cf. *Rawlings v. Ray,* 312 U. S. 96, 98 (1941); *Bomar v. Keyes,* 2 Cir. 162 F. 2d 136, 141; cf. also *Ragan v. Merchant's Transfer & Warehouse Co.,* 337 U. S. 530, 533 (1948). While state law may be adopted by federal law where Congress has not spoken, in order to fill the interstices of federal enactments, it may not be adopted where it supplants or conflicts with existing federal law. Cf. *Holmberg v. Armbrecht,* 327 U. S. 392.

[*"Transacting Business"*]

Plaintiff argues that the question whether the jury should have been instructed with respect to the "transacting business" test of the Clayton Act is moot, because Judge Levet, despite his opinion rejecting that test, in fact charged the jury to find the defendants present if they believed the defendants "transacted business with a fair measure of permanence and continuity" within the state. But a reading of the full charge makes plain that he defined "transacting business" to require a greater degree of business conduct within the state than that demanded by the Clayton Act. For example, the jury was told that

> "the mere solicitation of business and the mere presence of a soliciting agent of a foreign corporation will not suffice to bring the corporation within the terms of 'doing business' and to make it present in the state so as to subject it to process."

This plainly was an inadequate exposition of the test of "transacting business" as expounded in *Eastman Kodak v. Southern Photo Materials Co., supra; United States v. Scophony Corp., supra;* and *United States v. National City Lines, supra.* Technical criteria such as "mere solicitation" or "solicitation plus" are not determinative under section 12. The test of venue under section 12 is

> "the practical, every-day business or commercial concept of doing business or carrying on business 'of any substantial character' * * *"

United States v. Scophony Corp. at page 807.

It is undisputed on this record that Fruit Dispatch solicited orders in Connecticut and performed other acts of business there.[1] Obviously, during the period in issue Fruit Dispatch was transacting business there within the meaning of section 12 of the Clayton Act. In our opinion it was entitled to a directed verdict that the Connecticut statute of limitations was not tolled as to it.

[*Agency*]

The remaining question with respect to the Connecticut tolling statute is whether Fruit Dispatch transacted business in Connecticut in the capacity of an agent of United Fruit and therefore made the latter equally amenable to suit within the state under section 12 of the Clayton Act. See *United States v. Scophony* [1948-1949 Trade Cases ¶ 62,238], 333 U. S. 795; *Waldron v. British Petroleum Co., Ltd.* [1957 Trade Cases ¶ 68,653], 149 F. Supp. 830 (S. D. N. Y.); *Rayco v. Chicoppee Manufacturing Corp.,* 148 F. Supp. 588 (S. D. N. Y.); *United States v. Watchmakers of Switzerland, Inf. C.* [1955 Trade Cases ¶ 68,096], 133 F. Supp. 40 (S. D. N. Y.). The jury's verdict that United Fruit was not present in Connecticut cannot stand because of the improper instruction regarding the test of transacting business. Since the jury found under the improper charge that Fruit Dispatch was not doing business in Connecticut it was rationally compelled to find that United Fruit was equally not present in the state. Therefore no finding may be attributed to the jury on the question of whether Fruit Dispatch transacted business in Connecticut as an agent of United Fruit.

[1] Fruit Dispatch maintained a permanent office in Hartford, Connecticut, whose personnel: (1) annually solicited orders for $2,500,000. to $3,000,000. worth of bananas and forwarded these orders to Fruit Dispatch's New York office for acceptance or rejection, (2) collected the proceeds of Connecticut sales and deposited them in bank accounts maintained in Connecticut by Fruit Dispatch for the purpose or regularly transmitting the funds to New York, (3) received and investigated claims by Connecticut purchasers and forwarded them to New York for determination, (4) arranged for customers to use United Fruit's trademark, and (5) arranged for Fruit Dispatch's jobbers and dealers service departments to provide customers with technical and promotional assistance.

Defendant United Fruit contends that under a proper test it is entitled to a directed verdict that it was present in Connecticut. At the preliminary trial officers of both defendant corporations testified about various managerial functions of Fruit Dispatch, including the price at which it sold bananas, which were supervised or controlled by officers of United Fruit during the period in issue. In rebuttal, plaintiff relied on two documents which it maintains showed that Fruit Dispatch acted as an independent contractor and not as an agent of United Fruit and contends that it is entitled to a directed verdict in its favor as against United Fruit. In our opinion the record does not justify a directed verdict for the plaintiff or United Fruit. See *Bertha Building Corp. v. National Theatres Corp.* [1957 TRADE CASES ¶ 68,818], 2 Cir. 248 F. 2d 833, 835.

[*Reversed and Remanded*]

Both on plaintiff's and the defendants' cross-appeals the judgment must be reversed and the cause remanded for further proceedings not inconsistent with the foregoing opinion. It is so ordered.

[¶ 69,446] Charles Lawlor and Mitchell Pantzer, co-partners, trading as Independent Poster Exchange v. National Screen Service Corporation, Warner Bros. Pictures Distributing Corp., Columbia Pictures Corp., Loew's Incorporated, RKO Radio Pictures Inc., 20th Century Fox Film Corporation, United Artists Corp., Universal Film Exchanges, Inc., Paramount Film Distributing Corp.

In the United States Court of Appeals for the Third Circuit. No. 12,793. Argued May 27, 1959. Filed August 27, 1959.

On Appeal from the United States District Court for the Eastern District of Pennsylvania. C. WILLIAM KRAFT, JR.

Sherman Antitrust Act

Monopolization—Exclusive Manufacturing and Distribution Agreements—Accumulation of Copyright Licenses—Parallel Action in Selection of Licensee—Motion Picture Advertising Accessories.—Exclusive licenses under which motion picture producers and distributors granted to a manufacturer-distributor the right to manufacture and distribute their motion picture advertising accessories were not invalid *per se* under the antitrust laws; therefore, a trial court's dismissal of a company's action charging that it was injured in its business of leasing such accessories to motion picture exhibitors was affirmed. Exclusive agreements are not *per se* violative of the antitrust laws and are permitted in circumstances where the facts disclose a course of conduct and reasonableness of action not prohibited by the antitrust laws.

Standard motion picture advertising accessories created and manufactured for one picture could only be used in connection with that picture; therefore, they were not competitive articles. Each of the motion pictures was copyrighted, and the license agreements required the manufacturer-distributor to manufacture such accessories utilizing scenes and incidents from these pictures. The copyright law confers upon the owner of the copyright a limited monopoly and, as an incident thereof, confers upon the owner the right to license others. Such a license may be exclusive, and, if so, it grants the right to exclude others. Copyrights cannot be used to deter competition, or to extend the monopoly, or to break down competition in other areas; however, in the instant case, the articles which were licensed for manufacture and distribution were noncompetitive in nature and, therefore, no mere increase in the number of licenses obtained by one individual accomplished a restraint upon trade or limitation in the source of supply. The mere accumulation of copyright licenses is not in and of itself illegal. On the basis of the record, the accumulation of copyright licenses by the manufacturer-distributor was not used for improper purposes.

Each of the motion picture producers and distributors had the right to choose the person with whom it wished to deal, and the use by competitive units of the same distributor is not necessarily a limitation on their competition. Furthermore, while a conspiracy may be established by a showing of adherence to concerted action which has been contemplated

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or invited, the plaintiff-company failed to show any arrangement, plan, or scheme among the motion picture producers and distributors. The evidence showed that they, acting independently, as a result of substantial losses in their accessory business, decided to license an outsider to perform that phase of their business. They contracted with the manufacturer-distributor because no comparable firm was available to undertake the task. The most that could be said was that the business climate affected each of the motion picture companies in a substantially similar way, and they individually decided to extricate themselves from a losing proposition. Also, it was found that a settlement agreement in a prior suit was entered into voluntarily by the company. Under that agreement, the manufacturer-distributor granted the company sublicenses.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360; Monopolies, Vol. 1, ¶ 2530.16, 2540.12, 2580, 2610.304, 2610.500, 2610.554.

Private Enforcement and Procedure—Suit for Damages and Injunctive Relief—Proof of Damages—Injury to Nonexisting Business—Demand to Engage in Business.—A trial court finding that a company engaged in the business of leasing standard motion picture advertising accessories to motion picture exhibitors suffered no damage or injury to its business or property as a result of exclusive licenses, under which motion picture producers and distributors granted to a manufacturer-distributor the right to manufacture and distribute advertising accessories, was upheld on review. It was contended that specialty accessories, as distinguished from standard accessories, formed a large part of the business of the manufacturer-distributor, and that such accessories were not made available to the company. Admitting that it never participated in the specialty accessory rental business, the company attributed this inactivity to the fact that such accessories had been obtainable only from the manufacturer-distributor. However, the company did not show that the manufacturer-distributor refused to supply such accessories, and the evidence established that the company never held itself out as a renter of specialty accessories.

Also, the company never attempted to obtain from any of the motion picture companies licenses under which it would manufacture accessories, and it expressly stated that it did not desire such licenses. In the absence of such demand upon the part of the company, there can be no recovery in an antitrust action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011, 9011.350.

Private Enforcement and Procedure—Suit for Damages and Injunctive Relief—Appeal and Error—Trial Court's Findings of Fact.—The contention that a trial court's findings of fact were erroneous because the court allegedly accepted many of the findings proposed by the defendants was rejected. The reviewing court was asked to accept the plaintiffs' version of the facts and, in effect, to ignore the trial court's findings, that is, to try the case *de novo*. For "triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions." Rule 52 of the Federal Rules of Civil Procedure directs the reviewing court not to set aside findings of fact unless clearly erroneous. Where the evidence would support a conclusion either way, a "choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" Furthermore, even the plaintiffs did not contend that the trier of fact uncritically adopted all of the defendants' tendered findings of fact nor could they deny that a substantial number of the findings were uncontested.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.80.

For the appellants: Francis T. Anderson, Philadelphia, Pa.

For the appellees: Louis Nizer, New York, N. Y., for Natl. Screen Service Corp.; Louis J. Goffman, Philadelphia, Pa., for Warner Bros. Pictures Distributing Corp.; and W. Bradley Ward, Philadelphia, Pa., for Columbia Pictures Corp., Loew's Inc., Paramount Film Distributing Corp., RKO Teleradio Pictures, Inc. (formerly RKO Radio Pictures, Inc.), TCF Film Corp. (formerly Twentieth Century-Fox Film Corp.), United Artists Corp., and Universal Film Exchanges, Inc.

For a prior decision of the U. S. Supreme Court, see 1957 Trade Cases ¶ 68,630, vacating a decision of the U. S. Court of Appeals, Third Circuit, 1956 Trade Cases ¶ 69,446

¶ 68,509, reversing decisions of the U. S. District Court, Eastern District of Pennsylvania, 1950-1951 Trade Cases ¶ 62,919 and 1955 Trade Cases ¶ 68,122. For a prior opinion of the U. S. Supreme Court, see 1955 Trade Cases ¶ 68,061, reversing U. S. Court of Appeals, Third Circuit, 1954 Trade Cases ¶ 67,709, which affirmed U. S. District Court, Eastern District of Pennsylvania, 1953 Trade Cases ¶ 67,619; for prior opinions of the U. S. District Court, Eastern District of Pennsylvania, see 1955 Trade Cases ¶ 68,217, 68,216, and 1950-1951 Trade Cases ¶ 62,760, 62,603.

Before GOODRICH, KALODNER and STALEY, Circuit Judges.

Opinion of the Court

[*Prior Proceedings*]

By STALEY, Circuit Judge, [*In full text*]: In this long-protracted litigation, plaintiffs Charles Lawlor and Mitchell Pantzer seek injunctive relief and money damages pursuant to Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26, averring violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2.

The plaintiffs, in 1942, instituted a treble-damage suit, also praying an injunction, against National Screen Service Corporation and three of the eight producers who are defendants in the present action. By stipulation of the parties the suit was dismissed with prejudice on April 21, 1943. On August 18, 1949, the present complaint was filed seeking an injunction and treble damages for the period from 1943 to 1949. In 1951 Judge McGranery granted plaintiff's motion for summary judgment as against National Screen, but a final decree was never framed. Thereafter, in 1953, Judge Kirkpatrick granted defendants' motion to dismiss on the grounds that the 1943 judgment was res judicata of this claim. This court affirmed the judgment, [1954 TRADE CASES ¶ 67,709] 211 F. 2d 934 (C. A. 3, 1954). The Supreme Court reversed, [1955 TRADE CASES ¶ 68,061] 349 U. S. 322 (1955), and remanded the case. Chief Judge Kirkpatrick thereupon entered summary judgment against National Screen and upon review this court reversed, [1956 TRADE CASES ¶ 68,509] 238 F. 2d 59 (1956). Certiorari was granted and the Supreme Court vacated the judgments and remanded the cause to the district court for trial, [1957 TRADE CASES ¶ 68,630] 352 U. S. 992 (1957).

The case was then tried to the court, without a jury, and after a lengthy trial the court concluded that none of the defendants had violated the antitrust laws. The district court made 140 findings of fact and 12 conclusions of law. Based upon the foregoing, the court entered a formal order on October 31, 1958, dismissing the action as to all defendants, and the plaintiffs appealed. In effect the trial court held that plaintiffs had failed to sustain their burden of proof. For the plaintiffs to succeed on this appeal they must show that erroneous legal tests were applied to essential findings of fact or that the findings themselves were clearly erroneous within Rule 52(a) of the Federal Rules of Civil Procedure. *United States v. E. I. duPont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377 (1956).

[*Advertising Accessories*]

This case involves a field of endeavor collateral to the distribution and exhibition of motion picture films, the distribution of motion picture advertising accessories. These accessories consist primarily of lithographed posters containing photographs of scenes from the pictures which they are intended to advertise, and other articles for theater lobby and billboard display in and about motion picture theaters.[1] They are designed to stimulate public attendance at the current or future exhibition of the particular motion picture for which they are created.

[*Parties*]

Plaintiffs, as partners trading under the name of Independent Poster Exchange, have been engaged since 1940 in the business of leasing standard accessories to motion

[1] Traditionally certain types of accessories have become known in the film industry as "standard accessories." The standard accessories involved in this case are:
(a) 8 × 10 inch "stills" (black and white photographs);
(b) 11 × 14 inch lobby displays;
(c) 22 × 28 inch lobby displays;
(d) 14 × 36 inch insert cards;
(e) one sheet;
(f) three sheets;
(g) six sheets;
(h) twenty-four sheets.
Additional accessories of varied sizes and shapes have been conceived and used in the industry and have become generally known as "specialty accessories."

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picture exhibitors in the Philadelphia motion picture area (comprising eastern Pennsylvania, southern New Jersey, and Delaware). Defendant National Screen, during part of the period covered by this suit, was engaged, among other things, in the business (a) of distributing to exhibitors advertising accessories for motion pictures of some producers; and (b) of creating, manufacturing and distributing such accessories of other producers; and for part of the period in suit (c) of creating, manufacturing and distributing such accessories of all of the producers or distributors alleged here to be involved. The other defendants are the eight major American motion picture distributors, hereinafter referred to as the film companies.[2]

[*Standard Accessories*]

Inasmuch as motion pictures are dependent in great measure upon effective advertising for their success, the film companies necessarily expend large amounts of money for that purpose. The direct interest of the motion picture distributors in the results of this advertising is pointed up by the fact that the pictures are at times licensed at a rental based upon a percentage of box office receipts. Among the numerous means of advertising employed in such promotions are the local pin-point advertising by the exhibitors which includes standard accessories. The court found that regular use by exhibitors of such accessories is one of the essential means of obtaining maximum attendance at and revenue from the exhibition of motion pictures; however, the degree to which they are responsible for motion picture patronage is not established.

Standard accessories have been in use for many years and, historically, the general practice had been for the motion picture company to design and manufacture the various types of accessories and distribute them to exhibitors through the company's branch offices or exchanges. As standard accessories cannot be used for any motion picture other than the one for which they are created, and as it is impossible to predict accurately the future success of a motion picture and therefore the quantity of accessories that will be required, there is an obsolescence risk that varies from item to item.

[*Poster Renters*]

As it is a practice in the industry to exhibit feature motion pictures in a number of theaters on successive runs, the same accessories may be repeatedly used by different exhibitors. This fact resulted in the appearance upon the business scene of what came to be known as "poster renters." These individuals or organizations were unconnected with any producer or distributor of motion pictures, but rather obtained supplies of standard accessories and rented them to exhibitors for use with the particular picture being exhibited. The supplies were originally obtained by purchase from the film companies' exchanges, from exhibitors, or from other poster renters. By the nature of their business they were in competition with the local exchanges of the film companies for exhibitor customers. The poster renters offered a complete or almost complete rental service for accessories of all the major film companies, while the local exchanges serviced only their own films. The latter, however, made them available along with the film itself. Thus each had advantages, and by 1940 there was at least one poster renter in business in nearly every motion picture exchange area.

[*Exclusive Licenses*]

As a result of the competition from poster renters, the obsolescence risk, the cost of maintaining a special accessories department, the supervision and personnel requirements both in the national offices and the district exchanges, Paramount in 1939 recognized that the accessories feature of its business was operating at a substantial annual loss. Although it was apparent that one possible solution for reducing the losses

[2] During the period involved in this case, defendants Columbia Pictures Corporation, Loew's Incorporated, RKO Radio Pictures, Inc. (subsequently RKO Teleradio Pictures, Inc.) and Twentieth Century-Fox Film Corporation (subsequently TCF Film Corporation) were major producers and distributors of motion pictures in the United States. Defendants United Artists Corporation and Warner Bros. Pictures Distributing Corporation (formerly Vitagraph, Inc.) were major distributors of motion pictures, the former for independently produced pictures and the latter for pictures produced by its parent company, Warner Bros. Pictures, Inc. Defendant Paramount Film Distributing Corporation, a wholly-owned subsidiary of Paramount Pictures, Inc., was a major distributor of motion pictures produced or released by its parent. Universal Film Exchanges, Inc., a wholly-owned subsidiary of Universal Pictures Company, Inc., was a major distributor of motion pictures produced by its parent.

was to increase the license fees, this alternative was considered undesirable as it was likely to decrease the use of such advertising and therefore be self-defeating. The Paramount executives concluded that it was preferable to delegate the tasks of creating and distributing standard accessories to an independent contractor who possessed the experience, skill and facilities necessary to successfully undertake the operation. Paramount approached National Screen in the latter part of 1939 with a proposition to turn over these functions to it. National Screen, although it was not then in the business of creating standard accessories, had been engaged, since about 1935, in the business of producing and distributing certain motion picture specialty accessories. It had invested substantial sums in and was chiefly responsible for the development of a full line of specialty accessories. Under contracts licensing it to do so, National Screen was producing and distributing to exhibitors specialty accessories for films produced or distributed by United Artists, Loew's, and Columbia.

Paramount indicated that it would require National Screen to maintain a local branch in each city where Paramount had a film exchange, to open these new offices and staff them at its own expense, to manufacture and distribute a full line of standard accessories for Paramount pictures, and to purchase its existing inventory of standard accessories. As these obligations would involve substantial expenditures, National Screen required that it be given an exclusive license to produce and distribute Paramount standard accessories for a five-year term. On December 22, 1939, the parties formally entered into such a contract, to expire on January 31, 1945.[3]

Shortly thereafter, RKO, which also had a long history of unprofitable results from its accessories business and had even engaged an expert in the field to no avail, was approached by National Screen with an offer to undertake distribution of its accessories. On January 31, 1940, Advertising Accessories, Inc., the affiliate of National Screen, entered into a five-year contract with RKO to manufacture and distribute, under exclusive license, a full line of standard accessories.[4]

Subsequently, discussions between Advertising Accessories, Inc., and Universal ensued; however, no contract was consummated as the parties were unable to agree on terms. During 1940 Columbia also considered transferring its accessories responsibilities to National Screen but was reluctant to do so fearing a loss of control over this important means of advertising. Negotiations with Warner did, however, result in a non-exclusive license agreement for the distribution of Warner standard accessories on September 26, 1940.[5]

At approximately the same time, plaintiffs initiated their business in Philadelphia, announcing to exhibitors by printed notices their entry into the business of renting standard accessories. They procured their supplies of standard accessories for Columbia, Loew's, Fox, United Artists, Universal and Warner pictures at the exchanges in Philadelphia maintained by the respective companies. In addition they indicated to exhibitors their willingness to buy such accessories from them provided they had not been released over two months. The film companies, during the period that they manufactured and distributed standard accessories, made them freely available to plaintiffs who obtained only such items for which they had firm orders from exhibitors. Thus they were neither required nor did they maintain a full line of accessories, buying only infrequently the larger items such as 24-sheets and 6-sheets.

National Screen beginning in 1940, in addition to manufacturing and distributing standard accessories for RKO and Paramount, rented standard accessories for pictures of other film producers which it obtained from the several exchanges. The following year, it began negotiating a manufacturing and distributing contract with Loew's which had been experiencing losses in regard to this aspect of its business. After consultation with its branch exchange managers and in an effort to turn these financial losses into an ensured profit, Loew's entered into a

[3] The contract was extended until December 31, 1949, by a letter agreement dated December 28, 1945. The original contract also obligated National Screen's affiliate, Advertising Accessories, Inc. The affiliate merged with National Screen on July 18, 1941.

[4] This contract was later extended to January 31, 1950, by a supplemental agreement dated October 6, 1944.

[5] This agreement was for a term of one year and was extended by letter agreement for successive yearly periods up to and including August 31, 1945.

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ten-year exclusive contract with National Screen on February 6, 1942. Loew's, however, agreed to furnish the completed art work and still negatives from which the mats would be prepared. At plaintiffs' request Loew's arranged for them to obtain standard accessories from National Screen in the future, and their requirements were supplied under this arrangement until April 21, 1943.[6]

[*Settlement Agreement—Sublicensing*]

Early in 1942, plaintiffs organized an association of independent poster renters. At its initial meeting it was determined that an antitrust action be brought against National Screen, Paramount, RKO, and Loew's. The suit (entitled *Allied Poster and Supply Corporation v. National Screen Service Corp.*, Civil Action No. 2472) was instituted by plaintiffs and twelve others and alleged that the three existent exclusive licenses and contemplated licenses of a similar character constituted a violation of the antitrust laws. After protracted negotiations the suit was settled on April 21, 1943. The plaintiffs therein agreed to a dismissal with prejudice by the district court and executed a general release to National Screen, while National Screen agreed to grant plaintiffs a sublicense under which it undertook to make available for distribution a full supply of whatever accessories it was then manufacturing under license or would manufacture under future licenses. The district court in the instant case expressly found that the settlement agreement was entered into by the plaintiffs with full knowledge and understanding of its terms, after careful consideration and upon the advice of counsel.

Over a period of years following this settlement, National Screen entered into contracts for the manufacture and distribution of standard accessories of Universal, Columbia, United Artists, Warner Brothers, and Fox. The district court found that each of the film companies involved in this suit entered into the contracts for a good and sufficient economic reason, namely, to terminate an unprofitable feature of its business. These findings were based upon the testimony of responsible executive officers of each of the companies that they had neither consulted nor conferred with executives of other film companies in arriving at their individual decisions, but rather had done so solely for valid business reasons that did not depend in any way upon the action of any other company with respect to a similar arrangement.

As additional companies entered into contracts with National Screen, plaintiffs, pursuant to the sublicense agreement, obtained standard accessories for the pictures produced by the new companies from National Screen. The original sublicense agreement was extended for another five-year term, terminating on April 30, 1951. Although the instant complaint contained allegations that National Screen had deliberately been slow in deliveries and utilized tie-in arrangements to frustrate plaintiffs in their competition, the the district court found that plaintiffs had offered no evidence sufficient to sustain these allegations. The court also found that plaintiffs had other sources for standard accessories, some licit and at least one illicit.

Since the settlement of the *Allied* case in 1943, National Screen has granted 24 sublicenses, eleven to parties who were not plaintiffs in that suit. It was additionally found that during the period covered by this suit poster renters in other motion picture areas manufactured and distributed standard accessories of various types. The plaintiffs, however, never attempted to manufacture or obtain the right to manufacture or fabricate any kind of accessories.

During the years in controversy, 1943-1949, plaintiffs' gross income doubled and profits increased. In competition with National Screen for exhibitor-customers, plaintiffs succeeded in increasing their clientele mostly at the expense of National Screen. The prices plaintiffs paid to National Screen varied from item to item; however, despite an inflationary spiral and increases in the prices plaintiffs charged their customers, the prices National Screen charged were not increased at all until May 1, 1949. Furthermore, the pre-May 1, 1949, prices averaged substantially less than those which the film companies had formerly charged. This situation obtained even after the May 1, 1949, increase.

[6] After April 21, 1943, plaintiffs procured supplies from National Screen under the terms of a license agreement.

[*Appeal—Contentions*]

Appellants reply on three main arguments in an effort to obtain reversal of the judgment below, namely (1) *per se* invalidity of the exclusive licenses granted National Screen,[7] (2) the erroneous nature of certain findings of fact, and (3) "that on the facts found plaintiffs are entitled to judgments for both injunction and damages against all defendants."

[*Validity of Licenses*]

Consideration of the initial contention need not detain us unduly for the issue of *per se* invalidity of these exclusive agreements was extensively discussed in *Lawlor v. National Screen Service Corp.* [1956 TRADE CASES ¶ 68,509], 238 F. 2d 59 (C. A. 3, 1956). As was stated at page 65, "exclusive agreements are not *per se* violation of the anti-trust laws and are permitted in circumstances where the facts disclose a course of conduct and reasonableness of action not prohibited by the anti-trust laws." On appeal, the Supreme Court stated, "We agree with the Court of Appeals that the motion for summary judgment should have been denied. [Summary judgment had been entered by the district court on the ground that the contracts were invalid *per se.*] However, in our view, this disposition of the case made it unnecessary for the Court of Appeals to pass on any other issue than that of the *per se* invalidity of exclusive contracts under the Sherman Act." *Lawlor v. National Screen Service Corp.* [1957 TRADE CASES ¶ 68,630], 352 U. S. 992 (1957).

[*Findings of Fact*]

Appellants in their main brief make an oblique attack on the extensive findings of fact made by the district court. They imply that the findings are erroneous because the district court allegedly accepted many of those proposed by the defendants. A study of the record, the proposed findings, and the undisputed facts lends no credence to what is not even dignified by a direct argument. Plaintiffs ask us to accept their version of the facts and, in effect, to ignore the district court's findings, that is, to try the case *de novo.* Extensive citation of authority is not necessary to point up the fallacy of this argument. The Supreme Court had occasion to consider the problem in *United States v. Yellow Cab Co.* [1948-1949 TRADE CASES ¶ 62,522], 338 U. S. 341 (1949), where it was stated "that for triers of fact totally to reject an opposed view impeaches neither their impartiality nor the propriety of their conclusions." Rule 52, Federal Rules of Civil Procedure, directs us not to set aside findings of fact unless clearly erroneous. Where the evidence would support a conclusion either way, a "choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" Id. at page 342. Furthermore, even plaintiffs do not contend that the trier of fact uncritically adopted all the defendants' tendered findings of fact nor can they deny that a substantial number of the findings were uncontested.

[*Injury to Business*]

In their reply brief plaintiffs take issue with four specific findings, namely, 138, 72, 41, and 116. Finding 138 is to the effect that during the period in suit "plaintiffs suffered no damage or injury to their business or property as a result of any action of any of the defendants herein complained of by the plaintiff." In refutation of this finding, plaintiffs contend that specialty accessories formed a large part of National Screen's business and they alleged that these accessories were not made available to them by National Screen. Admitting that they have never participated in the specialty accessory rental business, they attribute this inactivity to the fact that such accessories, since 1940, have been obtainable only from National Screen. Plaintiffs have not here pointed to any evidence that National Screen refused to supply speciality accessories. Indeed, the mass of credible evidence is to the effect that from the inception of plaintiffs' business they never held themselves out as renters of specialty accessories, they purchased only two specialty type accesories (40 x 60 posters) during the period when those accessories were available from the film companies and lost money with respect to them, they refrained from purchasing specialty accessories from another available source even though one of the partners was

[7] "Statement of Questions Involved.
"1. Are the federal antitrust laws violated when each of the eight major American motion picture companies grants to the same person, on a profit-sharing basis, an exclusive license, of national scope, to service exhibitors with advertising posters?" Appellants' Brief, page 1.

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active in the organization of that source, and, finally, as late as May 9, 1949, in a letter to the Attorney General of the United States, plaintiffs in describing their business made no mention of specialty accessories but rather stated, "Our own company performs in eastern Pennsylvania, south Jersey and Delaware, distributing these standard accessories to the motion picture theatre accounts, either through outright sale or on a rental basis." Plaintiffs also predicate their claim of damages or injury upon the fact that press books[8] published by the film companies contained information that standard accessories were available from National Screen, the fact that posters manufactured and obtained from National Screen bore a printed notice on their face indicating that they were the property of National Screen,[9] and that National Screen's gross receipts, in the Philadelphia area during 1943-1949, on standard accessories were 4½ times that of plaintiffs. On the basis of the above summarized facts, plaintiffs assert that they have proved both the fact of damage and amount of loss. They cite for this proposition *Bigelow v. RKO Radio Pictures, Inc.* [1946-1947 Trade Cases ¶ 57,445], 327 U. S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927). These cases, however, merely stand for the proposition that have established the fact of damage or legal injury, the difficulty of determining the amount of damage will not preclude a recovery. Here there was a finding of fact, clearly borne out by the record, that there was no damage or legal injury. The evidence outlined above, relied upon by appellants here, certainly falls far short of that which would be necessary to overturn a finding of fact of the trial court.

[*Other Findings*]

We have considered the exceptions noted in the reply brief with regard to findings of fact 72, 41 and 116. They amount merely to quibbles concerning the meaning of language that is clear on its face. Finding of fact 72 is illustrative of this. It relates to the settlement agreement that terminated the prior litigation. On the basis of substantial evidence in the record, the district judge found that the agreement had been entered into voluntarily. At the most, the evidence cited by the palintiffs merely indicates the motives that impelled the plaintiffs to enter into what they admitted to be a voluntary agreement.

Finally, we are drawn to what plaintiffs have termed "the point of overriding importance," i.e., whether or not, on the facts found by the district court, plaintiffs are entitled to both an injunction and damages against all the defendants. Of course, this issue is disposed of, as we have noted above, by the district court's explicit finding, upon the record, that no cognizable damages or legal injury were caused plaintiffs.

[*Demand*]

There are, in addition, other considerations which compel the same result. Plaintiffs have never attempted to obtain from any of the film companies licenses under which they themselves would manufacture accessories and, in fact, have expressly stated that they do not desire such licenses. In the absence of such demand upon the part of plaintiffs, the courts have consistently held that there can be no recovery in an antitrust action. *Webster Rosewood Corp. v. Schine Chain Theatres, Inc.* [1959 Trade Cases ¶ 69,282], 263 F. 2d 533, (C. A. 2, 1959); *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.* [1954 Trade Cases ¶ 67,757], 212 F. 2d 840 (C. A. 2, 1954). See also *Milwaukee Towne Corp. v. Loew's, Inc.* [1950-1951 Trade Cases ¶ 62,891], 190 F. 2d 561 (C. A. 7, 1951), cert. denied, 342 U. S. 909 (1952).

[*Copyright Licenses*]

The district court found that standard accessories created and manufactured for one motion picture can only be used in connection with that picture. Thus they are not competitive articles. It was also found that each of the motion pictures is copyrighted and the license agreements required National Screen to manufacture standard accessories utilizing scenes and incidents from these movies. The copyright law confers upon the owner of the copyright a limited monopoly as regards his copyrighted ma-

[8] A printed pamphlet published by the film companies for each picture giving suggestions or advice to exhibitors with respect to their advertisement of the picture.

[9] The printed notice read as follows:
"Property of National Screen Service Corp. Licensed for display only in connection with the exhibition of this picture at your theatre. Must be returned immediately thereafter."

terial and as an incident thereof confers upon the owner the right to license others. The license may be exclusive and, if so, by its very nature it grants the right to exclude others. *Goldsmith v. Commissioner of Internal Revenue,* 143 F. 2d 466 (C. A. 2), cert. denied, 323 U. S. 774 (1944). This is not to say that owners may use their copyrights to deter competition or to extend the monopoly or to break down competition in other areas. *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948); *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100 (1948). Here, however, the articles being licensed for manufacture and distribution are noncompetitive in nature and, therefore no mere increase in the number of licenses obtained by one individual accomplishes a restraint upon trade or limitation in the source of supply. In the closely akin patent field this situation and its legal effect have been before the courts on a number of occasions. In *United States v. Winslow,* 227 U. S. 202 (1913), perhaps the leading case, Justice Holmes was called upon to consider whether the formation of the United Shoe Machinery Company by the owners of three basic but noncompetitive patents, all employed in the manufacture of shoes, constituted the new corporation a monopoly. He stated that "The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents * * *. [I]t is hard to see why the collective business should be any worse than its component parts." More recently the Supreme Court had occasion to review the problem in *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.* [1950-1951 TRADE CASES ¶ 62,634], 339 U. S. 827 (1950), and confirmed the facts that the mere accumulation of patents is not in and of itself illegal. We see no rational basis for treating copyrights any differently than patents, and a careful study of the record convinces us that this accumulation of copyright licenses was not used for improper purposes.

[*Exclusive Dealerships*]

It is abundantly clear to this court that the plaintiffs, by their own choice, are nothing more than jobbers in the field of standard accessories, and thus come within the purview of cases involving exclusive dealerships such as *Locker v. American Tobacco Co.,* 218 Fed. 447 (C. A. 2, 1914), where it was stated at page 450:

> "We are unable to discover anything illegal in a manufacturer of tobacco disposing of his goods to a jobber to sell to retailers, or, if he deems it advisable, to change his policy, and sell direct to the retailer himself. Why may he not do so? One who desires to become a jobber has no right to complain because the manufacturer chooses another to do this work, unless the manufacturer owes some duty to consign his product, or a part of [sic] thereof, to him."

As was said by the court in *Interborough News Co. v. Curtis Publishing Co.* [1955 TRADE CASES ¶ 68,129], 225 F. 2d 289, 293 (C. A. 2, 1955), "Use by competitive units of the same local distributor is not necessarily a limitation on their competition. After all, Interborough [plaintiffs herein are similarly situated] had no vested interest in the wholesaling of magazines and reprints in New York City or elsewhere."

[*Parallel Action*]

One last aspect of this case deserves mention. In an effort to show a conspiracy, plaintiffs rely upon *United States v. Paramount Pictures, Inc.* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948), and *Interstate Circuit, Inc. v. United States* [1932-1939 TRADE CASES ¶ 55,205], 306 U. S. 208 (1939), which hold that conspiracy may be established not only by express agreement but also by a showing of adherence to concerted action which has been contemplated or invited. Not only have the plaintiffs here failed in their proof of an "arrangement," "plan," or "scheme" but the great weight of credible evidence clearly shows that the film companies, acting independently, as a result of substantial losses in their accessory business, decided to license an outsider to perform that phase of their business. They contracted with National Screen because no comparable firm was available to undertake the task. The most that can be gleaned from the factual pattern is that the business climate affected each of the film companies in a substantially similar way and they individually decided to extricate themselves from a losing proposition. Judge Holtzoff, in deciding *Orbo Theatre Corp. v. Loew's, Inc.* [1957 TRADE CASES ¶ 68,869], 156 F. Supp. 770 (D. C. 1957), affirmed per curiam, [1958 TRADE CASES ¶ 69,185] 261 F. 2d 380

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(C. A. D. C., 1958), cert. denied, 359 U. S. 943 (1959), aptly pointed out the relevant considerations:

"* * * Parallel action may indeed be concerted action, but it may also be due to the fact that the persons concerned arrived at the same simple solution of a common business problem. Here the problem was a comparatively simple one, and the solution reached was more or less obvious. If the various officers and employees involved in the decision refrained from testifying on this point, the court might well draw an adverse inference. On the other hand, considering the fact that there was absolutely no evidence of the alleged conspiracy, beyond the taking of parallel action; that each of the participants denied any communication or consultation with any of the co-defendants; and that none of the witnesses was in any way impeached or gave any testimony that was inherently incredible, several of them being members of the bar, the Court is not justified in finding that the actions were jointly planned or concerted. In fact, the Court cannot do so without also reaching the conclusion that some of these witnesses testified falsely. There is, however, no basis for ascribing such reprehensible action to any of them. The Court, therefore, concludes that the plaintiff did not establish by a preponderance of the evidence that there had been a conspiracy on the part of the defendants * * *." 156 F. Supp. at pages 775-776.

[*Summary of Financial Data*]

At the argument of this appeal, we were presented with a motion to vacate an order of the district court directing that plaintiffs shall not employ the full text of the financial terms and provisions of the license agreements between National Screen and its licensors, the film companies. The order provided that the full text of other provisions of the agreements might be used but that only a summary of the financial terms, to be prepared by National Screen, might be used. Inasmuch as the precise terms were not necessary to plaintiffs' case, and seeing no compelling reasons for vacating the order, the motion will be denied.

[*Affirmed*]

Judgment will be affirmed.

[¶ 69,447] National Utilities of Gainesville, Inc. v. General Gas Corporation.

In the United States District Court for the Northern District of Georgia, Gainesville Division. Civil Action No. 820. Filed August 1, 1959.

Clayton Antitrust Act

Price Discrimination—Practices Constituting Discrimination Under Clayton Act, Section 2(a)—Cutting Prices in Locality Serviced by Local Competitor—Purpose of Price Cutting—Effect on Competition—Destruction of Competitor.—An interstate seller of liquefied petroleum gas was temporarily enjoined from continuing in effect a general price reduction in a local area, where it was found that the seller's price reduction in an area serviced by a local competitor, while maintaining its prices in adjacent areas, was likely to lessen competition substantially, and would tend to create a monopoly in violation of Section 2(a) of the Clayton Act. Price cutting is lawful, if considered as a separate transaction and without reference to its purpose, even though the sale price is below cost. However, the competition ceases to be normal and becomes illegal when a seller invokes the lower price as a means of destroying competition. Here, the local competitor's net worth would be completely depleted in approximately 11 months if it lowered its own prices to the interstate seller's reduced prices. Thus, the offer to sell to the local competitor's customers at a price which, if met by it, would destroy its business, tended to eliminate that local firm as a competitor, and would probably lessen competition substantially (the local firm allegedly had 20 per cent of the business in the area) and tend to create a monopoly (the interstate seller allegedly had 25 per cent of the business in the competitive area). Competition is the antithesis of monopoly and "any elimination of competition is a movement in the general direction of monopoly."

The court noted, however, that sales at cut prices which had been negotiated on a "customer basis" did not appear to be illegal. Discrimination is prohibited only where it is probable, and not merely possible, that competition will be lessened or a monopoly created.

See Price Discrimination, Vol. 1, ¶ 3505.840, 3506.250, 3506.440, 3506.500, 3506.620, 3508.545.

Price Discrimination—Meeting Competition Under Clayton Act, Section 2(b)—Competitor's Price Cutting on "Customer Basis"—Justification for "Area" Price Reduction.—A seller of liquefied petroleum gas which, in a particular trade area, reduced its prices to a level at which a local competitor could not sell and survive, while maintaining its normal prices in adjacent areas, failed to establish the "good faith meeting of competition" defense under Section 2(b) of the Clayton Act. It seemed clear that the seller's competitors were cutting prices on a customer basis, and that the seller, "becoming tired of the struggle customer by customer, declared war with a drastic price reduction" over the entire area in which the local seller competed. While the local competitor had approximately 1500 customers in the area and the seller had approximately 1800 customers in that same area, the seller, in seeking to justify its area price reduction, identified only 12 to 15 customers which had received the benefit of price cuts from its competitors. There were general allegations that those competitors had offered to sell at reduced prices, but there was no contention that they had put into effect any *general* price reductions against the seller. Hence, it appeared that the seller, in order to meet price cuts that were offered by its competitors from time to time on a *customer basis,* had announced a general price cut over the entire area.

See Price Discrimination, Vol. 1, ¶ 3515.500.

Private Enforcement and Procedure—Injunctive Relief from Violations of Antitrust Laws—Price Discrimination—Necessary Averments—Irreparable Injury—Destruction of Competitor's Business.—A local seller of liquefied petroleum gas was granted an injunction which required an interstate seller to "restore the general price structure" as it existed in a particular area prior to the interstate seller's general reduction of its prices in that area. It seemed clear that continuing in effect that price reduction during the pendency of the action would result in immediate irreparable loss to the local seller, inasmuch as its net worth would be completely depleted in approximately 11 months if it sold at the interstate seller's reduced prices. However, the injunction in no way invalidated the business obtained by the seller in competing with its competitors on a customer basis; it only enjoined the seller from continuing in effect the general price cuts which the court found were discriminatory, were likely to lessen competition substantially, and would tend to create a monopoly.

See Private Enforcement and Procedure, Vol. 2, ¶ 9022.05, 9022.50, 9024.70.

For the plaintiff: Joseph H. Blackshear, John N. Crudup, and Charles Dent Bostick, Gainesville, Ga.

For the defendant: Wheeler, Robinson, Norton & Thompson, Gainesville, Ga.

[*Price Discrimination Action*]

Boyd Sloan, District Judge [*In full text*]: Plaintiff, National Utilities of Gainesville, Inc., hereinafter sometimes referred to as "National," is engaged in the selling and delivering of liquefied petroleum gas in nine counties of Northeast Georgia and it brings this action under Title 15, U. S. C. A., §§ 2, 13, 15 and 26, and Title 28, U. S. C. A., § 1337 and seeks injunctive and other relief against the defendant.

The defendant, General Gas Corporation, sometimes hereinafter referred to as "General," conducts the same type business as plaintiff but in several states, including most of the counties comprising North Georgia and all of the counties in which plaintiff does business. Plaintiff contends that the defendant is guilty of unlawful discriminations in price cutting, and should be enjoined.

A show cause order was issued by this Court and the matter came on for hearing on Monday, July 27, 1959; evidence was received by affidavit, oral arguments of counsel were heard, and thereafter written arguments and briefs were filed on behalf of each party and the matter is now before the Court for determination.

[*Trade Involved—Liquefied Petroleum Gas*]

It appears from the evidence that General Gas Corporation, in 1954, acquired all of the capital stock of the Automatic Gas

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Company, Inc. which corporation was engaged in the business of selling liquefied petroleum gas to consumers in the Gainesville, Georgia, area here involved and that since that time it has been actively engaged in such business.

General Gas Corporation was and is engaged in the business of selling and distributing liquefied petroleum gas in Louisiana, Mississippi, Georgia and portions of Alabama and South Carolina.

General Gas Corporation services its distribution of liquefied petroleum gas from three headquarters or area towns, to-wit: Clarkesville, Athens and Gainesville. The counties served by these offices being as follows:

Clarkesville: Banks (part), Habersham, Rabun, Stephens, Franklin.

Athens: Clarke, Oglethorpe, Banks (part), Barrow (part), Jackson (part), Hart, Oconee, Walton, Madison.

Gainesville: Hall, White, Lumpkin, Banks (part), Forsyth, Dawson, Gwinnett (part), Jackson (part), Barrow (part).

Plaintiff, National Utilities of Gainesville, Inc., sells and distributes liquefied petroleum gas in Hall, Dawson, Lumpkin, White, Gwinnett, Forsyth, Banks, Habersham and Jackson and parts of Towns, Union, Rabun and Barrow Counties.

The sale and distribution of liquefied petroleum gas is highly competitive and in the three areas above described, which are served by General, there are some twelve other distributors of liquefied petroleum gas who compete with General in portions of the areas served by General.

No single competitor competes over the entire area served by General but each competitor competes in a portion of the area served by General.

[*Quantity Discounts*]

Since 1954 the price of liquefied petroleum gas in the area served by National has been 20¢ per gallon with a two cent per gallon discount for cash if paid within ten days from delivery, leaving a net price of 18¢ per gallon for domestic consumers.

Domestic consumers are generally considered in the trade to be those who consume the gas in homes or dwellings, while commercial users are generally considered to be quantity consumers who consume gas in business, factory or plant.

The price for commercial use has generally been two cents per gallon less than that charged for domestic use.

It has generally been the practice during the periods here involved for large commercial consumers to accept bids from various distributors for quantity purchases, and both plaintiff and defendant have competed in bidding for the business of large industrial users.

[*Free Service*]

It appears that the plaintiff gave free service to its customers in the form of repairs and servicing of equipment, charging only for such parts as were required in effecting such repairs, while the defendant, General, had a minimum service charge of $3.50 for each call.

It appears that such free service is the equivalent of a reduction in price paid for gas by the consumer of one cent per gallon.

[*Economic Strength of Parties*]

According to General Gas Corporation's annual report for 1958 published by Eisele & King, Libaire, Stout & Co., 50 Broadway, New York, New York, the sales of the company reached an all time high of 92,660,000 gallons during 1958. This compared with 81,039,000 gallons marketed in 1957 as shown by the annual report represents a 14.3 per cent gain in 1958. The report shows a net income for 1959 estimated at $302,710 after taxes as compared to $259,144 during the same period in 1958.

Throughout this trade area, the retail market for LP gas is a seasonal market, about 80 percent of the retail sales of all companies occurring in the eight months from September 1 to May 1. During the four months through August, the retail sale price of LP gas is at its lowest volume.

For the calendar years ending 31st of December shown below, plaintiff company sold the number of gallons of LP gas at the gross revenue and average price per gallon, as follows:

Calendar Year	Gallons Sold	Gross Revenue	Average Price Per Gallon
1957	886,629	$167,323.92	18.87
1958	1,436,414	258,910.87	18.02
*1959	819,035	148,878.09	18.17

* Five months 1959 ended May 31, 1959.

The plaintiff company does business on a 12 months fiscal year ending August 31st of each year. For the fiscal year ended August 31, 1958, plaintiff corporation sold and delivered 1,324,862 gallons of LP gas which yielded a dollar volume of $244,304.63. This business yielded a sale price of 18.44 cents per gallon net delivered. The net profit before taxes of the plaintiff for that year was $19,741.10. Since that was the last full year's business record available that period is used by plaintiff's accountant to demonstrate the effect of price reductions on the business, the following table shows the effect of price cuts:

1958 Price	Dollar Volume	Net Profit Before Taxes or Loss
At 18.44¢	$244,304.63	$19,741.10
If cut 1¢ to 17.44¢	231,056.01	6,492.48
If cut 2¢ to 16.44¢	217,807.39	(7,756.14) Loss
If cut 3¢ to 15.44¢	204,558.77	(20,004.76) Loss
If cut 4¢ to 14.44¢	191,310.15	(33,253.38) Loss
If cut 5¢ to 13.44¢	178,061.53	(46,502.00) Loss

Net earnings of National Utilities of Gainesville, Inc. for the year ended August 31, 1958 amounted to $19,741.10, income taxes in the amount of $6,475.08 were accrued on these earnings. At August 31, 1958, total retained earnings amounted to $14,289.83.

The total number of gallons of LP gas sold and delivered by National during this period was 1,324,862. During this period National received an average price of 18.44¢ per gallon net on retail sales of LP gas.

A reduction in the price of LP gas of 1¢ per gallon would reduce National's annual net profit by approximately $13,248.00, and each additional cut of 1¢ per gallon on LP gas would reduce the net profit or increase the net loss by approximately $13,248.00.

It is clear from the average sale price received by the plaintiff corporation that it has made no general price reduction but that any price reduction that it has made has been on a customer basis only.

[*Price "War"*]

It appears from the evidence here that competitors of the defendant corporation were cutting their prices from time to time on a customer basis and, while defendant contends that its broad price cuts in the Athens and Gainesville areas were good faith reductions to meet the equally low price of a competitor, it seems clear that there is this situation: The competitors of General were struggling for business and cutting prices on a customer basis and defendant, General, becoming tired of the struggle customer by customer, declared war with a drastic price reduction over the area in which plaintiff competes.

[*Competitive Area*]

It does not affirmatively appear from the record how many customer users of LP gas are located within the competitive area served by plaintiff and defendant. It does appear that plaintiff, National, has approximately 1500 customers which defendant contends constitutes twenty per cent of the business in this particular area. The defendant further contends that it has only twenty-five per cent of the business, and by applying the percentage to the number of plaintiff's total number of customers would indicate that defendant has some 1800 customers in the competitive area served by both plaintiff and defendant.

[*Area Price Reduction—"Meeting Competition"*]

In its affidavits in which it seeks to justify its area price reduction, the defendant only identifies a total of twelve to fifteen customers who have received and are receiving the benefit of price cuts from defendant's competitors, while there are general allegations that defendant's competitors are offering to sell at reduced prices, there is no contention that General's competitors have put into effect any general price reductions against defendant, so it appears that defendant, in order to meet price cuts that are offered from time to time on a customer basis by its competitors, has announced a general price cut over the entire Gainesville and Athens areas which includes substantially all of the area served by plaintiff, National, offering to sell its LP gas at prices with which General's competitors can not meet and survive.

At the time defendant started doing business in Gainesville, Georgia, it was doing approximately 60 per cent of the LP gas

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business in Hall and adjoining counties and the Childs Gas Company was doing approximately forty per cent of such business and since 1954 many other LP gas distributors have entered the Gainesville area as well as other areas adjacent thereto.

It appears from the record here that in the struggle for business there has been, both on the part of plaintiff and defendant, price cutting in vying for the business of individual consumers, but there had not been until the action of the defendant here complained of, an overall price reduction to all consumers within the competitive area.

On June 4, 1959, defendant reduced its sales price to domestic consumers to 17¢ less 2¢ and on June 24, 1959, defendant reduced its price to all consumers in the Gainesville area to 13.5¢ net, except customers under contract.

The defendant continues to sell and deliver LP gas in adjacent and adjoining trade areas at the prevailing price of 18¢ per gallon net.

[*Irreparable Loss to Plaintiff*]

A reduction by plaintiff in the price of LP gas to 13.5¢ per gallon would result in National Utilities of Gainesville completely depleting its net worth in approximately eleven (11) months.

It seems clear that continuing in effect the reduction in the price of LP gas to 13.5¢ per gallon net will result in immediate irreparable loss to plaintiff company.

The Robinson-Patman Act provides, *inter alia,* as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing contained in * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities or to such purchasers sold or delivered * * *:

"(b) Upon proof being made * * * that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *: *Provided, however,* That nothing contained in * * * shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." Clayton Act, § 2(a)(b) as amended by the Robinson-Patman Act, 15 U. S. C. A., § 13(a)(b).

In the competitive relationship where the struggle is not one of any competitor against the other, but with the other for a common prize, a conflict exists because there is competition. Struggle is in the nature of things incidental to competitive activity. In the field of competition, struggle is natural and essential and the rules of law should be designed to regulate the contest. It is typical of the order of struggle that a competitor is permitted to injure his rivals in trade; the wrong stems out of a violation of the rules prescribed for the fair contest. Callmann, *Unfair Competition and Trade-Marks,* 2d Ed., Vol. 1, § 6.2(a).

[*"Good" and "Bad" Price Cutting*]

Price cutting is a legally recognized competitive tactic. *Schine Theatres v. United States* [1948-1949 Trade Cases ¶ 62,245], 334 U. S. 110, 120. Price cutting by itself does not fall under the stigma of unfair trading and this is so even though the reduction yields a sales price below cost. *Sears, Roebuck & Company v. Federal Trade Commission,* 258 F. 307; *Andrew Jergens Co. v. Bonded Products Corporation,* 13 F. 2d 417, 422; *Remington-Rand v. Mastercraft Corporation,* 67 F. 2d 218, 221. There is both good and bad price cutting.

Nothing prevents the seller from selling below cost if he wishes to do so; he is not under an affirmative duty to attempt to realize a profit. It is for the seller to decide whether he wishes to profit from a particular transaction.

[*Purpose—Destruction of Competitor*]

The act of price cutting itself is lawful if considered as a separate transaction and without reference to its purpose.

Price wars usually arise out of ordinary business competition. For example, A and B are competitors. Enraged at B's success, A decides to mass all his economic reserves and utterly destroy B. With such hostilities, normal competition ends. The lower price, which is a legitimate weapon in the arsenal of a business and is normally invoked to attract new customers, is now invoked as a means of destroying a competitor. The customer is merely the incidental beneficiary of the struggle between A and B. Price-cut follows price-cut until both are selling at a loss. He who has sufficient reserves to hold out the longer will inevitably triumph. The parallel struggle of competition has thus metamorphosed into a direct attack by one against the other. Though economic strength is still the most potent weapon in the battle, the competition, nevertheless, is now illegal. Callmann, *Unfair Competition and Trade-Marks,* 2nd Ed., Vol. 1, § 26.

[*Unlawful Effect*]

The action of the defendant in reducing its price to 13.5¢ per gallon net over its entire Gainesville area and thus offering to all of plaintiff's 1500 customers LP gas at a price which plaintiff can not meet and which will destroy plaintiff's business tends to eliminate plaintiff as a competitor and thus will probably lessen competition substantially and tend to create a monopoly.

Under the facts here, plaintiff would suffer irreparable injury if this is allowed to continue during the pendency of this action and the defendant will be enjoined to restore and preserve the status quo as it existed prior to its overall price-cut of June 4 and June 24, 1959.

The defendant contends that the grant of the injunction woud leave plaintiff's contracts inviolate while defendant's contracts with Rohr Aircraft Company and Scovil Manufacturing Company would be abrogated.

The injunction to be granted here will have no such effect; it will require the restoring of the status quo as it existed prior to the overall price cuts of defendant in its Gainesville area on June 4 and June 24, 1959, but does not hold to be illegal the negotiated customer sales at cut prices.

[*Competition Defined*]

Competition is defined as the effort of two or more parties acting independently to secure the custom (that is the trade or business) of a third party by the offering of the most favorable terms. It is the struggle between rivals for the same trade at the same time; the act of securing or endeavoring to gain what another is endeavoring to gain at the same time. *Lipson v. Socony Vacuum Corporation* [1932-1939 Trade Cases ¶ 55,146], 87 F. 2d 265.

[*Competition on "Customer Basis" Preserved*]

The competition engaged in between plaintiff and defendant prior to June 4, 1959, even though it involved price-cuts, does not appear to have been illegal.

> "Discrimination in prices was not forbidden by the Sherman Anti-Trust Act. However under the Clayton Act, particularly as amended by the Robinson-Patman Act, 15 U. S. C. A. § 15, it is unlawful for a person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly, but not otherwise. Although the statute forbids price discrimination which 'may' lessen competition or create monopoly, it is only where such effect is probable and not merely possible that the discrimination is forbidden by the statute. * * *" 58 C. J. S., § 50, at p. 1026, 1027.

Competition is the antithesis of monopoly and any elimination of competition is a movement in the general direction of monopoly. The injunction here granted shall in no way invalidate the business obtained by the defendant in competing with plaintiff and defendant's other competitors on a customer basis nor shall it prevent such competition in the future.

[*"General" Price Cuts Enjoined*]

The order to be entered here shall restore the general price structure in the defendant's Gainesville area as it existed prior to June 4, 1959, that is 18¢ net for LP gas to domestic users and 2¢ less per gallon for commercial users, but preserving to both plaintiff and defendant the right to

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compete with each other and other competitors on a customer basis in the future as in the past. The injunction will enjoin defendant only from continuing in effect its general price-cuts of June 4 and June 24 which the Court has found to be discriminatory and likely to lessen competition substantially and would tend to create a monopoly.

An order in conformity with the findings and conclusions here may be prepared and presented.

[¶ 69,448] The Atlas Building Products Company v. Diamond Block & Gravel Company.

In the United States Court of Appeals for the Tenth Circuit. No. 5990—May Term, 1959. Dated August 17, 1959.

Appeal from the United States District Court for the District of New Mexico. Waldo H. Rogers, District Judge.

Clayton and Robinson-Patman Price Discrimination Acts

Price Discrimination—Practices—Geographic Pricing—Price Reductions in Single Competitive Area—Discriminating Between *Non-competing* Purchasers Located in Different Areas—Section 2(a) of Clayton Act and Section 3 of Robinson-Patman Act.—A manufacturer of cinder concrete building blocks, by selling at 23.1 cents per block in El Paso, Texas, and 20 cents per block in Las Cruces, New Mexico, discriminated in price between purchasers of the same class in the two areas in violation of Section 2(a) of the Clayton Act. The court, affirming a trial court's judgment in favor of a local competitor which had lost business by reason of the manufacturer's price reductions in the Las Cruces area, rejected the contention that "geographic price differentials or discriminations between noncompeting purchasers in different localities" are not actionable under Section 2(a) of the Clayton Act, but only under Section 3 of the Robinson-Patman Act (for which a *private* cause of action does not lie). There is nothing in Section 2(a) to indicate that its prohibitions are restricted to discriminations between competing purchasers in the same area. The statute is not couched in terms of locality. Further, in *Moore v. Mead's Fine Bread,* 1954 Trade Cases ¶ 67,906, the United States Supreme Court sustained a charge of geographic price discrimination between noncompeting purchasers under both Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act, pointing out that such practices were prohibited under the Clayton Act even before it was amended by the Robinson-Patman Act.

Section 3 of the Robinson-Patman Act, which imposes criminal penalties for some but not all of the same infractions prohibited by Section 2(a) of the Clayton Act, is specific in its interdictions of geographic price discriminations. Section 2(a) is broader; it prohibits discriminations between different purchasers wherever located, whether competing or not, when the discrimination may substantially lessen competition or tend to create a monopoly. In *Anheuser-Busch, Inc. v. Federal Trade Commission,* 1959 Trade Cases ¶ 69,330, it was held that price cuts directed at local competitors were not discriminatory, apparently because there was no discrimination among the *local* competitors. That conclusion was apparently based on the theory that the statutory words "different purchasers" means *competing* purchasers. The present court rejected any such restriction upon Section 2(a) of the Clayton Act, noting its conviction that geographic price discrimination employed for predatory ends is cognizable under that section or under Section 3 of the Robinson-Patman Act. Also, the court distinguished the present case from those brought by local purchasers against manufacturers (where competition between purchasers is essential to actionable price discrimination) and those in which the prohibited consequences were absent.

See Price Discrimination, Vol. 1, ¶ 3505, 3505.620, 3505.750, 3508.545, 3551.10, 3591.90.

Price Discrimination—Effect on Competition Under Clayton Act, Section 2(a)—Factors Considered—Size and Economic Power of Defendant—Comparative Prices to Purchasers in Different Areas.—In an action charging a manufacturer of concrete building

blocks with discriminating in prices by charging a lower price in a locality where it competed with a local seller than it charged in adjacent areas, it was significant that the manufacturer was the largest supplier of cinder concrete blocks in the "territory." It enjoyed a "virtual monopoly" in one Texas county and possessed "the dominant market power" in nearby counties in New Mexico, including the one in which it competed with the local seller. In that setting, it was fairly inferable that the manufacturer utilized its higher prices in the county where it had a virtual monopoly to stifle competition with its lower prices in the area served by the local seller. In other words, it was fairly inferable that the manufacturer had used its dominant market power for predatory ends. It was not error, therefore, for the trial court to instruct the jury that, in determining the tendency of the price discriminations to substantially lessen competition and create a monopoly, they could consider the size of the manufacturer, its economic power, and its comparative prices to purchasers in the two areas. The jury was also rightly instructed that it could compare the amount of the manufacturer's sales with the local competitor's sales and could consider the reasons given by purchasers for buying the manufacturer's blocks instead of those of its local competitor. Further, there was testimony that customers of the local seller inquired if it could meet the manufacturer's lower prices and, when it was forced to discontinue sales at those prices, they ceased buying from it and began buying from the manufacturer, thereby depriving the local competitor of its "bread-and-butter" business.

See Price Discrimination, Vol. 1, ¶ 3506.200, 3506.500, 3506.620.

Price Discrimination—Effect on Competition Under Clayton Act, Section 2(a)—"Possible" or "Probable" Harm to Competition.—A trial court properly instructed a jury that a building block manufacturer's sales at lower prices in an area where it competed with a local seller, while maintaining higher prices in other areas, was an actionable price discrimination if there was a "reasonable possibility" of a substantial lessening in competition or a tendency to create a monopoly. The manufacturer objected to the use of the words "reasonable possibility," insisting that the court should have required a showing of "reasonable probability" of the proscribed effect. While there has been considerable discussion concerning the authoritative choice of the two phrases to define the statutory phrase "may be to substantially lessen competition . . .," the United States Supreme Court, in *Federal Trade Commission v. Morton Salt Co.*, 1948-1949 Trade Cases ¶ 62,247, deliberately adopted "reasonable possibility" over the more positive "reasonable probability" to indicate the required quantum of proof to show the prohibited harm. Here, however, the trial court did emphasize that such harm must not be "imaginary or illusive."

See Price Discrimination, Vol. 1, ¶ 3506.400.

Price Discrimination—Meeting Competition Under Clayton Act, Section 2(b)—Area Price Reduction to Meet Equally Low Price of Competitor—Isolated Sale by Single Competitor.—A manufacturer of concrete building blocks which was charged with violating Section 2(a) of the Clayton Act by selling at a lower price in an area where a local seller competed, while maintaining higher prices in other areas, failed to establish the "good faith meeting of competition" defense under Section 2(b). The manufacturer referred to a sale of pumice blocks by another of its competitors at a low price, and indicated that its reduced prices in the area were made to meet "an equally low price of a competitor." However, the evidence showed that the competitor's low price referred to was an "isolated sale and arose through a misunderstanding between the purchaser and the supplier." In any event, the jury was told that even though they believed that the manufacturer had discriminated in price, if they were satisfied that such discrimination was in good faith and only to meet an equally low price of a competitor, their verdict should be for the manufacturer, so long as the price reduction was not below the competitor's low price. Those instructions, considered together, correctly stated the antitrust law applicable to those facts.

See Price Discrimination, Vol. 1, ¶ 3515.100, 3515.500, 3515.750.

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Price Discrimination—Clayton Act, Section 2(a)—Constitutionality—Due Process—Definiteness and Certainty of Prohibitions.—Section 2(a) of the Clayton Act, when construed as prohibiting "geographic price differentials or discriminations between noncompeting purchasers in different localities," is not so vague and indefinite as to be incapable of observance "in circumspect human conduct" and is not "fatally defective for want of due process." The generalized language of that section is not less definite and certain in the standards of conduct it proscribes than the restraint of trade and monopolization provisions of Sections 1 and 2 of the Sherman Act, the criminal sanctions of which have long since been sustained as against the claim of unconstitutional vagueness. In addition, other related provisions of the antitrust laws of equally vague import have withstood the constitutional test.

See Price Discrimination, Vol. 1, ¶ 3505.

Private Enforcement and Procedure—Suit for Civil Damages—Price Discrimination—Damages—Sufficiency of Proof—Proximate Cause—Economic Factors Other Than Defendant's Pricing Policies.—A jury which found that a manufacturer of concrete building blocks had been damaged in the amount of $10,000 by a competitor's price discrimination (selling in the competitive area at lower prices than its prevailing prices in other areas) had been properly instructed on the question of damages. The trial court had told the jury that the manufacturer had to prove its damages with reasonable certainty and not by guess and conjecture, but that if the damage was certain, "the fact that its extent is uncertain does not prevent a recovery." Also, the jury had been properly instructed on the question of "proximate cause." It was told that, if it should find that the competitor's pricing policies amounted to actionable price discrimination, the burden was still on the manufacturer to establish that its losses, if any, were proximately caused by such discriminations. The jury was also told that, if the manufacturer's losses were caused by legitimate competition or by such economic factors as (1) its inability to achieve or maintain an adequate inventory, (2) its inability to deliver its products to purchasers, (3) shut downs in its plants, (4) failure of materials and supplies, or (5) its failure to bid on business or solicit purchases, then their verdict should be for the competitor, since those factors could not be attributed to the competitor's pricing policies.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.560.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable—Price Discrimination—Measure of Damages—Elements—Loss of Profits—Diminution of Assets—Accounting Procedures.—A jury award of $10,000 to a manufacturer of concrete building blocks whose business had been injured by a competitor's price reductions in the area was "very moderate." The jury was properly instructed that, in determining damages, it might consider as separate elements the plaintiff's loss of profits, if any, and the diminution of its assets. The competitor objected to that instruction on the ground that it permitted the jury to assess double damages for one wrongful act. However, the statute speaks of injury to "business and property." Those words have been construed in terms of (1) the difference between amounts actually realized from sales by the injured party and what it would have reasonably been expected to realize but for the unlawful acts complained of, and (2) the extent to which the value of the plaintiff's property had been diminished as a result of such acts.

Here, a public accountant analyzed the local manufacturer's production cost and computed the amount of business it might have reasonably been expected to receive if the higher prices in other areas had prevailed in the area where it competed with the defendant, and from that projected the plaintiff's profits "but for the price discrimination." The accounting procedures were not as satisfactory as the trial court thought they should have been, but they were sufficient. The evidence tended to show that, as a result of the defendant's pricing policies, the plaintiff had been deprived of business which it would have reasonably been expected to obtain under prices generally prevailing in another area, and that, as a result of the loss of that business, its profits dwindled, its cost of production increased, and the value of its business diminished.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.640.

Private Enforcement and Procedure—Trial—Directed Verdicts—Sufficiency of Evidence to Take Case to Jury—Price Discrimination.—A Federal appellate court, affirming a trial court's judgment in favor of a building block manufacturer which had been injured in its business by a competitor's price reductions in the area where they competed, found that the evidence, considered in its entirety, was sufficient to support the judgment. Where the evidence and inferences fairly drawn therefrom are such that reasonable minded persons, in the exercise of fair and impartial judgment, might reach different conclusions upon crucial issues of fact, a motion for a directed verdict should be denied and the questions submitted to the jury. Here, the case was properly submitted to the jury on the theory that the burden was on the manufacturer to show, by a preponderance of the evidence, that the competitor discriminated in price between different purchasers of concrete cinder building blocks of like grade and quality.

See Private Enforcement and Procedure, Vol. 2, ¶ 9014.15.

For the appellant: John P. Eastham, Albuquerque, N. M. (of the firm Rodey, Dickason, Sloan, Akin & Robb), and J. F. Hulse, El Paso, Tex. (of the firm Scott, Hulse, Marshall & Feuille).

For the appellee: Dee C. Blythe, Clovis, N. M., and James T. Martin, Jr., Las Cruces, N. M.

Affirming a judgment of the U. S. District Court, District of New Mexico, 1958 Trade Cases ¶ 69,110.

Before MURRAH, PICKETT and BREITENSTEIN, Circuit Judges.

[*Price Discrimination Action—Appeal*]

MURRAH, Circuit Judge [*In full text*]: This is an appeal from a judgment for triple damages in a private antitrust suit, laid under Section 2(a) [1] of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1536, 15 U. S. C. A. 13(a).

[*Geographic Price Discrimination*]

The allegations are that the plaintiff-appellee, Diamond Block & Gravel Company, is a manufacturer and seller of cinder concrete building blocks to the building trade in Las Cruces, New Mexico and vicinity; that the defendant-appellant, Atlas Building Products Company, manufactures and sells the same products in El Paso, Texas and vicinity, where it has a virtual monopoly; and that it also sells those products to the building trade in Las Cruces and vicinity. The crux of the charge is that commencing in 1950, and continuing to the filing of this suit, the defendant has systematically sold its products in Las Cruces at prices actually lower than its comparable El Paso sales; that it employed its highest El Paso prices to finance its price war against competitors in New Mexcio, including the plaintiff; that such practices constitute price discriminations between different purchasers, the effect of which may be to lessen competition or tend to create a monopoly in commerce in building blocks, or to injure, destroy or prevent competition by the plaintiff with the defendant, and with persons who received the benefit of such discriminations, or with customers of either of them. The appellee then alleged that as a result of the acts complained of, it has been injured in its business in the sum of $200,000.00, for which it prayed judgment, to be tripled as required by law, and for reasonable attorney fees.

[*Section 2(a) of Clayton Act*]

The appellant moved to dismiss the complaint for failure to state a claim upon which relief could be granted under Section 2(a), and upon denial pleaded, first, that its pricing policies were not discriminatory, but if so, they were made in good faith to meet an equally low price of a competitor within

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them * * *."

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the meaning of Section 2(b), 15 USCA 13(b).[2] The case was submitted to the jury on the theory that the burden was upon the plaintiff to show by a preponderance of the evidence that the defendant did in the course of commerce, directly or indirectly, discriminate in price between different purchasers of concrete cinder building blocks of like grade and quality; that price discrimination in the statutory sense means the giving to one of the purchasers an advantage in price not accorded or given to other purchasers. The jury was specifically told that a price discrimination as thus defined was not alone sufficient to sustain a claim under Section 2(a), for to be actionable, the evidence must show a "reasonable possibility" of a substantial lessening of competition or tendency to create a monopoly, or injure, destroy or prevent competition with any person who grants or receives the benefit of such discrimination. Thus, the jury was instructed that "a price discrimination may exist if a seller exacts different prices from its customers * * * where one leg of the price differential is across state lines and this differential affects or has a tendency to affect competition in the ways I have mentioned"; and that "the jury has the right to consider any difference in prices charged in El Paso, Texas on the one hand, and prices exacted by it [the defendant] in Dona Ana County, New Mexico [Las Cruces] on the other."

[*Discrimination Between "Noncompeting" Purchasers*]

The defendant objected to all of these instructions and to refusal of the court to instruct the jury that to be actionable under Section 2(a), the price discrimination must be between different purchasers in direct competition with each other; and that the court therefore erroneously permitted the jury to consider the difference in the defendant's prices in El Paso on the one hand, and Las Cruces on the other.

[*"Noncompeting" Purchasers—Section 3 of Robinson-Patman Act*]

Thus, we have squarely presented the question whether the prohibitions of Section 2(a) are applicable to price discriminations between different, but noncompeting, purchasers of products of like grade and quality. The appellant takes the position that geographic price differentials or discriminations between noncompeting purchasers in different localities are not actionable under Section 2(a), but only under Section 3 of the Robinson-Patman Act, for which a private cause of action under Section 4 admittedly does not lie. And see *Nashville Milk Co. v. Carnation Co.* [1958 Trade Cases ¶ 68,915], 355 U. S. 373; and *Safeway Stores, Inc. v. Vance* [1958 Trade Cases ¶ 68,916], 355 U. S. 389.

In the first place, there is nothing in the statute to indicate that its prohibitions are restricted to price discriminations between competing purchasers in the same area. The statute is not couched in terms of locality. See *Corn Products Co. v. Federal Trade Commission* [1944-1945 Trade Cases ¶ 57,363], 324 U. S. 726, 734. The purpose of this Section as an integral part of the antitrust legislative scheme is to prevent price discriminations in commerce which tend to injure competitive enterprise. To that end, it forbids a seller from charging different customers different prices for the same products with the effect of lessening competition. And, we know that market power is a ready means toward competitive injury. See Sen. Rep. 1502, 74th Cong., 2 Sess., 4 (1936); H. R. Rep. 2287, 74th Cong., 2 Sess., 8 (1936); 80 Cong. Rec. 9417 (1936). Furthermore, geographic price discrimination between noncompeting purchasers was asserted and sustained under both Sections 2(a) and 3 in *Moore v. Mead's Fine Bread* [1954 Trade Cases ¶ 67,906], 348 U. S. 115. Indeed, the court pointed out that such practices were prohibited under the Clayton Act even before the Robinson-Patman Amendment, citing *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 237. The court was sure that "Congress by the Clayton Act and the Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent." It went on to quote from a statement of Congressman Utterback, one of the Managers of the Robinson-Patman Amendment, that

[2] Section 2(b) pertinently provides:
"That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

"Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other * * *."

And see also *Maryland Baking Co. v. Federal Trade Commission* [1957 TRADE CASES ¶ 68,681], 243 F. 2d 716.

[*Comparing Section 2(a) and Section 3*]

It is agreed that Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act "overlap in some respects", but are in no way inconsistent with each other. Section 2(a) provides a civil remedy by way of triple damages, while Section 3 imposes criminal penalties for some but not all of the same infractions. Section 3 is specific in its interdictions of geographic price discriminations, while Section 2(a) is broader to prohibit the same practices between different purchasers wherever located, whether competing or not, when the effect of such discrimination may substantially lessen competition or tend to create a monopoly in any line of commerce. Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor.

[*Cases Distinguished*]

Our case is clearly distinguishable from suits by a local purchaser against a manufacturer, where competition between purchasers is of course essential to actionable price discrimination. See *Naifeh v. Ronson Art Metal Works* [1954 TRADE CASES ¶ 67,646], 117 F. Supp. 690, affmd. [1955 TRADE CASES ¶ 67,925], 218 F. 2d 292; *Klein v. Lionel Corp.* [1956 TRADE CASES ¶ 68,485], 237 F. 2d 13; *Shaw's, Inc. v. Wilson-Jones Co.* [1932-1939 TRADE CASES ¶ 55,230], 105 F. 2d 331. Our case is also, we think, distinguishable on facts from *Balian Ice Cream Co. v. Arden Farms Co.* [1955 TRADE CASES ¶ 68,186], 231 F. 2d 356, in which, while the interstate manufacturer discriminated in price between different purchasers in distant localities, the difference in the price was held not to substantially lessen competition or tend to create a monopoly in the product sold. In short, the conclusive finding of the trial court negated the existence of any prohibited consequences or the possibility thereof.

[*Anheuser-Busch Case*]

The same legal issue was before the Seventh Circuit in *Anheuser-Busch, Inc. v. Federal Trade Commission* [1959 TRADE CASES ¶ 69,330], 265 F. 2d 677, where the court was presented with the basic question whether uniform local price cuts by an interstate manufacturer which disrupted the market to the injury of local competitors, were price discriminations within the proscription of Section 2(a). The court held that even though directed at local competitors, price cuts were not discriminatory, apparently because they did not discriminate among local competitors. This conclusion is apparently based upon the theory contended for here that the statutory words "different purchasers" means competing purchasers. We respectfully reject any such restriction upon Section 2(a). For, we are convinced that geographic price discriminations employed for predatory ends are cognizable under either Section 2(a) or Section 3, and it was therefore not error for the court to tell the jury that they might consider differences in price in El Paso County, Texas, and Dona Ana County, New Mexico, in determining whether the defendant was guilty of actionable price discrimination.

[*Constitutionality—Due Process*]

As thus construed and applied, the appellant says that the statute is so vague and indefinite as to be incapable of observance in circumspect human conduct, and is therefore fatally defective for want of due process. But we do not think the generalized language of Section 2(a) is any less definite and certain in the standards of conduct it proscribes than the restraint of trade and monopolization provisions of Sections 1 and 2 of the Sherman Act, the criminal sanctions of which have long since been sustained as against the claim of unconstitutional vagueness. See *Nash v. United States*, 229 U. S. 373. "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Id. p. 377. Other related provisions of the

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antitrust laws of equally vague import have withstood the constitutional test. See *F. & A. Ice Cream Co. v. Arden Farms* [1950-1951 TRADE CASES ¶ 62,848], 98 F. Supp. 80; *Elizabeth Arden, Inc. v. Federal Trade Commission* [1946-1947 TRADE CASES ¶ 57,467], 156 F. 2d 132.

[*Sufficiency of Facts*]

This bring us to the sufficiency of the facts to sustain the charge, and we think they are adequate.

[*Price Differential*]

It seems to be agreed that the appellant's prevailing El Paso prices to dealers and contractors during the period in question were 24¢ per standard block, less 10 per cent, plus 1½¢ delivery charge, or a delivered price of 23.1¢. And, there was evidence from which the jury was justified in finding that during the same period, the appellant's Las Cruces delivered price was 20¢, including a 3¢ haulage charge. There were variations in the prices to dealers and contractors, but the 20¢ delivered price was generally applicable to the principal building contractors. There was evidence to the effect that from the early part of 1952, when the appellee commenced business, it sold cinder blocks of the same grade and quality to the building trade for 23¢ per block, less 10 per cent, plus 1½¢ haulage, or a net of 22.2¢ delivered price; that in some instances it gave a 12 per cent discount to large contractors, or a net of 21.74¢; that in May 1953, the price was changed to 24¢, less 10 per cent, plus 1½¢ haulage, or a net of 23.1¢ delivered price. There was testimony to the effect that in April or May 1952, the contractors who had been purchasing blocks from appellee at the foregoing prices inquired whether it could meet a 20¢ delivered price; that thereafter appellee did sell blocks for two or three houses to one principal builder for 20¢ delivered price, but was forced to discontinue sales at this price; that this builder and other builders thereupon ceased to purchase blocks from appellee and thereafter purchased all of their blocks from the appellant.

[*Economic Factors*]

The appellant points to the fact that it sold much of its blocks through its dealers in Las Cruces and vicinity, and that those dealers sold blocks retail always in excess of 24¢, and sometimes as much as 27¢; that the appellee was actually in competition with appellant's dealers, between which there was no price discrimination; that the appellee was unable to compete for the contractors' trade because of its inability to supply their requirements due to lack of plant facilities and raw materials, production problems, failure to make special types of blocks needed in the building industry, wasteful increase in production costs, lack of sales organization, failure to maintain sufficient inventory, and other economic factors disabling the appellee from supplying the market demand in its trade area.

[*Discrimination Between Purchasers in Different Areas*]

There was evidence that during the prosecution period, the appellant sold $162,000.00 worth of blocks in the Las Cruces area for prices in excess of 24.1¢, but the evidence also showed without much dispute that during the same period, it sold $603,163.00 worth of blocks at prices lower than 24.1¢ in the same area. From this it is reasonable to say, as did the jury, that the appellant discriminated in prices between its purchasers in El Paso and its purchasers of the same class in the Las Cruces area.

[*Effects on Competition—Factors*]

As we have seen, the jury was emphatically told that only price discriminations resulting in proscribed harmful effects were actionable. But the jury was also told, rightly we think, that in determining the presence or absence of the harmful effects, if any, it could consider the size of the appellant and its economic power in the area in which it operates, the amount of blocks sold by appellant as compared to the amount sold by appellee, and the comparative prices at the consumer level, that is, the level of contractor and retail sales; and that they should take into consideration the reasons given by purchasers for purchasing appellant's or appellee's blocks. In that connection, however, the jury was advised that the antitrust laws were never intended as an "instrument to stifle or prevent competition, or as a means to create monopolies." That, "While its primary purpose was to give some measure of protection to the small business, as against

unlawful practices by strong and powerful competitors, it does not exclude or preclude the large business from entering into any field and competing legitimately with others engaged in a like business enterprise." Thus, the jury was told that if the appellee failed to prove by a preponderance of the evidence that the price discriminations, if any, had reasonably possible harmful effects as outlined in the statute, the verdict must be for the appellant.

[*Effect on Plaintiff*]

There was testimony that the appellant's 20¢ delivered price to the principal contractors deprived the appellee of its "bread-and-butter" business and prevented it from enlarging its plant facilities to take care of the demand, or to pursue a vigorous sales policy. There was evidence that in a healthy market the appellee could have enlarged its plant within a short time to enable it to compete for the business of the principal contractors in this particular area.

[*"Virtual Monopoly"—Dominant Market Power*]

It is significant, we think, that the appellant was the largest manufacturer and supplier of cinder concrete blocks in this territory. It enjoyed a virtual monopoly in El Paso County, and possessed the dominant market power in nearby counties in New Mexico, including Dona Ana County. In this setting, it is fairly inferable that the appellant utilized its higher El Paso prices to stifle competition with its lower prices in the Las Cruces area. In other words, that the appellant utilized its dominant market power for predatory ends. It was not error, therefore, for the trial court to instruct the jury that in determining the tendency of the price discriminations to substantially lessen competition and create a monopoly, they could consider the size of the appellant, its economic power and its comparative prices to purchasers in the El Paso and Las Cruces areas. Cf. *Moore v. Mead's Fine Bread, supra; United States v. Griffith* [1948-1949 Trade Cases ¶ 62,246], 334 U. S. 100.

[*"Meeting Competition" Defense*]

In defense of its pricing policy, appellant refers to a sale of pumice blocks by a competitor, not the appellee, for 20¢ delivered price, and indicates that its 20¢ delivered price was made to meet an equally low price of a competitor. But the evidence shows that the 20¢ delivered price was an isolated sale and arose through a misunderstanding between the purchaser and the supplier. In any event, the jury was told that even though they believed by a preponderance of the evidence that the appellant did discriminate in price, if they were satisfied by the same preponderance of the evidence that such discrimination was in good faith and only to meet an equally low price of a competitor, their verdict should be for the appellant, so long as the price reduction was not below the competitor's low price. And see *Standard Oil Co. v. Federal Trade Commission* [1950-1951 Trade Cases ¶ 62,746], 340 U. S. 231. We think these instructions, considered together, correctly state the antitrust law applicable to these facts.

[*"Probable" or "Possible" Competitive Effects*]

As we have seen, the jury was positively instructed that appellant's price dscriminations, if any, were actionable if there was a "reasonable possibility" of a substantial lessening in competition or tendency to create a monopoly. The appellant objected to the use of the words "reasonable possibility", insisting that the court should have required a showing of a "reasonable probability" of the proscribed effect on commerce.

The use of both phrases to mean the same thing in *Corn Products Co. v. Federal Trade Commission, supra,* has provoked considerable discussion concerning the authoritative choice of the two to define the statutory phrase "may be to substantially lessen competition * * *" which, in our judgment, needs no definition. *Federal Trade Commission v. Morton Salt Co.* [1948-1949 Trade Cases ¶ 62,247], 334 U. S. 37; *E. Edelmann & Co. v. Federal Trade Commission* [1956 Trade Cases ¶ 68,558], 239 F. 2d 152; *Whitaker Cable Corp. v. Federal Trade Commission* [1956 Trade Cases ¶ 68,559], 239 F. 2d 253; *Moog Industries v. Federal Trade Commission* [1956 Trade Cases ¶ 68,527], 238 F. 2d 43. But whatever may be said for the use of the words "reasonable probability" as a basis for judicial action (see Mr. Justice Jackson dissenting in *Federal Trade Commission v. Morton Salt Co., supra*), the fact remains that

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for good or bad, the Supreme Court has deliberately adopted "reasonable possibility" over the more positive "reasonable probability" to indicate the required quantum of proof to show the prohibited harm. *Federal Trade Commission v. Morton Salt Co., supra.*

While the court did tell the jury that reasonable possibility of harmful results was sufficient, it did emphasize that such harm must not be "imaginary or illusive". We cannot say that the trial court erroneously used the phrase "reasonable possibility" instead of "reasonable probability".

[*Proximate Cause*]

The appellant also complains of the refusal of the trial court to give its requested instructions on proximate cause. But the jury was told clearly and unmistakably that even though it should find that the appellant's pricing policies amounted to actionable price discrimination, the burden was on the appellee to establish by a preponderance of the evidence that the losses, if any, were proximately caused by such price discriminations; that loss of business occasioned by inability to achieve or maintain an adequate inventory, inability to deliver its products to purchasers, by shut downs in its plant, failure of material and supplies, or failure to bid on business or solicit purchases, could not be attributable to the appellant's pricing policies; and if, therefore, the jury found that the loss of business was caused by any of these factors or by legitimate competition, their verdict should be for the defendant. The jury was instructed in language too clear for doubt that there must be a causal connection between the losses sustained, if any, and the unlawful acts of the appellant. Under these instructions we think the question of proximate cause was properly submitted to the jury. And see *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555.

[*Damages*]

The ascertainment of requisite damages to the appellee's business and property was submitted to the jury on the theory that it was incumbent on the appellee to prove such damages with reasonable certainty, not by guess and conjecture. But, "If the damage is certain, the fact that its extent is uncertain does not prevent a recovery." *Story Parchment Co. v. Paterson Co., supra.* See also *Kobe, Inc. v. Dempsey Pump Co.* [1952 Trade Cases ¶ 67,312], 198 F. 2d 416; *Leader Clothing Co. v. Fidelity & Casualty Co. of N. Y.*, 237 F. 2d 7; *Wells Truckways v. Burch*, 247 F. 2d 194; *Bigelow v. R. K. O. Radio Pictures* [1946-1947 Trade Cases ¶ 57,445], 327 U. S. 251.

[*Loss of Business—Accounting Procedures*]

On the question of damages and the amount thereof, the appellee relied on the testimony of one of its partners, who produced the records of the Company on sales and cost of production, and who also testified concerning the appellee's sales policies in the Las Cruces area in its attempts to compete with the appellant. Generally, the testimony reflected an increased cost of production commensurate with decreased production resulting from diminished sales. A public accountant analyzed the appellee's production cost and computed the amount of business the appellee might reasonably be expected to receive if El Paso prices (i. e. 21.6¢ f. o. b.) had prevailed, and from that projected the appellee's profits but for the price discrimination. A manufacturer's agent, familiar with the block building business, and particularly the production methods and procedures prevalent in the business, testified that the appellee could have expeditiously enlarged its production facilities to meet the demand and compete for its fair share of the business in a flourishing market. The accounting procedures employed by the appellee to show damages were not as satisfactory as the trial court thought they should have been, but that they were sufficient. We agree that the evidence tended to show that as a result of the appellant's pricing policies, the appellee had been deprived of business which it would have reasonably been expected to obtain under prices generally prevailing in the El Paso area; and that as a result of the loss of this business, its profits dwindled, its cost of production increased, and the value of its business was diminished.

[*Profit Losses and Diminution of Assets*]

In that regard the jury was instructed that in determining damages it might consider as one of the elements, any profits that may have been lost by appellee in its business; and that it might also consider

as another element of damages the extent to which the value of appellee's profit or the net worth of its assets had been diminished as a result of the price discrimination. The appellant objected to this instruction on the ground that it permitted the jury to assess double damages for one wrongful act.

The statute speaks of injury to "business or property". And see Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. 15.[3] And, those words in their ordinary sense have been construed in terms of (1) the difference, if any, between the amounts actually realized by the injured party and what it would have reasonably expected to realize from sales but for the unlawful acts complained of; and (2) the extent to which the value of the petitioner's property had been diminished as a result of such acts. See *Story Parchment Co. v. Paterson, supra; Kobe, Inc. v. Dempsey Pump Co., supra; Bigelow v. R. K. O. Pictures, supra.* We think both loss of profits in business and diminishment of the assets were proper elements of damage, and the trial court did not err in so submitting the case to the jury.

[*Relevance and Probative Value of Testimony*]

The appellant also challenges the testimony of the accountant and the manufacturing agent as wholly outside the scope of the case and the knowledge of the witnesses, and as based upon hypothetical facts having no basis in the evidence and contrary thereto. Much of the accountant's testimony was of doubtful relevance, and the court excluded parts and confined other parts within narrow range. We think in the last analysis the weight and probative value of the testimony they gave concerning the amount of damages was for the jury under instructions of the court.

[*"Moderate" Award of Damages—Judgment Affirmed*]

As the trial court observed, the jury award of $10,000.00 was "very moderate" under the proof of the amount of sales and the worth of the business involved. We have recently restated the general rule that "on a motion for directed verdict upon the ground of the insufficiency of the evidence to take the case to the jury on the crucial issue or issues of fact, the evidence and the inferences fairly to be drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed. And if the evidence and the inferences fairly drawn therefrom—viewed in that manner—are such that reasonable minded persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue or issues of fact, the motion should be denied and the question submitted to the jury." *Transcontinental Bus System, Inc. v. Taylor,* 265 F. 2d 913. See also *Linn v. Ula Uranium, Inc.,* 265 F. 2d 916; *Story Parchment Co. v. Paterson, supra.* We agree with the trial court that the evidence, considered in its entirety, is sufficient to support the judgment of the court, and it is affirmed.

[¶ 69,449] Pevely Dairy Company v. Milk Wagon Drivers and Dairy Employees Union Local 603.

In the United States District Court for the Eastern District of Missouri, Eastern Division. No. 58 C 396 (3). Filed June 19, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Labor Unions—Exemptions under Clayton Act, Sections 6 and 20, and Norris-LaGuardia Act—Absence of Conspiracy with Non-labor Groups—Labor Agreement "Affecting Price Structure" of Milk—"Illegality *Per Se*" Doctrine.—A dairy's agreement with a truck drivers' labor union to pay delivery truck drivers on a "commission" system was not illegal *per se* under Section 1 of the Sherman Antitrust Act. The dairy contended that the agreement was forced upon it by the union,

[3] Section 4 provides in material part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * *."

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that the "excessive and illegal" commissions affected the price of milk, and that "*any* agreement, including labor contracts, which results in affecting the price structure, is illegal *per se*." The court concluded, however, that the "illegality *per se*" doctrine does not apply to a labor union, and that such an organization is immune from Sherman Act liability unless it is found to have conspired with non-labor groups for purposes not connected with legitimate labor ends. The courts have held that when the Sherman Act is read in connection with the Norris-LaGuardia and Clayton Acts, a union acting for a labor goal, in the absence of a conspiracy with outside groups, cannot be in violation of the Sherman Act. Here, there was no allegation or proof of a combination or conspiracy with a non-labor group.

The court distinguished the instant case from those cited as authority for the proposition that a union, even when acting alone, does not have an unlimited license to escape the antitrust laws. Here, there was a true employer-employee relationship. Since the union negotiated, on behalf of the dairy's employees, a contract providing for certain salaries and commissions, it would have been difficult for the court to state that those agreements did not concern "conditions of employment."

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063, 2101.100, 2101.265, 2111.

For the plaintiff: Alexander Kerckhoff and E. C. Hartman, St. Louis, Mo.

For the defendant: Harry H. Craig, St. Louis, Mo.

Opinion

[*Labor Unions Under Antitrust Laws*]

WEBER, District Judge [*In full text*]: Plaintiff filed its Complaint against defendant Union under §§ 1 and 4 of Title 15, U. S. C. A., known as the Sherman Antitrust Act, in which it alleges that Articles 14 and 15A of its contract with defendant[1] are in violation of the Act and are illegal and in restraint of trade and commerce among the several states.

[*"Excessive Commissions"—No Conspiracy Alleged*]

Plaintiff's Complaint generally alleges that these Articles were forced upon it by the Union in their bargaining session; that it is prohibited from employing independent contractors to distribute or sell its milk and dairy products in competition with other milk processers who have signed the identical contract and who have independent contractors delivering such products in the same area; that under the point commission basis for wholesale store route drivers, it has been compelled to pay some of them up to $20,000 per year for 8 hours work per day, 5 days per week; that such wholesale store route drivers average 120% more per week than home delivery route drivers and 40% to 150% more than all other defendant Local employees; that such excessive and illegal commission payments affect the price of milk, interfere with plaintiff's reasonable and competitive cost of delivery, and adversely affect both plaintiff and the consuming public; that it is compelled to compete with other companies who have not contracted with defendant Union; that this contract was forced upon plaintiff for the sole purpose of restricting, restraining

[1] The Articles of the Contract are too lengthy to quote verbatim, so the Court is setting them forth in essence, as follows:

Article 14 provides a minimum wage scale for retail, mixed retail, wholesale bulk and wholesale store routes, and tank and tractor drivers, route foremen, and route drivers. The wage scale in each category provides for a base pay per week, for overtime, for raises based on seniority and for paid vacations.

In addition to the base pay clauses, provision is made for monthly commissions to be paid on a *point basis*. The determination of points is set forth in detail in the contract, but may be generally stated to provide points for 1 quart of milk, or its equivalent in cream, ice cream, butter and cheese.

The only part of Article 14 of the contract about which plaintiff complains in its Complaint is with reference to the commissions for "wholesale store routes". The commissions therein provided for increase upon a point basis beginning at 15,000 to 50,000 points per month at 1½¢ per point; 50,000 to 60,000 points per month, 2¢ per point; in excess of 60,000, 3¢ per point.

Article 15A provides that during the life of the contract the employer will operate all wholesale and retail routes by "its employees and by no others and shall not engage independent contractors or outside persons, firms or corporations to do the type of work which is recognized as the work of the employees". (An exception was made to independent contractors presently engaged.)

and preventing competition and; that trade is restrained between the several states. (It should be noted that the Complaint is void of any allegation of conspiracy or combination.)

Defendant joined issue upon these allegations and the cause proceeded to trial before the Court without a jury.

[*Economics*]

Without overburdening this Opinion by details of the evidence, suffice it to say, that plaintiff's proof tended to establish that a certain percentage of the wholesale store route drivers would receive around, and even in excess of, $20,000 per year and that such wages and commission were considerably in excess of all other employees of plaintiff, even in the same category. An economist testified for plaintiff that an increase in commissions as unit deliveries increased, was poor economics; that good economics would require that as production increased, the cost should go down. Testimony further established the interstate character of plaintiff's operation and the effect of this phase of the contract as reflected in the price of milk.

[*Acquiescence—Alternative*]

Plaintiff's evidence further established that due to the perishable nature of its products a shutdown as the result of a strike would be disastrous; that plaintiff would lose its source of supply as well as its wholesale and retail customers, that such had been the experience in the industry and therefore plaintiff had no alternative but to enter into the contract.

[*Negotiations*]

It may further be pointed out that the negotiations on this contract proceeded in the following fashion: all of the dairies in this community met with the defendant's negotiators to attempt to reach agreement upon a contract; when a contract was not reached with the whole group, the Union then announced its plans to negotiate individually and elected one other dairy in the community with which to negotiate; the Union later announced to the remainder of the dairies that it had reached agreement with the one dairy; that thereafter all of the dairies, including plaintiff, signed a similar contract.

Defendant produced only one witness, the head of the Local, who substantiated the method of negotiations and testified that the employees receiving the high wages were older employees with considerable seniority. He also stated that the contract was negotiated with the intent of providing job security and to prohibit destruction of the Local's wage scale.

[*Issues*]

The pleadings and the testimony boil down the issues in this matter to two propositions: (1) is a union within contemplation of the Sherman Act, and if so, (2) can a union be in violation of the restraint of trade prohibitions of the Act when it acts singly, i.e., without combining with a non-labor group.

[*Agreements Affecting Price Structure—Legality*]

Plaintiff contends that *any* agreement, including labor contracts, which result in affecting the price structure, is illegal *per se*. This contention is not supported by the court decisions.

In *Adams Dairy Co. v. St. Louis Dairy Co., et al.* [1958 TRADE CASES ¶ 69,158], (8th CCA, 1958), 260 F. 2d 46, 54, (and in which this plaintiff was a defendant) the court said:

> "It should also be emphasized that this controversy bears another feature vitally distinguishing it from the cases where the 'Illegality *Per Se*' doctrine was applied, in that a labor union was a participant in the activities which culminated in the 1950 contract. Under decisional law, a labor organization is immune to Sherman Act liability unless it is found to have conspired with non-labor groups for purposes not connected with legitimate labor ends. *Allen Bradley v. Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939. See also *United States v. Hutcheson*, 312 U. S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788; Annotation, 29 A. L. R. 2d 323, 408. As urged by the Union, when labor organizations are involved, it is necessary to look apart from the Sherman Act, and consider it in conjunction with the Clayton Act, 38 Stat. 730, and the Norris-LaGuardia Act, 47 Stat. 70."

[*Exemption*]

In effect, what the courts have said is that when the Sherman Act (which has no specific provision for exemptions of unions from the restraints provided in the Act) is

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read in connection with the Norris-LaGuardia and Clayton Acts (which exempt unions where a labor dispute is involved) then, a union acting for a labor goal or end and absent conspiracy or combination with outside groups, cannot be in violation of the Sherman Act. See *Allen Bradley v. Local Union No. 3, supra* [1944-1945 Trade Cases ¶ 57,386].

[*Employer-Employee Relationship*]

Plaintiff has cited *Columbia River Packers Ass'n., Inc. v. Hinton, et al.* [1940-1943 Trade Cases ¶ 56,185], (1943), 315 U. S. 143; *I. P. C. Distributors, Inc. v. Chicago Moving Picture Machine Operators Union* [1955 Trade Cases ¶ 68,107], (N. D. Ill., 1955), 132 F. Supp. 294, 299, as authority for the proposition that a union acting alone does not have an unlimited license to escape the antitrust laws. These cases, however, are distinguishable from the present type of case. They involve situations where there is not an employer-employee relationship. In *Ring v. Spina, et al.* [1944-1945 Trade Cases ¶ 57,347], (2nd CCA, 1945), 148 F. 2d 647, at l.c. 651, the Court said,

> "* * * the exception (i.e., the exclusion of the union from violation of the Sherman Act, § 17, Title 15, U. S. C.) will not apply unless an employer-employee relationship is 'the matrix of the controversy'." (Parenthesis supplied.)

In the case at hand there is a true employer-employee relationship. The defendant Union has negotiated the contract in question on behalf of the plaintiff's employees. The contract provides for certain salaries and commissions and, in addition, that the employees of the plaintiff should be the only ones entitled to deliver the milk. It would be difficult for this Court to state that these agreements entered into on behalf of plaintiff's employees did not concern "conditions of employment". See, e.g., *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., et al.* [1940-1943 Trade Cases ¶ 56,070], (1940), 311 U. S. 91.

[*Agreement with Non-Labor Groups*]

Other cases cited by plaintiff on this proposition, viz., *Hawaiian Tuna Packers Ltd. v. International Longshoremen's Union,* (D. C. Hawaii, 1947), 72 F. Supp. 562 [1946-1947 Trade Cases ¶ 57,587], and *United States v. Milk Drivers and Dairy Employees Union* [1957 Trade Cases ¶ 68,813], (D. C. Minn., 1957), 153 F. Supp. 803, are situations where it was found that the union had entered into agreement with non-labor groups. Therefore, these cases are not authority for plaintiff's contention.

[*"Unfair Labor Practices"—NLRB Jurisdiction*]

Plaintiff also cites for this proposition *Bakery Sales Drivers Local Union No. 33 v. Wagshal,* 333 U. S. 437, *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry. Co.,* (D. C. Minn., 1949), 85 F. Supp. 65; *Teamsters Union v. Hanke, et al.,* (1950), 339 U. S. 470; *Penello v. International Union, U. M. W. A.,* (D. C. C., 1950), 88 F. Supp. 935. These cases likewise are not in point. They were not brought under the Sherman Act. They involved situations where the union was either striking or refusing to bargain over a certain matter which management was contending constituted an "unfair labor practice." There was no contract entered into by the parties and, therefore, it was the "unfair labor practice" that was the basis of the action.

If it is an "unfair labor practice" that plaintiff is complaining of, Norris-LaGuardia and Taft-Hartley provide it with a forum, as the N. L. R. B. has primary jurisdiction over such labor disputes. See *California Ass'n v. Building and Const. Council,* (9th CCA, 1949), 178 F. 2d 175; *United Brick & Clay Workers v. Junction City Clay Co.* [1946-1947 Trade Cases ¶ 57,523], (6th CCA, 1946), 158 F. 2d 552; *International Longshoremen's & Warehousemen's Union v. Sunset Line & Twine Co.,* (D. C. Calif., 1948), 77 F. Supp. 119; *LeBaron v. Kern County Farm Labor Union,* (D. C. Calif., 1948), 80 F. Supp. 151. Protection can even be had before actual industrial strife materializes to obstruct commerce. See *Labor Board v. Bradford Dyeing Ass'n.,* (1940) 310 U. S. 318, 326; *NLRB v. J. L. Hudson Co.,* 135 F. 2d 380, cert. den. 320 U. S. 740 (1943); *NLRB v. Rath Packing Co.,* (8th CCA, 1940), 115 F. 2d 217.

[*"Illegality Per Se" Doctrine*]

It is this Court's conclusion that the "Illegality *Per Se*" doctrine does not apply to a labor union and that such an organization is immune to Sherman Act liability unless it is found to have conspired or combined with non-labor groups for purposes not

connected with legitimate labor ends. *Adams Dairy Co. v. St. Louis Co., et al., supra.*

[*Economic Theories*]

The evidence offered by plaintiff as to the economic unsoundness of the contract in regard to these high commissions being paid some of the drivers and the further fact that its failure to sign the contract would cause a strike and destroy its suppliers and customers, is certainly a situation which must give plaintiff vital concern.

However, the courts cannot be called upon to choose sides between differing economic theories. It is the courts' function to view the pleadings and the evidence within the purview of the act upon which plaintiff has bottomed its case. As pointed out in the *Allen Bradley Co. v. Union, supra,* at l.c. 810-811:

> "It is true that many labor union activities do substantially interrupt the course of trade and that these activities, lifted out of the prohibitions of the Sherman Act, include substantially all, if not all, of the normal peaceful activities of labor unions. * * * a union's exemption from the Sherman Act is not to be determined by a judicial 'judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' *United States v. Hutcheson,* (312 U. S. 219, 232). Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly. Congress evidently concluded, however, that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition."

[*Judgment for Union*]

The plaintiff, having chosen its forum and having based its case entirely upon the provisions of the Sherman Act, has failed to produce any proof of conspiracy or combination with a non-labor group and thus has entirely failed to make a case within the confines of its pleading and the decisions applicable thereto. Therefore, an Order shall be entered finding the issues against the plaintiff and for the defendant.

[¶ 69,450] John I. Okerberg, Jr. v. Robert Crable and Carl E. Kersley.

In the Kansas Supreme Court. No. 41,348. Opinion filed July 10, 1959.

Appeal from the Franklin District Court, FLOYD H. COFFMAN, Judge.

Kansas Antitrust Laws

Combinations and Conspiracies—State Antitrust Laws—Practices—Territorial Division of Markets—Milk Haulers' Allocation of Routes for Delivery to Single Receiving Plant—Rule of Reason.—An agreement dividing route "territories" among milk "haulers" transporting milk from producers' farms to only one particular receiving plant in Kansas did not have the effect of eliminating competition in the transportation of milk to that plant by third persons in violation of Kansas "restraint of trade" statutes. The trial court had concluded that the signers of the agreement had bound themselves to prevent any other member-hauler, or any other person besides "the hauler who owned that territory," from receiving the "freight" on milk delivered to that plant (excepting deliveries by the producer himself). Reversing the trial court's ruling that the agreement was void, the court noted that the old rule as to limitations of time and space with respect to contracts in restraint of trade has given way to the modern doctrine of "reasonableness." Thus, the real test is never whether there is any restraint, but whether the restraint is reasonable under the facts and circumstances of the particular case. Further, reasonableness depends upon "fundamental elements of common fairness." Here, all of the producers were generally charged the same hauling rates within a particular route territory of a "can" hauler, whether the milk went to the plant in question or to some other plant, and irrespective of the distance from the farm to the receiving plant. Thus, the agreement did not work any hardship on the milk producers. Also, there was competition between the plant in question and other plants in the territory, competition between the haulers who had signed the agreement

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and the haulers for other plants, no price fixing, and no requirement that the producers sell to that plant. In addition, producers could haul their milk to that plant in their own trucks if they did not wish to use the services of the hauler who "owned" the route territory in which they were located.

See Combinations and Conspiracies, Vol. 1, ¶ 2345, 2429.

Combinations and Conspiracies—State Antitrust Laws—Action to Enforce Contract—Defenses—Antitrust Violations—Burden of Proof.—In an action seeking to enforce an agreement dividing route "territories" among milk "haulers" engaged in transporting milk from producers' farms to a particular receiving plant, the trial court improperly concluded that "although there was no direct evidence to establish that hauling rates would be less if the milk haulers' agreement were not in effect, such an agreement being contrary to the declared public policy of the state is presumed to be injurious to the public welfare." Any presumptions must be in favor of the validity of the agreement, not its invalidity; thus, the burden was on the defendant at all times to prove the invalidity of the agreement. There is no presumption that a contract is illegal, and one who denies his liability under a contract which he admits having entered into must make the fact of illegality apparent. The presumption is in favor of innocence, and the taint of wrong is a matter of defense.

See Combinations and Conspiracies, Vol. 1, ¶ 2407.

For the appellant: Basil W. Kelsey, Ottawa, Kan., argued the cause (Winton A. Winter was with him on the brief).

For the appellees: John C. Gage, Kansas City, Mo., argued the cause (William S. Bowers, Ottawa, Kan., was with him on the brief).

Syllabus by the Court

[*Allocation of Milk Route Territories*]

1. As more fully appears in the opinion, pursuant to certain milk route territory regulations covering all independent milk trucks, whether can or bulk tank type, delivering milk from producers to the Bennett Creamery Company in Ottawa, Kansas, plaintiff, a can milk hauler, as the result of conversion by three of his producers from the can to the bulk tank system, transferred them to defendants who failed and refused to make the payment required to be made to plaintiff under the above-mentioned regulations. Plaintiff thereafter filed this action seeking a money judgment. The record is examined and it is *held:* (1) The regulations herein concerned are reasonable and valid; (2) the trial court did not err in refusing to amend the findings of fact but it did err in its conclusions of law based on those findings; and (3) the trial court further erred in entering judgment in favor of defendants.

2. There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having entered into must make the fact of illegality apparent. The presumption is in favor of innocence, and the taint of wrong is a matter of defense.

3. The old rule as to limitations of time and space with respect to contracts involving restraint of trade has given way to the modern doctrine of reasonableness and the real test is never whether there is any restraint but always whether the restraint is reasonable under the facts and circumstances of the particular case. (*Heckard v. Park,* 164 Kan. 216, 188 P. 2d 926, 175 A. L. R. 605, 617.)

The opinion of the court was delivered by Robb, Justice [*In full text*]: This is an appeal from the trial court's final judgment in favor of appellees (defendants) against appellant (plaintiff) and from that court's order overruling plaintiff's motions to modify its findings of fact and conclusions of law and for a new trial.

[*Contract Action*]

The petition sought a money judgment of $1,229.50 based on a contract entered into by certain independent milk truck operators (haulers) who transported milk in cans from the farms of producers to the Bennett Creamery Company plant in Ottawa. The contract was captioned:

> "Milk Route Territory Regulations Covering All Independent Milk Trucks Delivering Milk From Producers to the Bennett Creamery Co., Ottawa, Kansas, February 6, 1957."

The contract provided, in substance, that milk routes were to be recognized by number and color, and when routes overlapped

roads should be colored to denote route territory on a route map to be kept and locked in a glass case in the haulers' office at Bennett's plant; any route change was to be made by not less than "three committee members" at the request of the haulers desiring the change and with all affected haulers present; a hauler had to serve all producers in his territory who sold to Bennetts and he would be penalized if he forfeited a producer's business; far-reaching routes would be protected from encroachment by new and nearer routes; (the compensation feature of the contract is covered in the trial court's findings of fact appended hereto). The remaining portion of the contract required the regulations to be signed by all haulers and posted with the route map, indicating their acceptance of both.

The contract and route map were in effect for a number of years (the record does not reflect the exact number) but it has been at least since the 1951 flood because a new route map was made up at that time.

[*Sale of "Territory"*]

In February, 1957, in order to provide for a more modern and efficient method of hauling milk from refrigerated bulk tanks on producers' farms via a hauler's bulk tank truck to Bennetts, an additional paragraph (item 10) was added to the regulations whereby it was agreed that tank hauling rights could be sold and transferred by a can hauler to a bulk tank hauler under one of two proposed payment plans. The payment plan with which we are here concerned was the first, or cash, payment plan, under which cash was to be paid within thirty days after the first bulk tank hauling and was to be computed at the "minimum rate of 50¢ per lb. average of previous 12 months daily average weight." The average weight was determined by dividing the total pounds of milk produced during the previous twelve months by 365, or if the period was less than twelve months, by dividing the total number of pounds by the number of days shipped. Such sale to a purchasing hauler would be final and binding and without recourse except that if a bulk tank farmer-producer reverted to cans within twelve months, then the territory owner (can hauler) had to refund the pro rata share of the purchase price to the bulk tank hauler. If the change back to cans occurred after a year then no refund was to be made but the bulk tank hauling rights were not thereby lost to the tank hauler or his successor.

Item 10 further provided that if a producer who converted from cans to bulk tank had not sold to Bennetts for more than a year, then no payment was to be made by the tank hauler to the territory owner (the can hauler). Item 10 was to be applied to bulk tank milk and did not affect previous can milk regulations. The regulations went with the territory and bound the successor. The Haulers' Committee would decide any bulk tank question not covered by item 10. At least ten haulers were required to call a meeting of route owners and a two-thirds majority of all route owners was required to change the regulations. A total of 34 haulers, including appellant and both appellees here, signed the regulations.

The issues were made up and both appellant and the appellees filed requested findings of fact and conclusions of law. The trial court's comprehensive and complete findings and conclusions, as finally amended, are hereto appended and made a part hereof.

Since the trial court's findings are supported by the evidence, they are conclusive on appeal. (*Davis-Wellcome Mortgage Co. v. Long-Bell Lumber Co.*, 184 Kan. 209, 336 P. 2d 469.) We believe that findings No. 11, 12, 18, and 27 substantially contain the theory set out in the suggested additional findings of appellant submitted in connection with his motion to modify the trial court's findings and we do not deem it necessary to discuss this claim of error.

[*Existence of Competition*]

Without repeating, we are of the opinion the last-mentioned findings establish the fact that there was competition between Bennetts and other plants in the territory in question and that there was competition between the signers of the regulations and the haulers for other plants. This competition was active in the territory under consideration here. If the producer did not wish to use the services of the hauler on his territory, he could haul the milk to Bennetts in his own truck but if he wished to use the services, the hauler was compelled to furnish them.

[*Effect on Prices*]

Under the trial court's findings 7 and 8, which refer to federal regulations control-

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ling this particular business, it is apparent why the parties do not make a material issue as to whether the territory regulations affect the price of milk and its by-products to the consumer. It is admitted, and the record shows, that the trial court was not confronted with, nor did it determine, any application or effect of the Federal Anti-Trust Laws and by reason thereof we shall not consider them in this appeal. In other words, this court is committed to the rule that it will not pass upon an issue which has not previously been presented to the court below. (*In re Estate of Cramer,* 183 Kan. 808, 816, 332 P. 2d 554.)

[*Kansas "Restraint of Trade" Statutes*]

The case was tried and decided by the trial court under two of our "restraint of trade" statutes. G. S. 1949, 50-101 in pertinent part reads:

"A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"*First.* To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

. . .

"*Third.* To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

"*Fourth.* To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article . . . of produce or commerce intended for sale, use or consumption in this state.

"*Fifth.* To make . . . any contract . . . by which they shall bind . . . themselves not to . . . transport any article or commodity . . . of . . . commerce or consumption below a common standard figure; or by which they shall agree . . . to keep the price of such article, commodity or transportation at a fixed or graded figure . . . to preclude a free and unrestricted competition among themselves or others in transportation . . . of any such article or commodity . . . that its price may in any manner be affected. And any such combinations are here declared to be against public policy, unlawful and void."

G. S. 1949, 50-112, in part, provides:

"That all arrangements, contracts . . . which tend to prevent full and free competition in the . . . transportation or sale of articles . . . of domestic growth or product raw material . . . which tend to advance, reduce or control the price or the cost to the producer or to the consumer . . . are hereby declared to be against public policy, unlawful and void."

[*Legality of Agreement—Cases Considered*]

In support of their argument that the agreement herein is contrary to public policy, illegal *per se,* and void, appellees rely on a number of our contract cases and we will examine some of them. The agreement in *State v. Smiley,* 65 Kan. 240, 69 Pac. 199, 196 U. S. 447, 25 S. Ct. 289, 49 L. ed. 546, was entered into by all the grain buyers of a certain market for the express purpose of preventing competition among the buyers. It was for the further purpose and effect of pooling the profits of the grain trade and the formation of a grain trust among the buyers. *State v. Wilson,* 73 Kan. 343, 84 Pac. 737, concerned an agreement among the members of an association, which practically controlled the business at a great commercial center, that they would make no purchases or sales for others without charging as a commission for their services at least 50¢ for each head of cattle handled. This obviously created a restriction in the full and free pursuit of that business. In *Mills v. Ordnance Co.,* 113 Kan. 479, 215 Pac. 314, a contract providing for the purchase and sale of tractors with the price fixed at which the purchaser should sell the tractors was held illegal because it was violative of the anti-monopoly statutes of this state. The contract involved in *McGregor v. Bank,* 114 Kan. 356, 219 Pac. 520, related to a settlement between a borrower and a bank and was held to be void because it was unfair and unjust to third persons, namely, creditors of the bank. A secret arrangement was entered into by the plaintiffs in *Gard v. Holmes,* 132 Kan. 443, 295 Pac. 716, whereby Holmes, a mortician in Wichita, was to hire one Schultz, a mortician in Anthony, Kansas, so as to discontinue Schultz as a competitor to the plaintiffs who ran the only other mortuary in Anthony, but examination of that opinion shows a relaxing of the strict

rule of the common law and our earlier cases by use of the following language:

> "If these plaintiffs had made a fair and open bargain to buy out Schultz' business and had bound him to stay out of the undertaking business in Anthony and thereabout for one year or ten, we would have little hesitation in upholding the contract."

The contract in *United Artists Corp. v. Mills,* 135 Kan. 655, 11 P. 2d 1025, was declared to be invalid on two grounds but we are concerned with only the one under G. S. 1949, 50-101, *Fifth,* fixing the exhibitors' price for admission at no less than ten cents. The contract in *Patterson v. Glass Co.,* 91 Kan. 201, 137 Pac. 955, was held bad because by it and other similar contracts, the company sought to control the output and price of window-glass factories throughout the country. This case was later cited in *Joslin v. Steffen Ice & Ice Cream Co.,* 143 Kan. 409, 412, 54 P. 2d 941, wherein plaintiff, a retailer, had to buy all the ice he required from Steffens at thirty cents a hundred weight and sell it at not less than forty cents a hundred weight. This court there said such an agreement resulted in the consumer having "to foot the bill." A manufacturer may set his price at which he will sell his product but he and his buyer cannot agree as to the price the retailer will charge third parties.

[*Prevailing Rule*]

A more exhaustive discussion of many of the cases cited by appellees appears in *Morrison v. Bandt,* 145 Kan. 942, 67 P. 2d 584, cited and relied upon by appellant. In that case the transaction was void because it sought, by securing title and possession of certain grain elevator property, to control the price of grain and prevent competition. The rule that must prevail in cases of this character from *McBratney v. Chandler, 22* Kan. 692, was quoted and followed in the *Morrison* case. It read:

> " 'That which is bad destroys that which is good, and they perish together.' "

The quotation from the *McBratney* case, as set out in the *Morrison* case, continued:

> " 'There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having made, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is [a] matter of defense.' "

Pohlman v. Dawson, 63 Kan. 471, 65 Pac. 689, also cited by appellant, concerned a contract to sell a barber shop wherein the court enjoined the seller from working in a competing barber shop under the agreement made that he "should not engage in the barber business in any manner in Russell, Kan."

[*Test of Legality—Reasonableness*]

An instructor in vocal training sued a pupil for an accounting and for specific performance of their contract and this court reversed the trial court's order sustaining a demurrer to the petition. (*Heckard v. Park,* 164 Kan. 216, 188 P. 2d 926, 175 A. L. R. 605, 617.) Therein is included a full treatment of the authorities cited by appellant here. Consideration and mutuality of the contract were also discussed which settles those questions now before us since, on the one hand, appellant has surrendered his three customers to appellees, and on the other hand, appellees have received them and have enjoyed their business and the income it has produced for them. The *Heckard* case recognized that no "hard-and-fast" rule governing all such contract cases can be laid down. This court there held:

> "The old rule as to limitations of time and space with respect to contracts involving restraint of trade has given way to the modern doctrine of reasonableness and the real test is never whether there is any restraint but always whether the restraint is reasonable under the facts and circumstances of the particular case."

In the *Heckard* opinion, similarly to our present case, the solution of the question of reasonableness of a contract of the character there being considered was said to depend "upon fundamental elements of common fairness in view of the facts and circumstances of the parties."

[*"Common Fairness"*]

Some of the circumstances to be considered in determining the fundamental elements of common fairness of the regulations in this case are that under finding eleven all of the producers of milk, none of which is a complaining party here, are generally charged the same hauling rates within a particular route territory of a can

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hauler whether the milk goes to Bennetts or to some other plant and irrespective of the distance from the farm to the receiving plant. Thus the regulations did not work any hardship on the milk producers. On the other hand, the producers had access, if they desired it, to the regular service of a hauler who knew and traveled all types of roads under all weather conditions, with proper equipment, so that the milk was picked up at approximately the same time every day if they used cans, or once every two days if they used the bulk tank system. Without such systematic and orderly regulations there would be overlapping of territories, excessive distances to be covered by haulers, and other circumstances whereby the producers could not be positive that all or any of the milk produced would reach its destination or what its condition would be when it arrived. As we view the regulations, the fundamental elements of common fairness, so far as the milk producers are concerned, are well established.

The appellees through the regulations here being considered have been and now retain their territory as can haulers along with the three customers of appellant they obtained by reason of item 10. Under the reasoning of the *Heckard* case, this is not inimical to our "restraint of trade" statutes or to public policy.

We cannot agree with the trial court's second conclusion of law that the regulations had the purpose and effect of eliminating competition for the transportation of milk by third parties. So far as Bennetts and the signers of the regulations are concerned, the producers could haul their milk themselves, if they preferred. The entire plan is based on competition, as heretofore stated, and further discussion is unnecessary on this point.

From previous discussion we think that the trial court's findings do not support the third conclusion of law since there is no price-fixing of the milk or requirement that the producer must sell to Bennetts. At no time does the milk become the property of the hauler. Appellees have cited *United States v. Nationwide Trailer Rental System* [1955 TRADE CASES ¶ 68,101], 156 F. Supp. 800, affirmed *per curiam* [1957 TRADE CASES ¶ 68,828], 355 U. S. 10, 78 S. Ct. 11, 2 L. Ed. 2d 20, which is not controlling here because a federal law was there involved. That case shows what appellees contend and the trial court concluded as to the purpose and effect of these regulations but a careful study of that case shows the distinction between a void agreement, as there, and a valid and reasonable set of regulations such as we have here.

[*Burden of Proof—Presumptions*]

In regard to the fourth conclusion of law, we believe our previous discussion has determined it was not proper and especially is this true on the point of any presumptions. They must be in favor of the validity of the regulations and not the invalidity thereof. The burden at all times was on appellees to prove the invalidity of the regulations.

[*Judgment Reversed*]

We believe it will suffice to say in a summary way that while the trial court did not err in refusing to amend its findings of fact, in view of those findings it did err in concluding the regulations were void when they were, in fact, reasonable and valid. The result is the judgment must be reversed. It is so ordered.

"Findings of Fact

"1. Plaintiff, John I. Okerberg, Jr., is the owner and operator of Can Milk Route No. 6, delivering milk in cans from a specific territory to the Bennett Creamery Company plant at Ottawa, Kansas.

"2. Defendant, Robert Crable, was on February 2, 1957, the owner and operator of Can Milk Route No. 3 and No. 5, delivering milk in cans from two specific territories to the Bennett Creamery Company plant. Subsequently, in the summer of 1957, Crable sold route No. 3 to Keith Watts. Crable is now the owner and operator of Can Milk Route No. 5.

"3. Defendant, Carl E. Kersley, was on February 2, 1957, the owner and operator of Can Milk Route No. 18, delivering milk in cans from a specific territory to the Bennett Creamery Company plant. Several months later, Kersley sold Route No. 18, moved his permanent residence to Phoenix, Arizona, and was not a milk hauler when the petition herein was filed.

"4. For more than ten years can milk routes coming into Bennetts had been operated under an agreement between the milk haulers. The written agreement in effect prior to February 2, 1957, consisted of all of the provisions of 'Milk Route Territory Regulations Covering All Independent Milk Trucks Delivering Milk

from Producers to The Bennett Creamery Company, Ottawa, Kansas,' being Plaintiff's Exhibit 1, except Item 10 thereof. The plaintiff and the defendants were parties to this agreement upon February 2, 1957, and prior thereto.

"5. On all can routes referred to herein as delivering to the Bennett Creamery Company there is and has been both Grade 'A' and Grade 'C' milk. There are approximately 1400 such producers of which 316 are Grade 'A' and the remainder are Grade 'C' who sell direct to Bennetts. The can milk haulers are required to use covered, insulated, truck beds which are designed to help keep the milk clean and prevent it from becoming too warm.

"6. All Grade 'A' milk, for more than eighteen months prior to and up to October 1, 1957, delivered to the Bennett plant was being purchased by Meyer Sanitary Milk Company, a Kansas corporation, lessee of the Grade 'A' receiving facilities of the plant owned by the Bennett Creamery Company, a Kansas corporation; and from October 1, 1957, to the present time, this Grade 'A' milk has been purchased by Pure Milk Producers Association of Greater Kansas City, Inc., which became lessee of the Grade 'A' receiving facilities of the plant.

"7. Meyer Sanitary Milk Company, and after October 1, 1957, Pure Milk Producers Association, have paid producers for this milk, making deductions from payment to producers for payment of hauling charges and paying the same to haulers. This Grade 'A' milk is normally shipped in bulk from said receiving station to Kansas City for use in bottling, the surplus or excess not required for said use, if any, being sold and transferred to Bennett Creamery Company for manufacturing purposes at a 'Class II' price, established by Federal Milk Marketing Order No. 13, which is approximately equivalent to the price for Grade 'C' milk. The Grade 'C' milk on these routes is sold and delivered to Bennett Creamery Company and processed in the Bennett Creamery Company manufacturing facilities.

"8. Pure Milk Producers Association of Greater Kansas City, Inc., is a cooperative marketing association, whose membership *consist* of Grade 'A' producers selling to handlers in the Greater Kansas City marketing area, as defined by Federal Milk Marketing Order No. 13. It is a bargaining or marketing cooperative, as distinguished from an operating cooperative. Its members are parties to a standard membership and marketing contract between themselves and the Association, whereby the Association has the right to control and direct the marketing of their milk.

"9. The Bennett Creamery Company has had since October 1, 1957, an agreement with Pure Milk Producers Association whereby the Association will cause to be delivered to the leased facilities at the Bennett plant milk of substantially all of its member can shippers who formerly delivered to Meyer Sanitary either at Bennetts or at the Lawrence receiving station. In practice a few Pure Milk members have transferred from Bennetts to other plants and Pure Milk has permitted such transfers by member producers. As many as 200 of the approximately 1400 producers who sell to Bennetts or through their plant have changed during a year to other plants or from other plants to Bennetts.

"10. Of the Grade 'A' producers delivering to the Pure Milk station at the Bennett plant, 80% to 90% are members of Pure Milk.

"11. Grade 'A' producers may transfer at any time from Bennetts to other plants willing to purchase their milk delivering into Kansas City, Lawrence, Topeka, Emporia or Council Grove, thus transferring their quota within the same Federal Marketing Area without any type of permit, unless they have voluntarily signed away this right to Pure Milk Producers Association and the Association enforces the right of directing the receiving plant to which the producers' milk should go. Such transfers have occurred since this action was filed and solicitations for transfers are going on currently. Hauling rates are generally the same for all producers within a route territory for the can milk routes of Bennetts and others, irrespective of distance from the receiving plant. Producers cannot transfer their marketing quotas to another Federal Order Market such as Wichita, except in the fall of the year.

"12. The plaintiff in the territory around Burlington, Kansas, covered by his Can Route No. 6 had competition for producers of both Grade 'C' and Grade 'A' milk from milk haulers who hauled to other than the Bennett plant. These competing plants included, from time to time: Meadow Gold of Topeka, through their Emporia receiving station, Pet of Iola; the Burlington cheese factory; a Parsons plant; two bottling plants at Emporia and other local smaller dairies. Some competition from plants other than Bennetts for milk from producers exists generally

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throughout the area served by the Milk Haulers who deliver milk to the Bennett plant. Grade 'A' bottlers, such as the two serving the city of Ottawa, which are not regulated by Federal Order and subject to federal marketing quotas have generally had an adequate and stable supply of milk and have been adding only very few producers.

"13. Since the fall of 1957 a few individual Grade 'A' milk producers in the area surrounding Ottawa have converted from production and delivery of milk in cans to production and delivery in bulk. This conversion requires purchase by the producer of a farm bulk tank for the cooling and storing of the milk. It also necessitates the use of an over-the-road bulk tank truck, the milk being pumped from the farmer's tank into the tank truck and delivered in bulk. Conversion to bulk delivery makes possible the production and delivery of a cleaner, higher quality, milk. Some plants are paying a bonus of 10¢ per hundredweight for tank milk for a period of 36 months. It also makes possible greater efficiency and saving in hauling expense to the producer through bulk handling and every-other-day pickup in bulk, whereas can pickups must be made every day.

"14. The volume in the Bennett Creamery Company manufacturing plant is presently about 200,000 pounds per day, during the so-called 'flush season' of the year when volume is at its highest level. The capacity of the Bennett manufacturing plant is approximately 500,000 pounds per day and the ideal volume would be 350,000 to 400,000 pounds each day. The Bennett Creamery Company needs additional milk for manufacturing and has an interest in preventing loss or depletion of its milk supply.

"15. On February 2, 1957, Crable was anticipating the establishment of a bulk tank milk route for the collection of milk in tanks from the territories in which the milk haulers to the Bennett plant operated their various numbered routes including Can Milk Route No. 6 owned by the plaintiff and Can Milk Route No. 18 owned by the defendant, Carl Kersley. He thereafter purchased a truck for $4,000.00; leased a tank from Pure Milk Producers Association; qualified for a sampler's license to take samples, etc., at the farms; and commenced the operation of Pure Milk Route No. 14 on March 1, 1957. Galen Bristow owner of Can Milk Route No. 37, had, prior to February 2, 1957, established a bulk tank route which was designated as Pure Milk Route No. 13. Crable and Bristow collected Grade 'A' milk from the various can route territories from which milk was collected and transported to the Bennett plant by can haulers and transported the same usually to Meyer Sanitary Milk Company at Kansas City, Kansas. However, at the beginning, some tank milk was delivered to the Bennett plant. In the event of a surplus Crable and Bristow could be instructed to divert their loads direct to Bennetts. (See Finding No. 7) Crable's tank was usually filled for the trip to Kansas City by 'Topping it off' at the Bennett plant.

"16. On February 2, 1957, at a called annual meeting of the Milk Haulers Association, a discussion was had concerning the matters later set forth in item 10 of the regulations. The price to be paid by tank haulers to can haulers, upon conversion by a producer from can to tank, was the principal subject. An agreement was made at that meeting by a majority, including the affirmative vote of the plaintiff and the defendants, Robert Crable and Carl Kersley, all of whom were present. This agreement was later reduced to writing by the Route Committee and agreed to by all the route owners by their signing of the new regulations, Plaintiff's Exhibit 1, including all of the parties to this action.

"17. The Bennett Creamery Company did not sign Exhibit 1. The Bennett Creamery Company has through the years and does now acquiesce in the division of the milkshed served by Bennetts into territories by the haulers and the regulations adopted by the haulers; has been represented at milk haulers' meetings; has assisted in the administration of the agreement by the Milk Haulers Association and its Route Committee and has at all times been the custodian of the route map, Plaintiff's Exhibit 2, which is not changed except in the presence of a representative of Bennetts as well as the individual haulers affected by the change. Any change is by agreement between the haulers affected or as determined by the 'Milk Haulers Committee.' Meyers Sanitary Company, prior to October 1, 1957, and Pure Milk Producers Association, since that date, have likewise acquiesced in the haulers' agreement to the extent of deducting the haulers' charge from the proceeds payable to the producer and making payment thereof direct to the hauler.

"18. According to the regulations set out in Plaintiff's Exhibit 1 'all freight on milk hauled to The Bennett Creamery Co., which is produced in a specified territory shown on the (route) map is

to be paid to the hauler who owns that territory as shown on the map.' Said regulations have been administered accordingly by the Milk Haulers Association with the consent, cooperation and assistance of The Bennett Creamery Company. Only the milk hauler in whose territory the milk is produced receives freight on the milk hauled by anyone other than the owner from his territory. A producer, if properly equipped, could, if he desired to do so, haul his own milk to Bennetts and the freight charge for the route territory in which the milk was produced would not be deducted from the price of milk so delivered by the producer thereof. A producer electing to sell Grade 'A' or Grade 'C' milk at the Bennett plant is required to use the services of the route owner in whose territory the milk is produced unless he hauls the milk himself.

"19. Under said Regulations, milk haulers were *unable* to and did set the price to producers for the hauling of their milk and raised the price without prior consultation with producers. Producers desiring to deliver their milk to the Bennett plant and to use the services of a hauler were in effect required to deliver on the truck of the hauler 'owning the territory' at the rate specified by that hauler because no other hauler could receive payment for hauling their milk. The acquiescence, cooperation, assistance and participation of Bennetts was present and required in achieving this result, in that deduction from payments to producers and payments of freight to haulers were made at the Bennett plant. The producers' only alternatives were (1) to haul his own milk or (2) to sell somewhere other than through the Bennett plant.

"20. The price paid by Bennett for Grade 'C' milk and the price paid by *Myer* Sanitary and Pure Milk for Grade 'A' milk is determined by federal orders, competition and other factors beyond the control of any of the parties to this action. The agreement between milk haulers, evidenced by Plaintiff's Exhibit 1, affects the amount received for Grade 'A' and Grade 'C' milk delivered to the Bennett plant in that the hauling charge fixed by the hauler, without competition from other Bennett milk haulers, is withheld from the purchase price of the milk.

"21. Under paragraph 10 of the Milk Haulers Regulations, Plaintiff's Exhibit 1, all haulers agree that the bulk or tank hauling rights will be sold for fifty cents (50¢) per pound on the average daily delivery of the producer for the previous twelve months under two plans set forth therein.

"22. The 50¢ per pound payment has been applied by separate agreement to bulk haulers who are neither signers of the regulations nor assignees thereof. For instance, Elvin Dillon agreed to make such payment for can milk converted to bulk and hauled on the tank route operated by him in a written agreement procured at the request of an officer of Bennett Creamery Company. Dillon had previously received a similar payment from 'Bennett' can milk haulers for producers who transferred to the Bennett plant and the Bennett can haulers from four or five can routes then owned by Dillon and previously delivering to the Lawrence-Meyer receiving station.

"23. The Regulations provide that 'the rights and benefits of the Regulations shall pass from a route owner to his successor and go with the territory, therefore, the buyer and seller of a route should consider these potential rights and benefits in negotiating the sale or transfer of a territory.' There have been numerous transfers of routes since February 2, 1957, and many of the persons signing Plaintiff's Exhibit 1 no longer have milk routes to the Bennett plant.

"24. Floyd Isch, can 211, Route 6, converted from a can producer of Grade 'A' milk to a bulk producer and transferred to Pure Milk Route No. 14 on July 15, 1957. The average daily weight of said producer was 1,202 pounds. This amount multiplied by 50¢ per pound amounts to $601.00. During the preceding year, the Grade 'A' milk of producer Isch had been sold and delivered to Meyer Sanitary Milk Company, a Kansas corporation, through the Bennett plant.

"25. Emil Hess, can 1, Route 6, converted from a can producer of Grade 'C' milk to a bulk producer and transferred to Pure Milk Route No. 14 on July 15, 1957. The average daily weight of said producer's milk was 543 pounds for the preceding period of 91 days during which he delivered to the Bennett Creamery Company. This amount multiplied by 50¢ per pound amounts to $271.50. Producer Hess transferred from another plant and did not deliver to the Bennett plant during the preceding year, with the exception of 91 days prior to July 15, 1957.

"26. Alfred Meyer, can 130, Route 6, converted from a can producer of Grade 'A' milk to a bulk producer and transferred to Pure Milk Route No. 14 on August 18, 1957. The average daily weight of said producer's milk was 714

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pounds. This amount multiplied by 50¢ per pound amounts to $357.00. Producer Meyer sold and delivered his milk during the preceding year to Meyers Sanitary Milk Company, through the Bennett plant.

"27. Competition exists in Route 6 and the other Bennett milk routes for the collection of Grade 'A' milk in bulk by tank from other haulers and companies. The defendants, Crable and Kersley, could have at all times obtained the conversion of Grade 'A' producers from can producers to tank producers who were and are being served by other haulers and companies competing with the haulers owning routes at The Bennett Creamery plant and competing with Bennetts, *Myers* Sanitary and Pure Milk.

"28. On or about January 6, 1958, Crable sold his truck (purchased in October, 1957, for $4,000.00) and assigned his interest in his tank lease and contract with Pure Milk to defendant Kersley for $6,500.00. Defendant Kersley thereafter moved his permanent residence from Phoenix, Arizona, to Ottawa, Kansas.

"29. Although plaintiff and defendants, as well as all the milk haulers mentioned herein, operate trucks for public use in transporting Grade 'A' and Grade 'C' milk produced by those producers residing in their respective route territories who desire to sell to or through the Bennett plant and therefore appear to be common carriers as defined by Section *660105* of the statutes of Kansas, there is no evidence that any of the parties have applied for and received a permit from the Kansas Corporation Commission to operate as common carriers. Therefore, the services performed and the rates charged by said parties have not been subject to the supervision and control of the Kansas Corporation Commission."

"Conclusions of Law

"1. The Milk Haulers Association is an unincorporated association of independent contractors engaged in the hauling of milk for producers desiring to sell milk to or through the Bennett plant. The members of the Milk Haulers Association are not agents or sole agents within the meaning of Section 16-112 of the statutes of Kansas.

"2. The members of the Milk Haulers Association, being the signers of the agreement designated 'Milk Route Territory Regulations Covering All Independent Milk Trucks Delivering Milk From Producers To The Bennett Creamery Co., Ottawa, Kansas,' (Ex. 1), and their assigns, have by said agreement bound themselves to divide the area from which milk is produced and delivered to the Bennett plant into territories and prevent any other member-hauler or other person beside 'the hauler who owns that territory' from receiving freight on milk hauled to the Bennett plant. The effect of this agreement and the operation thereof has been to eliminate competition for the transportation by third parties of milk from the producers desiring to deliver to the Bennett plant to said plant contrary to the following provisions of the statutes of the State of Kansas:

> "50-101 which prohibits a combination of the acts of two or more persons for the following purposes:
>
> "First, to create or carry out restrictions in aids to commerce, or to carry out restrictions in the full and free pursuit of any business.
>
> "Third, to prevent competition in the transportation of merchandise, produce or commodities, or to prevent competition in aids to commerce.
>
> "Fifth, to pool, combine or unite any interest they may have in connection with the sale or transportation of any article or commodity, that its price may in any manner be affected.
>
> "50-112 which prohibits all agreements between persons or corporations made with a view or which tend to prevent full and free competition in the transportation of articles of domestic growth and all such agreements designed or which tend to reduce or control the price or the cost to the producer of any products or any other services (in this case transportation).

"3. Such an agreement which is contrary to the public policy of the State of Kansas as defined by the legislature in the statutes referred to above is by the provisions of Section 50-107 of the statutes of Kansas not enforceable in any of the courts of this state. Judgment will therefore be entered for the defendants.

"4. Although there was no direct evidence to establish that hauling rates would be less if the milk haulers agreement (Ex. 1) were not in effect, such an agreement being contrary to the declared public policy of the state is presumed to be injurious to the public welfare."

[¶ 69,451] Adolph Hohensee v. Akron Beacon Journal Publishing Company, et al.

In the United States District Court for the Northern District of Ohio, Eastern Division. Civil Action No. 34891. Filed June 9, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action Under Antitrust Laws—Public Injury—Effect on Prices—Lessening of Competition.—An amended complaint in which a lecturer and seller of food products charged that he was compelled to discontinue his business activities in an area by various acts of harassment committed pursuant to a conspiracy in violation of the antitrust laws was defective because it could not be reasonably inferred that the public had suffered an injury in the sense in which that term is used in relation to the antitrust laws. It was alleged that, as a result of the claimed conspiracy, the public "was directly and indirectly substantially injured and damaged." However, there were no allegations which even remotely implied a restraint on competition in interstate commerce which "is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." There was no showing that any of the defendants were in competition with the plaintiff, no allegation suggesting a business motive for their allegedly conspiratorial acts, and no allegation that they sought to accomplish any of the traditional objects which have been found actionable under the antitrust laws. More importantly, however, it did not appear that the alleged acts had any effect on prices or lessened or suppressed competition, essential elements of a private antitrust action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments—General Requirements—Necessity for "Detailed and Specific" Complaint—Relationship of Parties.—An amended complaint charging a conspiracy in violation of the antitrust laws was deficient in failing to set forth in detail the relationship of the parties. An antitrust complaint must be detailed and specific. Here, the complaint failed to show the nature of the business of one of the defendants, the relationship of the various defendants, and the relationship of the named defendants to the several hundred "John Doe" defendants. Antitrust cases involve lengthy and expensive trials, and the courts are mindful of the possibility that a frivolous claim may become "a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions and pre-trial proceedings on collateral issues. . . ."

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.170.

For the plaintiff: Adolph Hohensee, *pro se.*

For the defendants: C. Blake McDowell, Jr., of Brouse, McDowell, May, Bierce & Wortman, Akron, Ohio, for Akron Beacon Journal Publishing Co., John S. Knight, Robert Feldkamp, and Summit County Medical Assn., its officers, etc.; John Lansdale, Jr., and Peter D. Van Osterhout, Cleveland, Ohio, for American Medical Assn., its officers, etc.; Robert L. Myers, Akron, Ohio, for Better Business Bureau of Akron, Inc.; William H. Vodrey, Jr., East Liverpool, Ohio, for Brush-Moore Newspapers, Inc., and J. G. Green; and John R. Milligan, Jr., and Leroy J. Contie, Jr., Canton, Ohio, for W. J. Hine.

Re: Motion to File Amended Complaint

[*Treble Damage Action*]

McNamee, District Judge [*In full text*]: This Court has heretofore granted the motion of defendant American Medical Association to quash the service of summons upon said defendant and entered an order dismissing the action against said defendant. Motions to dismiss the Complaint on the ground that it failed to state a claim upon which relief could be granted filed by all other defendants except The Summit County Medical Association were granted for the reasons set forth in this Court's Memorandum filed February 20, 1959 (171 Fed. Supp. 90). Pursuant to permission granted plaintiff moves for leave to file the Amended Complaint which is attached to his motion.

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[*Necessary Averments—Public Injury*]

Notwithstanding the dismissal of the action against the American Medical Association, plaintiff named said defendant as a party in the proposed Amended Complaint. While the Amended Complaint contains averments not found in the original complaint, it fails to cure the basic defect of the original pleading. It is not reasonably to be inferred from the averments of the Amended Complaint that the public has suffered an injury in the sense that term is used in relation to the antitrust laws. On the contrary, the Amended Complaint, read as a whole, seems clearly to relate solely to a private controversy between plaintiff and defendants.

In *Apex Hosiery Co. v. Leader* [1940-1943 TRADE CASES ¶ 56,039], 310 U. S. 469, 500, the Supreme Court said:

> ". . . this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. (Citations) It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." (Citations)

There are no allegations in the Amended Complaint which expressly state or even remotely imply a restraint on competition in interstate commerce which "is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

[*Conspiracy Alleged*]

The gist of plaintiff's claim is set forth in paragraphs 5 and 6 of the Amended Complaint, wherein he avers in substance that in furtherance of the alleged conspiracy, defendant, W. J. Hine, threatened to "throw plaintiff out of Canton;" that as a result of the alleged harassment and threats plaintiff was compelled to discontinue his lectures and sale of products in Canton, Ohio; that "he transferred his lectures and speeches to Akron, Ohio" where, according to plaintiff, defendants continued their conspiracy of harassment and threats and did unlawfully "screen and distort the true nature of his lectures; and did resort to unfair and unlawful methods to discourage the public from attending his said lectures." Plaintiff also re-avers in substance the allegations of libel and slander contained in his original complaint. As a result of these and other similar general allegations plaintiff claims he was damaged in the following respects:

(a) Destruction of lecture business;
(b) Destruction of products sales business;
(c) Destruction of health;
(d) Loss of freedom and liberty;
(e) Other losses and damages.

His allegation of public injury is stated as follows:

> "As a result of the foregoing combination and conspiracy in restraint of interstate trade and commerce the public was directly and indirectly substantially injured and damaged."

[*Effect on Prices or Competition*]

It does not appear that the defendants Summit County Medical Society or the Better Business Bureau of Akron are commercial organizations engaged in any business for profit. Nor does it appear that defendant, W. J. Hine, is engaged in business. The Beacon Journal Publishing Company and Brush-Moore Newspapers, Inc., obviously are commercial organizations but no showing is made that any of the defendants are engaged in competition with plaintiff or that in performing the alleged acts they were motivated by any purpose inimical to the public interest. Indeed, from all that appears, it is as reasonably to be inferred that the defendants were acting in the furtherance of the public interest as it is to

draw the contrary inference. More importantly, it does not appear that the alleged acts of defendants had any effect on prices or lessened or suppressed competition. These are among the essential elements of a private antitrust action. *Arthur v. Kraft Phenix Cheese Corp.*, 26 Fed. Supp. 824. There is no allegation that suggests a business motive for defendants' allegedly conspiratorial acts nor is there any allegation that defendants sought to accomplish any of the traditional objects which have been found to be actionable under the antitrust laws. Compare: *Georgia v. Pennsylvania R. R.* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439; *Terminal Warehouse v. Pennsylvania R. R.* [1932-1939 TRADE CASES ¶ 55,103], 297 U. S. 500.

[*Relationship of Parties*]

The Amended Complaint is deficient in other respects. It fails to set forth in detail the relationship of the parties. The nature of the business of defendant W. J. Hine, if any, is not shown. For aught that appears, said defendant may have been acting as a public official at the time of the alleged threats. Relationship of defendants who were residents of Canton and those who were residents of Akron does not appear and there is an absence of any indication of the relation of the named defendants to the several hundred John Doe defendants. It is settled that an antitrust complaint must be detailed and specific. *Baim & Blank, Inc. v. Warren Connelly Co.* [1956 TRADE CASES ¶ 68,285], 19 F. R. D. 108 (D. C. S. D. N. Y. 1956); *Bader v. Zurich General Accident & Liability Ins. Co.* [1952 TRADE CASES ¶ 67,277], 12 F. R. D. 437 (D. C. S. D. N. Y. 1956); *Chas. Rubenstein, Inc. v. Columbia Pictures Corp.* [1953 TRADE CASES ¶ 67,456], 14 F. R. D. 401 (D. C. Minn. 1953).

Antitrust cases involve lengthy and expensive trials. The courts are mindful of the possibility that a frivolous claim in such an action may become "a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions and pre-trial proceedings on collateral issues, most of which may have little relationship to the true issues of the case." *New Dyckman Theater Corp. v. RKO Corp.* [1954 TRADE CASES ¶ 67,853], 16 F. R. D. 203, at 206 (D. C. S. D. N. Y. 1956).

[*Dismissal Granted*]

The defendant, Summit County Medical Society, has moved for summary judgment. Its Motion will be treated as a motion to dismiss on the ground that plaintiff has failed to state a claim on which relief may be granted and, as so treated, the motion is granted.

[*Leave to Amend Denied*]

Plaintiff has been granted one opportunity to move to file an Amended Complaint. For the reasons indicated above, the proffered Amended Complaint fails to state a claim on which relief may be granted and it does not appear likely that if afforded another opportunity plaintiff could present such a claim.

The Motion for Leave to file an Amended Complaint is overruled and the action is dismissed at plaintiff's costs.

[¶ 69,452] **Frank W. Babcock v. Crafts 20 Big Shows, Inc., et al.**

In the California District Court of Appeal, Third District. Civ. No. 9553. Dated August 12, 1959.

Appeal from a judgment of the Superior Court of Sacramento County. ALBERT H. MUNDT, Judge. Reversed.

California Antitrust (Cartwright) Act

Combinations and Conspiracies—State Antitrust Laws—Contracts Not to Compete —Combining to Force Weaker Competitor Out of Business—Bidding for Privilege of Supplying Carnival Attractions to "Fairs."—A supplier of carnival attractions to fairs sufficiently stated a violation of the California antitrust law by alleging that three of its competitors conspired to drive him out of business by submitting joint bids which made it impossible for him to compete. It was alleged that they agreed to refrain from bidding

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in competition with each other, to bid unreasonably low if the supplier did not bid, and to bid higher (even if it permitted little or no profit to them) if he did bid. These allegations showed a combination formed with the intent to arbitrarily use its combined power to force weaker competitors out of business. If the combination were successful, it would stifle, or at least materially lessen, competition in the business. Thus, the purpose of the combination was to restrict competition by combining three of the dominant competitors in the field and eliminating the fourth. A combination made and maintained with those ends in view is unlawful.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.05.

Combinations and Conspiracies—State Antitrust Laws—Procedure—Sufficiency of Pleading—Injury to Business or Property as Pre-requisite to Right to Maintain Action.—A supplier of carnival attractions to fairs had a right, under the California antitrust law, to maintain an action for two-fold damages against three competitors which allegedly conspired to put him out of business. Enforcement of the statute is committed, in the main, to the attorney general and the district attorneys. However, private parties who have been injured in their business or property "by reason of anything forbidden or declared unlawful" in the statute are permitted to recover two-fold damages. Here, the supplier alleged that its competitors, pursuant to the conspiracy, jointly bid or offered to pay $132,500 for the privilege of supplying carnival attractions to the 1957 California State Fair, but that they would have submitted a bid of only $106,500 if the supplier had made no bid. Thus, the supplier alleged that, but for the combination and the unlawful intent to drive him out of business, his own bid of $117,500 would have been the high bid, and he would have obtained the privilege in question. His claim that he suffered damages in the sum of $50,000 by being unlawfully deprived of that privilege was a sufficient pleading of injury to meet the test of a general demurrer.

See Combinations and Conspiracies, Vol. 1, ¶ 2403, 2425.

For the appellant: Austin Clapp.

For the respondents: Charles Bagby.

[*Restraint of Trade Action*]

Action for damages suffered by reason of defendants' alleged unlawful combination in restraint of trade. Judgment for defendants after demurrer to complaint was sustained without leave to amend, reversed.

[*Appeal*]

Van Dyke, Presiding Justice [*In full text*]: This is an appeal from a judgment based upon an order sustaining a demurrer to plaintiff's amended complaint without leave to amend.

[*Conspiracy Charged*]

In substance the complaint alleges the following: Plaintiff and the defendants are all engaged in the business of buying exclusive privileges for supplying carnival attractions to various fairs and community celebrations in California. Prior to December, 1956, they were all in competition with each other and their position in the business was such that among them they did about 80 percent of the total business in the state. Competition was keen. During the year prior to the commencement of this action the defendants conspired and agreed to combine their capital and skill, with the purpose of creating and carrying out competitive restrictions in the business. To accomplish this they intended, by combining, to drive plaintiff out by making it financially impossible for him to compete with them, and then having thus come into a position of dominance and control they intended to fix and maintain unreasonably low prices for the privilege of supplying carnival attractions. Accordingly, they conspired and agreed that they would not bid for the privilege of furnishing carnival attractions in competition with each other, but would bid jointly, making unreasonably low bids if plaintiff did not bid, but if he did bid then they would jointly bid higher even though their joint bid would be at such a price as to permit little or no profit to them. Having so conspired, and plaintiff having bid for the privilege of supplying carnival attractions for the State Fair in 1957, the defendants submitted their joint bid substantially higher than plaintiff's bid, which they would not have done save for such

plan and thereby obtained the privilege to plaintiff's damage in the sum of $50,000 through his loss of the privilege.

[*California Antitrust (Cartwright) Act*]

Section 16720 and following of the Business and Professions Code (the Cartwright Act) contain California's legislation banning combinations of capital, skill or acts in restraint of trade or commerce. Section 16720 provides that:

"A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce.

". . .

"(c) To prevent competition in . . . ; sale or purchase of . . . any commodity."

[*Allegations Sufficient*]

The allegations are sufficient to state a violation of the statutes. They show a combination formed with the intent to arbitrarily use its combined power to force weaker competitors out of business. If the combination is successful it will stifle, or at least lessen materially, competition in the business. Clearly had the four parties combined they would be in a position of dominance in the field. The same effect will be reached if the purposes of the combination of three former competitors succeed in eliminating the fourth.

". . . [I]f it [the combination] arbitrarily used its power to force weaker competitors out of business, . . . it puts a restraint upon . . . commerce." (*United States v. E. I. Du Pont de Nemours & Co.*, 188 F. 127, 151.)

". . . [P]laintiff does have the right to have its business protected if there is concert of action directed at plaintiff, which results in its removal from competition.

". . . A suppression of competition necessarily restrains commerce. . . . The purpose of the anti-trust laws . . . is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete." (*William Goldman Theatres, Inc. v. Loew's, Inc.* [1944-1945 TRADE CASES ¶ 57,401], 150 F. 2d 738, 742, 743.)

[*Unlawful Purpose*]

The purpose of the combination was to restrict competition by (1) combining three of the dominant competitors in the field and (2) eliminating the fourth. The combination made and maintained with those ends in view was unlawful.

[*Right to Maintain Action—Injury*]

A serious question is presented concerning the right of plaintiff to maintain the action. The enforcement of the legislation banning monopolistic combinations is committed in the main to the attorney general and to the district attorneys. Section 16750 sets up the conditions under which private actions can be maintained and limits such actions to persons who have been injured in business or property "by reason of anything forbidden or declared unlawful" by the statutes. Such persons may sue to recover two-fold the damages sustained by them. Although the difficulties of proof may prove insurmountable we are not here concerned with that feature. Plaintiff has alleged that pursuant to the purposes of the combination respondents would have submitted a bid of $106,500 had plaintiff made no bid. But when plaintiff bid $117,500 then respondents submitted a bid of $132,500. He alleges that, but for the combination and the unlawful intent to drive him out of business, he would have been the high bidder and would have obtained the privilege; that by being unlawfully deprived of it he suffered damages in the sum of $50,000. We think there was here a sufficient pleading of injury by reason of the acts of the respondents to meet the test of a general demurrer.

[*Judgment Reversed*]

Accordingly, the judgment appealed from is reversed.

PEEK, J., and SCHOTTKY, J., concurred.

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[¶ 69,453] Albert E. Robinson v. Stanley Home Products, Inc., and William J. Gahm, d.b.a. Plura Plastics.

In the United States District Court for the District of New Jersey. Civil Action, File No. 91-59. Filed June 29, 1959.

Robinson-Patman Price Discrimination Act

Price Discrimination—Brokerage Commissions—Applicability of Brokerage Prohibitions to *Seller's* Broker—Eliminating Broker and Reducing Prices to Purchaser—Legality—Right to Select Customers.—Allegations that a manufacturer of collapsible plastic cups and a purchaser of such products worked out an arrangement between themselves to dispense with the services of the seller's broker (thereby avoiding the payment of brokerage commissions) stated no cause of action under Section 2(c) and (f) of the Clayton Act, as amended by the Robinson-Patman Act. It was alleged that the manufacturer granted, and the purchaser induced the manufacturer to grant, discounts "in lieu" of brokerage by eliminating the manufacturer's broker and selling directly to the purchaser at reduced prices. While the broker contended that Section 2(c) is an absolute prohibition of allowances in lieu of brokerage from sellers to buyers, it was held in *Henry Broch and Company v. FTC,* 1958 Trade Cases ¶ 69,208, that "neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c)." Thus, the payment of brokerage, or sums in lieu of brokerage, to agents of a *buyer* is prohibited, but not the elimination of the seller's broker. As noted in the *Broch* case, brokerage fees are an item in the cost of distribution which the public must ultimately defray, and a seller's costs would be "frozen" if he was forbidden to make such reductions.

The provisions of Section 2(c) and (f) were evidently intended to be invoked by the broker's allegations that (1) the purchaser knew that the price reduction which it sought could only be accomplished by diverting the broker's commission to itself, and (2) that the purchaser's offer to buy at a reduced price effected a diversion of the broker's commission to the purchaser. However, it is elementary that a seller may select his own customers. The buyer's "intentions" could not limit the manufacturer's freedom to sell at a reduced price, even though the discount might have equalled the amount of the broker's commission and might have involved the elimination of the seller's broker.

See Price Discrimination, Vol. 1, ¶ 3505.950, 3520, 3520.175, 3526, 3526.500.

For the plaintiff: Charles F. Sheeler, by Vincent Galvin.

For the defendants: Harkavy & Lieb, by Jerome S. Lieb, for William J. Gahm, d.b.a. Plura Plastics.

Opinion

[*Price Discrimination—Brokerage Commissions*]

Wortendyke, District Judge [*In full text*]: Defendant, William J. Gahm, doing business as Plura Plastics (Plura) has moved for an order striking the amended complaint for prolixity and non-conformity with Rule 8(a)(2) and (e)(1), for failure to state a claim against movant upon which relief can be granted, and for lack of jurisdiction over the subject matter; Rule 12(b)(6) and (1).

The first cause of action alleged is grounded upon §§ 13(c) and (f), and 15 of Title 15 of the United States Code. It is also alleged that there is diversity of citizenship between plaintiff (Robinson), a resident of Massachusetts, and Plura, a resident of New Jersey, but that the co-defendant Stanley Home Products, Inc. (Stanley) is a corporation of Massachusetts.

[*Exclusive Representative—Termination*]

It is further alleged that Stanley and Plura do business in interstate commerce, and that Robinson had agreed to act as exclusive New England representative, upon a commission basis, for the sale of Plura's products in that territory. Those products included collapsible plastic cups manufactured by Plura in New Jersey and shipped in interstate commerce. Stanley was allegedly one of the customers which Robinson had secured for Plura's products. After the initial order and reorder which Robinson had secured from Stanley, the latter made an offer directly to Plura to purchase

large quantities of the cups at a substantially reduced unit price. The complaint charges that this price reduction "could be accomplished only by diverting to Stanley the commission otherwise payable to plaintiff," and that, upon its acceptance of Stanley's offer, "Plura forthwith terminated the plaintiff's services as New England representative."

[*Clayton Act, Section 2(c) and (f)*]

It is further alleged that the reduced price at which Stanley offered to purchase Plura's products was unreasonably low and not justified by any savings in manufacture, packaging or shipment. Robinson charges that Stanley desired to eliminate his services so that it might purchase at the substantially reduced price, thereby obtaining for itself the amounts of the commissions which would otherwise have been paid to Robinson. The foregoing acts of the defendants are alleged to be violations of subsections (c) and (f) of § 13 of Title 15 of the United States Code.[1] Subdivision (a) of § 13 of that title provides, in part:

> "(a) * * * That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade * * *."

[*Treble Damages Sought*]

Incorporating by reference all of the preceding allegations of the amended complaint, Robinson, in paragraph 7, charges Plura with having breached its contract to pay commissions due to Robinson on sales to Stanley, for which he seeks recovery. The next succeeding paragraph, number 8, charges Stanley and Plura with having conspired to deprive Robinson of his rightful commissions as manufacturer's representative for Plura, and to divert those commissions to Stanley. In the concluding paragraph, number 9, the amended complaint charges Stanley with having induced Plura to breach the commission contract with Robinson. Robinson seeks treble damages from both defendants, and demands a jury trial.

[*Questions Posed*]

Plura's presently pending motion poses the following questions:

(1) Does the amended complaint state a cause of action under 15 U. S. C. § 13?

(2) Do the allegations of the amended complaint disclose a cause or causes of action upon which relief can be granted to Robinson against Plura?

(3) Do the allegations of the amended complaint disclose jurisdiction in this Court over the subject matter of the cause or causes of action therein set forth?

[*Causes Asserted Under State Law*]

It is obvious at the outset that in the last three numbered paragraphs of the amended complaint, summarized above, Robinson has rather inartistically endeavored to allege separate causes of action respectively, viz.:

(1) For damages for Plura's breach of commission contract with the plaintiff;

(2) For damages for the alleged conspiracy between Stanley and Plura to deprive Robinson of his commissions; and

(3) For damages for Stanley's inducement of Plura to breach the latter's commission contract with Robinson.

Each of the three foregoing causes of action is expressly asserted "under applicable State law."

[*Federal Jurisdiction*]

The jurisdiction of this Court with respect to these three causes of action depends upon a showing of diversity of citizenship AND the involvement of the statutory minimum monetary amount. 28 U. S. C. § 1332. While Robinson and Plura are citizens of

[1] The cited subsections provide as follows:

"§ 13. DISCRIMINATION IN PRICE, SERVICES OR FACILITIES—PRICE: SELECTION OF CUSTOMERS.

* * *

"(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

* * *

"(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

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Massachusetts and New Jersey respectively, the co-defendant, Stanley, is a corporation of Massachusetts. Because the plaintiff and one of the defendants are citizens of the same State, a vital element of diversity is lacking. *Walmac Co. v. Isaacs,* 1 Cir. 1955, 220 F. 2d 108. Diversity of citizenship alone, however, without a claim or showing that the minimum requisite monetary amount is involved, would be insufficient to confer jurisdiction. 28 U. S. C. § 1332(a); *McCoy v. Siler,* 3 Cir. 1953, 205 F. 2d 498, cert. den. 346 U. S. 872. Nowhere in the amended complaint does the amount in controversy appear. There is nothing to show (1) that the amount of the commissions of which Robinson claims to have been deprived, or of the damages which he claims to have suffered by reason of the breach of his commission contract, exceeded or even equalled the sum of $10,000, exclusive of interest and costs. The attempt to incorporate by reference into each of paragraphs numbered 7, 8 and 9 the allegations of the preceding paragraphs of the amended complaint does not aid the plaintiff insofar as the causes of action alleged in the latter three paragraphs are concerned. The motion to strike paragraphs 7, 8 and 9 of the amended complaint, therefore, must prevail.

[*Discounts "in Lieu" of Brokerage*]

We consider now the sufficiency of the first six paragraphs of the amended complaint, which purport to set forth a cause of action under 15 U. S. C. § 15, based upon alleged violations of Section 13 of that Title. In his brief in opposition to the motion, plaintiff contends

> (1) "That the violation by the said Gahm consisted of granting to the defendant Stanley a discount in lieu of the payment of a brokerage fee from the said Gahm to Stanley on sales by Gahm to Stanley" and (2) "That Stanley induced and procured a violation of the antitrust laws of the United States, * * * when Stanley induced the said Gahm to grant such discount."

Plaintiff argues that section 2(c) of the Clayton Act, as amended, contains an absolute prohibition of allowances or sums in lieu of brokerage from sellers to buyers, and that the same section must be construed independently of section 2(a) thereof. Robinson also urges that a violation of section 2(c) may exist in the absence of price discrimination and without injury to the public interest. The independence of subparagraphs (a) and (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, has long been recognized. *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission* [1932-1939 Trade Cases ¶ 55,242], 3 Cir. 1939, 106 F. 2d 667, at p. 677, cert. den. 1940, 308 U. S. 625. At page 678 of that opinion, the Circuit Court says:

> "The practice of paying brokerage, or sums in lieu of brokerage, to buyers or *their* agents by sellers was found by Congress to be an unfair trade practice resulting in damage to commerce. Paragraph (c) prohibits such practice." (Italics mine.)

See also *Quality Bakers of America v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,060], 1 Cir. 1940, 114 F. 2d 393.

[*Seller's Broker Not Covered by 2(c)*]

The situation confronting me upon the present motion is suggestive of that in *Freedman v. Philadelphia Terminals Auction Co.* [1957 Trade Cases ¶ 68,612], D. C. E. D. Pa. 1956, 145 F. Supp. 820. In the case at bar, as in *Freedman,* the operations of the defendant were unquestionably in interstate commerce. The cases are distinguishable, however, because in *Freedman* the defendant made a service charge against the plaintiffs for services not rendered, while in the complaint before us, there [are] no allegations that the defendant made any charge against or induced any payment from the plaintiff. What does clearly appear from the pleading here attacked is that Plura secured a customer, Stanley, allegedly as a result of the services of Robinson, and thereafter proceeded to deal directly with this customer, to which Plura accorded a price lower than that which Robinson had to quote to Stanley on the same product in order to cover his services.

Any doubt as to the meaning of § 2(c) as applied to the facts disclosed on the present motion, appears to have been dispelled by the Seventh Circuit Court of Appeals, in 1958, in *Henry Broch and Company v. Federal Trade Commission* [1958 Trade Cases ¶ 69,208], 261 F. 2d 725, in the following language, at p. 728:

> "Neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c). * * * In the case before us, no agent of the buyer is involved. Petitioner is an agent solely of the seller."

The order of the Federal Trade Commission in the *Broch* case was set aside. The examiner there found that the broker, Broch, in agreeing to reduce his commission, made no payment, either directly or indirectly to the buyer. The opinion concludes, at p. 729:

> "Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. *If a seller is to be forbidden to meet competition by reducing an item of its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public* which must ultimately defray the resultant costs of distribution." (Italics added.)

[*Right of Customer Selection*]

The *Broch* case was decided upon the evidence before the Commission. The motion before me, on the other hand, is addressed to the amended complaint. Keeping in mind the elementary principle that for the purpose of such a motion, all well-pleaded facts alleged in the complaint must be taken as admitted, our scrutiny of the first six paragraphs of this amended complaint discloses, with respect to §§ 2(c) and 2(f) of the Clayton Act, as amended, merely the following allegations, all in paragraph 6:

(1) Robinson secured Stanley as a customer for Plura.

(2) After an initial order and reorder by Stanley, Stanley's representatives suggested to Plura that Stanley might be willing to purchase large quantities of its product if Plura reduced its price.

(3) Upon the making of this offer by Stanley, Plura terminated Robinson's services as its New England representative, and thereafter accepted Stanley's offer to purchase directly in quantity at a price less by an amount equal to Robinson's commission than that which Robinson had been authorized to quote.

There are two allegations in the amended complaint which are evidently intended to invoke the provisions of § 2(c) and (f), namely, (a) that Stanley knew that the price reduction which it sought from Plura could be accomplished only by diverting Robinson's commission to Stanley, and (b) that Stanley's offer to purchase at such reduced price effected the diversion of Robinson's commission to Stanley. What Stanley may have known or anticipated in offering to purchase large quantities at a reduced price is immaterial to the right of Plura to eliminate the plaintiff as its broker. Stanley's intentions in making the offer to Plura could not limit Plura's freedom to sell to Stanley at a reduced price, even though it might involve the elimination of the seller's broker. Even if the amount of the discount given may have equalled the broker's commission, the seller was free to encourage the purchase of large quantities of his products by the allowance of such a discount. *Henry Broch & Co. v. Federal Trade Commission, supra.* It is elementary that a seller may select his own customers. *United States v. Colgate & Co.*, 1919, 250 U. S. 300; *Brosius v. Pepsi-Cola Co.* [1946-1947 TRADE CASES ¶ 57,459], 3 Cir. 1946, 155 F. 2d 99.

[*Eliminating Brokerage as Element of Cost*]

The substance of paragraph 6 of the amended complaint is the charge that the defendants Plura and Stanley worked out an arrangement between themselves which enabled Plura to dispense with Robinson's services and avoid the payment to him of commissions as an element of selling cost. Such a charge, if true, is not equivalent to a cause of action under the Act relied upon. *Chicago Sugar Co. v. American Sugar Refining Co.* [1948-1949 TRADE CASES ¶ 62,449], 7 Cir. 1949, 176 F. 2d 1, cert. den. 338 U. S. 948.

[*No Cause of Action*]

I conclude that the plaintiff has failed to plead a violation of §§ 2(c) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act. No cause of action within this Court's jurisdiction is discerned in the remaining allegations. Therefore, the motion to strike the amended complaint *in toto* must prevail.

An order may be submitted in conformity with the views herein expressed.

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[¶ 69,454] United States v. Greater Blouse, Skirt & Neckwear Contractors' Association, Inc.; National Association of Blouse Manufacturers, Inc.; Slate Belt Apparel Contractors' Association, Inc.; Blouse and Waistmakers' Union Local 25, International Ladies' Garment Workers' Union; James Clemenza, a.k.a. Jimmy Brown; I. Lloyd Cabin; Charles Kreindler; Abraham Rosenthal; and Harry Strasser.

In the United States District Court for the Southern District of New York. Cr. 158-181. Filed September 8, 1959.

Case No. 1434 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Combinations and Monopolies in Production of Ladies' Blouses—Sufficiency of Allegations of Indictment—"Injury to Public."—An indictment charging an individual with membership in a conspiracy to restrain and monopolize trade in the production of ladies' blouses was not "fatally defective" by reason of its failure to allege injury to the public. The court, denying a motion to dismiss the indictment, rejected as incorrect the individual's contention that proof of the raising or fixing of market prices was essential to sustain the charge. The United States Supreme Court, in *Apex Hosiery Co. v. Leader,* 1940-1941 TRADE CASES ¶ 56,039, made the statement that "in general, restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price." However, that court has since limited the application of that doctrine in a case (*Klor's, Inc. v. Broadway-Hale Stores, Inc.,* ¶ 69,316 of the TRADE REGULATION REPORTER) which also repudiated the requirement of public injury. There, the court held that a group boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." Here, the indictment alleged a group boycott, or, at least, a concerted refusal by traders to deal with other traders, which the *Klor's* opinion equated with group boycotts.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.570.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Combinations and Monopolies—Sufficiency of Allegations of Indictment—Duplicity—Double Jeopardy.—An indictment charging an individual with membership in a conspiracy to restrain and monopolize trade in the production of ladies' blouses was not "duplicitous." Denying a motion to dismiss the indictment, the court found that the allegations against the defendant were quite clear and could provide ample protection against double jeopardy. It was argued that, although each count charged one conspiracy starting about 1949 and continuing up to and including the date of the return of the indictment, the terms of the indictment revealed that "several distinct agreements are alleged in each count rendering those counts duplicitous." However, a single conspiracy may embrace several related conspiracies. Thus, the fact that the terms of the indictment did show that more than one agreement among the defendants was involved did not render the indictment duplicitous. Each count alleged a single continuing conspiracy; it was not necessary to break them up into several conspiracies merely because there were other agreements entered into to effectuate the conspiracy. Thus, the breaking-away and re-aligning of the various defendants did not detract from the continuation of the conspiracy, or necessitate the conclusion that another conspiracy was formed.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.540.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Combinations and Monopolies—Sufficiency of Allegations of Indictment—Vagueness and Uncertainty—Necessity for Detailed Pleading of Evidence.—An indictment charging an individual with membership in a conspiracy to restrain and monopolize trade in the production of ladies' blouses was not "too vague and uncertain to inform defendant of the charge against him." Denying a motion to dismiss the indictment, the court held that it met the requirements of Rule 7(c), Federal Rules of Criminal Procedure, namely, that the indictment "shall be a plain, concise and definite written statement of the essential facts

constituting the offense charged." Here, the individual was named as a defendant, and the "defendants" were charged with conspiring and attempting to monopolize. There were allegations of sufficient facts to show an agreement among the defendants to acquire control and monopoly, and to restrain trade, in the manufacture and distribution of ladies' blouses. There is no requirement that overt acts be charged, and the defendant was not entitled to a detailed pleading of the evidence to be presented against him.

See Department of Justice Enforcement and Procedure, Vol. 1, ¶ 8025.500, 8025.660, 8025.740.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Trial—Severance of Single Defendant—Alleged Prejudice to Other Defendants.—Defendants charged with conspiring to restrain and monopolize trade in the production of ladies' blouses were denied a motion for the severance of a defendant who allegedly had been closely connected with notorious criminals and racketeers. It was contended that the participation of that defendant in the trial would "tar" the other defendants because of the jury's abhorrence of racketeers, and that he was brought into the case so that the Government could proclaim the case to be an assault on racketeering as well as an attack on business arrangements alleged to violate the Sherman Act. While articles highlighting the claim that the defendant in question had underworld connections had appeared in newspapers on the day the indictment was returned and on the following day, it could not be said that the defendants could not receive a fair trial merely because of that publicity. No case was cited and none was found where a severance was granted because of prejudice against one of the defendants, in the absense of a highly inflammatory and incriminating statement made by that defendant. If the severance were granted, the necessity of relitigating the issues would prejudice the Government. Also, the defendants at the second trial could have the advantage of knowing in advance exactly what evidence the Government expected to offer against them.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.750.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Combinations and Monopolies—Discovery and Inspection of Documents in Government's Possession.—Defendants charged with conspiring to restrain and monopolize trade in the production of ladies' blouses were denied motions under Rule 17(c) of the Federal Rules of Criminal Procedure for the inspection and production of various documents in the Government's possession because of the "dragnet character" of the motions. The right of discovery granted by Rule 17(c) deals with material "obtained by the Government by solicitation or voluntarily from third persons," and "material which has been in the Government's possession from the time of its origin." However, "if defendants insist upon proceeding with catch-all descriptions they must at least list the evidentiary documents that are available to them elsewhere and exclude them from those demanded of the United States Attorney."

The defendants' further motions for discovery under Rule 16 (which deals with the inspection and copying of items "obtained from or belonging to the defendant or obtained from others by seizure or by process) were granted to the extent that it sought items the Government had obtained "by seizure or process." Since that rule cannot be used to get documents the Government obtained voluntarily, the motion was denied to the extent that it sought documents acquired in that manner. The court also ruled that a specific showing of "reasonableness and materiality" was not always a pre-requisite to discovery under Rule 16. Where the documents in the possession of the Government are too numerous for the defendants to identify, it is impossible to make a showing that they are material and that the request is reasonable.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021, 8021.700.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Defendants' Right to Additional Information—Bill of Particulars—Items Necessary for Preparation of Defense—Items Seeking Government's Evidence and Theory of Case.—In a criminal action charging defendants with conspiring to restrain and monopolize

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trade in the production of ladies' blouses, the court, attempting to balance the interest of the Government in the non-disclosure of its evidence against the interest of the defendants in being able to prepare their defense, granted the defendants' motions for a bill of particulars to the extent that they were reasonable and sought particulars necessary for the preparation of the defense. However, requests seeking the detailed evidence which the Government would offer and the theory on which the case would be tried were denied.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Sufficiency of Allegations—Time Limitation on Making of Motions.—Defendants charged with conspiring to restrain and monopolize trade in the production of ladies' blouses were denied "motion for leave to make further motions" at "any time before trial," where, by an order of the court, a date had been fixed as the last day for the making of motions. The court disagreed with the contention that Rule 12(b)(2), Federal Rules of Criminal Procedure, which provides that the "failure of the indictment . . . to charge an offense shall be noticed by the court at any time during the pendency of the proceeding" permitted the defendants to disregard a direction of the court that such motions in advance of trial shall be made on or prior to a certain date. The court also noted that no cogent reason had been advanced as to why it should grant further permission for the making of motions at that time.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.

For the plaintiff: Lawrence Gochberg and Ronald S. Daniels, Attorneys, Department of Justice.

For the defendants: Milton J. Levy for Greater Blouse, Skirt & Neckwear Contractors Assn., Inc., James Clemenza, and I. Lloyd Cabin; Paul, Weiss, Rifkind, Wharton & Garrison (Simon H. Rifkind, Jay H. Topkis, and John G. Simon, of counsel), and Lieberman, Katz & Aronson (Elias Lieberman and Morris P. Glushien, of counsel) for Local 25, ILGWU, and Charles Kreindler; Herbert Brownell, Jr. (Thomas F. Daly and William F. Hamilton, of counsel), for Slate Belt Apparel Contractors Assn., Inc.; Amen, Weisman & Butler (Herman L. Weisman, of counsel) for National Assn. of Blouse Manufacturers, Inc.; and Brower, Brill & Gangel (Joseph Brill, of counsel) for Harry Strasser.

Memorandum

[*Criminal Antitrust Action*]

DIMOCK, District Judge [*In full text*]: These are motions by all defendants in a criminal antitrust case in which three associations, one labor union and five individuals are charged with violations of sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 2, in the production of ladies blouses in a four state area.

[*Motions*]

Defendant Strasser moves under Rule 12, F. R. Crim. P., for dismissal of the indictment. All of the defendants, with the exception of defendant Strasser, move under Rule 14, F. R. Crim. P., for relief from an alleged prejudicial joinder of defendant Strasser, and, under Rules 16 and 17(c), F. R. Crim. P., for inspection and production of various documents in the Government's possession. All of the defendants move under Rule 7(f), F. R. Crim. P. for extensive bills of particulars. Finally, defendants ask leave to make further motions with respect to this indictment, after the Government's compliance with any requirements of this decision concerning bills of particulars and discovery and inspection, and at any time before trial. Each motion is opposed by the Government.

[*Conspiracy and Monopoly Charged*]

The indictment, in count 1, charges that defendants, and other co-conspirators not named as defendants, engaged in an unlawful combination and conspiracy, in restraint of interstate trade and commerce, in count 2 that they engaged in an unlawful combination to monopolize interstate trade and commerce, and in count 3 that they engaged in an attempt to monopolize interstate trade and commerce.

[*Defendants*]

Named as defendants are the following:

Greater Blouse, Skirt & Neckwear Contractors' Association, Inc. (hereinafter Greater), a New York corporation, claimed to be "an association whose members are contractors who produce, among other things, ladies'

blouses and do business in New York, New Jersey, Pennsylvania and Connecticut";

Slate Belt Apparel Contractors' Association, Inc. (hereinafter Slate Belt), a Pennsylvania corporation, also claimed to be "an association whose members are contractors who produce ladies' blouses" and who do business in Pennsylvania and New York;

National Association of Blouse Manufacturers, Inc. (hereinafter National), a New York corporation, claimed to be "an association whose members are manufacturers or jobbers of ladies' blouses doing business in New York, New York";

Blouse and Waistmakers' Union, Local 25, International Ladies' Garment Workers' Union (hereinafter Local 25), claimed to be "a voluntary association, organized and existing under the laws of the State of New York" whose membership "consists of workers engaged in the production of ladies' blouses";

James Clemenza, employed by Greater since 1953 and its Executive Director since 1957;

I. Lloyd Cabin, alleged to have been "associated with either Greater or Slate Belt in an executive capacity" during the entire period of the indictment;

Charles Kreindler, alleged to have been the "Manager of Local 25 and a Vice President of the International Ladies' Garment Workers' Union" during the entire period covered by this indictment;

Abraham Rosenthal, claimed to have been President of National from in or about 1949, the beginning of the period covered by this indictment, to November 1950 and from November 1952 to September 1956;

Harry Strasser.

[*Price Fixing, Allocating Market, and Exclusive Dealing*]

The indictment charges the following:

In the ladies' blouse industry the term "contractor" refers to persons, firms or corporations "engaged in the business of producing ladies' blouses from uncut or cut material owned by the jobber or manufacturer for whom such person, firm or corporation is producing those blouses." A contractor, it is alleged, "owns the means of producing such blouses, hires labor and takes the risk of profit or loss in the conduct of his business." The terms "jobber" and "manufacturer" refer to a person, firm or corporation "engaged primarily in the business of selling ladies' blouses at wholesale, and who has some or all of those blouses produced by contractors."

"33. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are to: fix the prices the members of National would be required to pay to members of Greater and Slate Belt for blouse contracting work; allocate the blouse contracting work of members of National among the members of Greater and Slate Belt; require members of National to use members of Greater and Slate Belt exclusively to do blouse contracting work; establish a policing and enforcing system to prevent violations of the conspiracy; impose penalties or damages for violations of the conspiracy; and require manufacturers and jobbers of ladies blouses who were not members of National either to join National or to conform to the aforesaid terms of the conspiracy.

"34. During the period covered by the indictment the said combination and conspiracy has been effectuated by various means and methods including, among others, the following:

"(1) In 1949 Slate Belt was formed by a group of contractors in Pennsylvania. Late that year, some time in October, Slate Belt affiliated with Greater. Under their affiliation agreement, Slate Belt's members became members of Greater. And Slate Belt was bound by all agreements made, or to be made, by Greater with Local 25 and National.

"(2) At about the same time, Greater, National and Local 25 evolved a plan to stabilize the blouse industry in New York, Pennsylvania, New Jersey and Connecticut. Carrying out this plan, Greater and National entered into an agreement in 1950 under the terms of which (1) prices to be paid contractors were fixed; (2) blouse contracting work of the members of National was allocated among the members of Greater and Slate Belt; (3) members of National were required to give their contracting work exclusively to members of Greater and Slate Belt; (4) members of Greater and Slate Belt were required to work exclusively for members of National; (5) an enforcement system through an industry Impartial Chairman was established.

"(3) In conjunction with the Greater-National agreement, Local 25 entered into

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separate agreements with National and Greater. These agreements provided that blouse contracting work of members of National was to be allocated among the members of Greater and Slate Belt; penalties were to be imposed upon members of National for violation of the allocation system; and an enforcement system was promulgated utilizing the same industry Impartial Chairman named in the Greater-National agreement.

"(4) All the above described agreements were in effect during the period 1950 through 1952. And during such period, Local 25 and National conducted a campaign to force non-member jobbers and manufacturers either to join National or to conform substantially with the terms of the Greater-National agreement. The Greater-National-Local 25-Slate Belt arrangements continued through 1952.

"(5) In 1953, however, Slate Belt, dissatisfied with its alliance with Greater, broke away from Greater. Slate Belt then entered into indepedent agreements with National and with locals of the ILGWU located in Pennsylvania. Slate Belt's agreement with National provided for a continuation of an allocation system, but it substantially changed the price fixing provisions of the 1950 Greater-National agreement. Greater also entered into separate contracts with National and with Local 25 providing for a continuation of an allocation scheme, but its new agreement with National also substantially changed the price fixing provisions of the 1950 Greater-National agreement. In this same period, National entered into an agreement with Local 25 continuing the allocation scheme specified in the 1950 National-Local 25 agreement. All of the 1953 agreements were to expire in late 1955 or early 1956.

"(6) In 1955, some months before these agreements were to expire, co-conspirator Northeast Department, ILGWU, refused to renew Slate Belt's independent agreements with its Pennsylvania locals. Slate Belt was informed that there would be only one union contract governing the contractors in the blouse industry, namely one between Local 25 and Greater. Thereafter, in the fall of 1955, Slate Belt again entered into a contract with Greater under which Slate Belt was bound by all agreements made, or to be made, by Greater with Local 25 and National. Defendant Harry Strasser, who had no apparent connection with the ladies' blouse industry, was instrumental in arranging Slate Belt's reaffiliation with Greater.

"(7) Following the rejoining of Greater and Slate Belt, Greater and National entered into negotiations for a new contract to replace the 1953 agreements which were to expire in early 1956. However, a dispute arose between Greater and National concerning the prices members of National would pay to members of Greater and Slate Belt for blouse contracting work, and the manner of fixing such prices. Defendant Harry Strasser played a major role in the settlement of this dispute. Growing out of this settlement Greater and National entered into an agreement which, among other things, provided for an effective system of price fixing, allocation of the blouse contracting work of National's members among the members of Greater and Slate Belt, and a requirement that members of National give their blouse contracting work exclusively to members of Greater and Slate Belt. Contemporaneously, Local 25 entered into agreements with Greater and National providing, among other things, for allocation of the blouse contracting work of National's members among the members of Greater and Slate Belt.

"(8) The 1956 agreements referred to above were effective at least until December 31, 1958. During this period organized policing of the industry was carried out by Greater, Local 25 and Slate Belt to enforce the price fixing and allocation provisions of the agreements. One of the results of this policing activity was that members of National, who contracted to have blouses made by members of Greater and Slate Belt at prices below those fixed in the 1956 Greater-National agreements, and without the prior approval of Greater and National, were forced to pay additional monies to the members of Greater and Slate Belt.

"35. The combination and conspiracy hereinbefore alleged has had the following effects, among others:

Manufacturers and jobbers of ladies blouses belonging to National have had to pay higher prices to the contractors—members of Greater and Slate Belt.

Manufacturers and jobbers of ladies blouses belonging to National have not been able to work with contractors of their own choosing.

Manufacturers and jobbers of ladies blouses belonging to National have not been able to distribute their work among contractors in the manner they desired.

Manufacturers and jobbers of ladies blouses, not members of National, have been brought into the conspiracy or made to abide by its terms.

Contractors producing ladies blouses, not members of Greater or Slate Belt,

have been deprived of an opportunity to work for members of National.

Competition among contractors belonging to Greater and Slate Belt has been eliminated."

Paragraph 33 is made applicable to counts 1 and 2 and paragraphs 34 and 35 are made applicable to all three counts. The following discussion will deal with these motions in the order in which they were set forth at the outset of this opinion.

I. Defendant Strasser's Motion for Dismissal of the Indictment

[*Public Injury*]

Defendant Strasser attacks the legal sufficiency of the indictment on the grounds (1) that it "is fatally defective in that it has failed to allege an essential ingredient of the offense, namely, 'injury to the public'", (2) that "it is too vague and uncertain to inform defendant of the charge against him," and (3) that "all three counts are duplicitous."

Strasser expands his first contention to say that the indictment is defective because it fails to allege that the purpose or effect of the conspiracy was to raise or fix the market price or to cause harm to the consuming public. He says that the Supreme Court has said "in general, restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price." *Apex Hosiery Co. v. Leader* [1940-1943 Trade Cases ¶ 56,039], 310 U. S. 469, 500. He also cites *Appalachian Coals, Inc. v. United States* [1932-1939 Trade Cases ¶ 55,025], 288 U. S. 344, 360, for the proposition that the

> "mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it."

The argument is that the Sherman Act condemns restraints upon competition only when their purpose or effect is to raise or fix the market price or result in harm to the consuming public, that proof of such purpose or effect is therefore essential to sustain a charge of violation, and that since there was no such allegation in the indictment the indictment is insufficient. Strasser's view of the elements necessary to sustain a Sherman Act violation is incorrect. The Supreme Court, in the *Apex Hosiery Co.* case, did indeed make the statement quoted above as to the necessity of effect on market price but that court has since limited its application in a case which also repudiated the requirement of public injury.

[*Klor's Case*]

In the recent case of *Klor's v. Broadway-Hale Stores* [1959 Trade Cases ¶ 69,316], 359 U. S. 207, a retail seller of household appliances brought an action for treble damages and an injunction against a chain of department stores and ten national manufacturers and their distributors claiming that the defendants conspired to restrain and monopolize commerce by agreeing among themselves either not to sell to plaintiff or "to sell to it only at discriminatory prices and highly unfavorable terms." 207 U. S. at 209. The defendants sought summary judgment and dismissal of the complaint for failure to state a cause of action, alleging that there were hundreds of other household appliance retailers selling the items which defendants refused to sell to plaintiff and arguing that the agreement of the defendants did not injure the public. The District Court dismissed the complaint and entered summary judgment for defendants [1956 Trade Cases ¶ 68,495] on the ground that this "purely private quarrel" did not amount to a "public wrong proscribed by the [Sherman] Act." The Ninth Circuit affirmed, stating that "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured." [1958 Trade Cases ¶ 69,007] 255 F. 2d 214, 233. On review by the Supreme Court the judgment was reversed and the case remanded for trial. The court held that a group boycott, such as was there alleged,

> "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

The complaint failed to allege any effect on market prices but the court required that its pronouncement on that subject in the *Apex Hosiery* case "be considered in the light of the fact that the defendant in that case was a labor union." 359 U. S. at 213, fn. 7. The complaint was therefore held to state a cause of action.

[*Labor Union*]

It is true that one of the defendants here is a labor union like the defendant in the

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Apex Hosiery case. That particular defendant has not joined in the motion to dismiss, however, so the question of its liability without an allegation of effect on market prices does not now arise. The indictment in this case alleges a group boycott like that in the *Klor's* case, or at least a concerted refusal by traders to deal with other traders which the *Klor's* opinion equates with group boycotts. Hence the indictment survives Strasser's motion to dismiss insofar as it is based on failure to allege effect on market prices or public injury.

[*Vagueness and Uncertainty*]

Strasser's second ground for dismissing the indictment, that it is too vague and uncertain to inform him of the charge against him, is also without merit. Rule 7(c), F. R. Crim. P., sets forth requirements that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." These requirements have here been met. Strasser is named as a defendant and the "defendants" are charged with conspiracy and attempt to monopolize. There are allegations of sufficient facts to show an agreement among the defendants to acquire control and monopoly and to restrain trade in the manufacture and distribution of ladies blouses. There is no requirement that overt acts be charged in the indictment, *Nash v. United States,* 229 U. S. 373, nor is defendant entitled to know what evidence will be presented against him. Strasser apparently is under the impression that he is entitled to a detailed pleading of evidence since he argues that he is entitled to know what he did to effect the conspiracy, with whom he conspired, when or where he conspired or performed an act or acts in furtherance of the conspiracy, how the prices were agreed upon, the territories allocated, the agreements negotiated, the policing accomplished, and how the public was affected. The answers to all of these questions would involve disclosing the Government's evidence and such disclosure need not be made in an indictment.

It is true that Strasser, after being described as a defendant, is mentioned only twice by name in the indictment, but, to paraphrase the language of the court in *Las Vegas Merchant Plumbers Ass'n v. United States* [1954 Trade Cases ¶67,673], 9 Cir., 210 F. 2d 732, 750, the charge against Strasser does not rest merely on these specific references.

[*Duplicity*]

Strasser's final contention is that the indictment must be dismissed because all three counts are duplicitous. He argues that, although each count charges one conspiracy starting about 1949 and continuing up to and including the date of the return of the indictment, the terms of the indictment reveal that "several distinct agreements are alleged in each count rendering those counts duplicitous." It is true that the terms of the indictment do show that more than one agreement was involved, but this does not render the indictment duplicitous. The plan to stabilize the blouse industry is alleged to have been arrived at in 1949. The fact that Slate Belt, in 1953, broke away from Greater and entered into independent agreements with National and the ILGWU in no way detracts from the continuation of the conspiracy, nor does the realignment of Slate Belt with Greater in 1955 necessitate the conclusion that another separate conspiracy was then formed. It may be that Slate Belt withdrew from the conspiracy in 1953, but it does not necessarily follow that the conspiracy ended at that time. In 1955, when Slate Belt once more associated itself with Greater, this could have been merely an act in furtherance of the conspiracy from which Slate Belt never withdrew, or Slate Belt's rejoining the conspiracy which it had earlier abandoned. If it is the former, the conspiracy could well have continued from 1949 to the date of the return of the indictment, and the allegations in the indictment are sufficient. If the 1955 reassociation was a rejoining of a pre-existing conspiracy from which Slate Belt had withdrawn, the indictment still stands. "The rule is clear that one who joins an existing conspiracy takes it as it is, and is therefore held accountable for the prior conduct of co-conspirators." *United States v. Sansone,* 2 Cir., 231 F. 2d 887, 893, cert. denied 351 U. S. 987; *United States v. Kessler,* 2 Cir., 253 F. 2d 290, 291.

[*Continuing Conspiracy*]

The charge in count 1 is a conspiracy to restrain trade, and the charge in count 2 is a conspiracy to monopolize. Each count alleges a single continuing conspiracy which need not be broken up into several con-

spiracies merely because there were other agreements entered into in order to effectuate the conspiracy. A single conspiracy may even embrace several related conspiracies, *Nye & Nissen v. United States,* 9 Cir., 168 F. 2d 846, 850, aff'd 336 U. S. 613; *United States v. Coplon,* D. C. S. D. N. Y., 88 F. Supp. 912, 914, rev'd on other grounds, 185 F. 2d 629; although the agreement between Slate Belt and Greater may not necessarily have been a related conspiracy, as pointed out above. The allegations against defendant Strasser are quite clear and can provide ample protection against double jeopardy if that should be attempted.

Defendant Strasser's motion to dismiss the indictment is denied.

II. Motions for Severance

[*Prejudice*]

Defendants Local 25 and Kreindler have moved for a severance of defendant Strasser from themselves and the other defendants in the case, or, in the alternative, for a severance of the moving defendants from Strasser and the other defendants. Each of the other defendants has joined in this motion. The basis for the plea for the severance of Strasser is a claim of prejudice on account of unsavory company that he is alleged to keep. He allegedly has been closely connected wth extremely notorious criminals and racketeers so that his participation in the trial would tar the defendants throughout the litigation because of the jury's abhorrence of racketeers. Local 25 claims, and not without justification, that because of the efforts of the International Ladies Garment Workers Union, the union members have come to enjoy a higher standard of living than they theretofore realized and the sweatshop has been largely eliminated and that Local 25 consequently enjoys a high reputation. Local 25 claims that Strasser has been brought into this case so that the Government could counteract the effect of this high reputation by proclaiming the case to be an assault on racketeering, as well as an attack on business arrangements alleged to violate the Sherman Act. It is because the suggestion of racketeering is present that Local 25 complains that it will not be able to receive a fair and unbiased verdict on the antitrust issues.

In support of its argument that this case is an attempt to convict a racketeer, Local 25 has attached to its affidavit articles which appeared in the city's leading newspapers on the day that the indictment was returned and the following day all of which highlighted the claim that Strasser had underworld connections. In each article there was a statement, attributed either to the Attorney General of the United States or to a Justice Department official, to the effect that the antitrust laws were now going to be used to attack racketeering and union abuses. Defendant claims that because of such publicity the Government has

> "sought to inject a prejudicial and irrelevant issue of 'racketeering' into the trial of an important antitrust controversy."

It is, of course, highly regrettable if the publicity surrounding the indictment stressed heavily facts which have no place in the case. I am, however, unable to say that defendants cannot receive a fair trial merely because of the publicity immediately following the indictment, limited in time to one evening and one morning. No case has been cited and none has been found where a severance has been granted because of prejudice against one of the defendants, in the absence of a highly inflammatory incriminating statement made by that defendant. Compare *United States v. Lebron,* 2 Cir., 222 F. 2d 531, 535, cert. denied 350 U. S. 876, with *United States v. Haupt,* 7 Cir., 136 F. 2d 661, 673-674.

No defendant makes a stronger case for a severance than Local 25.

[*Severance Denied*]

If a severance were granted, the necessity of relitigating the issues would prejudice the Government, particularly in view of the fact that an antitrust case so often takes a long time to try. In addition, the defendants at the second trial would have the advantage of knowing in advance exactly what evidence the Government expected to offer against them.

The motions for a severance are denied.

III. Motions under Rules 16 and 17(c)

All of the defendants, with the exception of defendant Strasser, have moved under Rules 16 and 17(c) for the relief hereinafter described.

1. Defendants Local 25 and Kreindler seek, under Rule 16,

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"to inspect and copy or photograph, all books, records, documents and papers relative to the indictment belonging to defendant Local 25 or defendant Kreindler or obtained by the Government by seizure or process,"

and, under Rule 17(c),

"to inspect and copy or photograph, books, records, documents and papers designated in a subpoena *duces tecum* served on the plaintiff on May 14, 1959, to wit: all books, records, documents and papers that are relative to the indictment and of evidentiary character, other than those furnished by defendant Local 25 or defendant Kriendler to the Government and those obtained by the Government by seizure or process";

2. Defendant Slate Belt seeks, under Rule 16,

"to inspect, make extracts from, copy or photograph any and all books, records, documents, minutes, reports, checks, check vouchers, check stubs or any other writing relative to the indictment heretofore obtained from others by or in the name of the Government from any source whatever,"

and, under Rule 17(c),

"to inspect, make extracts from, copy or photograph any and all books, records, documents and papers described in a Subpoena *Duces Tecum* * * * which were obtained from any and all sources, persons, corporations, associations, or otherwise, and are in the custody and control of the Government or any of its attorneys or agents, which bear, tend to bear upon, or relate to each of the crimes alleged in the indictment, the means allegedly used to effectuate the same, and the consequences alleged therein to have resulted therefrom, and are of an evidentiary character, excepting only such of the foregoing written material which defendant has been permitted to inspect or copy pursuant to an order granted in response to the request for relief [under Rule 16]";

3. Defendants Greater, Clemenza, and Cabin seek, under Rule 16:

"1. Corporate documents and reports, bulletins, minutes since January 1, 1949.

2. Agreements, contracts, arrangements, correspondence, memoranda and writings relating to labor, contractors, manufacturers, jobbers or associations thereof, and

3. All correspondence and other writings from January 1, 1953 relating to, (a) the manufacture, production and prices of blouses, (b) price schedules or agreements and requests or attempts to deviate therefrom, and (c) registration and designation of contractors, manufacturers or jobbers and attempts to deviate therefrom,

4. All correspondence and other writing from January 1, 1950 relating to (a) enforcement, fines, sanctions, or other action; (b) disputes including proceedings before the Impartial Chairman and attempts to enforce his decisions; attempts or efforts to induce membership in any association or to adhere to its rules or practices,

5. All books, records or documents showing (commencing January 1, 1953): membership lists, names, addresses, official capacity, and terms of the officers, records of income and disbursements and other financial arrangements."

and under Rule 17(c):

"all books, records, documents and papers obtained by Government counsel, other than those belonging to the said defendants or those obtained by the Government by seizure or process, which (a) are relative to or resulted in the indictment and (b) will be offered as evidence on the trial of the defendants or any of them, under said indictment; excluding, however, documents heretofore obtained by said defendants, such as copies of agreements to which the defendant Greater Blouse is a party."

4. Defendants National and Rosenthal seek, under Rule 16:

"to inspect, make extracts from, copy or photograph any and all books, records, documents, minutes, reports, checks, check vouchers, check stubs, or any other writing heretofore obtained from others by seizure or process by or in the name of the United States of America from any source whatever, particularly such as were obtained by said seizure or process from any and all persons, corporations and organizations named herein as defendants or co-conspirators as well as from all other persons, corporations and organizations described but not named herein as co-conspirators which may in any way, degree or extent relate to, reflect or record acts, conduct, transactions, occasions, statements and payments referred to or alleged in the indictment which bear or tend to bear upon the public offenses alleged in Counts One, Two or Three, respectively, in the indictment, the means allegedly used to effectuate the alleged unlawful conspiracies and attempt and/or

the consequences which are alleged to have resulted therefrom;"

and, under Rule 17(c):

"to inspect, make extracts from, copy or photograph any and all books, records, documents and papers described in a Subpoena *Duces Tecum,* a copy whereof is hereunto annexed, served on the United States Attorney and on said 'Attorneys, Department of Justice' on the 14th day of May, 1959, and which were obtained from any and all sources, persons, corporations, associations or otherwise and are in the custody and control of the United States of America or any of its said attorneys or agents which bear, tend to bear upon, or relate to each of the crimes alleged in the indictment, the means allegedly used to effectuate the same and the consequences alleged therein to have resulted therefrom, excepting only such of the foregoing written material, which said defendants have been permitted to inspect or copy pursuant to an Order granted in response to the request for relief under Rule 16."

[*Fishing Expedition*]

I have deliberately included the text of these motions to indicate the broad and thorough exploration that defendants seek of all the documents in the possession of the Government. Merely because the motions seek broad discovery, however, it does not necessarily follow, as the Government argues, that they are designed to permit the oft condemned fishing expedition. This case involves a conspiracy charge against nine defendants and it is essential in a case of this type that "each have an opportunity to examine before trial documents which may be introduced against him but which he has never before seen." *United States v. Cohen,* D. C. S. D. N. Y., 15 F. R. D. 269, 273.

I also reject the Government's argument that the practice of using Rule 17(c) as an additional means of discovery was "prohibited by the Supreme Court in *Bowman Dairy Co. v. United States* [1950-1951 TRADE CASES ¶ 62,818], 341 U. S. 214, 220." See *United States v. Cohen, supra.* As I read the *Bowman Dairy* case, "the Court reasoned that if a subpoena is directed towards a good-faith effort to obtain evidence there is no reason why such evidence may not be reached under Rule 17(c), even though not obtainable under Rule 16." *United States v. Gross & Kiley,* D. C. S. D. N .Y., C. 155-333, June 9, 1959.

[*"Dragnet Character" of Motions*]

Rule 16 deals with inspection and copying of items "obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of [the] defense and that the request is reasonable." The right granted by this Rule is conditioned upon a showing of materiality and reasonableness. The right of discovery granted by Rule 17(c) deals with material "obtained by the Government by solicitation or voluntarily from third persons," see *Bowman Dairy Co. v. United States,* 341 U. S. at page 221, and "material which has been in the Government's possession from the time of its origin." *United States v. Cohen,* D. C. S. D. N. Y., 15 F. R. D. 269, 271, *supra.* Nevertheless all of the motions made under Rule 17(c) must be denied because of their dragnet character. As I said in the *Cohen* case at page 273,

"If defendants insist upon proceeding with catch-all descriptions they must at least list the evidentiary documents that are available to them elsewhere and exclude them from those demanded of the United States Attorney."

Here defendants must at least list the documents that are available to them which come within the classes mentioned in the indictment.

[*Materiality and Reasonableness*]

The motions of the defendants under Rule 16 ask for items that seem to fall within it except that the defendants have made no specific showing of materiality and reasonableness. The issue therefore is whether such a specific showing is always a prerequisite to discovery under Rule 16. I hold that it is not. In a case of this type, where the documents in the possession of the Government, obtained through seizure or process, are too numerous for the defendants to identify, it is impossible to make a showing that they are material and that the request is reasonable. This is especially true where the defendants may not even know what documentary proof the Government has in its possession and where most of the evidence offered at trial by the Government is likely to consist of such documentary proof. See *Bowman Dairy Co.*

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v. United States, 341 U. S. 214, 219, *supra,* where the Supreme Court declared that Rule 16 gives "discovery as to documents and other materials otherwise beyond the reach of the defendants which, as in the instant case, might be numerous and difficult to identify."

I do not mean to say that merely because the Government obtained the documents in question by seizure or process they are therefore presumed to be material, cf. *United States v. Parr,* D. C. S. D. Tex., 17 F. R. D. 512, appeal dismissed 225 F. 2d 329, aff'd 351 U. S. 513, since documents could be seized and prove immaterial to the charge in the indictment, but in an earlier motion in this case, when an order was entered impounding the documents obtained by subpoena, the Government conceded that the "papers, documents, books and records are essential for the preparation and trial of the above captioned cause." If these items were essential for the preparation of the prosecution's case they are surely material to the preparation of the defense. I also find that the request is reasonable since inspection by the defendants is the "only way the defendant[s] can reach such materials so as to inform [themselves]." *Bowman Dairy Co. v. United States,* 341 U. S. 214, 219, *supra.*

The Government has offered "to produce all documents which it may use in the trial of this case" and argues that this is the maximum to which defendants are entitled. This argument, however, overlooks the fact that Rule 16 grants production and inspection of documents not merely to help a defendant understand the prosecution's case but to help the defendant in the preparation of his defense. The fact that much of the material consists of documents which belong to third parties whose interests may be adverse to the moving defendants is not persuasive for denying the motion. Many of these documents will be introduced at trial anyway, if they are relevant, and the fact that they were obtained by seizure or process would minimize any inference of voluntary aid to the Government. I also reject the Government's argument that much of the material "could be of no practical value to the defendants in the preparation of their defense." Such a value judgment is one that should be made not by the prosecution but by the defendants alone. Of course, documents which bear no relation to the indictment or are privileged need not be produced.

[*Documents Provided Voluntarily*]

The motion of defendant Slate Belt under Rule 16 requests items obtained from others both voluntarily and by seizure or process. Rule 16 cannot be used for the purpose of getting documents obtained from others voluntarily so that it will be granted only to the extent of documents obtained from others by seizure or process.

[*Ruling*]

The motions under Rule 16 are granted except where specifically denied above. The motions under Rule 17(c) are denied.

IV. Defendants' Motions for Bills of Particulars

[*Seeking Government's Evidence*]

The nine defendants have made five separate motions for bills of particulars and the requests cover sixty-three legal pages. Many of the requests seek the detailed evidence which the Government will offer and the theory on which the case will be tried. On the other hand some of the requests are reasonable and seek particulars necessary for the preparation of the defense in view of the fact that the indictment covers ten years and involves thousands of people. The difficulty in ruling on such requests lies in the fact that the precedents furnish little help since each case must be judged by its special factual situation. The principles to be applied in a decision of this type have been well stated, see *United States v. Aluminum Co. of America,* D. C. S. D. N. Y., 41 F. Supp. 347, 348; *United States v. The Metropolitan Leather & Find. Ass'n* [1948-1949 Trade Cases ¶ 62,367], D. C. S. D. N. Y., 82 F. Supp. 449, 453, and I will attempt to balance the interest of the Government in non-disclosure of evidence against the interest of defendants in being able to prepare their defense.

[*Rulings on Specific Requests*]

I shall take up the motion of Local 25 and Kreindler. I shall here refer to the paragraphs in the indictment to which the requests are respectively addressed.

Paragraph 15. The names and addresses of the unnamed co-conspirators are asked. The indictment charges no specific acts by

any unnamed conspirators and enough are named to identify the conspiracies.

Paragraph 22. These items are denied except for the item to which the Government consents. The paragraph to which these requests are addressed is purely descriptive, detailing the trade and commerce involved. It is clear without the further description which is asked.

Paragraphs 26, 27, 28 and 29. The Government agrees to furnish item 1 of paragraph 27 and item 1 of paragraph 28. The requested particulars as to periods of time are unnecessary since it is clear that the indictment here speaks only as of its date. Where the indictment alleges that National represents a majority of the jobbers, defendants are entitled to know how many jobbers the Government claims exist and how many it claims are represented by National. The allegation in paragraph 29 that certain contracts set the pattern for the labor contracts in the entire blouse industry is an important part of the indictment and defendants are entitled to a statement of the area referred to in the term "the entire blouse industry."

Paragraph 32. Item 1 requests particulars as to the identity of the persons who acted for each defendant and the periods of defendants' participation. These are proper and must be furnished.

The particulars requested under item 2 with respect to the character of the conspiracy as a series of separate conspiracies or a continuing one are furnished by paragraph 33 of the indictment, where it states that the combination and conspiracy has consisted of a continuing agreement and concert of action.

Paragraph 33. Defendants are entitled to the usual particulars with respect to an agreement as requested in items 1 and 2.

Item 3, however, asks not only for the perfectly proper substance of any implied agreement, but also asks for the identity of the acts or documents from which it was implied and the names of the persons who performed such acts. This seems to me to be a request for a statement of the direct evidence upon which the Government will rely as circumstantial evidence of an implied agreement. It is a clear case of a request for the opponent's evidence, and is denied.

Item 4 asks for a characterization of the continuing agreement as to whether it had any terms or purposes other than those set forth in the indictment. Defendants can determine the matter of terms from the written instruments or statements of the substance of oral agreements furnished in accordance with this memorandum. So far as purposes other than those set forth are concerned, the matter is unimportant. Item 4 is denied.

Paragraph 34. Item 1 is evidently a request for an expansion of the expression "among others" in the statement that the combination and conspiracy has been effectuated by various means and methods including, among others, the following: To grant this request would require the Government practically to turn over to defendants all of the Government's evidence in advance of trial. It is denied.

Item 2 asks with respect to each "agreement", "plan" and "contract" referred to in paragraph 34, all of the particulars asked with respect to the agreements referred to in paragraph 33 and this request under item 2 in paragraph 34 is disposed of as was the corresponding request with respect to paragraph 33.

Item 3 seems to be a duplication of material required by item 2 and is denied.

Item 4 seeks the parts of the various agreements which are in furtherance of the continuing agreement or concert of action alleged in paragraph 33. This request is denied on the authority of *United States v. Cohen,* D. C. S. D. N. Y., 113 F. Supp. 955 and 15 F. R. D. 269, *supra.* This applies to both subdivisions (a) and (b).

Items 5 and 6 are not within the province of a bill of particulars. The particulars requested form no part of the Government's case.

Items 7(a) and 7(b) ask in substance for a specification of the ways, other than "negotiating, entering into and enforcing the agreements" to which Local 25 was a party, referred to in paragraph 34, in which defendants Local 25 and Kreindler participated in the alleged contining agreement and concert of action. This is only another way of stating item 1 and is likewise denied.

Item 8(a) asks with respect to the second subdivision of paragraph 34, a statement of means and methods by which an alleged

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plan to stabilize the blouse industry was evolved and, among other things, the act or acts by which defendants Greater, National and Local 25 are claimed to have participated in evolving the plan. The alleged plan to stabilize the blouse industry seems to me very much like an agreement and I think that defendants are entitled to the same information with respect to it that I have permitted in the case of the agreements referred to in paragraph 33 and the part of 34 thus far treated.

Item 8(b) asks for a statement of the prices to be paid the contractors which were fixed by the 1953 agreement referred to in paragraph 34 and the area in which each price was so fixed. Since a copy of the agreement must be furnished under a previous ruling of mine with respect to paragraph 34, an answer to item 8(b) would be a duplication.

Item 9 is unintelligible and is denied.

Items 10(a) and 10(b) are in substance the particulars as to the way in which defendants Local 25 and National conducted and participated in a "campaign" to force action by non-member jobbers and manufacturers. Such matters do not lend themselves to precise statement as do allegations as to agreements and, to require the particulars asked, would force the Government to detail evidence which, presumably, would be largely circumstantial. They are denied.

Item 11 must be treated as was 8(b).

Items 12(a) and 12(b) must be treated as were items 10(a) and 10(b).

The allegations respecting defendant Strasser's participation are so general that I am disposed to take a more liberal attitude toward item 12(c). That requests a statement of where, when, how and by what act or acts and at whose request defendant Strasser "was instrumental" in arranging Slate Belt's reaffiliation with Greater. Such a statement, except for "at whose request" must be given. There is no allegation in the indictment that defendant Strasser acted at anyone's request.

Item 12(d) is denied for the same reason that prompted the denial of "at whose request".

Item 13(a) is denied as dealing with comparatively unimportant matters.

Item 13(b) deals with more important matters and the indictment in this respect is extremely broad. It is treated as was 12(c) above.

Item 13(c) is denied as dealing with unalleged matter.

Item 13(d) is denied for the same reason and item 13(e) consequently becomes moot.

Item 13(f) is denied as dealing with unalleged matter.

Item 14 subdivisions (a), (b) and (d) are subject to one or both of the objections that they deal with unalleged matter or, like item 10, with matter which does not lend itself to precise statement.

Item 14(c) asks specification of the persons forced to make certain payments, the persons to whom the payments were made, when and where the payments were made, the moneys paid and the contracts on account of which such moneys were paid. These particulars closely approach in character the familiar type form of details as to agreements and must be supplied.

Paragraph 35. Item 1 is denied for the same reason as paragraph 34 item 1.

Item 2, with the later stated exception, is granted for the reason stated with respect to item 14(c) of paragraph 34. The Government need not state what prices it claims the manufacturers and jobbers would have paid in the absence of the conspiracy. That is a matter which does not lend itself to precise statement.

Item 3(a). These requests would be appropriate as interrogatories in a civil case. While it is true that requests for particulars in criminal cases must fulfill to some extent the function of interrogatories, these requests for the Government's views as to reasons why a given cause had an alleged effect are too far away from the traditional office of a bill of particulars to be granted.

Item 3(b), as I construe it, asks for details of instances where manufacturers and jobbers have been prevented from working with contractors of their own choosing. The indictment does not allege that there were any such instances—merely that they were not able to work with contractors of their own choosing. Perhaps the Government will rely on inferences without specific instances. Nevertheless evidence of such instances would be admissible as well under the allegation and defendants are entitled to such information as will

permit effective preparation. Subdivision (b) is therefore granted.

What I have said with respect to item 3(a) applies as well to item 4(a).

What I have said with respect to item 3(b) applies as well to items 4(b), 5 and 6.

Item 7(a) is denied for much the same reason as item 3(a).

Item 7(b) is denied. Unlike item 3(b) it does not seek instances and the matter alleged in the indictment does not lend itself to precise statement.

Second and Third Counts Generally. Item 1. The relevant market is sufficiently stated in the indictment. This item is denied.

Items 2 and 3 are denied for the same reasons as item 3(a) of paragraph 34.

Paragraph 38. Defendants request the same particulars as with respect to paragraph 32 and the request is treated as paragraph 32 was.

Paragraphs 40 and 41 ask the same particulars as paragraph 34 item 1 and paragraph 35 item 1 respectively and the requests are disposed of in the same manner.

Paragraph 44 is disposed of as was paragraph 38 for the same reason.

Paragraph 45 is disposed of as were paragraphs 40 and 41 for the same reason.

Paragraph 46 item 1 asks a more particular statement of the "portion" of production controlled and the period during which control has accrued. Defendants are entitled to have the statement as to control expanded as requested. Just what they want as to dates is hard to gather but the Government will be required to give the date prior to the date of the indictment on which control accrued to the members of the conspiracy.

Item 2 asks particulars as to the "manner" of control of defendants Local 25 and Kreindler. It is enough to say that the indictment contains no allegation of control by these defendants apart from the other conspirators. It is denied.

[*Further Particulars*]

With respect to any matter concerning which the Government shall state in its bill of particulars that its knowledge or information is incomplete, the Government will state whatever knowledge and information it may have and furnish each defendant further particulars within ten days after it shall have obtained further knowledge or information.

[*Resubmission*]

The foregoing rulings will supply a large part of the information requested by other defendants. Insofar as particulars are asked by other defendants which have not been specifically granted or denied above, inspection indicates that counsel for the Government and the respective requesting defendants can apply the principles upon which the above rulings have been made and reach the result which I would have reached had I passed upon them. Insofar as this proves impossible the matter may be resubmitted to me.

V. Motion for Leave to Make Further Motions

[*Motion Deadline*]

Defendants move for leave to make further motions with respect to this indictment, after the Government's compliance with any requirement of this decision concerning bills of particulars and discovery and inspection, and at any time before trial. Judge Palmieri fixed May 7, 1959, as the last day for making motions and this was extended to May 14, 1959 by Judge Murphy. The motions just disposed of were made within the time so fixed. The time to make motions has expired and no cogent reason has been advanced why I should grant further permission at this time. I disagree with defendants' contention that Rule 12(b)(2) F. R. Crim. P. which provides that "failure of the indictment * * * to charge an offense shall be noticed by the court at any time during the pendency of the proceeding" permits defendants to disregard a direction of the court that such motions in advance of trial shall be made on or prior to a certain date.

Settle order on notice.

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[¶ 69,455] **United States v. R. P. Oldham Company; Winter Wolff & Co., Inc.; Thos. D. Stevenson & Sons, Inc.; Balfour, Guthrie & Co., Limited; John P. Herber & Company, Inc.; Kinoshita and Co., Ltd., U. S. A.; The Nissho California Corporation; Mitsubishi International Corporation; Ataka New York, Inc; Sumitomo Shoji Kaisha, Ltd.; Daiichi Bussan Kaisha, Ltd.; and Mitsui Bussan Kaisha, Ltd.**

In the United States District Court for the Northern District of California, Southern Division. Civil Action No. 36385. Filed September 14, 1959.

Case No. 1338 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Export and Import Control—Price Fixing.—Exporters of Japanese wire nails were each prohibited by a consent decree from (1) agreeing with any other person to fix prices at which importers sell such nails in the United States, and (2) agreeing with any importer to fix prices at which any other importer buys such nails. Also, the importers were each prohibited from agreeing with the other importers or with any other person to fix prices at which importers either buy or sell Japanese wire nails.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.718, 2011.181, 3015.20.

Combinations and Conspiracies—Consent Decree—Practices Prohibited—Export and Import Control—Allocation of Markets and Customers.—Exporters of Japanese wire nails to the United States were each prohibited by a consent decree from agreeing with any other person to allocate sales territories in the United States among importers. Also, importers of such nails into the United States were each prohibited from agreeing with the other importers or with any other person to allocate sales territories in the United States.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468, 2005.718.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Export and Import Control—Sale Control.—Exporters of Japanese wire nails to the United States were each prohibited by a consent decree from agreeing with any importer to determine the amount of such nails to be sold in the United States. Also, the importers were each prohibited from agreeing with any other person to determine the amounts to be sold in the United States or in any sales territory therein.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.718, 2005.760.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Export and Import Control—Discriminations.—Exporters of Japanese wire nails to the United States were each prohibited by a consent decree from discriminating in the sale of such nails in favor of defendant-importers by making available to them quantities, prices, or terms and conditions of sale which were not available to other importers. Also, the importers were each prohibited from purchasing such nails from any defendant-exporter with knowledge that it was discriminating among importers in violation of the decree.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.630, 2005.718.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Export and Import Control—Exclusive Dealing.—Importers of Japanese wire nails to the United States were each prohibited by a consent decree from accepting an exclusive or semi-exclusive arrangement for the purchase or sale of such nails.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Export and Import Control—Refusal to Deal.—Exporters of Japanese wire nails to the United States were each prohibited by a consent decree from (1) agreeing with any importer to determine which exporters in Japan should be permitted or not permitted to sell to importers, and to hinder or prevent any importer from buying or selling Japanese

wire nails, (2) agreeing with any other person to designate which persons would be permitted to act as importers, and (3) refusing, in furtherance of certain agreements prohibited by the decree, to sell to importers financially able to purchase Japanese wire nails. Also, the importers were each prohibited from (1) agreeing with any other person to determine which persons should buy or distribute such nails in the United States and to hinder or prevent any person from buying or selling such nails in the United States and (2) urging or suggesting to any Japanese rod-maker, nail-maker, or exporter that he refuse to sell to any person in the United States.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.718, 2005.785, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General, William D. Kilgore, Jr., Lewis Bernstein, Lyle L. Jones, Marquis L. Smith, and Gerald F. McLaughlin, Attorneys, Department of Justice.

For the defendants: Carl J. Schuck of Overton, Lyman & Prince, for R. P. Oldham Co.; Macklin Fleming of Mitchell, Silberborg & Knup, for Winter Wolff & Co., Inc.; Frank J. McCarthy of Dreher, McCarthy & Dreher, for Thos. D. Stevenson & Sons, Inc.; Walker Lowry of McCutchen, Brown, Doyle & Enersen, for Balfour, Guthrie & Co., Limited; Joseph L. Alioto, for John P. Herber & Co., Inc.; Whitman Knapp of Root, Barrett, Cohen, Knapp & Smith, and Hajime William Tanaka, for Kinoshita and Co., Ltd., U. S. A.; A. J. Zirpoli, for The Nissho Calif. Corp.; Henry W. Robinson of Marcel E. Cerf, Robinson & Leland, for Sumitomo Shoji Kaisha, Ltd.; Salvatore C. J. Fusco, for Daiichi Bussan Kaisha, Ltd.; and Kenji Ito, for Mitsui Bussan Kaisha, Ltd.

For a prior consent decree entered in the U. S. District Court for the Northern District of California, Southern Division, see 1958 Trade Cases ¶ 69,143.

Final Judgment

George B. Harris, District Judge [*In full text*]: The Plaintiff, United States of America, having filed its complaint herein on April 25, 1957, and the defendants signatory hereto having appeared through their respective attorneys herein and having filed their answers denying the substantive allegations of the complaint; the parties signatory hereto through their respective attorneys having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without any admission by any party hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein and upon the consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed, as follows:

[I]

[*Jurisdiction*]

This Court has jurisdiction of the subject matter of this action and of the parties signatory hereto. The complaint states claims for relief against the defendants signatory hereto under Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and under Section 73 of the Act of Congress of August 27, 1894, c. 349, 28 Stat. 509, as amended, entitled "An Act To reduce taxation, to provide revenue for the Government and for other purposes," commonly known as the Wilson Tariff Act.

II

[*Definitions*]

As used herein:

(A) "Japanese wire nails" means bright common nails, bright smooth box nails, bright casing nails, and bright finishing nails manufactured in Japan by Japanese nail-makers;

(B) "Person" means an individual, partnership, firm, association, corporation, or any other legal entity;

(C) "Importers" means persons engaged in the business of purchasing or acquiring nails from Japanese nail-makers or exporters for resale to wholesalers located on the West Coast of the United States; a Japanese exporter who is engaged in the activity of selling nails in the United States directly to such wholesalers is an importer with respect to such sales;

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(D) "Japanese exporters" mean persons and their agents, subsidiaries or affiliates in the United States, who arrange for the export of Japanese wire nails to importers;

(E) "Japanese rod-makers" means steel mills located in Japan which manufacture wire rod from which Japanese wire nails are made;

(F) "Japanese nail-makers" means nail manufacturers located in Japan who manufacture wire nails from wire rod purchased from Japanese rod-makers;

(G) "Defendant importers" means defendants R. P. Oldham Company, Winter Wolff & Co., Inc., Thos. D. Stevenson & Sons, Inc., Balfour Guthrie & Co., Limited, and John P. Herber & Company, Inc.;

(H) "Defendant exporters" means Kinoshita and Co., Ltd., U. S. A., the Nissho California Corporation, Mitsubishi International Corporation, Ataka New York, Inc., Sumitomo Shoji Kaisha, Ltd., Daiichi Bussan Kaisha, Ltd., and Mitsui Bussan Kaisha, Ltd.

III

[*Applicability*]

The provisions of this Final Judgment applicable to the defendants shall apply to the defendants signatory hereto and to their successors, assigns, affiliates, subsidiaries, officers, directors, servants, employees, and agents, and to all persons in active concert or participation with such a defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Prohibited Agreements—Exporters*]

Each defendant exporter signatory hereto is enjoined and restrained from directly or indirectly entering into, adhering to or claiming any rights under any agreement or understanding, or in concert with any other person maintaining any plan or program:

(A) To allocate sales territories in the United States among importers with respect to Japanese wire nails;

(B) To fix, establish or stabilize prices at which importers sell Japanese wire nails in the United States;

(C) To select or designate what person or persons should be permitted to act as an importer or as importers.

For the purpose of this Section IV only, a defendant exporter and its parent Japanese corporation, or a defendant exporter and any Japanese business firm affiliated with it for whom it regularly acts as agent or representative in the sale and distribution of Japanese wire nails in the United States shall be deemed to be a single person, provided that nothing contained in this paragraph shall make a defendant exporter liable for any separate act of such Japanese parent or affiliated business firm.

V

[*Discriminating Against Importers*]

Each defendant exporter signatory hereto is enjoined and restrained from:

(A) Entering into, participating in or enforcing any contract, agreement or understanding with any importer:

(1) To select or determine what importers should be permitted or not permitted to buy Japanese wire nails;

(2) to select or determine what exporters in Japan should be permitted or not permitted to sell Japanese wire nails to importers;

(3) to hinder, restrict, limit or prevent any importer from buying or selling Japanese wire nails;

(4) to determine or fix the amount of Japanese wire nails to be sold in the United States;

(5) to fix, establish or stabilize prices at which any other importer buys Japanese wire nails;

(B) Discriminating in the sale of Japanese wire nails in favor of defendant importers against other importers by making available to the former quantities, prices or terms and conditions of sale not available to the latter.

(C) For the purpose of furthering, directly or indirectly, any agreement or understanding prohibited by Section IV or by subsection V(A) of this Final Judgment:

(1) Refusing to sell Japanese wire nails, to the extent they are available, to any importer financially able to purchase such nails; and

(2) Discriminating in the sale or in the terms and conditions of sale of Japanese wire nails among importers.

VI

[*Prohibited Agreement—Importers*]

Each defendant importer signatory hereto is enjoined and restrained from entering into, adhering to, maintaining or furthering directly or indirectly, or claiming any rights under, any agreement, understanding, plan, program or common course of action among themselves or with any other person:

(A) To select or determine what persons shoud buy or distribute Japanese wire nails in the United States;

(B) To hinder, restrict, limit or prevent any person from buying or selling Japanese wire nails in the United States;

(C) To allocate sales territories in the United States with respect to Japanese wire nails;

(D) To fix, establish or stabilize prices at which importers buy Japanese wire nails;

(E) To fix, establish or stabilize prices at which importers sell Japanese wire nails; and

(F) To determine or fix the amount of Japanese wire nails to be sold in the United States or in any sales territory in the United States.

VII

[*Refusal to Sell—Exclusive Dealing*]

Each defendant importer signatory hereto is enjoined and restrained from:

(A) Urging or suggesting, directly or indirectly, to any Japanese rod-maker, Japanese nail-maker, or Japanese exporter that such rod-maker, nail-maker or exporter refuse to sell wire rods or wire nails to any person or group of persons in the United States;

(B) Accepting any exclusive or semi-exclusive agency or other exclusive or semi-exclusive arrangement for the purchase or sale of Japanese wire nails; and

(C) Purchasing any Japanese wire nails from any defendant exporter, knowing that such exporter is not complying with subsection B of Section V hereof.

VIII

[*Notice of Judgment*]

Within 30 days after the entry of this Final Judgment, defendant Kinoshita and Co., Ltd., U. S. A. shall mail a copy thereof to each of the persons listed in Appendix I hereto [*not reproduced*].

IX

[*Compliance*]

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants made to their principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of defendants relating to any matters contained in this Final Judgment.

(B) Subject to the reasonable convenience of defendants and without restraint or interference from defendants, to interview officers or employees of defendants, who may have counsel present, regarding any such matters.

Upon such written request, defendants shall submit such reports in writing with respect to the matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment.

No information obtained by the means permitted in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

[*Jurisdiction Retained*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

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[¶ 69,456] United States v. Ford Motor Company.

In the United States District Court for the District of Columbia. Criminal No. 807-58. Dated April 30, 1959.

Case No. 1409 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sufficiency of Allegations of Indictment—Motion for Bill of Particulars—Evidentiary Matters—Matters Within Defendant's Own Knowledge—Overt Acts.—An automobile manufacturer charged with conspiring to fix the prices at which its dealers sold parts and accessories in the Washington, D. C., metropolitan area was granted a request for particulars as to whether the alleged conspiracy was express or implied, oral or written, since it was entitled to know the "nature of the offense." The Government could disclose that without revealing any of its evidentiary material. All of the manufacturer's other requests, however, were denied on the ground that they called for a disclosure of evidentiary matter. The manufacturer sought particulars as to (1) the formation of the alleged conspiracy, (2) its own entrance into the alleged conspiracy, (3) the means and methods allegedly employed by it in carrying out the claimed conspiracy, and (4) the period of time in which it allegedly continued in the conspiracy. In situations involving widespread conspiracies, there could be a need for a disclosure of dates, places, and persons involved. Here, however, the situation was not one dealing with branches of corporations spread throughout the country; instead, the alleged conspiracy was small as to the number of parties and size of the area involved. Thus, certain of the information sought was within the defendant's own knowledge or could be readily ascertained by investigation. While a defendant is presumed innocent and thus ignorant of the crime charged, that presumption was not changed by requiring the manufacturer to take notice of its own business activities. The court also noted that since proof of overt acts is unnecessary in a conspiracy action, any disclosure thereof would be a revelation of the Government's evidence.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

For the plaintiff: Paul Owens and John Fricano, Department of Justice, Washington, D. C.

For the defendant: H. Graham Morison, Samuel K. Abrams, and Robert M. Lichtman, Washington, D. C.

Memorandum Opinion

[*Indictment*]

Edward A. Tamm, District Judge [*In full text*]: The indictment returned in this case on September 3, 1958, named this defendant and seventeen others with having violated Section 3 of Title 15, United States Code, this section being a portion of the Sherman Anti-Trust Act. All other defendants have previously entered pleas of *nolo contendere* and are now out of this case as defendants but remain as co-conspirators.

[*Bill of Particulars*]

The defendant Ford Motor Company has filed a motion for a bill of particulars pursuant to Rule 7(f) (Federal Rules of Criminal Procedure) relating to Count Three of the indictment in this case, this defendant having been named in Count Three only. Its requests for particulars, of which there are seven, may be classified under four main groups; namely, particulars as to the formation of the alleged conspiracy, particulars as to the entrance of this defendant into the alleged conspiracy, the means and methods employed by this defendant in carrying out the alleged conspiracy, and the period of time in which this defendant allegedly continued in the conspiracy.

[*Government's Opposition*]

The Government, in its opposition to the foregoing motion, states: (1) that all requests should be denied because they call for a disclosure of evidentiary material; (2) that requests 1, 1a, 2, 3, 4, 5, 7a and 7b should be denied for these are matters which are peculiarly or equally within the knowledge of the defendant or which it has equal opportunity to discover; (3) that the infor-

mation sought by requests 3, 4, 5, and 7a are, in effect, requests asking for particulars of overt acts in pursuance of the conspiracy and that the Government should not be required to furnish these, and (4) that the information sought by requests 7, 7a and 7b may be obtained from a reading of the indictment itself.

[*Nature of Act Charged*]

Request 1 of the defendant is as follows:

"(1) Specify the nature of the agreement or conspiracy alleged in Count Three, i.e., whether express or implied, oral or written.

(a) If express, specify the time, place and circumstances of the formation of the alleged agreement and the names of all persons who are claimed to have joined in its formation.

(b) If implied, specify each act allegedly performed by any defendant, including the names of all persons alleged to have performed such act, from which the formation or existence of the alleged agreement is inferred or implied.

(c) To the extent written, identify all documents alleged to embody or set forth the terms of the alleged agreement, specifying the dates and parties to all such documents.

(d) To the extent oral, specify the time, place and names of persons participating in each conversation through which the alleged agreement is claimed to have been formed and the substance of what was said."

[*Evidentiary Material Sought*]

The defendant has cited authority for the proposition that it has the right to know the nature of the act complained of (*United States v. Balaban,* 26 F. Supp. 491; *United States v. Allegheny Retail Druggists Assn.* [1952 Trade Cases ¶ 67,274], 12 F. R. D. 249; *United States v. MacLeod Bureau,* 6 F. R. D. 590), that is, whether it was express or implied, oral or written. It would seem to be fair and consistent with the purpose of a bill of particulars that the defendant be informed of the nature of the offense. The Government could disclose this without revealing any of its evidentiary material. Of course, it does not follow that requests 1(a) through 1(d) should be granted, as this would be a disclosure of the evidence upon which the Government intends to rely. The defendant does have some authority that evidentiary material may be disclosed when justice necessitates it, *United States v. Balaban,* 26 F. Supp. 491, but this Court does not believe that justice necessitates the disclosure of evidence in this case, and such disclosure would follow if requests 1(a) through 1(d) were granted.

Finally, once the defendant is made aware of the nature of the offense, it would seem that such other particulars as it desires would be matters which it has in its own knowledge, or to which it has access.

Request number 2 asks for,

"the time, place and the names of the officers, or employees through whom it is claimed that defendant Ford Motor Company entered into the alleged agreement or conspiracy. State the names of all other persons who were present at such time and place."

[*Size of Conspiracy Charged*]

The Government has pointed out, quite correctly, that this alleged conspiracy—both in the number of parties comprising it and area size—is small, by comparison, to many of the factual situations revealed in the cases cited by the defendant where such information was divulged. This case, however, is not a situation that deals with branches of corporations that are spread throughout the country or even over a few states. In such a situation as the latter, it could possibly be understood that there could be a need or showing for names, times and places in order to apprise the defendants of what they should know. The belief of the Court in this case is best expressed by the following:

"A corporation can act only through its officers and agents, and appellant company at all times knew the names of its officers, agents, and employees. It also knew the scope of the authority of each of such persons. The names and various acts of such persons were peculiarly within the knowledge of appellant company. The trial court did not abuse its discretion, and the motion for a bill of particulars was properly overruled." *Zito v. United States,* 64 F. 2d 772-3.

Request number 3 is directed to paragraphs 30(b) and 30(e) of the indictment. Paragraph 30 of the indictment states the substantial terms of the combination and conspiracy, parts (b) and (e) thereof being two of the terms. Part (b) is:

"To sell Ford parts and accessories to purchasers classified by defendant Ford

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dealers as authorized wholesale purchasers at the suggested wholesale list prices established by the Ford Motor Company."

Part (e) is:

"To utilize a Ford Parts Identification Card Program for the purpose of insuring that only persons classified as authorized wholesale purchasers would be permitted to purchase parts at the suggested wholesale list prices established by the Ford Motor Company."

In connection with these two sub-paragraphs, the defendant desires to know:

"The time, place and nature of each act allegedly performed by the Ford Motor Company, including the names of officers and employees through whom it is alleged to have acted, in connection with the alleged classification of purchasers of parts and accessories from defendant dealers and the alleged utilization of a Ford Parts Identification Card Program in this regard."

Requests four and five are similar to request three, except that request four refers to paragraph 30(d) and deals with the

"alleged establishment of a uniform maximum discount in the sale of parts and accessories to insurance companies by defendant dealers,"

and request number five refers to paragraphs 30(b), (c) and (f) and deals with

"the alleged agreement that defendant dealers would sell parts and accessories only at suggested list prices and grant no discounts from such prices, except in sales to insurance companies, in which case no discounts in excess of 15 per cent of the retail list price would be granted."

[*Matters Within Defendant's Own Knowledge*]

It seems to be quite obvious to this Court that this information which the defendant desires is within its own knowledge, or is readily ascertainable. The defendant relies upon the case of *United States v. Smith,* 16 F. R. D. 372, among others. In the *Smith* case, Judge Whittaker stated:

"Nor is it any answer to a motion for a bill of particulars to say: 'The defendant knows what he did, and, therefore, has all the information necessary.' This argument could be valid only if the defendant be *presumed to be guilty.* For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges.' [Citing cases] This conclusion seems to me to be elementary, fundamental and inescapable." (Italics supplied by that Court)

The wisdom of the reasoning of the Court in the above cited case is not questioned; however, the case of *United States v. Greater Pittsburgh Linen Supply Assn., et al.* [1950-1951 TRADE CASES ¶ 62,725], 10 F. R. D. 585, seems to be more appropriate in this case. At page 586 of that case, there is the following:

"Moreover, most of the data requested should be within the knowledge of the defendants and of the Association, or its officers and agents, to whom each defendant member has or should have access; or it should be found among the records of the Association, which each member should be able to examine. From the detail already appearing in the indictment, no defendant should be prejudicially surprised if inquiry is made with reasonable diligence among the members of this Association.

"Whether the Association or its members participated in the conspiracy as charged in the indictment is peculiarly within their knowledge. If defendants did not so conspire, they can readily defend against the charge so made."

[*Indictment as Basis for Defendant's Own Investigation*]

This Court does not believe that the effect of the presumption of innocence is changed by requiring the defendant to take notice of its own business activities, investigate and ascertain from such investigation, the information which it seeks in requests three, four and five. Also, there appears to be sufficient detail in the indictment to serve as a basis upon which the defendant may investigate and determine the information by itself which it seeks through these three requests.

Request number six asks for the

"means and method by which it is claimed that the conspiracy or agreement alleged in Count Three was carried out or sought to be carried out."

The language of the Court in the case of *United States v. Van Wagenensager,* 34 F. Supp. 735, is particularly appropriate in regard to this request. In that case, the de-

fendants were charged with a conspiracy to violate the Fair Labor Standards Act of 1938. The Court states at page 735:

> "The demands for particulars can be classed as requiring the time and place of the formation of the conspiracy; all acts of the co-conspirators tending to connect each of them to the alleged conspiracy and the names of those stated in the indictment as being 'to the Grand Jurors unknown,' * * * The Government is not compelled, either by indictment or bill of particulars, to define the specific means employed in committing the offense. Moreover, I do not see how the Government could comply with the demands as framed, without injurious disclosure of its evidence."

The last request of the defendant, number seven, seeks information as to "whether it is claimed that defendant Ford Motor Company participated in the alleged carrying out or continuation of the agreement or conspiracy charged in Count Three." If the answer is in the affirmative, it then desires to know (a) the time, place and nature of each alleged act or participation, or act from which such participation is inferred, along with the names of officers and employees through whom the acts were allegedly performed, and (b) the period of such participation.

Part (a) of this request must be denied upon the same grounds as requests three, four and five were denied. Part (b) relating to the period of participation may obviously be obtained from a reading of the indictment, as the Government has already pointed out.

[*Overt Acts*]

One remaining point should be made, and that is, that in a case of this type, overt acts need not be alleged or furnished. To require a disclosure of overt acts would be a revelation of the evidence upon which the Government intends to rely. Also, the crime charged is a conspiracy—nothing else. In the case of *United States v. MacLeod Bureau, et al.*, 6 F. R. D. 590, 592, the defendants were indicted for violation of the Sherman Anti-Trust Act. The Court, in treating the motions for bills of particulars, stated:

> "Particulars should not be required as to matters made clear in the indictment, nor matters which are not necessary to be proved by the Government in order to gain a conviction. Thus in the present case, it is unnecessary for the Government to prove any overt act was committed by the defendants or any of them in carrying out their alleged conspiracies. Such overt acts are merely evidence and the government should not be called upon to supply the defendants with its evidence so as to unduly limit the government's proof. *United States v. General Electric Company*, D. C., 40 F. Supp. 627."

[*Motion Denied in Part*]

This Court also feels that all the requests, except number one, should be denied on the ground that they call for a disclosure of evidentiary matter. True, the defendant has cited authority to the effect that when justice necessitates it, the information requested by way of a bill of particulars will be furnished even if it requires the disclosure of evidentiary material. This Court in this case does not believe that justice requires a disclosure of the material requested by the defendant nor has any sufficient basis for such disclosure been advanced by the defendant.

Counsel will submit the necessary order to effectuate the rulings of this memorandum opinion.

[¶ 69,457] United States v. Swift & Company, Armour & Company, Wilson & Co., Inc., and The Cudahy Packing Company, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 58 C 613. Filed September 14, 1959.

Case No. 211 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Petition for Modification of Consent Decree—Discovery—Privileged Matters—Replies to Government "Questionnaires"—"Lawyers Work Product" Privilege—Good Cause—"Informer's" Privilege.—In proceedings to modify a consent decree entered against certain meat packers, replies to Govern-

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ment questionnaires seeking information relating to economic factors and competitive forces in the industry were not privileged from discovery. As to the "lawyers' work product" privilege, no "new" invasion of the "thoughts" of the Government's attorneys would result, since the questions contained in the questionnaires had already been revealed and the only "work" to be protected was the largely clerical task of circulating and receiving the questionnaires. Further, production was sought only as to writings of witnesses and no attempt was made to examine any statement, memoranda, or note prepared by any attorney. In addition, the Government had allegedly sent the questionnaires to more than 1500 companies of unknown identity; therefore, it was not a case where the moving party knew the specific witnesses and could interview them itself. As to the alleged absence of "good cause" for the production of the replies, that objection is interdependent with the claim of "privilege," that is, when the "privilege" claim is weak, the required showing of good cause is lessened.

Also, there was no merit in the Government's claim of the "so-called informer's privilege." The function of that privilege is to prevent reprisals against persons who have reported violations of law. Here, the writings sought related only to the question of whether present market conditions warranted modification of the consent decree. Hence, the companies which answered the Government's questionnaires, thereby reporting on the volume and operations of their businesses, did not "inform" in any ordinary sense of that term.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.600.

For the plaintiff: Earl A. Jinkinson, Willis L. Hotchkiss, Dorothy M. Hunt, and Ned Robertson, Attorneys, Department of Justice, Chicago, Ill.

For the defendants: John T. Chadwell of Snyder, Chadwell, Keck, Kayser & Ruggles, Chicago, Ill., for Swift & Co., Swift & Co., Inc., and Derby Foods, Inc.; E. Houston Harsha of Kirkland, Ellis, Hodson, Chaffetz & Masters, Chicago, Ill., for Armour & Co.; and Walker Smith of McDermott, Will & Emery, Chicago, Ill., for The Cudahy Packing Co. and E. A. Cudahy, Jr.

For an opinion of the U. S. District Court for the District of Columbia transferring the action to the U. S. District Court for the Northern District of Illinois, Eastern Division, see 1958 Trade Cases ¶ 68,929; for a prior opinion of the U. S. Supreme Court, see 1932-1939 Trade Cases ¶ 55,005.

Memorandum of Decision on Defendants' Motion to Produce

[Replies to Government "Questionnaires" Sought]

HOFFMAN, District Judge *[In full text]*: The defendants, petitioners for modification of a consent decree previously entered in government antitrust proceedings, have moved under Rule 34, Federal Rules of Civil Procedure, for the production of

> "copies of all writings from any person, firm or corporation . . . received by the plaintiff [government] in answer to questionnaires or inquiries of the plaintiff. . . ."

Copies of the questionnaires and inquiries are appended to the motion.

[Government Opposition]

The plaintiff resists the motion upon three grounds. First, it is argued that the writings sought are privileged from discovery as the work product of the lawyer within the meaning of the opinion in *Hickman v. Taylor*, 329 U. S. 495 (1946). Second, the plaintiff submits that the defendants have failed to show good cause for production as required by Rule 34. Third, it is claimed that the communications are privileged as information supplied to a law enforcement agency of the government.

[Good Cause—Privilege of Lawyer's "Work Product"]

The first two grounds of objection are related. Under the principles laid down in the *Hickman* case, the privilege of the lawyer's files is not absolute. If good cause is shown, disclosure may be compelled even though the attorney's privacy is thereby invaded. 329 U. S., at 512. The questions of the work-product privilege and good cause may therefore be considered together.

The crux of this qualified privilege is the protection of the lawyer's mental processes, his strategy, and his legal theories evolved in preparation for trial, free from unnecessary intrusion by the opposing party. This protection does not extend to all information supplied to the attorney at his request. "A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." *Hickman v. Taylor,* 329 U. S. 495, at 504 (1946). Statements or reports made in the ordinary course of business and not in preparation for trial do not embody the lawyer's opinions, tactics, or conclusions, and accordingly they do not enjoy the privilege afforded the attorney's work. Speaking of such cases, Professor Moore observes:

> "The Supreme Court decision clearly authorizes, if it does not require, these holdings. The policy against invasion of 'the files and the mental impressions of an attorney' is not applicable, and, that absent, the Court made it clear that discovery is to be liberally allowed and that 'either party may compel the other to disgorge whatever facts he has in his possession.'" [4 Moore, *Federal Practice* 1135-36 (2d ed. 1950)]

[*No "New" Invasion*]

Here the written statements sought were concededly obtained in preparation for trial. But it does not appear that production would involve any new or substantial invasion of the thoughts of plaintiff's attorneys. The questionnaires and inquiries which elicited the written responses at issue have already been revealed to the defendants. Compilations of the information contained in the various answers were disclosed in part in the materials previously submitted to support the plaintiff's motion for summary judgment.

[*Witnesses' Writings Only*]

The motion to produce is confined to writings by the witnesses, and no attempt is made to examine any statement, memoranda, or note prepared by any attorney. In this respect the situation differs from that before the Court in the *Hickman* case itself, where the moving party made a broad demand for statements prepared by the lawyer, for his private memoranda containing facts learned by him, and for his recollection of oral interviews with witnesses. Since the defendants have limited their motion to statements in writing prepared and supplied by the witnesses, it is unnecessary to decide upon the scope of the privilege in protecting reports and memoranda prepared by agents other than the attorney himself.

[*Clerical Tasks*]

The information here at issue can be called the lawyer's work product only in a qualified and attenuated sense. The privacy of counsel's mental processes is not at stake. Since the questions asked by the plaintiff have already been disclosed, the only "work" of the plaintiff to be protected are the largely clerical tasks of circulation and receipt of the questionnaires.

[*Protracted Cases—Full Disclosure*]

The trial of this case promises to be complex and protracted. The information sought by the defendants relates to economic conditions, the state of the market, and competitive forces in the meat and related foods industry. Such compilations of data can be adequately appraised and weighed only if their foundations can be tested. In such a case, the policy of full disclosure must control if litigation is to be manageable. The Report of the Committee on Procedure in Anti-Trust and Other Protracted Cases, adopted by the Judicial Conference of the United States and reported at 13 F. R. D. 62-84, states:

> "Unless it is impossible for some compelling reason, the parties to these cases should be required to exchange prior to trial copies of proposed exhibits. The advantages of such exchange in preventing delay and volume of record in the trial are obvious. Before such a case is called for trial each side should be advised fully as to the material which his opponent proposes to offer. [13 F. R. D., at 69]

As noted by the Supreme Court,

> "The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise." *Hickman v. Taylor,* 329 U. S. 495, at 507.

[*Difficulty of Acquiring Information*]

This is not a case where specific witnesses with personal knowledge are equally known to the moving party, who could interview them himself. It is stated that a vast num-

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ber of companies, in excess of 1500, received the questionnaires sent by the government, but their identities are not known. The case is therefore unlike *United States v. Deere & Co.* [1950-1951 TRADE CASES ¶ 62,572], 9 F. R. D. 523 (D. Minn. 1949), where the government's questionnaire was sent to the defendant's own dealers. To compel these defendants to send a duplicate questionnaire would be time-consuming and expensive, and would not provide a sound basis for analyzing the statistical results of the plaintiff's survey or assaying its probative force.

[*Relevance*]

In the course of the *Hickman* opinion, the Court observed:

> "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted." [329 U. S., at 511-12]

[*Balancing Competing Interests*]

Here the information requested is relevant and undoubtedly useful to the defendants in preparation for trial. It is not privileged as a communication from client to attorney. The privilege of the lawyer's work product and the showing of good cause sufficient to overcome it are interdependent, and when, as here, the factors supporting the claim of privilege are weak, the requisite showing of good cause is correspondingly lessened. There is disagreement among the lower courts on questions of this sort. Compare *Durkin v. Pet Milk Co.*, 14 F. R. D. 385 (W. D. Ark. 1953), allowing production, with *United States v. Deere & Co.* [1950-1951 TRADE CASES ¶ 62,572], 9 F. R. D. 523 (D. Minn. 1949), denying discovery. But neither decision is directly in point. In the last analysis, the determination must rest upon the balance struck in the particulars of a concrete case between the competing interests of full disclosure and protection for the fruits of the lawyer's labor. In the light of the importance of the information to the merits of the litigation, the difficulties confronting defendants' efforts to acquire the needed information for themselves, and the relatively inconsequential prejudice to the plaintiff, the objection to the motion on this ground must be overruled.

[*"Informer's Privilege"*]

The plaintiff's claim of the so-called informer's privilege also lacks merit. The function of that privilege is principally to prevent reprisals and recrimination against persons who have reported violations of law to an appropriate law enforcement agency. As stated in *Roviaro v. United States,* 353 U. S. 53 (1957):

> "The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." [353 U. S., at 60]

[*Companies Did Not "Inform"*]

Extending the logic of this reasoning, the privilege has no application where the information supplied does not relate to the commission of some unlawful act or is not of the kind to excite resentment. Here the fact of commission of an offense was established by consent a number of years ago. The statements at issue relate not to that fact, but to the question whether market conditions today warrant modification of the decree. The companies which supplied the statements reported on the volume and operations of their businesses, and did not "inform" in any ordinary meaning of that term.

Referring again to the opinion in the *Roviaro* case, *supra,* the Supreme Court teaches that no absolute privilege can be claimed:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." [353 U. S., at 62]

[*Government Secrecy—No General Right*]

The government enjoys no general right to withhold information from an opposing litigant. Secrecy must be predicated upon the specific claim of some privilege based upon considerations peculiar to the operations of government or the government must conform to the rules governing private parties. *Mitchell v. Bass,* 252 F. 2d 513 (8 Cir. 1958); *Durkin v. Pet Milk Co.,* 14 F. R. D. 385 (W. D. Ark. 1953).

> "Likewise, it does not rest well with the government to insist upon withholding such information merely on the theory that disclosure would have an untoward effect on the government's case from the point of view of a litigant." *Fowkes v. Dravo Corporation,* 5 F. R. D. 51 (E. D. Pa. 1945).

[*Discovery Granted*]

The defendants' motion will accordingly be granted.

[¶ 69,458] United States v. The Procter & Gamble Company, et al.

In the United States District Court for the District of New Jersey. Civil Action No. 1196-52. Filed August 14, 1959.

Case No. 1150 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Civil Suit for Injunctive Relief —Use of Grand Jury Process to Elicit Evidence in Civil Case—Continuation of Grand Jury Proceedings After Decision Not to Seek Indictment—Misuse of Grand Jury Process. —The Government's production of witnesses before a grand jury after the United States Attorney General had decided not to ask for the return of an indictment constituted a misuse of the grand jury process. In *U. S. v. Procter & Gamble Co.,* 1958 TRADE CASES ¶ 69,046, the United States Supreme Court referred to the use of "criminal procedures to elicit evidence in a civil case" as a "flouting of the policy of the law." Thus, a belief of a prosecuting official that he was acting according to law in continuing the grand jury proceedings after the decision not to seek an indictment "in nowise derogates from the fact that this use by the Government of the Grand Jury, a solely criminal instrumentality, for a purpose which had been decided to be of a purely civil character, was clearly a misuse, and thus an abuse, of the law."

As to the Government's contention that the Attorney General's decision did not suffice to terminate the use of the grand jury as a "criminal procedure," there was no suggestion that the grand jury here was a "runaway" grand jury. Further, the complexity of antitrust cases virtually requires the Government's control of the grand jury proceedings. Since a determination by the Attorney General controls his subordinates and practically controls the grand jury, any further procedure with the grand jury, after his decision not to seek an indictment, was either insubordinate or illegal. Also, it was immaterial that the subpoenas for the witnesses called thereafter had been issued prior to the decision not to proceed criminally, since that decision terminated the right of the Department of Justice to take testimony under those subpoenas.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225, 8225.593.

For the plaintiff: Chester A. Weidenburner, U. S. Attorney (by Charles H. Hoens, Jr., Assistant U. S. Attorney), and Miss Margaret Brass, Attorney, Department of Justice.

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For the defendants: O'Mara, Schumann, Davis & Lynch, and Cahill, Gordon, Reindel & Ohl (by Mathias Correa), for Colgate-Palmolive Co.; Bailey & Schenck and Arnold, Fortas & Porter (by Abe Fortas), for Lever Bros. Co.; Toner, Crowley, Woelper & Vanderbilt, and Royall, Koegel, Harris & Caskey (by Kenneth C. Royall), and Dinsmore, Shohl, Dinsmore & Todd (by Joseph Dinsmore), and Taft, Stettinius & Hollister (by Charles Sawyer), for Procter & Gamble Co.; and Davies, Richberg, Tydings, Landa & Duff (by Shelby Fitze) and McCarter, English & Studer, for Assn. of American Soap & Glycerine Producers, Inc.

For a prior opinion of the U. S. Supreme Court, see 1958 Trade Cases ¶ 69,046; for prior opinions of the U. S. District Court, District of New Jersey, see 1959 Trade Cases ¶ 69,385, 69,333, and 69,260, 1956 Trade Cases ¶ 68,488, 68,457, and 68,335, 1955 Trade Cases ¶ 68,228, 1954 Trade Cases ¶ 67,677, and 1953 Trade Cases ¶ 67,497.

Opinion II on Use of Grand Jury Transcript

[*Decision Not to Seek Indictment—Continuation of Grand Jury Proceedings*]

HARTSHORNE, District Judge [*In full text*]: In accordance with the opinion of this Court, filed June 9, 1959 [1959 TRADE CASES ¶ 69,385], directing the Department of Justice to answer the Special Interrogatories filed by defendants herein concerning the Grand Jury investigation which preceded the institution of this civil case, plaintiff, over objection, filed answers thereto, indicating in substance that on November 14, 1952, the then Attorney General decided not to ask for the return of an indictment by the Grand Jury, upon the basis of the evidence previously taken before that body. Defendants accordingly asked this Court to find that there had been an abuse of the Grand Jury process, within the meaning of the opinion of the United States Supreme Court filed in this cause June 2, 1958 [1958 TRADE CASES ¶ 69,046] (356 U. S. 677, 683), by the Government's production of certain witnesses before the Grand Jury on and after November 14, 1952.

[*Absence of Intent to Violate Law*]

Plaintiff still claims that, despite the above facts, this Court should not find that there has been any such abuse of process, because the Department of Justice did not knowingly intend to violate the law, and because the mere decision by the Attorney General of the United States not to use the Grand Jury proceedings for criminal purposes did not itself bring such proceedings to a halt, and the testimony thereafter taken by the Government before the Grand Jury was under subpoenas issued some time previously.

The above contentions by plaintiff Government seem based upon a misunderstanding of the United States Supreme Court's above opinion, in alluding to the prosecution's "flouting of the policy of the law", p. 683, "when the criminal procedure is subverted", p. 684, by the Government's "using criminal procedures to elicit evidence in a civil case", p. 683, in taking evidence before a Grand Jury—a purely *criminal* procedure —when it had no intention of using such evidence in other than a purely *civil* case. Obviously what the Supreme Court had in mind in alluding to this flouting of the law and subversion of the criminal procedure was the misuse of a purely criminal instrumentality, the Grand Jury, in bringing a purely civil proceeding. This misuse or abuse therefore occurred whether the action of the Government official in charge of same was knowingly unlawful, or, on the contrary, was based in fact upon his belief that in so doing he was acting according to law. In fact, as this Court's earlier opinion shows, it had doubtless been the long continued practice and belief of the United States Department of Justice, before the filing of the above opinion of the United States Supreme Court in this case, that it had the legal right to use the Grand Jury for civil purposes, at least if at the start it had a possible criminal purpose in mind. On the other hand, this belief of this official in nowise derogates from the fact that this use by the Government of the Grand Jury, a solely criminal instrumentality, for a purpose which had been decided to be of a purely civil character, was clearly a misuse, and thus an abuse, of the law.

[*Termination of "Criminal Procedure"—Sufficiency of Attorney General's Decision*]

We turn to the second contention of the Department of Justice, that its decision on

November 14, 1952 not to proceed criminally, upon the basis of the testimony previously taken before the Grand Jury, did not suffice to terminate the use of the Grand Jury as a criminal procedure, and that therefore the testimony taken thereafter was properly taken as the continued use of criminal procedure. It is, of course, possible for such a situation to occur, as by a "runaway" Grand Jury, a situation to which this Court also alluded in its previous opinion in this regard. Here, however, the Government does not so much as intimate that any such situation existed, and, of course, must admit that, as the former opinion says, in an antitrust case its complexity "virtually requires the careful, long continued control of the Grand Jury proceedings by the Government itself." Thus a determination by the Attorney General of the United States, which, of course, controls his subordinates, in turn practically controls the Grand Jury. Hence any further procedure by the subordinates with the Grand Jury is therefore either insubordinate, of which there is no claim, or illegal, in the light of the above opinion of the United States Supreme Court. Nor is it material that the subpoenas for the witnesses, called after November 14, 1952, had been issued previously thereto. The right of the Department of Justice to proceed under these subpoenas to take further testimony had been terminated by the action of the Attorney General.

[*Objection Overruled*]

Plaintiff's objection to the finding of this Court that in this cause there had been a flouting of the policy of the law and a subversion or abuse of the Grand Jury process is overruled, and an order may be entered accordingly.

[¶ 69,459] United States v. Radio Corporation of America and National Broadcasting Company, Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 21,743. Filed September 23, 1959.

Case No. 1311 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Television Broadcasting Industry—Practices Enjoined—Coercion—Network's Acquisition of Ownership Interest in Television Broadcasting Stations.—A radio and television manufacturer and its subsidiary, a radio and television network, in a civil action charging them with conspiring to obtain ownership of very high frequency television broadcasting stations in five of the eight largest markets in the United States by unlawfully using the network's power to grant or withhold network affiliation, were each prohibited by a consent decree from coercing any person to sell any ownership in any station by terminating, or refusing to enter into, a network affiliation agreement with any other station controlled by that same person. Unless notice was given to the Government (thereby affording it an opportunity to apply to the court for a determination of whether or not coercion has been used), the defendants were also enjoined from (1) acquiring any substantial ownership interest in any station in any one of seven market areas, or (2) representing stations in their sale of non-network advertising to national advertisers. In an area where they had allegedly acquired radio and television broadcasting facilities by coercion, the defendants were prohibited from acquiring any ownership interest in any television broadcasting station for the duration of the decree, and any ownership interest in any standard (radio) broadcasting station for a period of five years from the entry of the judgment.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.575, 2005.785, 2005.833.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Divestment of Interest in Television Broadcasting Stations.—A radio and television manufacturer and its subsidiary, a radio and television network, were ordered by a consent decree to sell, exchange, or otherwise dispose of all right, title, and interest in a television broadcasting station and a standard (radio) broadcasting station which the network had

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allegedly obtained by coercion. The decree also provided that the disposition should be to a person or persons not controlled directly or indirectly by either defendant and in which neither of them had any substantial ownership interest. The decree further provided for the giving of written notice to the Government of the proposed disposition.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.10.

Department of Justice Enforcement and Procedure—Consent Decree—Duration of Decree.—A consent decree entered against a radio and television manufacturer and its subsidiary, a radio and television network, provided for the termination of the decree nine years after the network's compliance with a divestment provision of the decree, but in no event earlier than ten years from the date of the entry of the consent judgment.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241.195, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General, Joseph H. McGlynn, Jr., U. S. Attorney, Philadelphia, Pa., W. D. Kilgore, Jr., Charles L. Whittinghill, Bernard M. Hollander, and Raymond M. Carlson, Attorneys, Department of Justice.

For the defendants: Schnader, Harrison, Segal & Lewis (by Bernard G. Segal and Edward W. Mullinix); Cahill, Gordon, Reindel & Ohl (by John F. Sonnett); Thomas E. Ervin, Vice President and General Attorney for National Broadcasting Company, Inc.; and Robert L. Werner, Vice President and General Attorney for Radio Corporation of America.

For a prior opinion of the U. S. Supreme Court, see 1959 Trade Cases ¶ 69,284, reversing a decision of the U. S. District Court, Eastern District of Pennsylvania, 1958 Trade Cases ¶ 68,913; for a prior decision of the District Court, see 1957 Trade Cases ¶ 68,788.

Final Judgment

[*Consent Decree*]

KIRKPATRICK, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on December 4, 1956; the defendants having filed their answer to the complaint, denying the substantive allegations thereof; the Supreme Court of the United States having rendered its opinion with respect to the third, fourth and fifth defenses raised by defendants' answer, as reported in *United States v. Radio Corporation of America, et al.* [1959 TRADE CASES ¶ 69,284], 358 U. S. 334 (1959); and plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment without trial or finding on any issue of fact herein, without adjudication by this Final Judgment of any issue of law herein, and without this Final Judgment constituting evidence or an admission by either of them in respect to any such issues;

Now, Therefore, before any testimony has been taken, without trial or finding on any issue of fact herein, without adjudication by this Final Judgment of any issue of law herein, and upon consent of the parties as aforesaid, it is hereby ordered, adjudged and decreed, as follows:

I.

[*Jurisdiction*]

The Court has jurisdiction of the subject matter of this action and of the parties hereto. Defendants having agreed, solely in order to permit entry of this Final Judgment, to waive the defense asserted by them that the complaint fails to state a claim upon which relief may be granted, the Court adjudges that the complaint states claims upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means any individual, partnership, corporation, association or other legal entity;

(B) "NBC" means the defendant National Broadcasting Company, Inc.;

(C) "RCA" means the defendant Radio Corporation of America;

(D) "WRCV-TV" and "WRCV" mean, respectively, the television and the standard broadcast stations presently owned by NBC in Philadelphia;

(E) "NBC network affiliation agreement" means an agreement between NBC and the owner of a television broadcast station for affiliation of the station with the television network of NBC;

(F) "Broadcast station" means a station licensed by the Federal Communications Commission in the television or standard broadcast band transmitting signals intended to be received by the general public;

(G) "National spot representation" means representation of a television broadcast station (other than such a station owned directly or indirectly by NBC or RCA) in sales by such station of nonnetwork advertising to national advertisers;

(H) "Television network" means an organization which provides interconnection with, and a national program service to, television broadcast stations not owned by such organization and which sells advertising time to national advertisers in connection with such programs; and

(I) "Market area" means a metropolitan area as defined by the United States Bureau of the Budget in its publication dated June 1959 entitled "Standard Metropolitan Statistical Areas"; if new issues of such publication replace the June 1959 issue, the most recent issue shall be used. To determine the population rank of a market area, the population statistics in the most recent issue of "Survey of Buying Power", a publication of the magazine "Sales Management", shall be used. A broadcast station shall be considered to be in a market area if the transmitter of such station is located within a radius of twenty-five miles from the main post office of the principal city in such area.

III.

[*Applicability*]

The provisions of this Final Judgment applicable to either defendant shall apply to such defendant and to each of its subsidiaries, officers, directors, employees, agents, successors and assigns, and to all other persons in active concert or participation with either such defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Coercion—Acquisitions*]

NBC, and RCA during any period of time when it directly or indirectly controls or has a substantial ownership interest in a television network, are each enjoined and restrained from:

(A) Coercing or attempting to coerce any person to sell or otherwise transfer any ownership interest in any broadcast station to either defendant, or to any person directly or indirectly controlled by either defendant or in which either defendant directly or indirectly has a substantial ownership interest, by terminating or threatening to terminate or refusing or threatening to refuse to enter into, an NBC network affiliation agreement with any other television broadcast station controlled by the same person or in which such person has a substantial ownership interest;

(B) Acquiring directly or indirectly any substantial ownership interest in any television broadcast station in the market area of New York, Chicago, Los Angeles, Detroit, Boston, San Francisco, or Pittsburgh, unless

(1) defendants shall have given written notice of the proposed acquisition to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

(2) if plaintiff shall have so applied, the Court shall have determined that the consent of the other party to the proposed acquisition was not obtained by acts or conduct of NBC or RCA relating in any way to the negotiations for the proposed acquisition, which acts or conduct constitute either (a) an unreasonable restraint of trade (as to which issue plaintiff shall have the burden of proof) or (b) a violation of subsection (A) of this Section IV (as to which issue the defendants shall have the burden of proof);

Provided, however, that the shifting of a television broadcast station from one channel of the television broadcast band to another channel in the same market area, when such shifting results from a change in allocations by the Federal Communications Commission, shall not be deemed to be the acquiring of an ownership interest in a television broadcast station within the meaning of this

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subsection (B); and, *Provided further,* that any party hereto may at any time upon ten days' written notice to the other parties apply to this Court for a modification of the list of the seven market areas specified in this subsection (B), when the list specified, with Philadelphia included, no longer represents the first eight market areas in the United States in terms of population of the respective areas; and

(C) Undertaking the national spot representation of any television broadcast station other than those listed on Exhibit A hereto unless

(1) defendants shall have given written notice of the proposed spot representation to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

(2) if plaintiff shall have so applied, the Court shall have determined that NBC has not coerced the owner of such station to engage NBC for the national spot representation of the station by terminating or threatening to terminate or refusing or threatening to refuse to enter into, an NBC network affiliation agreement with the station sought to be represented or with any other television broadcast station controlled by such owner or in which such owner has a substantial ownership interest, defendants having the burden of proof.

V.

[*Divestment Ordered*]

Defendants are ordered and directed, on or before December 31, 1962, to sell, exchange or otherwise dispose of all right, title and interest in WRCV-TV and WRCV to a person or persons not controlled directly or indirectly by either defendant and in which neither defendant has any substantial ownership interest.

Such disposition, if accomplished by exchange, shall be an exchange for a station or stations not in the Philadelphia market area and such exchange shall not be effected unless

(1) defendants shall have given written notice of the proposed exchange to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

(2) if plaintiff shall have so applied, the Court shall have determined that the consent of the other party to the proposed exchange was not obtained by acts or conduct of NBC or RCA relating in any way to the negotiations for the proposed exchange, which acts or conduct constitute either (a) an unreasonable restraint of trade (as to which issue plaintiff shall have the burden of proof) or (b) a violation of subsection (A) of Section IV of this Final Judgment (as to which issue the defendants shall have the burden of proof).

If such disposition is accomplished otherwise than by exchange, defendants shall give plaintiff written notice of such proposed disposition at least thirty days prior to filing with the Federal Communications Commission any application for the Commission's consent to such disposition.

NBC and RCA are prohibited from acquiring any ownership interest in any television broadcast station in the Philadelphia market area until this Final Judgment shall terminate and be of no further force and effect.

NBC and RCA are prohibited, for a period of five years from and after the date of entry of this Final Judgment, from acquiring any ownership interest in any standard broadcast station in the Philadelphia market area. Any such acquisition after five years from the date of entry of this Final Judgment shall be subject to the procedure provided in subsection (B) of Section IV of this Final Judgment for acquisition of television broadcast stations in certain market areas.

VI.

[*Federal Communications Commission*]

Nothing contained in this Final Judgment shall be construed to require this Court to pass upon any transaction of acquisition or exchange by the defendants or any undertaking by them of national spot representation except to the extent expressly stated in subsections (B) and (C) of Section IV and in Section V of this Final Judgment.

Defendants shall not apply to the Federal Communications Commission for consent to any exchange or acquisition subject to the provisions of subsection (B) of Section IV

or of Section V of this Final Judgment until after expiration of the time within which plaintiff may apply to this Court for a determination as provided therein or, if plaintiff so applies, until after such determination shall have been rendered by this Court. In the event of an appeal from any determination rendered by this Court pursuant to subsections (B) or (C) of Section IV or Section V of this Final Judgment, defendants shall not, during the pendency of such appeal, consummate the exchange or acquisition involved or undertake the national spot representation involved.

VII.

[*Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to either defendant made to its principal office, be permitted, subject to any legally recognized privilege, (a) reasonable access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment; and (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters. Either defendant, upon the written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VIII.

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment, and no one else, to apply to this Court at any time for such further orders or directions as may be necessary or appropriate in relation to the construction of or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

IX.

[*Duration of Decree*]

This Final Judgment, and each and every provision hereof, shall terminate and be of no further force and effect nine years after the date upon which NBC finally disposes of all right, title and interest in WRCV-TV and WRCV, but in no event earlier than ten years after the date of entry of this Final Judgment.

Exhibit A

KOA-TV, Denver
KSD-TV, St. Louis
WCKT-TV, Miami
WAVE-TV, Louisville
WRGB-TV, Schenectady
KONA-TV, Honolulu

[¶ 69,460] Opinion of Attorney General of Utah.

Opinion by E. R. Callister, Attorney General, and Jack L. Crellin, Assistant Attorney General. Opinion Number 58-027, March 27, 1958. 1958 Biennial Report of the Attorney General of Utah, page 283. Requested by Parley W. Hale, Executive Secretary, Utah Trade Commission.

Utah Unfair Practices Act

Sales Below Cost—Utah Unfair Practices Act—Computation of Costs—Markups—Advertising at "Cost Plus 5%" or "Wholesale Plus 10%"—Legality.—A retailer's adver-

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tisement of merchandise for sale at "cost plus 5%" or "wholesale plus 10%" does not violate the Utah Unfair Practices Act where the retailer admittedly uses the terms "cost" and "wholesale" to include operating cost markups. Cost is defined by the Act as the retailer's invoice cost, plus freight, cartage, and a markup of 6% in the absence of proof of a lesser proportionate cost of doing business. Also, the minimum lawful "wholesale price" to a retailer would necessarily be the "cost to the wholesaler" as defined by the Act. Hence, the advertisements are not violative of the Act so long as the terms "cost" and "wholesale" include the defined elements.

However, this sort of advertising, although technically lawful under the Unfair Practices Act (because of that Act's unusual definitions), is not so protected under 76-4-1, Utah Code Annotated, 1953 ("Advertising Offenses" provisions of the Utah Penal Code).

See Sales Below Cost, Vol. 2, ¶ 7141.47, 7145, 7201.47, 7231.

Unfair Practices Act—Deceptive Advertising

QUESTIONS

1. Does the advertisement, offer or sale by a retail merchant of his merchandise at "cost plus 5%" or "wholesale plus 10%" violate the Unfair Practices Act where the merchant admittedly uses the terms "cost" and "wholesale" in the sense of invoice cost plus cost of selling of approximately 25-35% in the former and invoice cost plus 0-15% operating cost markup in the latter?

2. Does such advertisement violate the provisions of Section 76-4-1, U. C. A. 1953, pertaining to false, deceptive and misleading advertising?

CONCLUSIONS

1. No.
2. Yes.

[*Definitions*]

We are asked to give an opinion to the above questions based upon a "legal definition" of the terms "cost" and "wholesale" which this office would be willing to defend. Insofar as the Unfair Practices Act of this state is concerned, the term "cost" is explicitly defined as it is used therein.

The pertinent provisions of Section 13-5-7, U. C. A. 1953, as amended, are as follows:

"13-5-7(a). It is hereby declared that any advertising, offer to sell, or sale of merchandise, either by retailers or wholesalers, *at less than cost as defined in this act* . . . . is declared to be a violation of this act."

"13-5-7(b) 2. When used in this act, the term 'cost to the wholesaler' shall mean the invoice cost of the merchandise to the wholesaler or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added:

(a) Freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage.

"3. When used in this act, the term 'cost to the retailer' shall mean the invoice cost of the merchandise to the retailer within thirty days prior to the date of sale, or the date of offering for sale, or the replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added:

"(a) Freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one per cent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup, and a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be six per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage, but before adding thereto a markup."

[*"Cost"*]

It will be noted that a violation of the act occurs only when merchandise is advertised, offered or sold at a price less than cost which is defined as the retailer's invoice cost plus freight and cartage, as applicable, plus a markup of 6% in the absence of proof of a lesser proportionate

cost of doing business. Thus, in the sense that "cost" is defined in the act itself, an advertisement, offer or sale of merchandise at "cost plus 5%" is not violative of the act so long as the term "cost" in fact includes the defined elements. Where words are defined in a particular statute, and it is clear that the Legislature intended to give to such words a different meaning than the one generally and ordinarily given to such words, the statutory definition is the one to be applied. *Creameries of America, Inc. v. Industrial Commission et al.,* 98 Utah 571, 102 P. 2d 300; *Fox v. Standard Oil Company,* 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780. There can be no argument that a sale by a retailer at his "cost," as defined in 13-5-7(b)(3), would consist of all the elements of a lawful sale under the statute. The addition of 5% to that "cost" in any advertisement, offer or sale cannot deprive the transaction of its basic validity under this particular enactment. In fact, a sale at "cost" under this statute would be entirely lawful.

[*"Wholesale"*]

The term "wholesale" is not defined by the act insofar as it comprises a portion of the retailer's cost. Webster's New International Dictionary, 2d Edition, defines "wholesale" as "Sale of goods by the piece or in large quantity;—distinguished from retail." The term "wholesale" or the selling in or by unbroken parcels is distinguished from "retail" or dividing into smaller quantities and selling direct to consumers. *Continental Baking Co. v. Campbell,* 176 Okla. 218, 55 P. 2d 114.

As the above definitions indicate, the term "wholesale" denotes a sale of goods in gross to retailers to sell to consumers. These sales are based upon a consideration —the "wholesale price"—which has been defined as "the price fixed on merchandise by one who buys in large quantities of the producers or manufacturers, and who sells the same to jobbers or retail dealers." *Fawkner v. Lew Smith Wall Paper Co.,* 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230. Thus, under our Unfair Practices Act, the minimum lawful lawful "wholesale price" to a retailer would necessarily be the "cost to the wholesaler" as defined in 13-5-7(b)(2). It necessarily follows that advertisements, offers or sales at "wholesale plus 10%" ("wholesale" and "wholesale price" being synonymous when used to denote the consideration paid by the retailer) do not violate the Act when the sales price to the consumer does, in fact, include the essential elements of the "cost to the retailer" as defined therein. It is apparent that such an advertisement, offer or sale is not, in and of itself, a violation of the law. The violation occurs only when the term "wholesale plus 10%" is actually less than the "cost to the retailer" as defined by the act.

[*Utah Penal Code—Advertising Offenses*]

We, therefore, conclude that an advertisement, offer or sale at "cost plus 5%" or "wholesale plus 10%" does not, as such, violate the Unfair Practices Act. Only the facts surrounding such advertisement, offer or sale are determinative of this question. We feel, however, that this sort of advertising, though technically lawful under the Unfair Practices Act, because of the unusual definitions contained therein, is not so protected under Section 76-4-1, U. C. A. 1953, as herewith set forth:

> "Every person, whether acting on his own behalf or on behalf of another, who, with intent to sell or in any way dispose of real or personal property, choses in action, merchandise, service or anything or any nature whatsoever offered by such person, directly or indirectly, to the public for sale, use or distribution, or with intent to increase the consumption thereof, or to induce any member of the public to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, publishes, disseminates, circulates, or causes to be published, disseminated or circulated, or who in any manner places, or causes to be placed, before the public in this state, by any newspaper, magazine, book, pamphlet, circular, letter, handbill, placard, poster or other publication, or by any billboard, sign, card, label or window sign, showcase or window display, or by any other advertising device, or by public outcry or proclamation, or by telephone or radio, or in any other manner whatever, an advertisement regarding such property or service so offered to the public, which advertisement shall contain any statement, representation or assertion concerning such property or service, or concerning any circumstance or matter of fact connected in any way, directly or indirectly, with a proposed sale, performance or disposition thereof, which statement, representation or assertion is false in any respect, or which is deceptive or misleading, and which is

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known, or by the exercise of reasonable care could be known to be false, deceptive or misleading, to the person publishing, disseminating, circulating or placing before the public such advertisement, is guilty of a misdemeanor."

[*Common Definition*]

"Cost" as commonly defined is the amount or equivalent paid, or given or charged, or engaged to be paid or given for anything bought or taken in barter or for service rendered; charge; price. Webster's New International Dictionary, 2d Edition. The word "cost" ordinarily indicates price or part of it paid by the buyer to the seller as consideration for the sale of goods or that which has to be given for a thing in order to procure it, especially, the price paid. *City Ice Delivery Co. v. U. S.*, C. A. N. C., 176 F. 2d 347, 352. And it has been held that "cost price" to an importer is one thing, to the jobber another, to a retailer another, and to the purchaser from the retailer still another. It is said to be what is actually paid or promised to be paid for an article. As applied to a retail stock of goods, it usually has reference to the cost at wholesale. *Sylvester v. Ammons,* 126 Iowa 140, 101 N. W. 782, 785. Thus in the ordinary sense that the term "cost" is used, it obviously means the price paid for the goods by the seller himself. And certainly that is the impression and inducement intended by "membership" retail outlets advertising merchandise at "cost plus 5%" in order to obtain a more favorable bargaining position with the buying public. It is certain also that true advertising as "cost plus operating cost of 25-35% plus 5%" would be injurious to these firms in their bargaining inducement and is, therefore, avoided by the deceptive art of semantics.

The usual and ordinary meaning of the word "cost", as it refers to a retail merchant's stock in trade for sale, does not include his operational cost markup, and it is our opinion that the advertising media of "cost plus 5%" is deceptive and misleading, and is known to be so, by those employing its use when "cost" is understood by the seller to include his operational cost markup, but cannot be reasonably so interpreted by the average purchaser.

Even more misleading and deceptive, indeed even false, is advertising proclaiming the purchaser's price to be "wholesale plus 10%" when, in fact, only a small portion of the merchandise is actually marked at invoice price, or wholesale as previously defined, and the balance of the merchandise is marked upwards to as much as 15% above invoice, and the purchaser pays a blanket 10% above the combined marked prices of his purchased goods. We believe the term "wholesale," commonly understood and legally defined as the price fixed by the wholesaler and paid by the retailer, is false, deceptive and misleading and is known to be so, when used in advertising media calling for a sale price of "wholesale plus 10%" when, in actuality, the customer pays nearer 12-15% above the merchant's wholesale price. And, as in the next preceding paragraph concerning "cost," should it be claimed that the term "wholesale" is used in the sense of meaning "wholesale plus operational cost markup," contrary to the usual and common understanding of the word, it must be held that such use is deceptive and misleading under the provisions of 76-4-1, U. C. A. 1953. See *Ritholz v. City of Salt Lake,* 3 U. 2d 385, 284 P. 2d 702, 706.

[¶ 69,461] United States v. E. I. du Pont de Nemours and Company, General Motors Corporation, Christiana Securities Company, and Delaware Realty & Investment Corporation.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 49 C-1071. Dated October 2, 1959. Final judgment filed November 17, 1959.

Case No. 987 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Acquisitions of Stock or Assets—Stock Acquisition—Vertical Integration (Supplier Corporation's Acquisition of Stock in Customer Corporation)—Injunctive Relief Against Unlawful Acquisition.—Where a chemical company's acquisition, holding, and use of 23 per cent (63,000,000 shares) of the stock of an automobile manufacturer violated Section 7 of the Clayton Act (prior to its amendment in 1950), the judgment (1) ordered the chemical company to divest itself of the right to vote any of the shares (such shares would be voted by the stockholders of the chemical company, with certain exceptions), (2) prohibited the chemical company and two security holding companies (which held stock in the chemical company and were interrelated through stock ownership and by other means) from acquiring any additional stock interest in the automobile manufacturer and from attempting to influence such manufacturer in any way, (3) prohibited the two security holding companies from voting any of the shares of stock that would otherwise be voted by them as stockholders of the chemical company (the portion of such shares that were allocable to the two companies was sterilized along with 535,500 shares of stock of the automobile manufacturer which one of the companies owned), (4) ordered that no officer or director of the chemical company or the two security holding companies be permitted (a) to vote any stock of the automobile manufacturer, either in accordance with the "pass-through" described in (1) above or otherwise, or (b) to serve as an officer or director of the automobile manufacturer, (5) prohibited the automobile manufacturer from having as an employee any employee of the chemical company or the two security holding companies, (6) ordered the cancellation of any requirements contract and all preferential trade arrangements or understanding between the chemical company and the automobile manufacturer and prohibited them from entering into any such arrangements or embarking on joint commercial ventures as long as the chemical company owned the automobile manufacturer's stock.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209.400.

Acquisitions of Stock or Assets—Stock Acquisition—Vertical Integration (Supplier Corporation's Acquisition of Stock in Customer Corporation)—Injunctive Relief Against Unlawful Acquisition—Divestiture of Stock or Divestiture of Stock Voting Rights.—A chemical company, which violated Section 7 of the Clayton Act by acquiring, holding, and using 23 per cent (63,000,000 shares) of the stock of an automobile manufacturer, was not required to distribute such stock to its shareholders, and two security holding companies (which held stock in the chemical company and were interrelated through stock ownership and by other means) were not required to sell, through a trustee, the automobile manufacturer's stock which would be distributed to them as stockholders of the chemical company.

In view of Internal Revenue Service rulings and state income taxes, the tax impact of such a distribution on individual stockholders of the chemical company would be enormous and the tax impact on corporations forced to sell, such as the two security holding companies, would also be great. Such a distribution and sale would also have a serious impact on the market value of the stock of the automobile manufacturer and the stock of the chemical company. Evidence consisting of data regarding a variety of security offerings, charts of stock movements and the flow of investment funds, and the testimony of economists without practical experience or management responsibility cannot overcome the weight of testimony of men of wide experience and great responsibility for investing funds and marketing securities. There would be a serious risk that the sales caused by such a distribution would depress the market value of the two stocks and cause substantial losses to the many thousands of direct or indirect holders of such stock who could not con-

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ceivably be called guilty persons or even persons aware of any illegality. Also, such a distribution and sale would seriously handicap the automobile manufacturer in doing any common stock financing, to its possible detriment and the injury of its stockholders. In conclusion, the court ruled that such a distribution and sale would be unnecessarily harsh and punitive, and that there was an effective means of preventing any possible control of the automobile manufacturer by divesting the chemical company of the votes on such shares.

There was nothing in the record which would support the conclusion that the company's possession of the bare legal title to the manufacturer's stock, stripped of its right to vote and of its right to representation on the board of the manufacturer, would create any possibility that the stock would have any influence on the practices and policies of the manufacturer or could be used in any way that would be inconsistent with the mandate of the Supreme Court when it reviewed the legality of the acquisition. It was not necessary to divest the bare legal title in order to remove and to guard against the probability of restraint or monopolization of trade. While the stock was not held solely for investment and did not therefore come within the exemption to Section 7 of the Act, the divestiture and ancillary injunctive provisions of the judgment would be effective to assure that such stock would be held solely for investment.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209.625.

Acquisitions of Stock or Assets—Stock Acquisition—Vertical Integration (Supplier Corporation's Acquisition of Stock in Customer Corporation)—Injunctive Relief Against Unlawful Acquisition—Divestiture of Voting Rights—Representation on Board—Interlocking Directorates—Divestiture of Legal Title to Stock.—Where a chemical company's acquisition, holding, and use of 23 per cent (63,000,000 shares) of the stock of an automobile manufacturer violated Section 7 of the Clayton Act, the court's final judgment ordered a divestiture of the voting rights of those shares, such divestiture to be accomplished by passing through the vote on such shares pro rata to the stockholders of the chemical company. The pass-through vote would not be exercised on any shares allocable to anyone who was an officer or director of the company, and the limitation was extended as well to members of the family of any such officer or director residing in the same household with him. Also, this same group was prohibited from voting any other shares of the manufacturer's stock. Furthermore, the judgment divested the stock of any right to representation on the board of the manufacturer and enjoined both the company and the manufacturer from having any common officers and directors or employees.

With respect to two security holding companies, the court ruled that because of their substantial stock interest in the chemical company and because of the long-standing close relationship between these two companies and the management of the chemical company, injunctive provisions substantially similar to those that were entered against the chemical company should be directed against them to guard against any possibility that they might acquire stock in the manufacturer or attempt to influence or control the manufacturer. The shareholders of the two companies were prohibited from voting their allocable portion of the chemical company's shares of stock of the manufacturer. The vote was not passed through to the shareholders of the two companies, and the judgment precluded any person from exercising the pass-through vote or from voting any of the manufacturer's stock who was at the time of any meeting of the manufacturer an officer or director of either of the two companies or a member of the immediate family of such officer or director and living in his household. The court found it unnecessary, in view of the above prohibitions and others, to divest the chemical company of its bare legal title to the stock.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209, 4209.385.

Acquisitions of Stock or Assets—Stock Acquisition—Vertical Integration (Supplier Corporation's Acquisition of Stock in Customer Corporation)—Injunctive Relief Against Unlawful Acquisition—Acquisition of Additional Stock—Trade Between Two Corporations—Requirements Contracts—Joint Commercial Ventures.—Where a chemical company's acquisition, holding, and use of 23 per cent (63,000,000 shares) of the stock of an automobile manufacturer violated Section 7 of the Clayton Act, the court's final judgment

prohibited the chemical company from acquiring any additional stock in the manufacturer. However, the company was permitted to retain such shares as it receives by virtue of stock dividends or in the exercise of rights extended with respect to its present holdings. The voting rights on shares so received would be subject to a vote pass-through in the same manner as the shares presently held by the company.

The court rejected the contention that injunctive provisions relating to trade between the two companies were unnecessary and perhaps improper in framing a decree to cure a violation of Section 7 of the Clayton Act. In view of the finding that only a probability that the company's stock interest in the manufacturer was likely to result in a restraint of the manufacturer's purchases of automotive finishes and fabrics, the court was not satisfied that provisions of the character and scope proposed by the Government were necessary. However, the court was of the opinion that such provisions were appropriate. The judgment ordered the cancellation of all requirements contracts, exclusive patent arrangements, or arrangements relating to preferential use of discoveries and enjoined the companies from embarking upon joint commercial ventures. Such provisions would remain in effect so long as the company holds any stock in the manufacturer, except that a period of three years should be sufficient insofar as the ban against requirements contracts is concerned. A ban of any longer duration would appear to be an unwarranted and unnecessary interference with the manufacturer's right to purchase from suppliers on terms and conditions that it is able to secure. After the three-year period, requirements contracts would be permitted, provided that they do not extend over a period longer than a single calendar or automobile model year. While there was no evidence of the slightest impropriety in the company's conduct of its trade relations with the manufacturer and other automobile manufacturers, the judgment prohibited the company from giving the manufacturer preferential access to any of its products or from selling to the manufacturer on terms more favorable than those made available to competitors of the manufacturer so long as the company owned any stock in the manufacturer.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209.400, 4209.500, 4209.750, 4209.785.

Acquisitions of Stock or Assets—Stock Acquisition—Injunctive Relief Against Unlawful Vertical Acquisition—Contingent Modification of Judgment—Administrative or Legislative Change in Tax Policy.—A chemical company which violated Section 7 of the Clayton Act by acquiring 23 per cent of the stock of an automobile manufacturer was not required to distribute the stock to its shareholders because of the enormous tax consequences of such a distribution. However, any party could apply to the court for a modification of the judgment in the event that (1) the judgment proved inadequate to remedy the violation of the Clayton Act, or (2) legislation should be enacted, or there should be a change in the regulations or rulings of the Internal Revenue Service, which "would substantially and significantly ameliorate the existing inequitable and burdensome tax consequences" of such a distribution to the chemical company's stockholders. In its opinion, the court noted that such a distribution was not necessary to remedy the effects of the acquisition which were offensive to the statute, in view of other provisions of the judgment, but that such a distribution would leave a more simplified structure from the corporate standpoint.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.325.

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief—Unlawful Stock Acquisitions under Clayton Act, Section 7—Injunctive Decrees—Permissive Provisions—Restricted Right to Sell Unlawfully Acquired Stock.—A chemical company which violated Section 7 of the Clayton Act by acquiring 23 per cent of the stock of an automobile manufacturer was authorized, by a final judgment (which ordered a divestiture of all rights in the stock except the bare legal title, the right to receive dividends, the right to participate in the distribution of assets upon dissolution, and any rights reserved to it under the judgment), to sell or otherwise dispose of, for its own account, all or any part of that stock. However, if any single disposition consisted of

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more than 50,000 shares, or if the shares to be disposed of, plus the number of shares disposed of in the preceding 12 month period, exceeded 200,000 shares, then prior notice had to be given to the Attorney General. If the Attorney General should interpose an objection, then the disposition of the stock would not be consummated until first approved by the court.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief—Unlawful Stock Acquisitions under Clayton Act, Section 7—Injunctive Decrees—Divestiture as Mandatory Relief.—In determining the appropriate relief to eliminate the effects of a chemical company's acquisition of 23 per cent of an automobile manufacturer's stock in violation of Section 7 of the Clayton Act, the court rejected the Government's contention that, by virtue of Section 11 of the Clayton Act, it was mandatory that the court order a divestiture that would deprive the chemical company of every aspect of ownership of the acquired stock, including even the bare legal title thereto. It was not disputed that the jurisdiction of the court to hear and decide a case arising under Section 7 of the Clayton Act, and to frame a final judgment in such a case, was derived from Section 15 of the Clayton Act. That section is identical in form with Section 4 of the Sherman Act, which confers equity jurisdiction on district courts to hear and decide suits for injunctive relief under that statute. The discretion conferred on a court of equity by Section 4 is not confined or restricted by any requirement that divestiture is a mandatory remedy. Further, the words of Section 11 provide no support for the suggestion that it was intended to have any limiting effect upon the jurisdiction exercised by a district court under Section 15. The particular sentence on which the Government relied is directed entirely to the procedure to be followed by an administrative agency in enforcing the provisions of the Clayton Act and does not even refer to the authority of district courts under Section 15. It is hardly to be supposed that, if Congress had intended to limit the historic equity jurisdiction of the district courts to frame judgments, it would have done so in a section which does not refer to those courts, or that it would have used words which required the alleged limitation to be derived entirely from inference or implication.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209.625; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8221.100, 8233; 8801.

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief—Unlawful Stock Acquisitions Under Clayton Act, Section 7—Court's Power to Grant Relief Against "Acquired" Corporation Which Had Not Violated Antitrust Laws.—In determining the appropriate relief to eliminate the effects of a chemical company's acquisition of 23 per cent (63,000,000 shares) of the stock of an automobile manufacturer in violation of Section 7 of the Clayton Act, the district court held that a court of equity has the power to grant, against the corporation whose stock had been acquired (the automobile manufacturer), such relief as might be necessary and appropriate in the public interest to eliminate the effects of the acquisition which were offensive to Section 7 of the Clayton Act. In so ruling, the court rejected the manufacturer's contention that, since it had not violated the antitrust laws, the court was without the power to grant any relief against it, and that the granting of such relief would violate fundamental constitutional principles of due process. The authority of the court was derived from Section 15 of the Clayton Act, which clothed it with all of the historic powers of a court of equity. Further, the United States Supreme Court has held that district courts are given "large discretion to model their judgments to fit the exigencies of the particular case." Thus, the fact that the manufacturer had not violated Section 7 was a relevant consideration in determining the nature of the relief that might be granted, but that fact did not lead to the conclusion that the court was powerless to grant any relief against the manufacturer.

For the same reason, the court rejected the contentions of a third and fourth company (the third owned stock in the chemical company and the fourth owned stock in both the chemical company and the third company) that no relief could be granted against them because no cause of action had been asserted against them. In the exercise of its authority under Section 15, the court could enter a judgment which directly and substantially affected their rights and interests, even though they had not been found guilty of any violation of

law. It followed, therefore, that it could grant certain kinds of ancillary relief against them, not because they had violated the law, but because the granting of such relief was an appropriate and necessary exercise of the power of the court to frame a judgment which would effectively dissipate the consequences of the unlawful stock acquisitions. However, in prohibiting one of the companies from voting shares of the manufacturer which it owned, the court noted that it was not satisfied that it was within its authority to prohibit the voting of such shares since it was not alleged nor shown that these shares were acquired or held in violation of the section.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief—Unlawful Stock Acquisitions Under Clayton Act, Section 7—Court's Power to Grant Relief Against Stockholders Who Were Not Parties to Action.—In determining the appropriate relief to eliminate the effects of a chemical company's acquisition of 23 per cent of an automobile manufacturer's stock in violation of Section 7 of the Clayton Act, the court held that stockholders of a third company, who also owned stock in the chemical company, would be indispensable parties if the relief sought by the Government were to be granted directly against them, and that, since they were not parties, that relief could not be granted. None of the parties before the court had authority to speak for those stockholders. It is only as to corporate matters that a corporation is normally regarded as a representative of its shareholders. Here, the Government sought relief that touched the individual interests of those stockholders and not relief concerned with matters that were corporate in their character. Furthermore, the relief requested by the Government would discriminate between that group of stockholders and other stockholders of the chemical company and the third company, which disqualified the corporations as representatives of that group. The court also noted that some of those stockholders were originally named as defendants, but were dismissed during the course of the trial in chief, in some instances with the consent of the Government. There was no appeal from the dismissals that were made without the Government's consent. Further, at no time during the hearing on relief did the Government attempt to bring them before the court, although it was on notice of the contention that, if any relief were to be granted against them, they were indispensable parties and were entitled to notice and representation.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4209; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.

Department of Justice Enforcement and Procedure—Civil Suits for Injunctive Relief—Unlawful Stock Acquisitions Under Clayton Act, Section 7—Scope of Injunctive Relief—Factors Considered.—In determining the appropriate relief to eliminate the effects of a chemical company's acquisition of 23 per cent of an automobile manufacturer's stock in violation of Section 7 of the Clayton Act, the court noted that its primary duty was to devise a judgment that would effectively guard against the probability of restraint or monopolization which had been found to exist, but that, in performing that duty, there were other considerations that should not be ignored. The property interests involved were immense. The chemical company, which had more than 230,000 direct or beneficial stock owners, owned 63,000,000 shares of the automobile manufacturer's stock with a market value of more than $3,500,000,000. There were more than 700,000 owners of the manufacturer's stock. Under no theory could the stockholders of those companies be said to have participated in any violation or improper conduct. Moreover, the Government itself could not escape responsibility for the plight of those stockholders, since it had waited some thirty years after the acquisition before bringing the action. Therefore, it should recognize that stockholders who purchased the chemical company's stock in those intervening years had every reason to believe that its holding of the manufacturer's stock was entirely legal and proper. The primary purpose of the judgment was remedial and not punitive. Thus, while the private interests of the stockholders could not outweigh the public interest in a judgment that would effectively dissipate the unlawful effects of the acquisition, that primary public purpose should be achieved, so far as possible, without inflicting unnecessary injury upon innocent stockholders.

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As to the effect that the judgment might have upon the lawful interests of the corporate defendants, that was a matter to be considered in framing the judgment, but it was far less important than the interests of the many thousands of stockholders whose interests were directly involved. As to the question of whether the acts found to have violated the law "could reasonably have been thought permissible" at the time they were committed, and the fact there was no fraudulent or improper conduct on the part of the officers and directors of both companies and no "overreaching" of any kind, those facts did not mitigate or qualify the duty of the court to frame a decree that would effectively guard against the unlawful effects of the acquisition.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.100.

For the plaintiff: George D. Reycraft, Eugene Metzger, Bill G. Andrews, Edmund D. Ludlow, and Paul A. Owens, Antitrust Division, Washington, D. C.

For the defendants: Sidley, Austin, Burgess & Smith, by George Ragland, Jr., Chicago, Ill.; and Covington & Burling, by Hugh B. Cox, John Lord O'Brian, Charles A. Horsky, Daniel M. Gribbon, and Alvin Friedman, Washington, D. C., for E. I. du Pont de Nemours and Company. Charles A. Rittenhouse III, and Irving S. Shapiro, on behalf of the Legal Department, E. I. du Pont de Nemours and Company. Mayer, Friedlich, Spiess, Tierney, Brown & Platt, by Leo F. Tierney, Bryson P. Burnham, and Lee N. Abrams, Chicago, Ill., and Henry M. Hogan and Robert A. Nitschke, Detroit, Mich., for General Motors Corporation. Kirkland, Ellis, Hodson, Chaffetz & Masters, by Howard Ellis and Don H. Reuben, Chicago, Ill., Dewey, Ballantine, Bushby, Palmer & Wood, by Wilkie Bushby, Philip C. Scott, and Aram J. Kevorkian, New York, N. Y., for Christiana Securities Company and Delaware Realty & Investment Corporation. Andrew J. Dallstream, Milton H. Cohen, and Burton R. Rissman, Chicago, Ill., *Amicus Curiae* with respect to the interest of the Stockholders of E. I. du Pont de Nemours & Co. Manuel E. Cowen and Francis M. Clamitz, Associate Counsel, Chicago, Ill., *Amicus Curiae* with respect to the interest of the Stockholders of General Motors Corporation.

For prior decisions of the U. S. Supreme Court, see 1957 Trade Cases ¶ 68,723 and 1950-1951 Trade Cases ¶ 62,633. For prior decisions of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1958 Trade Cases ¶ 69,181; 1954 Trade Cases ¶ 67,905, 67,898; 1953 Trade Cases ¶ 67,509, 67,444, and 67,429; 1952 Trade Cases ¶ 67,348, 67,307, 67,292; and 1950-1951 Trade Cases ¶ 62,809 and 62,557.

Memorandum

[*Unlawful Stock Acquisitions—Appropriate Relief*]

WALTER J. LABUY, District Judge [*In full text*]: On June 3, 1957, the Supreme Court of the United States held that the acquisition by E. I. du Pont de Nemours & Company of approximately 63,000,000 shares of common stock of General Motors Corporation violated Section 7 of the Clayton Act. It remanded the case to this Court "for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute." ([1957 TRADE CASES ¶ 68,723] 353 U. S. 586, 607.) The decision of the Supreme Court reversed the prior determination of this Court that the acquisition of stock of General Motors by du Pont did not violate Section 7 of the Clayton Act but did not review or reverse the findings of this Court that there had been no violation by any of the defendants of Sections 1 or 2 of the Sherman Act.

[*Parties*]

The defendants now before the Court, in addition to du Pont, include General Motors Corporation, Christiana Securities Company which owns 12,199,200 shares of du Pont common stock, and Delaware Realty and Investment Company which owns 1,217,920 shares of du Pont common stock and 49,000 shares of common stock of Christiana. Christiana and Delaware's motion for dismissal of the appeal as to them was denied by the Supreme Court, with the direction that they be retained as parties "pending determination by the District Court of the relief to be granted." [1957 TRADE CASES ¶ 68,723] (353 U. S. 586, 608.)

[*Recommendations to Court*]

The Court appointed Andrew J. Dallstream amicus curiae to represent the interests of the stockholders of du Pont, and Manual E. Cowen amicus curiae to represent the interests of the stockholders of General Motors. Both are among the leading members of the Illinois bar. Mr. Dallstream is a past president of the Chicago Bar Association and a lawyer with vast experience in the field of corporate law and finance. Mr. Cowen is a Master of the United States District Court of the Northern District of Illinois, Eastern Division, and has had wide experience in corporate law. The order appointing the amici curiae provides that they study the various plans proposed by the litigants and conduct the necessary investigation in order to present plans and make recommendations to the Court.

On September 25, 1957 the Court held a pre-trial conference to determine the mode of procedure following the mandate of the Supreme Court. On October 25, 1957 the Government submitted its proposed final judgment. On May 14, 1958 du Pont filed its proposed final judgment. In June 1958 General Motors filed its objections to the final judgment proposed by the Government, but did not offer a form of decree. In August 1958 each of the amici curiae submitted proposed final judgments and detailed comments on the plans submitted. Prior to the trial which commenced on February 16, 1959, the parties took numerous depositions and submitted interrogatories.

Christiana and Delaware filed a motion to strike certain provisions affecting them from the final judgment proposed by the Government. The motion was argued orally before trial, briefs were filed, and the matter taken under advisement.

[*Government's Proposed Judgment*]

The Government's proposed judgment provides, in substance, (a) that du Pont, Christiana and Delaware deliver to a trustee to be appointed by the Court certificates representing the shares of General Motors stock held by them; (b) that the trustee deliver to each du Pont stockholder of record, other than Christiana and Delaware (Christiana owns 535,000 shares of General Motors and Delaware owns none)*, notices of meetings of stockholders of General Motors and proxies authorizing such stockholders to vote the shares of General Motors stock held by the trustee pro rata according to their holdings of the shares of du Pont stock, including the stock to be deposited by Christiana and Delaware; (c) that du Pont declare annually for ten years a dividend of one-tenth of the shares of General Motors stock held by it, or 6,300,000 shares per annum (there are about 1.38 shares of General Motors common stock allocable to each share of du Pont); (d) that the trustee sell the General Motors shares comprised in such dividends allocable to Christiana and Delaware and to persons who are stockholders of Delaware (approximately 2,000,000 shares per annum), within twelve months after receipt; (e) that du Pont, Christiana and Delaware be enjoined from acquiring any General Motors stock or exercising any control or influence over General Motors; (f) that du Pont and General Motors be ordered to terminate any agreement between them which provides (1) that General Motors purchase any specified percentage of its requirements of any product of du Pont, (2) that either grant to the other any exclusive patent rights, and (3) that General Motors grant to du Pont a first or preferential right to manufacture or sell any chemical discovery made by General Motors; (g) that General Motors and du Pont be enjoined from having any joint enterprise; and (h) that General Motors on the one hand, and du Pont, Christiana and Delaware on the other, be enjoined from having any common officer or director.

The Government proposal also provides that stockholders of du Pont (other than Christiana and Delaware, and persons who are stockholders of Delaware), will have the option to fill out any fractions of shares received as dividends into full shares by purchasing fractions out of the shares owned by Christiana, Delaware and persons who are stockholders of Delaware held by the trustee and, further, that the stockholders of du Pont (other than Christiana, Delaware and persons who are stockholders of Delaware) are to be given fifteen-day options to purchase the shares owned by Christiana, Delaware and the stockholders of Delaware

* There were no allegations in the complaint and no finding by the Supreme Court regarding these shares of stock of General Motors owned by Christiana.

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required to be sold annually by the trustee, all at an unspecified price or prices. Also, the trustee is given the right to apply to the Court to postpone any annual sale if, in his judgment, reasonable market conditions did not prevail, provided that such sales did take place before the end of the ten-year period. The proposed judgment further provides that reasonable market conditions shall not be deemed to exist if the price which can be realized at the time by the trustee is not sufficiently high to reflect the fair value and true worth of the stock. The proposed decree also provides that the trustee may, in his own discretion, sell in any one year more shares of stock than the shares received by Christiana, Delaware and persons who are stockholders of Delaware as a dividend for that year from du Pont.

[*Tax Rulings*]

The Commissioner of Internal Revenue ruled that under the Government's proposed judgment the annual dividends payable by du Pont in shares of General Motors stock would be taxable as ordinary income to the extent of du Pont's current earnings and accumulated earnings and profits. In the case of individual stockholders the Commissioner ruled that the amount of the dividend would be the fair market value (at the time of the hearing it ranged from $46 to $48 per share, and is now around $55 per share)* of the General Motors shares at the time of each annual distribution. In the case of tax paying corporate shareholders the amount of the dividend would be the lesser of the fair market value of the shares or du Pont's tax basis which is approximately $2.09 per share of General Motors. Such corporate shareholders would be taxed at the regular corporate rate after allowance of the dividends received deduction which would result in an effective rate of approximately 7.8% on the amount of the dividend received. The Commissioner of Internal Revenue also ruled that gain on the sales of General Motors stock required under the Government's proposed judgment would be taxable to Christiana, Delaware and the stockholders of Delaware at the capital gains rate of 25%.

[*Decree Proposed by du Pont*]

The position of du Pont is that the proposed Government decree would bring about disastrous tax consequences to stockholders of du Pont, and that the sales of General Motors stock by the trustee, the additional sales by du Pont stockholders which will be made to raise money with which to pay taxes, and the sales by existing holders of General Motors stock, would drastically reduce the market price of General Motors stock and cause disastrous losses to thousands of people who were innocent of any illegal act, that there would be also a drastic reduction in the market value of shares of du Pont stock, that there would be an adverse effect on General Motors itself and, possibly, an adverse effect on the whole stock market and the economy. Du Pont further took the position that it was unnecessary to require the divestiture of the legal title as proposed by the Government and that it was sufficient to divest du Pont of the votes on the General Motors shares owned by it and to "pass through" such votes to the ultimate stockholders of du Pont, Christiana and Delaware.

The decree proposed by du Pont provides for such a "pass through" of the vote. It also enjoins du Pont from acquiring any General Motors stock, except such stock as might be distributed in respect of the General Motors stock held by it or as might be acquired by the exercise of rights. It also enjoins du Pont from having as a director, officer or employee any person who is at the same time an officer or employee of General Motors, and provided that no person who is a director, officer or employee of du Pont may serve as a director of General Motors without the approval of the Court.

[*Position of Christiana and Delaware*]

Christiana and Delaware filed comments on the Government proposal, taking substantially the same position as du Pont, but also taking the position that the Court was without power to grant relief against them, because no violation of the statute had been alleged in the complaint or found against them. Christiana and Delaware, however, consented to the decree proposed by du Pont so far as it required them to "pass through" to their stockholders the votes on

* Thus, individuals would be taxed at rates from 20% to 91%, less dividend received credit, on the value of the shares received.

the General Motors stock received from du Pont or, in the case of Delaware, from Christiana.

[*Position of General Motors*]

General Motors filed its objections to the final judgment proposed by the Government. It also urged that it was not a party subject to the order of the Court and could not be ordered to do even the ministerial things proposed in the Government's decree.

[*Proposals of Amici Curiae*]

The amici curiae filed separate comments which criticized certain features of the Government proposal and the du Pont proposal. The plans of the amici contained provisions for "passing through" the vote on the General Motors shares held by du Pont to the ultimate stockholders of du Pont, Christiana and Delaware. They also provided for an injunction against du Pont, Christiana and Delaware on the one hand, and General Motors on the other, having any common director, officer or employee.

The plans filed by both amici provided that no one who was an officer or director of du Pont, Christiana or Delaware, or spouse, or person living in his household, should exercise any "passed through" voting rights.

The plan filed by amicus Dallstream extended this prohibition to anyone employed by du Pont in selling automotive finishes or fabrics to General Motors. The plan filed by amicus Cowen extended the prohibition to any person who for a period of ten years prior to the decree had been an officer or director of du Pont, Christiana or Delaware. The plan filed by amicus Dallstream had an additional provision, similar to the injunction proposed in the Government plan regarding trade relations between du Pont and General Motors.

Both plans of the amici referred to possible federal legislation granting relief from income tax on the shares of General Motors distributed as a dividend pursuant to Court order and providing for application to the Court in such event for an amended plan. A bill providing for tax relief was introduced in Congress in 1958 and has been reintroduced during the current session, S. 200. The bill relieves from income tax any distributions made pursuant to a court order in an antitrust case. It is similar in theory to legislation which gave tax relief in the case of dispositions ordered by the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act and in the case of dispositions ordered by the Board of Governors of the Federal Reserve System pursuant to the Bank Holding Company Act. While S. 200 provided for relief from the income tax on dividends, it would not grant relief from the capital gains tax on sales made pursuant to Court order. Other bills giving somewhat different forms of tax relief in antitrust cases were introduced in both houses of Congress before the first session of the 86th Congress closed, but no law was passed at the session.

[*Proposed Creation of New Class of Stock*]

The Dallstream proposal contains a program which has been termed in this proceeding a "takedown." In brief, under the takedown program du Pont would create a new class of common stock known as "du Pont Special Common" which would have no rights in the General Motors stock or its proceeds held by du Pont. The stockholders would be permitted to apply to the court from time to time for permission to exchange their present du Pont Common for a like number of shares of du Pont Special Common plus their allocable portion of General Motors shares owned by du Pont. Pursuant to order of the court the parties requested the Internal Revenue Service to issue a ruling as to the tax consequences of the provision for takedown. It was originally assumed by amicus Dallstream that the takedown plan would have essentially the same income tax consequences as a distribution made in accordance with the Government's proposal. However, the Internal Revenue Service has ruled otherwise in some respects. The particular merit of the takedown plan is that each du Pont shareholder could select the time at which to apply to the court for approval of an application to take down his allocable General Motors shares. Thus, each shareholder would have an opportunity over a period of years to select a time at which the takedown might be accomplished with the least unfavorable tax consequences. The ruling as issued by the Internal Revenue Service would permit the timing advantage as described above. The ruling as issued would, however, deny to corporate stockholders

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the 85% deduction for dividends received, and to other stockholders the $50 exclusion and 4% credit against tax for dividends received, with respect to the receipt of General Motors shares taken down.

[*Request for Amendment of Tax Regulations*]

Amicus Dallstream is filing with the Internal Revenue Service and the Treasury Department a request that the income tax regulations be amended to specifically provide that such intercorporate deduction be applicable to corporations, and that such $50 dividend exclusion and dividend credit be applicable to other taxpayers, who are allowed to take down, on the ground that such regulations as now construed violate the express provisions of the statute. It is urged by amicus Dallstream that the ruling as respects denial of the dividend relief provisions expresses an opinion in direct opposition to the established cases. Whether the regulations are so changed or not, or the ruling of the Department is ultimately sustained or overruled, nevertheless the takedown provision has further obvious advantages under the ruling now handed down which are not available if the Government plan were to be adopted.

First, any present or future purchaser of du Pont stock can exercise the takedown provision, if approved by the court, paying a tax on only the lessor of (a) the fair market value of the General Motors shares taken down, or (b) the excess of the sum of the fair market values at time of takedown of the General Motors shares and of the new du Pont Special Common received over his tax basis for the old du Pont Common surrendered. Recent purchasers of du Pont Common Stock who have a high cost could take down with very little tax cost by reason of that limitation.

Second, new purchasers of present du Pont stock exercising the right of takedown prior to any increase in market value would be able to take down the stock without tax consequences. For this reason, it can reasonably be expected that, in addition to the normal market, security dealers would engage in arbitrage transactions in du Pont and General Motors stock, which would create additional buying demand and would stimulate utilization of the takedown program.

Third, in the case of individual stockholders who die, assuming takedown was exercised by their estates shortly after death, the takedown would be without any or only nominal tax consequences; so that in the course of one generation most of the stock held by individuals might be expected to be exchanged under the takedown program.

Fourth, the so-called built-in tax liability to purchasers in the event of the adoption of the Government plan described by many experts as likely to have depressing market consequences upon du Pont, would under the takedown plan, be limited solely to a tax on appreciation in value after the date of purchase.

[*No Change in Government's Position*]

The Government filed a memorandum replying to the criticisms of its proposed judgment by the other parties and by the amici.* The memorandum of the Government offered no change in its proposed judgment but it did make certain suggestions as to how its proposed judgment might be modified. These suggestions included (a) an expansion of the period required for execution of the plan from 10 years to 20 years, (b) the distribution by du Pont of the General Motors stock in lieu of all or part of its regular cash dividend, and (c) the distribution by du Pont in one dividend of all the General Motors shares held by it. It appeared, however, that the Government's discussion of these suggestions was not intended to indicate that the Government was prepared to modify its plan in accordance with the suggestions or would consent to any such modification. At a later point in the hearing the chief counsel for the Government stated that he had no authority to propose or to consent to any change in the Government's proposed judgment.

[*Courts "Equity" Power—Clayton Act, Section 15*]

Questions have been raised with respect to the power of this Court to grant relief

* Along with its memorandum the Government filed a study by Alfred Boni, President of Boni, Watkins, Jason & Co., economic and management consultants of New York City, regarding the effect on the market prices of General Motors stock and du Pont stock if the Government proposed decree were put into effect. This study was not offered or received in evidence. Mr. Boni testified in the hearings, and portions of the study were put in evidence as exhibits through him.

against General Motors, Christiana, Delaware and the stockholders of Delaware, which should be considered at the threshold of this opinion.

[*General Motors—Absence of Antitrust Violation*]

General Motors contends that, since the Supreme Court has not found that it has violated Section 7 of the Clayton Act or any other provision of the antitrust laws, this Court is without power to grant any relief against it and argues that if the Court should grant relief it would violate fundamental constitutional principles of due process. The authorities cited by General Motors do not sustain this broad proposition. The fact that General Motors has not violated Section 7 of the Clayton Act is a relevant consideration in determining the nature of the relief that might be granted against General Motors but that fact does not lead to the conclusion that this Court is powerless to grant any relief against General Motors. The authority of the Court in this case is derived from Section 15 of the Clayton Act which clothes the Court with all the historical powers of a court of equity. The Supreme Court has held that in framing equitable decrees under the antitrust laws District Courts are given "large discretion to model their judgments to fit the exigencies of the particular case." The Court is of the opinion that in a proceeding under Section 7 of the Clayton Act in which it has been found that the acquisition of stock by one corporation in another violates the statute, a court of equity has power to grant such relief against the corporation whose stock has been acquired as may be necessary and appropriate in the public interest to eliminate the effects of the acquisition which have been held to be offensive to the statute. For this reason the Court concludes that the Court has the power to grant the kind of relief against General Motors which is provided for in later passages of this opinion. In the hearing on relief General Motors participated fully, cross-examining witnesses presented by other parties and presenting witnesses of its own, so that its procedural rights have been fully protected.

[*Christiana and Delaware—Absence of "Cause of Action"*]

The' contentions made by Christiana and Delaware raise a somewhat different problem. In support of their motion to strike the portions of the Government's proposed judgment which request relief as against them these corporations argue that the granting of relief against a party must be based upon a cause of action justifying relief, that no cause of action under the Clayton Act has been asserted against Christiana and Delaware and that the relief proposed against them cannot be granted on the basis of the Government's cause of action against du Pont. The Government on the other hand, relies on the proposition that relief may be had against any party to an antitrust action where dissipation of the effects of violation of the antitrust laws requires such relief. * The Government also relies upon the Supreme Court's action in denying the motion of Christiana and Delaware to dismiss the appeal and retaining them as parties pending a determination of the relief that should be granted. A review of the authorities cited in support of these opposing legal contentions indicates that none of them deals with a situation that is comparable to the one now before the Court.

[*"Broad Discretion"*]

As in the case of General Motors, the answer to this question may be found in the broad discretion which is conferred upon the Court by Section 15 of the Clayton Act. Christiana and Delaware are parties and the Supreme Court has held that they are properly before the Court. It cannot be disputed that under Section 15 this Court possesses the authority to enter an order with respect to General Motors stock now owned by du Pont as may be appropriate and necessary to remedy the violation of the statute which the Supreme Court has found to exist. In the exercise of its authority the Court could enter a judgment which directly and substantially affects the rights and interests of Christiana and Delaware even though they have not been found guilty of violating any law. It follows, in my opinion, that this Court may grant cer-

* The Government also argued that in fact relief against Christiana and Delaware is necessary in this case because of the stock relationship existing between the two companies and the du Pont Company. In this connection it also adverts to the finding made by this Court in its opinion after the trial in chief that the du Pont family "controls" the management of the du Pont Company.

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tain kinds of ancillary relief against these two corporations, not because they have violated the statute but because the granting of the relief is an appropriate and necessary exercise of the power of this Court to frame a judgment which will effectively dissipate the consequences of the stock acquisition found to be unlawful. This is particularly true in the instant case where the absence of power to grant any kind of relief against Christiana and Delaware might leave the Court in a position where to discharge its duty it would be necessary to frame a decree which would entail harsh consequences to a large number of innocent parties and would therefore to that degree be against the public interest and also offensive to justice.

[*Limited Power as to Christiana and Delaware*]

The fact that the two corporations have not violated Section 7 should be taken into consideration in determining the nature and extent of relief that may be granted against them. Doubtless there are forms of relief which this Court should not, or perhaps could not, grant against Christiana and Delaware in view of the fact that they have not been found to have violated the antitrust laws. But this does not justify the broad conclusion that the Court has no power whatever to grant any relief that might affect the interests of the two corporations. The Court therefore concludes that it has power to grant the relief against Christiana and Delaware provided for later in this opinion.

[*Delaware Stockholders—Non-parties to Action*]

The stockholders of Delaware who are also stockholders of du Pont are in a different position from either General Motors or Christiana and Delaware. They are not parties and are not before the Court. Some of these stockholders were originally named as defendants but were dismissed during the course of the trial in chief, in some instances with the consent of the Government. The Government did not appeal from the dismissals that were made without its consent. At no time during the course of the hearing on relief did the Government attempt to bring these shareholders before the Court either by resort to the procedures available to it under Rules 23 of the Rules of Civil Procedure or by other method, although the Government was on notice that the defendants contended that if any relief were to be granted against these shareholders they were indispensable parties and as such were entitled to notice and representation.

[*Absence of Representation*]

None of the parties before the Court has authority to speak for these stockholders. In view of the nature of the relief requested against these stockholders by the Government neither du Pont nor Delaware can be regarded as a representative of this particular group of stockholders. The Government seeks relief that touches the individual interests of these stockholders and not relief concerned with matters that are corporate in their character and it is only as to corporate matters that a corporation is normally regarded as representative of its shareholders. Furthermore, the relief requested by the Government would discriminate between this particular group of stockholders and other stockholders of both du Pont and Delaware. There is therefore a potential conflict of interest between this particular group of stockholders and the other stockholders of Delaware and du Pont which disqualifies the corporations as representatives of this particular group of stockholders. *Baltimore, C. & A. Ry. v. Godeffroy*, 182 Fed. 525 (4th Cir. 1910) and cases cited therein. In these circumstances the Court holds that the stockholders of Delaware who are also stockholders of du Pont would be indispensable parties if the relief sought by the Government were to be granted directly against them and that since they are not parties that relief cannot be granted.

[*Guarding Against "Probability" of Restraint or Monopolization*]

Under the mandate of the Supreme Court it is the responsibility of this Court to frame a judgment which will eliminate the effects of du Pont's acquisition of stock of General Motors which are offensive to the statute. The effect of the acquisition which the Supreme Court found to be offensive to the statute was the "reasonable probability" that the acquisition might result in restraint or monopolization of the market for automotive fabrics and finishes. [1957 TRADE CASES ¶ 68,723] 353 U. S. 586, 595, 607. Accordingly, the problem before this Court

is one of devising a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist.

[*"Immense" Property Interests Involved*]

The primary duty of the Court is therefore clear. But in the performance of this duty, particularly as it may involve a choice among different remedial measures that will be equally effective to achieve the statutory purposes, there are certain other considerations that should not be ignored. The property interests involved are immense. The 63,000,000 shares of General Motors owned by du Pont have a current market value of over $3,500,000,000. Any judgment that this Court may enter with respect to this stock will affect the interests of hundreds of thousands of persons in addition to the interests of the four corporations who are before the Court as parties. The record shows that at the time of the hearing there were over 230,000 individuals who were either direct or beneficial owners of du Pont stock. General Motors has more than 700,000 stockholders of record. Christiana has approximately 4,000 stockholders. Substantial amounts of the stock of all three of the corporations are owned by educational, religious and charitable organizations. In framing a judgment the Court should take into account the interests of all of these stockholders.

[*Innocence of Stockholders—Government's Delay*]

The effect that a judgment in this case may have upon the lawful interests of the corporate defendants in their separate corporate capacities is of course a matter which the Court should consider in framing a judgment, but in the circumstances of this case it appears to the Court far less important than the interests of the many thousands of stockholders whose rights are directly involved. Under no theory can these stockholders be said to have participated in any violation or engaged in any improper conduct. Moreover, the Government itself cannot escape responsibility for the plight of these stockholders. At the time of the acquisition there existed a very small fraction of the present number of stockholders of the corporations involved. It waited some thirty years after the acquisition occurred before bringing this action. It should, therefore, recognize that stockholders who purchased du Pont in those intervening years had every reason to believe that du Pont's holding of General Motors was entirely proper and legal.

It was with these considerations in mind at the beginning of the hearing on February 16, 1959, this Court stated:

> "The primary problems to be resolved through this trial is for the Court to promulgate a decree which will remedy the violation of Section 7 of the Clayton Act, without penalizing those who may become the innocent victims of this case, the stockholders and the beneficiaries in various trusts and institutions.
>
> "Equity and justice demand that the decree protect the interests of this group lest they become the casualties of this litigation, for under no reasonable theory can they be accused of violating any provision of the antitrust laws.
>
> "To redress a violation of law in this case is fairly simple, but to do it without punishing innocent people is the big problem here. During the delay of over thirty years before filing this lawsuit, the rights of over a million stockholders of these corporations have intervened, which greatly aggravates the Court's problem."

[*Remedial Purpose of Judgment*]

This does not mean that the private interests of the stockholders can outweigh the public interest in a judgment that will effectively dissipate the effects of the acquisition found to be unlawful. But it does mean that in the opinion of this Court the primary public purpose should be achieved so far as possible without inflicting unnecessary injury upon innocent stockholders in the various corporations involved. The purpose of the judgment should be remedial and not punitive. *Hartford Empire v. United States* [1944-1945 TRADE CASES ¶ 57,319], 323 U. S. 386, 409; *United States v. National Lead Co.* [1946-1947 TRADE CASES ¶ 57,575], 332 U. S. 319. No harsh and oppressive consequences should be visited upon the stockholders unless it can be shown on the facts that these results are inescapable if a decree is to be framed that will comply with the mandate of the Supreme Court. The cases leave no doubt that these are considerations which the Court should weigh in the framing of its final judgment. *United States v. American Tobacco Co.*, 221 U. S. 106, 185.

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Compare *Timken Roller Bearing Co. v. United States* [1950-1951 TRADE CASES ¶ 62,837], 341 U. S. 593, 604.

[*Reasonable Belief as to Legality of Acts*]

The defendants have suggested that in framing the judgment the Court should properly take into account that the question whether there was a violation of law was reasonably in doubt at the time of the challenged act. *United States v. United Shoe Machinery Corp.* [1953 TRADE CASES ¶ 67,436], 110 F. Supp. 295, 348 (D. Mass. 1953), aff'd. [1954 TRADE CASES ¶ 67,755], 347 U. S. 521. It is true that the Supreme Court has recognized that in framing an antitrust judgment it is proper to consider whether the acts found to have violated the law "could reasonably have been thought permissible" at the time they were committed. *United States v. Gypsum Co.*, 340 U. S. 76, 89-90; *F. T. C. v. National Lead Co.* [1957 TRADE CASES ¶ 68,629], 352 [U. S.] 419, 429. Although the Court believes that there might be cases in which this consideration would be of importance, the fact remains that in this case the Supreme Court has found the acquisition to be unlawful. The Court therefore approaches the problem on the assumption that the appropriate relief is that which is necessary to eliminate the effects of the acquisition offensive to the statute, notwithstanding that the acquisition might reasonably have been believed to be permissible when made.

[*No Improper Conduct*]

In its opinion the Supreme Court recognized the fact that all concerned in high executive posts in both du Pont and General Motors "acted honorably and fairly each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors." [1957 TRADE CASES ¶ 68,723] 353 U. S. 586. The Supreme Court thus accepted the detailed findings of this Court to the effect that in the commercial relations between du Pont and General Motors there was no fraudulent or improper conduct on the part of the officers and directors of both companies, and no overreaching of any kind. Here again, however, the Court concludes that these facts do not in any way mitigate or qualify the duty of this Court to frame a decree that will effectively remove and guard against the effects of the acquisition of the stock which have been held to be offensive to the statute.

[*Divestiture as Mandatory Remedy*]

Before referring to the evidence which was adduced at the hearing on relief there is another basic question which requires consideration.

The Government contends that in one important respect this Court has no discretion in the framing of its decree. It is the position of the Government that the Court must order a divestiture that will deprive du Pont of every aspect of ownership including even the bare legal title to the stock. If this contention is sound the question whether divestiture is in fact necessary in order to eliminate the effects offensive to the statute becomes immaterial because divestiture is a mandatory remedy even if some other form of relief would be equally effective, or even more effective, to remove the illegal consequences of the acquisition. By the same token, the fact that divestiture would inflict serious injury upon persons who were innocent of any wrongdoing would be immaterial. On this view of the matter the Court would possess discretion only as to the time and method of divestiture.

[*Section 11 as Restriction on Court's Equity Powers*]

The Government bases this argument primarily on the provisions of Section 11 of the Clayton Act which prescribe the procedure to be followed by the Federal Trade Commission and other administrative agencies in enforcing the provisions of the Clayton Act. No court has ever construed or applied Section 11 of the Clayton Act in the sense contended for by the Government. On the contrary it has been held that divestiture is not a necessary remedy under Section 7 and that measures other than divestiture may satisfy the requirements of the statute. *American Crystal Sugar Co. v. Cuban Sugar Co.* [1957 TRADE CASES ¶ 68,735] 152 F. Supp. 387 (S. D. N. Y. 1957), aff'd [1958 TRADE CASES ¶ 69,155], 259 F. 2d 524 (2d Cir. 1958).

It is not disputed that the jurisdiction of this Court to hear and to decide a case arising under Section 7 of the Clayton Act and to frame a final judgment in such a

case is derived from Section 15 of that Act. Indeed it was this section which the Government invoked when it filed its complaint. It cannot be denied that Section 15 is identical in form with Section 4 of the Sherman Act which confers equity jurisdiction on district courts to hear and decide suits for injunctive relief under that statute. It has long been held that under Section 4 a district court has the traditional powers of a court of chancery. There can be no doubt that in cases arising under the Sherman Act the discretion conferred on a court of equity by Section 4 is not confined or restricted by any requirement that divestiture of ownership is a mandatory remedy. *Timken Roller Bearing Co. v. United States* [1950-1951 TRADE CASES ¶ 62,837] 341 U. S. 593, 603; *United States v. Minnesota Mining and Manufacturing Co.*, 96 F. Supp. 356, 358. The question raised by the Government's contention is therefore whether Section 11 of the Clayton Act reads into Section 15 of that statute a restriction on the court's exercise of discretion which is not explicitly provided for in Section 15 and which is admittedly not imposed by the provisions of Section 4 of the Sherman Act.

The words of Section 11 provide no support for the suggestion that it was intended to have any limiting effect upon the jurisdiction exercised by the District Court under Section 15. The Court finds it unnecessary to decide whether Section 11 imposes upon the regulatory agencies a mandatory duty to order divestiture in every case in which it is found that stock has been acquired in violation of Section 7. The parties have taken conflicting views on this question. The defendants have pointed to certain cases which they contend indicate that the regulatory agencies have not construed Section 11 as requiring mandatory divestiture of ownership. See particularly *I. C. C. v. Baltimore & Ohio Railroad Co.*, 183 I. C. C. 165, and *New York, Chicago & St. Louis Railroad Co. Control*, I. C. C. Finance Docket No. 17883 (report dated April 10, 1958, and order dated August 26, 1958). They have also referred to certain consent orders entered in F. T. C. proceedings, *In the Matter of the Vendo Company*, FTC Dkt. No. 6646 (1957); *In the Matter of International Paper Co.*, FTC Dkt. No. 6676 (1957); *In the Matter of Scoville Mfg. Co.*, FTC Dkt. No. 6427 (1956).

But even if it is assumed that Section 11 restricts the discretion of the regulatory agency it does not follow that the section similarly restricts the equity powers conferred on a district court by Section 15.

The particular sentence in Section 11 on which the Government relies is directed entirely to the procedure to be followed by an administrative agency in enforcing the provisions of the Clayton Act and does not even refer to the authority of the district courts under Section 15. Indeed the section as a whole does not refer in any way to the jurisdiction exercised by a district court under Section 15. To the extent that it deals with judicial power at all it refers to the powers of a circuit court of appeals to enforce or to review an order entered by an administrative agency. In this connection it is significant that the power given to a court of appeals when it reviews an order of an administrative agency is a broad power to enter a judgment "affirming, modifying or setting aside" the order of that agency. It is hardly to be supposed that if Congress had intended to limit the historic equity jurisdiction of the district courts to frame judgments it would have done so in a section which does not refer to those courts or that it would have used words which required the alleged limitation to be derived entirely from inference or implication.

The Government attempts to support its construction of Section 15 by reference to certain statements made in the Congressional debates when the Clayton Act was passed. These statements which are not directed to the relationship between Sections 15 and 11 or to the particular point now under consideration are not persuasive or even relevant. They are entitled to no weight as against the statements in the reports of the committees recommending passage of the Clayton Act which make it clear that Section 15 was intended to confer upon the courts the same kind of equitable jurisdiction to enforce the Clayton Act that they possessed and exercised under Section 4 of the Sherman Act in cases arising under that statute. S. Rep. No. 698, 63rd Cong., 2d Sess. pp. 17 and 50 (1914), and H. Rep. 627, 63rd Cong., 2d Sess. p. 21 (1914).

To adopt the interpretation of Section 11 advanced by the Government would lead to an extraordinary result. In terms of the

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present case it would mean that although the Court has no choice but to order divestiture in a proceeding under Section 7 of the Clayton Act, which involves only a probability of restraint or monopolization, it would have complete choice of remedies and would be under no mandatory duty to divest if there had been a violation of the Sherman Act rather than the Clayton Act and the Court had found either that du Pont's stock interest in General Motors was a combination or conspiracy that had restrained trade in violation of Section 1 or that du Pont had used its stock interest to achieve a monopoly position in violation of Section 2. Such a distinction in the powers of an equity court would be arbitrary and illogical and the Court finds nothing in Sections 11 and 15 to suggest that it was intended by Congress. Indeed the legislative reports cited above strongly indicate the contrary.

The Government also takes the position that the opinion of the Supreme Court in this case shows that divestiture is a mandatory remedy. The Court finds nothing in the language of the Supreme Court that appears to support this contention. Instead the Court speaks of the "large discretion" possessed by a district court to model its judgment "to meet the exigencies of the particular case." (353 U. S. 608) These words would hardly be appropriate if the Supreme Court had intended to hold that this Court was under a mandatory duty to order divestiture.

[*Court's Authority to Order Divestiture*]

Under Section 15 this Court has unqualified authority to order complete divestiture if it decides that in the particular circumstances involved that is an appropriate remedy and is required to achieve the purposes of the statute. But it is not compelled to direct divestiture or to direct any particular form of divestiture if it determines that there is an alternative form of relief. In the exercise of its authority under Section 15 the Court has the authority to adopt a form of relief other than divestiture, or to order divestiture of some but not all of the incidents of ownership if it decides on the facts that these alternatives are more equitable and will effectively carry out the direction of the Supreme Court to eliminate the effects of the acquisition offensive to the statute.

In this connection the Court observes that in many instances both the Department of Justice and the Federal Trade Commission have consented to the entry of judgments under Section 7 of the Clayton Act which have not called for divestiture of the stock or assets acquired in violation of that section. See, e. g., *United States v. Schenley Industries, Inc.*, CCH [1957] Trade Cases, Para. 68,664 (D. Del. 1957); *United States v. General Shoe Corp.*, CCH [1956] Trade Cases, Para. 68,271 (D. Tenn. 1956); *In the Matter of Union Bag & Paper Co.*, FTC Dkt. No. 6391 (1957); and *United States v. Hilton Hotels Corp.*, CCH [1956] Trade Cases, Para. 68,253 (N. D. Ill., 1956). Furthermore, so far as this Court is aware, this is the first case in the period of over 40 years during which the Clayton Act has been law in which the Government has advanced the contention that a district court acting under Section 15 of the Clayton Act lacks the traditional authority of a court of equity and must order divestiture upon a finding of a violation of Section 7.

The Government presented its evidence on twelve hearing days between February 17 and March 16, 1959. The defendants and the amici presented their evidence on twelve hearing days between March 16 and April 1. The Government presented its rebuttal on four hearing days, April 6, 7, 8 and 9. The Court then gave the Government twenty days to file a brief, and the defendants twenty days thereafter, the amici ten days thereafter, and the Government ten days thereafter to reply, so that the case was submitted to the Court in June, 1959.

[*Tax Impact—Avoidance*]

In considering the decree proposed by the Government, an important factor is the impact of taxes. The Government attorneys displayed their sensitivity on this point by introducing testimony regarding devices whereby individual stockholders of du Pont might seek to avoid the tax impact.

A member of an accounting firm testified, over objection, that stockholders might form corporations of various types to which they would transfer their shares of du Pont. Such corporations would then receive the General Motors shares distributed by du Pont as dividends under the Government proposed decree and, under some of the devices retain them and, under other devices, in turn, distribute the shares as divi-

dends. These devices, if valid, would tend to minimize the taxes. However, it appeared that Government counsel had discussed the devices with lawyers in the Internal Revenue Service and there was doubt whether the Internal Revenue Service would recognize such devices as having substance. Further, Government counsel refused to state whether or not they would accept such devices from an antitrust standpoint or would attack them under the antitrust laws. The Court does not think that such devices can be seriously considered unless and until they are tendered as a plan acceptable to the Government and have been ruled on from a tax standpoint by the Internal Revenue Service.

The defendants moved to strike this testimony as to domestic law as inadmissible. It would be in an ordinary lawsuit, but in this kind of proceeding it is informative to the Court, and the motion was denied.

Under the ruling of the Internal Revenue Service (Amicus Dallstream Ex. 2) there can be no avoiding the conclusion that the tax impact by reason of the distributions of 63,000,000 shares of General Motors stock by du Pont will be crushing in the case of individuals and trusts. They will be taxed at rates varying from 20% to 91% (less dividend received credits) by the Federal Government on the receipt of shares having a current market value of $45 or $55 per share. Whatever the value, or whatever the rate, these individuals will lose a large portion of their investment in General Motors through du Pont. In many instances there will also be state income taxes imposed. Many du Pont stockholders reside in the following states, with the income tax rates indicated: California (1% to 6%), Delaware (1½% to 8%), Massachusetts (7.38%) and New York (2% to 10%).

[*No Penal Sanctions*]

No doubt there are investors who purchased du Pont having in mind that, while they were acquiring an interest in the leading company in the chemical industry, they were also acquiring shares of stock in the leading company in the automotive industry. It would be grossly unfair to impose such a penalty on thousands of innocent persons. Section 7 of the Clayton Act is not a "penal statute". This is simply a remedial section. It contains no penal sanctions such as there are relating to certain other sections of the antitrust laws.

[*Survey—du Pont Stockholders*]

There are approximately 185,000 stockholders of record of du Pont. There are, of course, in addition many others whose stock is held in the name of banks or brokerage firms or who are beneficiaries of trusts owning du Pont stock. All of these persons would be taxed on the same basis as if they were direct owners of du Pont stock. Testimony and exihibits were introduced by Dr. Benjamin Tepping of National Analysts, Inc., an independent statistical research organization. This organization conducted a survey of du Pont stockholders for the purpose of determining the tax-paying characteristics of such stockholders and of estimating the additional income taxes that would be payable if the Court were to accept the Government's proposal. The National Analysts' survey was conducted on the basis of probability sampling. This is a method of sampling by which on the basis of data obtained from a sample of the group under examination estimates can be made as to the result that would be obtained if a complete census of the entire group had been undertaken. The particular utility of probability sampling is that through the use of mathematical formulae the margin of error between the results of the sample and the results that would be obtained from a complete census can be ascertained.

Dr. Tepping was able to include within his survey the individual holders of some 16,000,000 shares of du Pont stock (out of a total of some 45,000,000 shares) and to estimate for such holders the effective rate of tax and the additional taxes that would be payable if the Government's proposed judgment were accepted by this Court. In addition Dr. Tepping stated as his expert opinion similar estimates for the owners of an additional 9,000,000 shares of du Pont stock, basing these estimates very largely upon an extension of the results obtained in the sample survey. His testimony, in summary, was that these two groups of individual owners of du Pont stock would pay income taxes at the rate of between 55% and 60% if the Government's proposal were accepted and that the additional income taxes payable by such owners upon receipt of the General Motors shares in ac-

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cordance with the Government's plan would total as much as $1,000,000,000 over the ten year period if the General Motors stock were to have a value of approximately $50 a share and would total approximately $770,000,000 over the same period if the General Motors stock were to have a value of about $40 a share.

The Court is satisfied that the National Analysts' survey was conducted on an objective basis and that the procedures used were in accordance with accepted standards recognized in the field of statistical surveys. The evidence shows that care was taken to simplify the questionnaires used to the extent possible in light of the fact that the subject matter—Federal income tax—is inherently complicated. At the trial the Government moved to exclude the testimony of Dr. Tepping and the exhibits introduced by him on the ground that the underlying data constituted hearsay evidence. The Court overruled the motion and at the conclusion of the trial it was renewed by the Government.

If the issue before the Court were the precise amount of income taxes to be paid by the du Pont stockholders in the aggregate or by individual classes of du Pont stockholders, there might be merit to the Government's contentions. But that is not the issue. The court is satisfied that the estimates are sufficiently reliable to indicate the order of magnitude of the income taxes that would be occasioned by adoption of the Government's proposal. Accordingly, the Government's motion is overruled. In this connection the Court observes that in its reply brief with respect to this motion the Government states:

> "It has never been any secret throughout this proceeding that the proposed distribution of General Motors stock would be taxable to the stockholders. A bill has been introduced in the Congress concerning this matter. This is a matter of law so obvious that the Court is not even required to take judicial notice of it. If the only use to be made of these survey results were to allow the Court to consider them for whatever they are worth, the Government would not object."

The practical question before the Court is whether it will be better able or less able to frame a decree to carry out the mandate of the Supreme Court by excluding Dr. Tepping's testimony and evidence. To this question the Court believes there is but one answer. It cannot perceive how the interests of the Government can be prejudiced by acceptance of this testimony on the basis and for the purpose described above. Moreover, there is ample precedent for the use of such evidence. The magnitude of the taxes occasioned by the Government's proposal is certainly an important element in this case and all of the parties, including the Government, should be anxious to provide the Court with the best available information. The evident care and objectivity with which the survey was conducted, and which were not criticized by the Government's own statistical expert, assure a high degree of trustworthiness. The record discloses that various agencies of the Government itself have used surveys of this type and indeed have employed this same organization, National Analysts, Inc. Support is also found for the competence and trustworthiness of sample evidence in the following court decisions: *United States v. Aluminum Company of America,* 35 F. Supp. 820, 823-24 (S. D. N. Y. 1940); *United States v. United Shoe Machinery Corp.* [1953 Trade Cases ¶67,436], 110 F. Supp. 295, 305-06 (D. Mass. 1953); *United States v. E. I. du Pont de Nemours & Co.* [1953 Trade Cases ¶67,633], 118 F. Supp. 41 (D. Del. 1953); *United States v. National Football League* [1953 Trade Cases ¶67,614], 116 F. Supp. 319 (E. D. Pa. 1953); *State Wholesale Grocers v. Great A. & P. Tea Co.* [1957 Trade Cases ¶68,772], 154 F. Supp. 471 (N. D. Ill. 1957). It further appears that in only one recent case has such sample evidence been rejected and in that case certain survey findings offered by the Government were excluded because they utilized arbitrary methods and classifications not recognized in the industry under study. *United States v. Brown Shoe Co., Inc.,* Civil No. 1527(3) (E. D. Mo. 1958). Neither of these objections has application to the survey of the National Analysts.

Mr. David M. Kennedy, Chairman of the Board of the Continental Illinois Bank and Trust Company of Chicago and also Chairman of its Trust Committee, presented an estimate that beneficiaries of trusts in its Trust Department holding du Pont stock were on the average in the 50% to 60% bracket. Mr. Thomas H. Beacom, Vice President in charge of the Trust Department of the First National Bank of Chicago, esti-

mated that the beneficiaries of the trusts in his bank holding du Pont stock would be taxable at an average rate of 51.7%.

Whatever disagreement may be had with these estimates regarding the tax brackets of individual and trust beneficiary stockholders of du Pont, there can be no doubt that du Pont stock, selling for $200 a share or more (now $250 a share), is held in many instances by people of substantial income, and that the tax impact would be very serious as to them. Seventeen individual stockholders of du Pont and General Motors in various walks of life testified regarding their family holdings, their taxes and their intention as to selling or not in case the Government plan were put into effect, as summarized below:

Witness	Residence	Status	Holdings	Additional ann. taxes or bracket	Intention
Paul H. Kuhns	Ponca City, Okla.	Retired Cont. Oil	50 du P. 60 G. M.	$60	Sell both
F. A. Christensen	Wash., D. C.	Retired Mfrs. Rep.	600 du P.	47%—$1,126	Sell both
A. B. Moran	Detroit, Mich.	Investment broker	964 du P.	47%—$2,074.80	Sell G. M.
Claude E. Holland	Beaumont, Tex.	Insurance agent	250 du P. 630 G. M.	59%—$761	Give away du P. to children
Mrs. W. C. Bedell	Poughkeepsie, N. Y.	Wife of surgeon	15 du P. 33 G. M.	30% $21.52	Keep both
Wm. F. Schwenke	Schererville, Ill. (about	Du P. Dept. supervisor to retire)	131 du P.	26%—$187	Sell G. M.
Harold A. Roscoe	Highland, Ind.	Du P. engineer	41 du P.	26%—$57	Keep both
Raymond J. Govert	Griffith, Ind.	Du P. Asst. Supt.	62 du P.	22%—$75	Keep both
Norman R. Wallner	Lansing, Ill.	Du P. Chem. Engineer	30 du P.	22%—$35	Keep both
Henry L. Payte	Jersey City, N. J.	Tax accountant (retiring)	40 du P. 341 G. M.	30%	Sell 30 du P.; sell G. M. received as dividend; undecided as to G. M. now owned
Maxwell Turner	Fall River, Mass.	Auctioneer	60 du P. 210 G. M.	22%	Sell both
Elizabeth Babbitt	Chicago, Ill.	Writer	630 du P.	30% $896	Sell G. M.
Walter F. Pond	Greybull, Wyo.	Geologist	60 du P. 300 G. M.	34%	Undecided
Leon A. Miller	St. Petersburg, Fla.	Retired engineer	160 du P. 126 G. M.	22% $158	Undecided
Richard C. Peter	Louisville, Ky.	Manufacturers agent	692 du P. 412 G. M.	43% plus 8% Ky. $1,298 addl. Fed. taxes	Sell G. M. to pay tax
Archie J. Marschak	Chicago, Ill.	Bank asst. vice pres.	66 du P.	34%	Sell G. M.
Harvey H. Orndorff	Chicago, Ill.	Investment broker	Trustee for elderly woman of 1,000 du P.	84% $4,636.80	Sell du P.

It was assumed for the purpose of the above testimony that General Motors would have a market value of $40 per share when distributed. Most of the above stockholders expressed the opinion that they would not get the fair value of the shares which they would have to sell because of the race to get into the market.

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The shocking tax impact* would impel the Court not to order a distribution of General Motors stock by du Pont, if any other means of removing the effects offensive to the statute are available, and there are such means.

[*Tax Legislation*]

In case tax legislation, such as S. 200, were to pass, this tax result from ordering a distribution would, of course, be eliminated.

[*Proposed Decree—Christiana and Delaware*]

The Government proposed decree also calls for the sale by a trustee of the General Motors stock received through dividends by Christiana and Delaware, as well as the 535,500 shares of General Motors owned by Christiana. Christiana owns 12,199,200 shares of du Pont. Delaware owns 1,217,920 shares of du Pont and 49,000 shares of common stock of Christiana. Under the Government plan Christiana would receive 16,805,684 shares of General Motors and Delaware would receive 1,677,813 shares of General Motors. Accordingly, including the 535,500 shares owned by Christiana there would be sales of stock owned by the two corporations amounting to 19,018,997 shares. The tax base for such General Motors shares is $2.09 a share (except that for the 535,500 shares owned by Christiana it is $9.01 per share). Any proceeds of such sales in excess of those base figures per share would be subject to a capital gains tax of 25%. The market value of General Motors stock at the time of the hearings was $46 per share. If that figure were realized, the capital gains tax impact on Christiana would be $183,351,000 and on Delaware would be $17,831,000 or a total of $201,182,000. In addition, there would be dividend taxes of $3,021,000. Even if much less were realized, because of a decline in the market value of General Motors, the tax impact would still be staggering.

There are over 4,000 stockholders of Christiana and Delaware, including many charitable and educational institutions. (See Pages 51-52 for a list of many such institutions.) There is no finding of violation of any law against either Christiana or Delaware or their stockholders and, again, it would be unjust to impose this loss upon them. The Court is not aware of any proposed legislation which is receiving serious consideration in the Congress, designed to give relief from taxes on the gains from such sales. Consequently, the Court would not order the sale of shares owned or received by Christiana and Delaware, if there were any other means of eliminating the condition offensive to the statute. There are such means.

[*Stretch-Out of Plan*]

As previously stated, in its memorandum of September 26, 1958 the Government suggested a stretch-out of its plan over a twenty-year period as against a ten-year period. This would not change the tax impact on the individual shareholders of du Pont, but simply spread it out over a longer period. Nor would this change the tax impact on Christiana and Delaware and their stockholders of sales by the trustee. It would simply spread out the impact over a longer period.

[*Single Distribution*]

Also, the Government memorandum made the suggestion that du Pont might make a single distribution of the 63,000,000 shares of General Motors and pointed out that, under present tax laws, the total value of the General Motors shares would not be taxed to the recipients as a dividend, but only that portion representing the accumulated earnings and surplus of du Pont. Schedules were introduced by du Pont showing the tax impact of such a distribution on individuals and trust beneficiaries, and assuming a market value of $45 per share for General Motors stock. The total figure was $588,044,000. These figures would not indicate that a single distribution by du Pont would eliminate the severe tax impact of the Government proposed decree.

[*Economic Consequences of Proposal*]

The economic consequences of the Government proposed decree to be considered are the effect on the market price of General Motors common stock, on the market price of du Pont common stock, and on

* It was testified by Dr. Jacoby (whose testimony is discussed below) that as an economic matter the tax was a capital levy and that this penalty would not fall equally on shareholders of du Pont according to their holdings of shares of du Pont, but the penalty would be different on each, depending on the tax brackets of the various stockholders due to other income.

General Motors Corporation itself, that is, its ability to finance its operations during the ten-year period of the Government decree.

If there is a drastic decline in the market value of General Motors stock, this will affect the stockholders of du Pont who sell their General Motors shares to raise money to pay taxes, Christiana and Delaware and their stockholders through losses on the sale of their General Motors shares by the trustee, and existing stockholders of General Motors who feel forced to sell or who have General Motors pledged as collateral, or who have General Motors in portfolios which must be carried in their reports at market value.

If there is a drastic decline in the market value of du Pont common stock, this will have an impact on the stockholders of du Pont, both individuals and trustees, who feel forced to sell to avoid the problems and the tax consequences of constant receipt of General Motors shares as a dividend. It will also have a direct effect on Christiana and Delaware and their stockholders, and on other stockholders of du Pont who have the stock pledged or in portfolios which must be marked to the market.

If there is a drastic decline in the price of General Motors common stock, this could interfere with the ability of General Motors to do financing during the ten-year period of the Government proposed decree.

[*Government Evidence—Types*]

The Government called witnesses to give three types of testimony on this phase of the case designed to show that the Government's proposed decree would have little impact on the market prices of General Motors stock and du Pont stock.

One type of evidence was to the effect that there was considerable investment money coming into the market regularly. (The other two types which will be discussed later were (a) testimony of analysts and statisticians, and (b) testimony regarding offerings of securities of various types which had been made in recent years.) But there was no convincing evidence in this category that any substantial portion of this investment money would be directed to buying General Motors stock at the true value of the stock, if the Government decree were in effect.

[*Investment Money Market*]

Mr. John J. Scanlon, Treasurer of American Telephone & Telegraph Company, testified that the Bell System pension plans expected to invest $15,000,000 to $20,000,000 a year in equity securities, but that the trustee of the trusts had a policy of diversification, so that only a small amount of this would go into any one common stock.

Mr. Edward G. Kinloch, Manager of the Trust Investments Operations Department of General Electric Company, testified that 25% to 30% of the $75,000,000 to $80,000,000 invested annually by its pension trusts would go into equities, but only 4% of the money for equities would go into automotive stocks, and less than half of this into General Motors, even under present conditions. This would amount to less than $400,000 per annum. Mr. Kinloch also said that, if the trustee sales called for by the Government plan were to take place, he would be somewhat cautious and whether he would make any purchases of General Motors stock would depend on market conditions.

Dr. James J. O'Leary, Director of Economic Research of the Life Insurance Association of America, said that, according to a study he had made for a committee of the Senate, twenty-five life insurance companies, owning 85% of the common stocks held by insurance companies, made net purchases between January, 1953 and September, 1955 of only $7,700,000 of common stocks. He testified that the insurance companies had to diversify their common stock investments and, therefore, could put no great amount in any one stock. He also said that, assuming the Government proposal were put into effect, the insurance companies would be inclined to buy General Motors if that stock declined in price sufficiently.

Mr. Harold S. Oberg, Research Director of the National Association of Investment Companies, testified these companies made net purchases of over $1,000,000,000 in common stocks in 1958, but he did not know whether they purchased General Motors stock, and said they all had a policy of diversification so as to limit investments in any single stock.

Mr. Dudley A. Hall, of the Boston Management Research Company, testified as to investment of college endowment funds in common stocks, including Christiana, du Pont and General Motors, as shown by

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surveys of his Company. The surveys showed that the amount invested by colleges in these three companies' stocks had decreased substantially between June 30, 1957 and June 30, 1958.

Mr. George E. Johnston, Chairman of the Board of Equity Annuity Insurance Company, testified that although life insurance companies had over $101 billion dollars in total assets, they had invested less than 4% in common stocks. He said that the sale of variable annuities by life insurance companies might expand, but that depended on a pending case in the Supreme Court and on legislation;* and that, while funds behind variable annuities would be invested in common stocks, there would be a policy of diversification as between industries and as between companies within an industry.

Mr. Clarence Stanley, Vice President and Pension Coordinator of General Motors Corporation, testified that the General Motors pension trusts held only $5,330,000 of General Motors common stock, representing .68% of the combined assets of the trusts.

Mr. Vito Natrella, Chief Economist of the Trading Exchanges for the Securities and Exchange Commission, testified as to the large amounts of stocks in the hands of various types of investors. He said that his figures did not show that a particular institution would buy any particular stock at any particular time.

Dr. Roger F. Murray, Professor of Finance at the Columbia University Graduate School of Business, testified that pension funds would regularly invest 1⅔% of the money invested in equities in common stock of General Motors. However, this testimony must be considered against that of an active administrator of large pension funds, Mr. Kingsley Kunhardt, Vice President in charge of the Investment Department of Guaranty Trust Company of New York, administering 217 pension funds with assets of $2,000,000,000. Mr. Kunhardt, who testified for du Pont, said that Guaranty Trust Company would not put any fixed portion of pension funds into General Motors stock. He testified that if the Government plan were put into effect the trust company would be a buyer of General Motors stock for pension trusts only at a greatly reduced price.

Mr. Carrol Shanks, President of Prudential Life Insurance Company, testified that his company would like to get into the variable annuities business and was supporting legislation to that end, but that it would be fairly slow going and the money that would go into variable annuities would be diverted from other types of savings, among them direct stock purchases in the market.

Mr. Jack Morgan, Comptroller of the Savings and Profit Sharing Pension Fund for Sears, Roebuck & Co., said this fund now has assets of over $1,000,000,000, 10.6% of which are in common stocks but that the fund owned no General Motors stock.

Mr. Edward T. McCormick, President of the American Stock Exchange, testified that institutional investors should grow to be a very substantial factor in the market.

In its brief of April 29, 1959 and accompanying proposed findings, the Government contends that, if General Motors purchased stock for its bonus plan, savings plan and stock option plan from the trustee for Christiana and Delaware, this would absorb all the shares offered by the trustee and would not disturb the market. The Government points out that the General Motors stock purchased in recent years for the bonus plan has amounted to 1,000,000 shares per annum, that the trustee for the Savings Plan has purchased in the last three years about 1,000,000 shares of newly issued General Motors stock per annum, and that there are outstanding options under the option plan to purchase 368,859 shares, first exercisable September 18, 1959.

The buying of stock in the market for the bonus plan is already a factor in the market and to withdraw it from the market to shift it to purchases from the trustee for Christiana and Delaware would not add any new demand to offset the increased supply of General Motors stock which would be offered by the trustee and others as the result of the Government proposal.

As to purchases of General Motors stock for the savings plan, the Board of Directors of General Motors has chosen so far to have the trustee for the plan purchase newly

* Since this testimony the Supreme Court of the United States has decided the case referred to adversely to the insurance companies, holding that sale of variable annuities would have to be registered with the S. E. C., under the Securities Act of 1933 and under the Investment Company Act of 1940, *S. E. C. v. Variable Annuity Life Ins. Co.*, 359 U. S. 65, March 23, 1959.

issued shares from General Motors, which is a continuing source of capital funds to the Company. The Court doubts the propriety of attempting to dictate the financial policy of General Motors by reason of the finding of a violation of Section 7 of the Clayton Act by du Pont.

The amount of stock for which options are outstanding is too insignificant in relation to the problem here to warrant discussion.

This type of evidence does not have any substantial probative force to indicate that any demand for General Motors stock would spring up to counterbalance the increased supply in the market which would be created directly and indirectly by the Government's proposed decree.

[*Testimony of Statisticians and Analysts*]

The second type of evidence adduced by the Government relating to the impact of the Government proposed decree on the market prices of General Motors and du Pont stocks was the testimony of statisticians and analysts in the academic or professional field. These men were Dr. Roger Murray of Columbia, previously referred to, Dr. Erwin Friend, Professor of Economics and Finance at the University of Pennsylvania and Mr. Alfred Boni, the author of the study filed with the Government memorandum of September 26, 1958. In rebuttal Mr. Paul L. Howell, an economist, also testified for the Government.

These men each testified that they had never been in the underwriting business and had no experience in the marketing of stocks or other securities. They placed their reliance on charts and statistics. But there were no charts and statistics relating to any situation remotely approaching the forced sale of 2,000,000 shares of General Motors stock every year for ten years, accompanied by other sales for tax purposes by recipients of General Motors stock as a dividend, and other sales by existing holders of General Motors stock. Nor did these charts or statistics encompass any market situation such as that relating to the du Pont stock under the Government plan where many present holders would decide to sell and take a capital gain rather than incur the ordinary income taxes on the General Motors stock to be distributed to them, and any potential individual purchaser of du Pont stock would be faced wtih buying a tax liability if he made the purchase.

Dr. Murray testified that he would defer to the judgment of investment bankers as to the price which the trustee would obtain for the General Motors stock. Dr. Friend agreed that there had never been anything in the past comparable to the sales contemplated by the Government plan. He also testified that an increase in supply in stock of 10% had in the past brought about a decline in price of roughly 5%, that an increase of 20% had been associated with price declines of between 10% and 15%. There was no testimony by Dr. Friend as to the effect of an increase in supply of 30%.

The Government plan provides for an increase in supply of 30%. Du Pont owns about 23% of General Motors outstanding common stock, making the present supply not more than 77% of the outstanding stock. 23%, the increase in supply following distribution by du Pont, is about 30% of the 77%, the existing supply.

Mr. Boni's testimony was devoted principally to asserting that "volume" of transactions in a stock did not have any co-relation to price movements in the stock. The fallacy of this testimony is that volume of transactions is not the same thing as increase in supply without an increase in demand. Furthermore, Mr. Boni's testimony was based solely on the assumption that the sales by the trustee under the Government plan would take place by several brokers to be employed by the trustee in the auction market on the floor of the New York Stock Exchange,* whereas the testimony of all the investment bankers was that the only practical way of making the sales would be in a secondary offering off the floor of a stock exchange by a nationwide syndicate of underwriters, including large underwriting houses not members of the New York Stock Exchange, and with a spread several times the amount of an ordinary stock exchange commission.

* There was testimony from an experienced broker to the effect that an attempt to sell 2,000,000 shares of General Motors on the floor of the New York Stock Exchange through brokers employed by the trustee would so disorganize the market that the specialists would call in floor members of the Board of Governors, and the Board of Governors would stop the sales and recommend that they be made through a secondary distribution off the floor.

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Therefore, this type of testimony adduced by the Government has little or no weight as showing that the Government plan would have little or no impact on the market.

In particular, the Court was not persuaded by the testimony of Mr. Boni or Mr. Howell. The statistical tables from which the former drew his conclusions were prepared in a loose manner which could hardly be said to comply with accepted standards of statistical approach. His demeanor on the stand and his inability to give specific answers to the questions addressed to him left the Court with the conclusion that little or no reliance could be placed on his expert opinion. The opinions which Mr. Howell expressed in the course of the Government's rebuttal were completely unsupported by any evidence that he had studied the issues before the Court. While he stated those opinions freely, in view of their lack of foundation the Court cannot attach any weight to them.

[*Statistics and Testimony—Offerings of Securities*]

The third type of testimony introduced by the Government as to market impact of its plan was statistics and oral testimony relating to offerings of securities which had taken place in the recent past. There were three kinds of offerings referred to, (a) offerings of debt securities, (b) offerings of common stock by corporations to their own stockholders following the issuance of negotiable rights to subscribe to the stockholders at substantial discounts from the current market, and (c) secondary offerings of common stocks by others than the issuing corporations.

From the testimony it is clear that offerings of debt securities, even if convertible into common stock, have little or no relevance to the secondary offering which would have to be made by the trustee under the Government plan.

Also, from the testimony it seems plain that rights offerings by corporations to their own stockholders have little relevance because of the difference in the circumstances. In rights offerings the corporation is free to fix a subscription price substantially below the current market. Then the stockholder receiving the rights can sell the rights. The offering is made to a body of people already interested in the company. Anyone exercising a right can borrow from a bank 75% of the value of the stock, whereas under existing regulations on a secondary offering the purchaser can borrow only 10%. Further, in a rights offering the valuable mechanics of purchasing rights and exercising them and selling the stock so acquired is available to the underwriters, a process known as a "lay-off". This procedure has a stabilizing effect and is very helpful to the success of the operation. However, it is not deemed "stabilization" under present rules and underwriters can purchase such rights without reference to the stringent stabilizing rules of the Securities and Exchange Commission. The "lay-off" procedure is, of course, not available in a secondary offering.

There remains the testimony and statistics regarding large secondary offerings of common stock which have taken place in recent years. None of them is similar to what would take place under the Government plan. Only five (one being a series) need be discussed.

There was a secondary offering of Ford Motor Company common stock at $64.50 per share by a group of underwriters in the amount of about $650,000,000 by the Ford Foundation in 1956. Ford stock was not owned by the public at the time and was not listed on any exchange. Ford was a renowned company with a glamorous reputation. Although the Ford Foundation owned and retained substantially more stock, there was no threat of forced sales of this stock. As Winthrop C. Lenz, Vice President in charge of the Corporation Underwriting Division of Merrill, Lynch, Pierce, Fenner & Smith, Inc., one of the managing underwriters, testified, investors felt that the Foundation would make further sales only under favorable circumstances.

A Government witness, Mr. Ralph C. Sheets, Vice President in charge of sales at Blyth & Co., testified regarding another secondary offering of Ford stock by the Ford Foundation on March 31, 1959. Blyth & Co. was one of the managing underwriters. It was brought out on cross-examination of Mr. Sheets that the market price of Ford stock was substantially less at the time of this secondary offering than the offering price under the offering previously referred to, whereas the industrial stock averages had increased substantially over the same period. It was also developed through Mr. Sheets that the second offering

presented a more difficult selling job although much smaller ($113,000,000 against $650,000,000) than the first and had a larger spread for the underwriters and dealers—$2 a share as against $1.50; $2 being 3.54% of the offering price of $56.50. The second offering of Ford stock was considered successful, as was the first. The second offering was made at a particularly favorable time both from the standpoint of the general stock market and also from the standpoint of the sales and earnings of the Ford Motor Company, which were sharply up in the early part of this year.

There was a secondary offering of 1,278,833 shares of General Motors stock made by the Sloan Foundation in 1956 through a syndicate headed by Morgan, Stanley & Co. at $43.75 per share, and with a spread of $1.35 per share. Both Mr. Sumner B. Emerson, a partner of Morgan, Stanley & Co., and Mr. Lenz of Merrill, Lynch, Pierce, Fenner & Smith, another member of the underwriting group, testified that the offering had a substantial adverse effect on the market price of General Motors. Schroeder Boulton, partner in charge of research of the New York investment house of Baker, Weeks & Co., a Government witness, testified that the Sloan secondary offering had caused a decline in market price and that, if repeated year after year, would have a much greater depressing effect. But, here again in the Sloan secondary offering of General Motors stock, there was no threat of additional forced selling of General Motors stock.

A series of secondary offerings referred to by the Government were the offerings of stock of Aluminium, Ltd., pursuant to a court decree of divestiture entered in 1951. These offerings were much smaller in amount than those involved here and they had a depressing effect on the market for Aluminium stock. Mr. Edward Townsend, Vice President and Director of First Boston Corporation, who managed the underwriting group, testified that the offerings had short-term market effects and that, in one or two of the offerings, they were disappointed with the after-market.

Dr. Friend also testified for the Government regarding the secondary offering of 1,800,000 shares of A. & P. stock at $44.50 per share on March 24, 1959. It was brought out on cross-examination that from some time before the offering was made or known about in the markets to the time of offering, i. e., from January to March 24, 1959, the market price of the A. & P. stock declined 15½% against the Dow Jones industrial average.

In this connection the Court would like to point out that the Government witnesses repeatedly referred to the fact that charts showed that the market prices of stock involved in offerings "recovered" after the offering. That is, of course, a small comfort to those stockholders whose stock was sold at the low prices on the offering or who felt compelled to sell on their own volition during the period of the offering. Furthermore, the sellers on the offerings are compelled to lose in addition the cost of the underwriting, i. e., the spread, which is substantial.

There were no other secondary offerings on which evidence was introduced which seem to have any real materiality.*

The circumstances surrounding these secondary offerings are not similar to the circumstances which would surround the execution of the Government proposal. In any event, in most instances the offerings did have a depressing effect on the market price of the stock involved. The second Ford offering is an exception, but the conditions under which it was made were extremely favorable and unlike those which would accompany the execution of the Government proposal.

The Court is of the opinion that this evidence gives no assurance that the execution of the Government proposal would not have a serious depressing effect on the market value of du Pont and General Motors stock and would not cause serious losses to those who sell such stocks for whatever reason during the period while the decree is being executed. To accept the responsibility of entering a decree such as the Government proposes, the Court must have reasonable assurance that serious adverse economic effects will not result.

This is apart from the impact of the taxes on innocent persons which the proposed Government decree would have under the present tax laws. The Government adduced

* The Government has not asked for any findings regarding the Campbell Soup stock offering.

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no evidence as to what the economic impact might be in case the tax laws were amended along the lines of S. 200, making distributions exempt from taxation. Under such circumstances there would still be the impact of the forced sales by the trustee under the Government plan and the heavy taxes on Christiana and Delaware.

The Government called no witness who had responsibility in his business to invest large funds or to market large blocks of stock who testified that the Government plan would not have a serious market impact on the market for the stocks of General Motors and du Pont. Men of that type who were called by the Government either testified to the contrary on cross-examination or testified on other points. For example, the Government presented as witnesses Mr. Shanks, President of the Prudential Life Insurance Company, Mr. Townsend, of First Boston Corporation, Mr. Sheets, of Blyth & Company, and Mr. Weiss, of Bache & Company. All of these men had extensive practical experience in buying and selling securities and it is significant that the Government asked none of them to testify as to their opinion of the market consequences of the judgment proposed by the Government.

In contrast to the type of evidence introduced by the Government on this phase of the case, the defendants introduced the testimony of men charged with the responsibility of investing large funds and men of wide experience in the business of marketing large blocks of stocks and other securities. The defendants also called one economist.

[*Defendants' Evidence*]

The defendants introduced the testimony of Mr. Sumner B. Emerson, since 1936 a partner or officer in Morgan, Stanley & Co., one of the leading underwriting firms in the country. Mr. Emerson is in charge of handling underwritings of stock offerings and other securities underwritten and sold by his firm. His testimony was that the probable impact of the adoption and execution of the Government plan on the market price of the common stock of General Motors would be in the area of 20% to 25% below what the stock would sell for in the absence of such a plan. In making this estimate he took into consideration the periodic forced sales by the trustee and also other selling which would take place, particularly by stockholders of du Pont who received General Motors shares and had to pay ordinary income taxes on the value thereof at the time of receipt. He also thought that the figure of 20% to 25% might be exceeded in periods when the stock market was thin or tending downward.

Mr. Emerson assumed that sales by the trustee would be made through experienced underwriters, and sales by others would be scattered and disorganized. Those selling through underwriters would lose not only the reduction in market price but also the expense of the offering, i. e., the spread, estimated at $1.50 per share upward.

Mr. Emerson said that the offering and the situation surrounding it were without precedent, and that the market impact would be greater than that of any other offering of which he knew. Emerson further testified that it would not be feasible for the trustee to make the sales in the first 10 years under the limitations in the Government proposal. In other words, the trustee would not receive the fair value of the stock.

This witness also held the opinion that the adoption of the Government plan would have a serious impact on the market price of the common stock of the du Pont Company. He said there would be very heavy selling because of the heavy tax on the receipt by such stockholders of General Motors shares. For this purpose Emerson used a table he had had prepared showing the tax advantage of selling the du Pont stock and paying a capital gain tax, as against receiving the General Motors stock as a dividend on du Pont stock and paying ordinary income tax on its value. He estimated that 4,000,000 shares of du Pont would be offered for sale. He contrasted with this the annual volume in the last 2 years on the stock exchange, which was approximately 800,000 shares.

Emerson pointed out that there would not only be no increase in demand for du Pont stock but a decrease in demand, because individuals buying du Pont would be buying into a tax problem and trustees buying du Pont would be buying into a tax problem and an allocation problem. He said there would be some increased buying by corporations and institutions if the price decreased sufficiently.

Mr. Emerson estimated that, if the Government proposed decree became effective, du Pont stock would sell at least 25% under what it would otherwise sell for, and the decrease might be much larger. He said that this reduction in market value would be over and above the decrease in the market value of the stock of du Pont due to the distribution of the General Motors stock.

Mr. Emerson was also asked about the suggestion in the Government memorandum of September 26 that the General Motors stock be distributed by du Pont in lieu of cash dividends. He was of the opinion that this would increase the impact on the market price of General Motors because more General Motors would be sold by stockholders of du Pont who would otherwise have no cash income from du Pont. He estimated the impact in this case would be from 25% to 30%. He said it would increase the impact on the market price of du Pont stock, for people dislike a stock that pays no cash dividends. He estimated the impact under such a plan would be between 30% and 35%.*

Emerson was asked about the further suggestion in the Government's Reply Memorandum that the period for distribution and selling be stretched out to twenty years instead of ten. He thought the impact on General Motors stock would be less than under the ten-year plan, that is, 12% to 15%. He also estimated that such a plan would have an impact on the market value of du Pont stock of at least 15%.

Tabulations were introduced through Mr. Emerson showing the loss to Christiana which would result from the execution of the Government proposed decree, assuming various sales prices received by Christiana for General Motors stock. Taking prices estimated by Emerson, that is, after a market impact of 20% and 25%, the loss from the then current market value of $46 per share, including cost of selling and taxes, was $332,429,000 and $362,412,000, respectively. A similar tabulation for Delaware, but including additional loss on the asset value of Christiana shares owned by Delaware, was $140,870,000 and $153,566,000, respectively. The combined realized losses were shown on these tables for the two companies at $364,694,000 and $397,578,000, respectively. These figures are not the sum of the separate figures for the two companies but eliminate duplication which would occur from simply combining such figures.

To present the effect of the Government plan on Christiana and Delaware, further tabulations were introduced through Mr. Emerson giving pro forma income of Christiana based on reinvestment of the net proceeds of the sales of General Motors shares at a yield equal to the current yield on the Dow Jones industrials and contrasting that pro forma income with actual income for 1958. This showed a decrease of 26.8%. The same figure for Delaware showed a decrease of 26.6%. Similar tables were introduced showing the effect on the income of Christiana and Delaware in case a bill such as S. 200 were enacted. The decrease would not be dissimilar. It was 25% in the case of Christiana and 24.6% in the case of Delaware.

Not only do compilations from the lists of stockholders of Christiana, du Pont and General Motors show that many charitable and educational institutions own shares in these companies, but there are large holdings of this type which do not appear from the stock lists. The following information was introduced in evidence regarding the holdings of Harvard University, Massachusetts Institute of Technology, the University of Chicago, and, in the case of Christiana, by a group of colleges and universities as of recent dates:

Harvard (including Harvard Yenching Institute): 526 shares Christiana; 6,584 shares du Pont; 84,189 shares General Motors.

M. I. T.: 360 shares Christiana; 5,335 shares du Pont; 206,831 shares General Motors. These M. I. T. investments had a total market value as of December 31, 1958,

* If this sort of plan were adopted the du Pont Company would accumulate a vast amount of cash and there would be a problem of how to reinvest it. Mr. R. Russell Pippin, Treasurer of du Pont, testified that this would result in a cash accumulation of up to $2,835,000,000. He said that the company would have no use for this cash to fulfill its capital requirements in the chemical industry. He said the company had no skills to go into other lines of business. He thought that it would be unwise to turn part of the company into a huge investment trust. He compared this sum of $2,835,000,000 with the size of the largest investment trust in the country, i.e., Massachusetts Investors Trust, with assets of about $1,500,000,000. He also spoke of legal problems which might arise if du Pont acquired other companies or their securities.

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of $16,454,491, representing 10.88% of M. I. T.'s investment portfolio (not including real estate). The market price for Christiana shares used in this computation was $14,100. Christiana stock is not listed on the New York Stock Exchange but is traded in the over-the-counter market.

University of Chicago: 150 shares Christiana; 4,460 shares du Pont; 21,815 shares General Motors.

A group of 14 tax-exempt institutions (excluding the University of Chicago's 150 shares) held 1,519 shares of Christiana on June 30, 1958. These would have a market value of $21,417,900, using the per share figure just stated. The total holdings in Christiana including Harvard, M. I. T. and Chicago have a market value of $36,025,500.

Mr. Dallstream, amicus curiae, questioned Mr. Emerson on features of his voluntary takedown proposal. Mr. Emerson was of the opinion that the present du Pont common stock would sell at a slightly lower market value than a combination of a du Pont Special Common and an allocable number of shares of General Motors. Mr. Emerson said there would be buying by arbitragers. He testified that certain classes of shareholders would find the takedown attractive, assuming the tax effects contended for by Dallstream—tax-free institutions, corporate stockholders, investment trusts and foreign holders. An arbitrager, David T. Skall, Vice President of A. G. Becker & Company, Chicago investment bankers, testified that the new du Pont Special Common would be more desirable than the old common because it would not be under the cloud of a possible future compulsory divestiture of General Motors stock by du Pont. He said that a corporate arbitrager would have a particular advantage under the tax laws in purchasing present du Pont common, taking down General Motors and selling the General Motors and the special du Pont.

Another experienced underwriter who testified for the defendants was Mr. Winthrop C. Lenz, a Vice President of Merrill, Lynch, Pierce, Fenner and Smith, Incorporated, and a partner of the predecessor partnership, in charge of the corporate buying department of the underwriting division. Merrill, Lynch is the largest brokerage firm in the country, the largest commodity firm, and one of the ten largest underwriting firms, with 126 offices in 108 cities. There were 71 partners prior to incorporation. The firm has 6,500 employees. It does 14.7% of the round-lot volume and 21.1% of the odd-lot volume on the New York Stock Exchange, and has between 325,000 and 350,000 active accounts. Lenz' firm was one of the managing underwriters of the Ford Motor Car secondaries.

He testified that, if the Government plan were put into effect, there would be a substantially adverse impact on the market price of General Motors common stock. Lenz' opinion was that, if the Government proposal were put into effect, General Motors stock would sell 20% to 30% below where it would otherwise sell, but without taking into account additional selling by holders of the existing 218,000,000 shares in the hands of the public, which he thought would be substantial. Lenz emphasized the problem of the selling which would be done by the existing holders of such shares. He pointed out that there were hundreds of thousands of such shareholders who would be very badly hurt, in his judgment, by the proposal if it were put into effect. He said his firm alone has on its books in its name for some 25,000 individuals 2,600,000 shares of General Motors and that, if the Government proposal were put into effect, the firm would have to inform the holders, would then be asked by them what they should do, and the firm would have to tell such holders that they should sell. Lenz also pointed out that, if 1% of the General Motors stock other than that owned by du Pont were sold, there would be another 2,000,000 shares on the market and, if 2% were sold, another 4,000,000 shares, and it would all be disorganized selling. Lenz testified that it would not be at all practicable to organize such stockholders for a single secondary offering as had been suggested by the Government witness, Dr. Friend. There were too many of them; such a secondary would be too expensive; and most of them would want to race into the market ahead of the others. Lenz said that the problem of selling by the existing General Motors shareholders may be the most difficult problem involved in the Government proposal.

Lenz thought that, if the plan were extended so that there was a 20-year period instead of a 10-year period, the impact on the same basis would be from 15% to 20%.

He was also asked to make an assumption that du Pont pay out the General Motors stock in lieu of its regular cash dividend. Lenz thought this would be worse and that the impact would be a decrease in market price of General Motors of between 25% and 35%. Lenz was asked what the effect would be if du Pont were required to make a single dividend of the General Motors stock. He thought that there would be many more sales of General Motors stock and a still greater depressing effect on the market.

Lenz thought that the Government plan would cause the sale of from 5,000,000 to 6,000,000 shares of du Pont. He said that, even if that amount were cut in half, it would still be difficult to dispose of such shares. He thought the market impact would be a decrease of around 25% to 30%. He could not see who would buy du Pont stock under such conditions, except for tax-free institutions and corporations which might buy at bargain prices.

Lenz estimated that the spread which the trustee for Christiana and Delaware would have to pay underwriters would be from $1.80 to $2 per share of General Motors, which would be a loss to Christiana and Delaware on top of the reduction in market price due to the Government proposal. Lenz said, if the trustee tried to make a sale and then withdrew it, it would be very difficult to revive buyer interest. It would appear that sales by the trustee would probably have to be registered with the Securities and Exchange Commission under the Securities Act of 1933. Lenz did not think there would be too much difference in selling, whether the offering were registered or not, except that there would be less flexibility if registered.*

Lenz agreed with Emerson that the trustee would never realize a price, in the words of the Government proposal, "sufficiently high to reflect the fair value and true worth of the stock."

Lenz also gave his opinion as to the effect of the Government plan in case a bill such as S. 200 passed and the du Pont Company made one distribution of the 63,000,000 shares of General Motors, but where the trustee still sold shares going to Christiana and Delaware in ten equal annual installments. He estimated a 10% to 15% decrease in market price.

Mr. James R. Forgan, a partner of Glore, Forgan and Company, an investment banking firm in New York and Chicago, testified for General Motors. He is in charge of the operations of the New York office and has been in the business of marketing securities for nearly thirty years. He testified that, if the decree proposed by the Government were to be entered, the market for General Motors stock would be drastically depressed. He said that, in addition to the 2,000,000 shares a year to be sold by the trustee, another 1,000,000 to 1,500,000 shares a year would be sold by du Pont stockholders receiving General Motors stock and there would be further sales by existing General Motors stockholders.

Mr. Forgan testified there was no precedent for the situation which would be created by the Government proposal. He said it would be a unique situation in investment history. His opinion was that the trustee stock could only be sold under these conditions at a 30% discount from the existing market and that the stock would fall to that price immediately upon the Government plan becoming effective.

The defendants introduced the testimony of Mr. Ralph Lowell, President of The Boston Safe Deposit and Trust Company and a member of the Finance Committee of John Hancock Mutual Life Insurance Company. The Trust Company has 4,400 trust and agency accounts with over $1,187,000,000 of assets. These trusts hold 467,357 shares of General Motors and 89,100 shares of du Pont. The Trust Company has many small accounts.

Mr. Lowell testified that, in case the Government plan were put into effect, the Trust Company would sell the du Pont stock held in most personal trusts because the Massachusetts law would require a trustee to treat General Motors stock re-

* After the record was closed, the Government put before the Court correspondence between the Antitrust Division and a member of the staff of the Securities and Exchange Commission regarding methods of sale by the trustee. The correspondence was fragmentary. There were indications that conversations in addition to the correspondence must have taken place. The correspondence should not be given serious consideration under such circumstances. However, as indicated above, registration is not a very important factor in appraising the situation.

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ceived as a dividend as income, whereas the Trust Company would consider the distribution as principal. He said the Trust Company would do the same thing in the case of charitable trusts for a similar reason. He said the Trust Company had taken such action in the case of stock dividends by the Standard Oil Company of New Jersey. He said that extension of the period of the plan from 10 to 20 years would not change the action of the Trust Company.

On this phase of the case Mr. David M. Kennedy, Chairman of the Board of the Continental Illinois Bank and Trust Company of Chicago and Chairman of its Trust Investment Committee, testified that the Trust Company has been a net seller of du Pont stock from the date of the Supreme Court decision, June 4, 1957, to February 19, 1959, and that most of the selling was done since the announcement of the Government proposal. He said that the net sales amounted to 16,715 shares. Mr. Kennedy also testified that there would be serious trust problems in connection with the receipt of General Motors stock as a dividend and this would cause protracted litigation. He said the Trust Company had held in 635 trusts 105,855 shares of du Pont stock, with a market value, at $217 a share, of $22,970,535, and that the Company held 845,323 shares of General Motors common in 1,221 trusts, with a market value, at $46 per share, of $38,884.858.

Mr. Beacom, Vice President in charge of the Trust Department of the First National Bank of Chicago, also testified on this phase of the case. He testified that the Bank held in 1,822 trusts 853,650 shares of General Motors of a market value, at $46 per share, of $39,267,900. There were 133,490 share of du Pont in 946 trusts with a total market value, at $230 a share, of $30,702,700. Mr. Beacom testified that the Government plan would adversely affect the value of both du Pont and General Motors stock. He emphasized that there would be no offset in demand against the additional supply which would go on the market. He thought there would be an avalanche of offerings of du Pont stock from trust institutions throughout the country. He said the Bank had come to the conclusion that the Government proposed decree would cost the accounts to which General Motors stock might be distributed as much as $10,000,000 to $12,000,000. Mr. Beacom also stressed the problems of allocation between principal and income in the trusts of the General Motors stock received as a dividend.

In rebuttal the Government called Mr. George B. Rogers, a lawyer with the First National Bank of Chicago, to bring out that there had been allocations to trusts of dividends in stock of other companies without difficulty in the past. But the size of the distributions was small compared to the distribution proposed under the Government decree and this evidence does not detract from the testimony of Messrs. Lowell, Kennedy and Beacom to the effect that there would probably be allocation difficulties for trustees and litigation with beneficiaries if the Government decree were put into effect.

The defendants introduced the testimony of two men whose business was the investment of insurance company funds. Mr. Charles F. Caley, Jr., Assistant Treasurer of Aetna Life Insurance Company and affiliated companies, in charge of making the original recommendations on the companies' investments in common stocks, testified. The Aetna Life Insurance Company has assets of $3,550,000,000, making it about seventh in the life insurance field. The affiliated companies have assets of $616,000,000, which make them fourth or fifth in the fire and casualty insurance business. The companies have about $240,000,000 in common stocks. They own 27,600 shares of du Pont and 50,205 shares of General Motors. Caley was of the opinion that the Government plan, if put into effect, would substantially lower the price of General Motors stock. He said his company would not buy in the early part of the 10-year period, except at "an absurdly low price." He said he did now know how far down the price of du Pont would go, and he would take the advice of investment bankers and brokers on that. Caley was asked what the situation would be if du Pont paid out the General Motors stock in lieu of cash dividends. He though the investment problem of the accumulated cash would be difficult and could easily cause trouble for du Pont with the Department of Justice.

Mr. John V. Herd was the other insurance executive who testified. He is Chief Executive Officer of the America Fore Insurance Group and a director of the America Fore Loyalty Group, a total of twelve companies in the fire and casualty insurance business, with assets in excess of

$1,500,000,000. Herd is also a director of American Telephone and Telegraph Company, the Dominick Fund, an investment company, and the Hanover Bank, a New York City bank with a large trust department. He is a member of the Trust Committee of the Bank. The America Fore Group have $820,000,000 invested in common stocks, which Herd said was by far the largest investment in common stocks under any one insurance company management. The companies held 249,500 shares of General Motors as of the year-end, with the then market value of $12,350,250. The corresponding holding of du Pont was 123,300 shares, with a market value of $26,355.375. Herd testified that if the Government plan were adopted the market value of General Motors stock would be depressed, and also that his company would sell some of its General Motors stock. Herd said that the Government plan would take the blue chip luster from the General Motors stock.

Another financial expert called by the defendants was Mr. William B. Moses, Jr., a trustee of Massachusetts Investors Trust and a director of Massachusetts Growth Stock Fund, who administers the investment research department of both funds. Massachusetts Investors Trust is the largest open-end investment company in the country, with approximately 200,000 shareholders and assets of $1,500,000,000, almost entirely in common stocks. The Growth Fund has assets of $250,000,000 invested in common stocks believed to have substantial prospects for growth development. The Growth Stock Fund has about 69,000 stockholders. Moses said that Massachusetts Investors Trust owns 700,000 shares of General Motors with a market value of approximately $32,000,000, and that it had 112,000 shares of du Pont, with a value of about $25,000,000. He said the Growth Stock Fund held no General Motors, but had 17,000 shares of du Pont.

Moses held the view that the Government plan would depress the price of General Motors stock. He said he would recommend that the Massachusetts Investors Trust purchase additional General Motors in the price area of $35 or $40 a share, compared to the then current price of $46 per share. Moses thought the impact of sales by du Pont stockholders receiving General Motors shares would be greater than the impact of the trustee's sales. He thought the trustee would have to sell at a bargain level. Moses thought the Government plan would depress the price of du Pont stock, because stockholders would sell to avoid the tax, and that there would be very few wanting to buy the stock. He said he would recommend that his companies purchase du Pont if the price of the stock receded to about $160 a share, the price at the time of the hearing being about $230 a share.

Defendants called one economist not in the business of investing funds or marketing securities. He was Dr. Neil H. Jacoby, Dean of the Graduate School of Business Administration at the University of California. Dr. Jacoby served on the President's Council of Economic Advisors from 1953 to 1955. He was also American advisor to the Government of India, and the United States representative on the Economic and Social Council of the United Nations. Dr. Jacoby testified on the basis of the economic factors which he found to be relevant that the Government plan would reduce the value of du Pont stock. He said that, if du Pont paid out General Motors stock in lieu of cash dividends, the consequences would be even more severe. He also testified that such a policy might well create other serious problems as to the ability of du Pont to invest the accumulated cash profitably and legally. The resulting problem in his opinion would be not only that of the du Pont management but also a concern of Government officials charged with enforcing the antitrust laws.

Dr. Jacoby also testified that adoption of the Government plan would materially affect the value of General Motors stock because of the substantial increase in supply without any compensating increase in demand.

Dr. Jacoby did not attempt to assess the stock market reactions that might influence the market prices of du Pont and General Motors stock. He recognized that such factors might serve to accentuate the effects which purely economic factors would have on the value of du Pont and General Motors stock. He also emphasized that, if unfavorable economic conditions should occur during the period covered by the Government plan, the economic consequences of the Government plan could be appreciably greater. He noted that unfavorable conditions of the kind described above had occurred in the past 10 years.

Mr. Moses, of Massachusetts Investors Trust, testified that General Motors had raised $700,000,000 through new financing during the past ten years and that the prospect is that General Motors would need

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still more money during the next ten years. He said that the Government proposal would hamper General Motors in its effort to raise money through the sale of common stock.* Emerson expressed the opinion that it would be a very difficult operation for General Motors to finance through the issuance of common stock during the period the Government decree was in effect. Lenz testified that the Government plan would make financing by General Motors through sale of its stock highly uneconomic and very difficult of accomplishment. Forgan held the view that, if the Government plan were in effect, the price at which General Motors could do financing through the sale of common stock would be so low that the Company would be ill advised to use that form of financing. He would advise General Motors against such an operation. He doubted whether an underwriting group could be formed under such circumstances. Jacoby thought the plan would handicap General Motors in raising equity capital.

While there is no evidence that the Government proposal would make it difficult for General Motors to do debt financing, the Government's witness, Mr. Shanks, President of Prudential Life Insurance Company, testified that a company could not do continuous debt financing without doing some equity financing as well and that the Government plan would pretty well prevent General Motors from equity financing.

Inability of General Motors to do equity financing might have a serious adverse effect on General Motors raising the capital needed to maintain its position in the industry.

The foregoing are economic effects the risk of which cannot be ignored in considering the desirability of the forced distribution and forced sale features of the Government proposal.

[*Voting Control of General Motors*]

In considering the type of decree which should be entered, evidence should be considered as to any possible voting control of General Motors by corporations or individuals affiliated with du Pont which might result from the decree.

No testimony was introduced in the relief hearings on this branch of the case. Instead, tabulations of various stockholdings in Delaware, Christiana, du Pont and General Motors and of du Pont family relationships were introduced. Such other evidence as there is on the subject is contained in the record of the original trial.

[*Votes—"Pass Through" Plan*]

The contentions of the Government regarding potential control of General Motors through the votes inhering in its common stock can most conveniently be discussed against the background of the du Pont plan. Under the du Pont plan the votes on the shares of General Motors stock owned by du Pont are passed through pro rata to the stockholders of du Pont, and the votes going to Christiana and Delaware are passed through successively to their ultimate stockholders. Although the du Pont plan does not provide for Christiana passing through the votes on the 535,500 shares of General Motors held by it, the discussion below assumes that such votes are passed through.

[*Government Contention—Groupings*]

The contention of the Government is that the General Motors stock allocable to Christiana, Delaware and the stockholders of Delaware should be sold because otherwise it can be assumed that certain groups of stockholders of du Pont, Christiana and Delaware would act in concert in exercising the votes on General Motors stock passed through to them. In the Government's memorandum of September 26, 1958, the contention was that individuals who were stockholders of Delaware would control General Motors as a group by use of the votes they would receive from du Pont, from Christiana and from Delaware under the du Pont plan, when such votes were added to the votes on their directly owned General Motors shares. From the evidence adduced at the trial it appears that the vote on approximately 1.8% of General Motors stock would come in the aggregate to the stockholders of Delaware (other than charities) in the event of the pass through of the votes, including the vote on directly held General Motors stock. In addition, the personal foundations directly related to this group, namely, Longwood Foundation, Inc., and the Carpenter Foundation, Inc., would

* Mr. Moses also held the view that a deterioration in the market price of General Motors stock would make it difficult for other automobile companies to do any equity financing, for their stock would have to compete with the price of General Motors stock at the time.

exercise voting rights on somewhat in excess of 1,000,000 shares of the General Motors stock. Adding the two together, the resulting votes would represent slightly over 2% of the outstanding General Motors stock.

In its brief of April 29, 1959, and accompanying proposed findings, the Government contends that additional individuals, each having the name du Pont as some part of his name, should also be grouped with the stockholders of Delaware, and that certain corporations in which these individuals, and also stockholders of Delaware, own stock, or on whose boards they sit, should be placed in the group. The contention is that the votes which all these 65 persons now have and would receive on a pass-through would amount to about 8% of the total General Motors vote and that this is a controlling vote. There was no evidence adduced at the hearings as to the basis for the grouping other than statements of relationships, many of which are very remote, and statements of financial interests in companies such as the old 1899 du Pont Corporation.

To determine whether there is any basis for the groupings contended for by the Government, the genesis of the present-day stock interests of members of the "du Pont family" in du Pont, Christiana and Delaware, as shown by the record on the original trial, should be analyzed. The term "du Pont family," as now used by the Government, includes all lineal descendants (and their spouses) of Pierre S. du Pont de Nemours, a great-great-grandfather of the Pierre S. du Pont, who was a defendant in this case. However, as set forth in paragraph 7 of the amended complaint, the Government did not thereafter claim in the original trial a family grouping beyond the eight brothers and sisters of the defendant, Pierre S. du Pont, and their spouses and descendants.

It would seem to the Court that, regardless of whether there is basis for the latter grouping, the history of the Companies shows that there is no basis for combining in any group the remote relations consisting of the people first described, i. e., descendants of Pierre S. du Pont de Nemours, merely by reason of such descent, or persons simply because they had a financial interest in the old du Pont Company of 1899.

[*Relevant History*]

The relevant history starts in 1899 when the du Pont enterprise was first incorporated. The stockholders were individuals with the name du Pont although not in the families of the defendant Pierre S. du Pont or his eight brothers and sisters.

In 1902 the assets of the 1899 Corporation were sold out and were acquired by three cousins, two of whom had not theretofore been interested in the business, T. Coleman du Pont and Pierre S. du Pont, the new investors, and Alfred I. du Pont. These men formed a new corporation to which the business was transferred. The bulk of the stock, 72%, was acquired 36% by T. Coleman du Pont, 18% by Pierre S. du Pont, and 18% by Alfred I. du Pont. Following this sellout of the 1899 Company there was no basis for grouping its stockholders with defendant Pierre S. du Pont or his brothers and sisters, except for T. Coleman du Pont and Alfred I. du Pont.

This situation broke up in 1915 when the defendant, Pierre S. du Pont, and some of his brothers and brothers-in-law and certain associates formed another corporation which acquired the stock of T. Coleman du Pont. This corporation was the predecessor of Christiana. Substantially all of the du Pont stock now held by Christiana, about 27%, traces back to this transaction. Pierre S. du Pont, with his brothers and brothers-in-law, held a substantial majority of the stock of Christiana.

Following this transaction, which eliminated T. Coleman du Pont from the situation, there was a protracted and bitter litigation between the defendant, Pierre S. du Pont, and his cousin, Alfred I. du Pont. The defendant Pierre ultimately won out and Alfred I. du Pont then retired from any active participation in the affairs of the du Pont Company. Consequently, the Court is of the opinion that there is no basis for grouping relatives of Alfred I. du Pont or T. Coleman du Pont with the defendant Pierre S. du Pont and his brothers and sisters and their families.

The origin of Delaware traces to a transaction in 1924 in which the defendant Pierre S. du Pont conveyed to Delaware a substantial portion of his holdings in Christiana and du Pont and in consideration therefor received a substantial annuity for himself and his wife. The stock of Dela-

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ware was initially purchased in eight equal blocks by the families of his eight brothers and sisters. All of the Christiana and du Pont stock now held by Delaware was acquired in this transaction. As a result of this transaction and subsequent transactions, the stock of Christiana which was initially held in most part by defendant Pierre S. du Pont and the families of his brothers and sisters is now held as follows: 49,000 shares, about one-third, by Delaware, 24,453 shares by individuals who are stockholders of Delaware, and the balance by approximately 4,000 stockholders. This Christiana stock is actively traded in the over-the-counter market. Delaware holds, in addition to the 49,000 shares of Christiana common, 1,217,920 shares of du Pont common. The Delaware stock is, generally speaking, still held by the families of the brothers and sisters of the defendant Pierre S. du Pont—some 140 persons.

Substantial amounts of this Delaware and Christiana stock are not held directly in these families, but are in trusts for them at the Wilmington Trust Company. The Wilmington Trust Company has close ties with many members of these families through their holdings of Wilmington Trust Company stock and through their creation of these trusts in the Trust Company.

A majority of the officers and directors of both Christiana and Delaware come from such families and many of them are officers and directors of du Pont.

Counsel for Christiana and Delaware contend that there is no justification for assuming that the families of the brothers and sisters of defendant Pierre S. du Pont (who comprise the stockholders of Delaware and some additional individuals) and the Wilmington Trust Company would act in concert to vote their General Motors stock. They point to the fact that an analogous claim was made and disproved as to many of these same people in this case. It was charged that some of these people, through ownership of approximately 17% of the voting stock of U. S. Rubber, influenced the trade relations between du Pont, General Motors and U. S. Rubber, and that charge was disproved.

A corollary question on this branch of the case is whether, even if these people acted in concert, they would have sufficient voting rights under the "pass-through" of the du Pont plan to exercise any real control over General Motors. As set forth above, the stockholders of Delaware, other than public charities, would have a total of slightly in excess of 2% of the total General Motors votes. The tabulations now in evidence show that additional members of the eight families who are not direct or beneficial stockholders of Delaware would have an additional 1,263,806 votes, not including votes connected with trusts at Wilmington Trust Company. If these votes were combined with the votes of Delaware stockholders, the total would be about 2.5% of the General Motors total. Even if there were added in the additional votes which the Wilmington Trust Company would have from various sources, 9,513,311 (or 3.4%), the total per cent would increase to only about 5.9%. It seems doubtful that this is a sufficiently large number of votes to exercise any real control over General Motors.

[*Question Need Not Be Decided*]

However, the Court does not deem it necessary to decide this question because, as will be shown hereafter, it intends to direct a form of decree which will obviate the determination of the two questions whether these people would act in concert and whether, if they did, they would have control or influence.

The proposed Government decree (as supplemented by the Assistant Attorney General's letter to the Internal Revenue Service, dated March 13, 1958 (Amicus Dallstream Exhibit 2)) provides that the trustee for shares of General Motors stock distributed as dividends to Christiana and Delaware by du Pont, before selling the shares in the market, shall give fifteen-day options or rights to purchase such shares to other stockholders of du Pont. There is no specification regarding the price at which the shares may be purchased under such option or rights. It would seem that the price would have to be the market price in order that there be no unjustified taking of property from Christiana and Delaware and giving it to other stockholders of du Pont. But, if it is the market price, there would be no incentive to such other stockholders to purchase the shares since they receive many such shares as dividends and know that the trustee must make a general offering of General Motors shares

and that the market price will be further depressed. Accordingly, it appears to the Court that the provision is without substance. It is apparently inserted to give the appearance that the offering by the trustee is similar to a rights offering by a corporation to its own stockholders. There is no such similarity.

The Government decree also provides that such trustee may in his discretion accelerate the time schedule for the sale of shares of General Motors allocable to Christiana, Delaware and the stockholders of Delaware by selling more than one-tenth in any one year. However, the trustee will not hold any stock for the accounts of these persons until the dividend is declared each year and paid to all stockholders of du Pont. Accordingly, there is no way he can accelerate the time schedule. The provision was apparently inserted to indicate that the trustee would have additional flexibility in making the sales, but it is meaningless.

Apparently also to indicate that the trustee would have flexibility in making sales of General Motors shares, the Government proposed decree provides:

> "If, in the judgment of the trustee, reasonable market conditions do not prevail over an appreciable and adequate portion of this one-year period, the trustee may petition the Court for an order extending this time for such additional part of the 10-year period as the Court may direct. In addition to such other circumstances as may be relevant, reasonable market conditions shall not be deemed to exist if the price which can be realized at the time by the trustee is not sufficiently high to reflect the fair value and true worth of the stock."

However, it was testified that the trustee could never realize during the ten-year period a price sufficiently high to reflect the fair value and true worth of the stock. Accordingly, this provision would make the Government proposed decree a virtual nullity unless the intent is that, at the end of the ten-year period, the trustee shall dump all of the approximately 20 million shares of General Motors then belonging to Christiana, Delaware and the stockholders of Delaware on the market at any price. The latter would not be a sensible proposal. However, the provision does indicate that the Government concedes that these shareholders of du Pont should not be penalized and should receive the fair value and true worth of the General Motors stock. The mechanics of accomplishing this desirable objective are simply faulty.

The provision for a trustee appointed by the Court and acting as a Court Officer to handle the marketing of 20,000,000 shares of stock over a ten-year period having a present value of approximately $1,000,000,000, seems to the Court to be singularly inappropriate. According to the Government witness Boni, who was called as an expert, the Court should lay out a program for its trustee. The trustee would have to exercise discretion about when to sell the stock. Boni then conceded that the trustee might have to call in underwriters to make a secondary offering, with whom the trustee would have to make a contract. The trustee would undoubtedly seek the advice of the Court in order to share his great responsibility. This Court does not believe that any court should be called upon to exercise such a function in the case of stock transactions of such complexity and magnitude.

[*Nature of Relief—Problems*]

The problems that arise with respect to the nature of the relief that should be granted fall into two categories: First, there is the question of what provision the judgment should make with respect to the 63,000,000 shares of General Motors stock owned by du Pont. Second, there is the question of what provisions the judgment should contain by way of injunctive relief in addition to the provisions that deal with the stock. The Court will deal with these problems separately.

[*Stock—Two Categories*]

In view of the Court's decision, the General Motors stock owned by du Pont should be considered in two categories:

1. The stock allocable to all stockholders of du Pont other than Christiana and Delaware—approximately 43,000,000 shares.

2. The stock allocable to Christiana and Delaware—approximately 20,000,000 shares.

[*Shareholders of Delaware*]

The Court has held earlier in this opinion that no relief can be granted against the shareholders of Delaware who are also shareholders of du Pont because they are

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indispensable parties and are not before the Court. Accordingly, no separate discussion of the shares of General Motors allocable to this group of stockholders of du Pont is necessary.

[*Divestiture of Voting Rights—"Pass Through" Method*]

Considering first the shares of stock of General Motors allocable to the stockholders of du Pont other than Christiana and Delaware, the Court has no doubt that the voting rights of these shares should be divested. The Court is of the opinion that this divestiture should be accomplished by passing through the vote on these shares to the stockholders of du Pont. The parties are in virtual agreement that this measure of relief is desirable and practical. The Government plan proposes this kind of divestiture of the voting rights pending the distribution and sale of the stock provided for by that plan. The plans submitted by du Pont and the amici also provide for divestiture of the voting rights.

Therefore, the final judgment should provide for this divestiture and should require both du Pont and General Motors to take whatever steps may be required to make the pass-through of the vote effective. The judgment should provide that the Court appoint a monitor whose duty it will be to supervise the effectiveness of the voting provisions of the judgment and to report to the Court. In this connection the judgment should also provide that the passed-through vote should not be exercised on any shares allocable to anyone who is an officer or director of the du Pont Company, since to do so would be inconsistent with the purposes of this divestiture. This limitation should extend as well to the members of the family of any such officer or director residing in the same household with him. In addition, the final judgment should also prohibit this same group from voting any other General Motors shares. These provisions taken together will assure that no officer or director of du Pont will be in any position to exercise a vote with respect to General Motors shares. They are in substantial accordance with the proposal made in the plan submitted by the amici. Divestiture of the voting rights on the General Motors shares should be effective as long as du Pont continues to hold legal title to those shares.

[*Representation on Board—Interlocking Directorates*]

It is also the opinion of the Court that the judgment should divest the General Motors stock owned by du Pont of any right to representation on the Board of General Motors. To this end the judgment should enjoin both du Pont and General Motors from having any common officers and directors or employees in substantially the form requested by the Government. Du Pont has proposed a form of judgment which would permit the Court to sanction interlocking directorates between the two companies, provided that the common directors did not participate in any discussions or decisions on the Board of General Motors relating to its commercial relations with du Pont. In the Court's opinion such a provision in the judgment would not be appropriate. The separation between the two Boards should be complete and should be accomplished by the resignation from the one Board or the other of any existing common directors within a reasonable time after the entry of the judgment, that time to be fixed by the terms of the judgment itself.

[*No Divestiture of Legal Title*]

This leaves for consideration the question of whether the judgment should also provide for the divestiture of du Pont's legal title to the General Motors stock, either in accordance with the plan proposed by the Government, some modification of that plan, or by some other method. With the voting rights of the stock divested, and with its right to representation on the Board of General Motors also divested, as provided for above, the possession of the legal title by du Pont will leave du Pont with the right

1) to receive dividends on the stock,

2) to share pro rata with other stockholders in the assets of General Motors in the event of liquidation,

3) to dispose of the legal title.

In this connection it should be noted that it is not disputed that for many years du Pont has passed on to its stockholders as dividends the amount of the dividends that it has received from General Motors less the amount of the intercorporate dividend tax. There is no suggestion that du Pont intends to modify or abandon this practice.

On the contrary, the testimony of the Treasurer of the du Pont Company shows that its financial projections for the future have been made on the assumption that this practice will continue. This discussion of the question of the right to receive dividends leads the Court to the conclusion that as a practical matter retention of the bare legal title to the stock by du Pont will leave it simply with the right to share pro rata in the assets of General Motors and the right to dispose of that legal title. Neither of these attributes of ownership would appear to raise any problem in the context of this case. Should a situation arise where either of these attributes took on significance it appears likely that the only action du Pont could take by reason of such attributes of ownership would encourage the enforcement of the antitrust laws and assist in carrying out the mandate of the Supreme Court.

The question then is whether with the legal title stripped of all of the incidents of ownership except those heretofore mentioned, the Court should also require divestiture of that legal title. The Court has heretofore held that it is not required, as a matter of law, to divest the bare legal title unless it finds on the facts that divestiture is required to eliminate the effects of the acquisition of the stock found to be offensive to the statute. The question is, therefore, whether the Court can find that in this case it is necessary to divest the bare legal title in order to remove and to guard against the probability of restraint or monopolization of trade which was the consequence the Supreme Court found to be offensive to the statute.

There is no evidence on which the Court could make such a finding. The Government did not offer any evidence that bears on this question, its principal reliance being on the legal argument that the Court is required, as a matter of law, to order divestiture of the legal title irrespective of whether that kind of divestiture was required in fact to guard against the unlawful consequence of the acquisition.* If the General Motors stock is stripped of its voting rights and of its right to representation on the Board of General Motors, as provided for above, no incidents or attributes of ownership are left with du Pont which could be used to influence the practices and policies of General Motors. General Motors would have no motive in these circumstances, arising either from fear of the exercise of the voting rights or resulting from the presence on its Board or on the committees of its Board of du Pont representatives or resulting from considerations of self-interest, to favor du Pont. It is well recognized that the normal and indeed the only way in which the holder of a substantial block of stock can influence the practices and the policies of the corporation is through the exercise or threatened exercise of voting rights or by representation on the Board of Directors. The Court is reinforced in this view by the fact that in the trial in chief and before the Supreme Court the Government relied primarily upon du Pont's voting rights and upon the participation of its representatives in the affairs of the Board of Directors of General Motors as the avenues and means which had been used or could be used by du Pont to influence the conduct of General Motors.

The Court has carefully considered whether it might be thought that if the voting rights of the General Motors stock should be distributed to the more than 200,000 shareholders of du Pont there is any reasonable possibility that those shareholders or any part of them (excluding from consideration Christiana and Delaware, which will be dealt with separately) could by voting cohesively or, as a group, influence General Motors to favor du Pont. The Government has made no showing that any such possibility exists and there is no basis in the record on which the Court could assume that anything of the kind could happen. The number of stockholders, the diversity of their interests and the unlikelihood that General Motors trade policies could be influenced by actions taken at stockholders' meetings militates against any such possibility. In addition the Court proposes, in a manner that will be stated hereafter, to provide by appropriate injunctive provisions against the remote possibility that the numerous stockholders of du Pont would nominate or elect a representative on the General Motors Board.

* Certain related contentions made by the Government as to the significance of the evidence it offered with respect to du Pont's trade relations with General Motors are discussed hereafter.

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In essence, therefore, what would be left in du Pont would be the most sterile kind of an investment. The Court notes in this connection that Section 7 of the Clayton Act expressly excludes from its operation "corporations purchasing such stock solely for investment and not using the same by voting or otherwise" to bring about anti-competitive effects. There would thus appear to be a recognition on the part of Congress that the holding of stock does not in all instances carry with it the power to bring about consequences offensive to the statute. The Court recognizes that the Supreme Court has held that in the past du Pont has not held its stock in General Motors solely for investment. This Court is of the opinion, however, that the divestiture and ancillary injunctive provisions referred to hereafter will be effective to assure that hereafter General Motors stock will be held by du Pont solely for investment.

The Court has given no consideration to the question of whether the continued holding of General Motors shares under the conditions outlined above would be an attractive investment for du Pont. It goes without saying that a holding of a substantial investment of common stock, with the limitations and restrictions on such ownership to be imposed by the Court, is unusual. Du Pont will have no vote on the General Motors shares. It cannot have any representation on the General Motors Board. It passes through the dividends, minus the dividend tax, to its stockholders. Under these circumstances it is possible that the du Pont management would be motivated to dispose of the investment, or parts of it, from time to time when suitable occasions might arise. There would be nothing in the decree to prevent such dispositions.

In the circumstances, therefore, the Court finds that there is nothing in the record made in the hearing on relief or in the record in the trial in chief which would support, even by inference, the conclusion that du Pont's possession of the bare legal title to General Motors stock, stripped of its right to vote and of its right to representation on the Board of General Motors, would create any possibility that the stock would have any influence on the practices and policies of General Motors or could be used in any way that would be inconsistent with the mandate of the Supreme Court.

[*Consequences of Divestiture of Title*]

The question remains whether divestiture should be ordered even though it is not necessary in order to prevent the consequences condemned by the statute. It is in relation to this point that the Court is required to consider what the consequences of divestiture of the legal title would be to the shareholders of both du Pont and General Motors. On the record there can be no doubt that divestiture of the legal title would have serious adverse consequences to these stockholders. If the Government plan were to be adopted and the General Motors stock should be distributed by du Pont in addition to its usual cash dividends, the tax consequences would be extraordinarily severe and as explained above would in effect amount to a capital levy on the market value of the General Motors stock ranging in amount from 20% to 91%, and averaging perhaps 50-60% (less the dividends received credit), depending upon the tax brackets of individual stockholders.

That kind of distribution would also have adverse consequences on the market value of both General Motors and du Pont stock. The extent of those consequences is in dispute. This is a matter that cannot be measured with any degree of certainty. But the record satisfies the Court that there would be adverse consequences and that they would be substantial. Although much of the evidence offered by both sides was concerned with measuring the adverse consequences of the Government's proposed divestiture of legal title, there is no need for the Court to resolve the conflict in the evidence as to how severe those consequences would be. The Court is persuaded beyond any doubt that a judgment of the kind proposed by the Government would have very serious adverse consequences. In the circumstances, the Government is asking the Court to speculate with the property of innocent parties. It would be unreasonable and unjust for the Court to adopt measures which are certain to result in losses to innocent stockholders when the effects offensive to the statute can be eliminated by measures which will not result in such consequences. If the provisions of the decree, as outlined in this memorandum, should prove in the future to be inadequate to curb the violation, the door of the Court is open to the Government to petition for a modification of the judgment at any time.

If du Pont should discontinue completely its normal cash dividend and pay dividends entirely in the stock of General Motors for the ten year period required by the Government plan, these tax consequences would be mitigated. But, in these circumstances, the effect on the market value of General Motors stock would certainly be greater, since many more du Pont stockholders would doubtless be forced to sell in order to raise cash to pay taxes.

There is another point that deserves consideration in this connection. If du Pont should adopt this policy it seems certain that in the ten years involved the Company would accumulate an extraordinarily large amount of cash in excess of its needs for the normal development of its chemical business. In fact, the projections of the Company, which were the subject of testimony of its Treasurer and were not attacked by the Government, indicated that du Pont would accumulate an amount of approximately $2,500,000,000 or $3,000,000,000 in excess of its needs for anticipated growth. Assuming that du Pont could find useful employment for this amount of capital it seems clear that the result would be to increase enormously the power and economic position of the du Pont Company. Although the Court is aware that legally size alone does not violate the antitrust laws, the Court is of the opinion that in formulating an antitrust judgment it should not use its equitable powers in a way that seems certain to enhance the power and position of the du Pont Company and perhaps create new antitrust problems for both the Company and the Department of Justice in the future.

The Court has considered whether there might be modifications of the Government's plan or other forms of divestiture of the legal title which might reduce or mitigate these adverse consequences. The modifications of the Government's plan which were discussed in the hearing would not, in the opinion of the Court, remove these adverse consequences although they might mitigate their severity to some extent. For example, if the Government plan or any comparable arrangement should be adopted, the Court is satisfied that a longer period than ten years should be allowed for its execution. In its reply memorandum, the Government itself suggested that a period as long as twenty years might be appropriate. In this connection, the Court finds it significant that in the *Aluminum* case the United States District Court for the Southern District of New York allowed a ten year period for divestiture in a situation in which the problems of divestiture were less complicated and the dollar value of the property involved was substantially smaller than is the case here. Alternative methods were not suggested by any of the parties. The Court does not believe that there is any method of divesting legal title to the General Motors stock now held by du Pont which would not either impair the value of the property interests involved or impose severe tax consequences upon the stockholders of the du Pont Company.

Because divestiture of the legal title is not necessary to remove the consequences of the acquisition found to be offensive to the statute, the Court concludes that it would be unfair and repugnant to the principles of equity to impose injurious consequences upon the stockholders of du Pont and General Motors by requiring the divestiture of the legal title.

[*Injunctive Provisions*]

Two types of injunctive provisions appear to the Court as necessary in order to assure the effectiveness of the divestiture which the Court proposes to direct and to provide additional means of eliminating the effects offensive to the Clayton Act.

[*Acquisitions of Additional Shares*]

Certain of such injunctive provisions are in a sense ancillary to the divestiture order. As indicated above, du Pont and General Motors should have no common officers, directors or employees. Du Pont should be prohibited from acquiring any additional stock in General Motors substantially in the terms contemplated by Paragraph VIII of the Government's proposed judgment, except that it would seem fair to the stockholders of du Pont and in keeping with the investment character of du Pont's continued holding of General Motors shares to permit du Pont to retain such General Motors shares as it receives by virtue of stock dividends or in the exercise of rights extended with respect to its present holdings. The voting rights on any General Motors shares so received by du Pont should be subject to the pass-through in the same manner as the 63,000,000 shares presently held by du

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Pont. The amici curiae have suggested injunctive provisions which would prevent du Pont from bringing to bear influence on General Motors in any fashion either by nominating directors or by soliciting votes with respect to any General Motors matters. Such provisions are desirable and should be included in the final judgment. Furthermore, the judgment should provide that the voting rights of the General Motors shares which are to be passed through to the stockholders of du Pont may not be voted at any General Motors annual or special meeting in favor of any persons nominated, designated or held out in any way to be a representative of the du Pont Company or of its interests. Necessary provisions to this end directed to both du Pont and General Motors should therefore be included in the judgment.

[*Trade Between Companies—Injunctive Provisions*]

The second group of injunctive provisions to be considered relate directly to trade between du Pont and General Motors. Du Pont has taken the position that such provisions are unnecessary and perhaps improper in framing a decree to cure a violation of Section 7 of the Clayton Act. As the Court has indicated earlier in this opinion its powers under Section 15 of the Clayton Act are exceedingly broad and extend to any activity or relationship which the Court believes must be effected in order to prevent or restrain violations of the Act. Accordingly, the Court specifically rejects the contention made by du Pont with respect to the appropriateness of injunctive provisions relating to trade between du Pont and General Motors.

In view of the fact that the Supreme Court found only a probability that du Pont's stock interest in General Motors was likely to result in a restraint of General Motors purchases of automotive fabrics and finishes, the Court is not satisfied that injunctive provisions relating to trade of the character and scope proposed by the Government are necessary. It believes, however, that in the circumstances they are appropriate and may well contribute to an elimination of the consequence offensive to the statute in accordance with the mandate of the Supreme Court.* Accordingly, provisions substantially along the lines of those suggested in Paragraph IX of the Government's proposed judgment should be incorporated in the final judgment. Such provisions will require termination of any requirements contracts, exclusive patent arrangements or arrangements relating to preferential use of discoveries which may exist between du Pont and General Motors. They will also prevent General Motors and du Pont from embarking upon joint commercial ventures. On the whole, such provisions should remain effective so long as du Pont holds any stock in General Motors, except that a period of three years after the effective date of the judgment should be sufficient insofar as the ban against requirements contracts is concerned. A ban of any longer duration would appear to be an unwarranted and unnecessary interference with General Motors right to purchase from its suppliers, including du Pont, on such terms and conditions as it is able to secure. Following the expiration of this three-year period, the parties should be permitted to enter into such requirements contracts as they desire, provided that no such contract may extend over a period longer than a single calendar or automobile model year.

At the hearing the Government sought to present in evidence a substantial number of documents reflecting efforts on the part of du Pont to sell various products to General Motors, to other automotive manufacturers and to suppliers to the automotive industry. Counsel for the Government conceded that the evidence they were offering reflected no restrictive or improper conduct. They further conceded that they were not attempting to show a violation of Section 7 with respect to any products other than automotive fabrics and finishes—the products covered by the Supreme Court's holding. The evidence, it appears, was offered on the ground that it was appropriate in a hearing on relief to consider the whole area of present and future trade relations. The Court agrees with this statement and believes that the injunctive provisions referred to above evidence a recognition of both present and future areas of trade relations between du Pont and General Motors.

* Although the Government asks for the termination of "existing" requirements contracts and preferential trade agreements of various kinds, there is no evidence that any agreements of this character are presently in effect between du Pont and General Motors or have been in effect for many years.

The Court excluded certain of the documents offered by the Government bearing on trade between du Pont and General Motors. These documents were presented as an offer of proof and submitted along with the record. The Court has had an opportunity to examine all of them. None of them suggests the slightest impropriety in du Pont's conduct of its trade relations with General Motors and other automotive manufacturers. As indicated above, the Court does not understand that the Government makes any such contention. Government counsel, in connection with the offer of these exhibits, suggested the possibility that if du Pont retained a financial stake in General Motors, even on behalf of its stockholders, du Pont would favor General Motors over other automotive manufacturers whenever du Pont developed new products useful in the automotive industry. The Court finds no support for this suggestion either in the evidence taken at the trial in chief or in the evidence received or offered at the hearing on relief. Nevertheless, the Court will direct that the injunctive provisions in the final judgment relating to trade prohibit du Pont from giving General Motors preferential access to any of its products or from selling to General Motors on terms more favorable than those made available to competitors of General Motors so long as du Pont owns any stock in General Motors.

[*Christiana and Delaware—Divestiture*]

Since du Pont is to retain the legal title to the General Motors shares owned by it there is no occasion to consider a sale of those shares that would be allocable to Christiana and Delaware in the event a divestment of the legal title to the shares were to be directed. The Court observes, however, that the sale contemplated by the Government's proposed judgment would have serious tax and economic consequences to the shareholders of both of these companies, which include many religious, charitable and educational organizations. Moreover, the record discloses that sales of the magnitude contemplated by the Government's proposed judgment would in all probability disrupt the market for General Motors stock and cause serious harm to the stockholders of that company. For these reasons the Court would not be constrained to order such sales unless it were satisfied that they were the only means of formulating a decree that would carry out the mandate of the Supreme Court.

There remains for consideration, however, whether the final judgment should contain any special provisions with respect to Christiana and Delaware. The Court is satisfied that because of their substantial stock interest in du Pont, and because of the long-standing close relationship between these two companies and the management of du Pont, injunctive provisions substantially similar to those that will be entered against du Pont should be directed to Christiana and Delaware to guard against any possibility that they might acquire stock in General Motors or attempt in any way to influence or control General Motors. Inasmuch as neither Christiana nor Delaware is engaged in industrial operations there appears to be no occasion to extend to them the injunctive provision which will operate on the trade relations between du Pont and General Motors.

[*No "Pass Through"—Christiana and Delaware*]

Du Pont, Christiana and Delaware have suggested that the latter two companies should not be permitted to vote any of the 63,000,000 shares of General Motors which they otherwise would be entitled to vote as stockholders of du Pont. Their proposal is that the vote be passed through in turn to the stockholders of Christiana and the stockholders of Delaware. If du Pont were to pass through to its stockholders the vote on the 63,000,000 General Motors shares which it owns Christiana would be entitled to vote approximately 16,805,684 shares of General Motors, and Delaware would be entitled to vote approximately 1,677,813 shares. Together Christiana and Delaware would be entitled to vote approximately 6½% of the outstanding General Motors common stock. The Government has contended that this number of shares should not be left in the hands of these two companies or distributed to their shareholders. The basis of this contention is that all of this stock, notwithstanding that it would be voted in varying amounts by some 4,000 shareholders of Christiana and some 200 shareholders of Delaware, would be voted as a block. In addition the Government asserts that some of these same shareholders own or would be able to vote additional amounts of Gen-

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eral Motors stock so that as much as 8% of the outstanding General Motors stock would be voted as a block by people who have a substantial common stock interest in the du Pont Company. The Government further contends that such a block would constitute control of General Motors. Although the Government has made these contentions in support of its proposal to sell the General Motors stock that would be distributed to Christiana and Delaware under its proposal, it is reasonable to believe that the same contentions would be made against the efficacy of any proposal to pass through the vote on the General Motors shares owned by du Pont and allocable to Christiana and Delaware.

The Government has failed to establish by credible evidence either of the premises upon which the foregoing contentions rest. The Court is not persuaded that the General Motors shares allocable to Christiana and Delaware would be voted by their shareholders as a block. Nor is it persuaded that even if they were voted as a block they would pose any real threat that General Motors purchasing policy could be directed in a way that would favor du Pont. The Government at the hearing on relief made no effort to establish these propositions except to introduce elaborate and detailed schedules disclosing the manner in which the stock of Christiana and Delaware and du Pont was held by various stockholders of Christiana and Delaware. The Court accepts these schedules as proof that the shares are held as indicated therein. It does not believe, however, that the schedules even suggest that the owners of the stock would all vote their allocable General Motors shares in a block. No effort was made by the Government to show how even 8% of the stockholders of General Motors would go about influencing the management of that company to favor du Pont in its purchases.

This is a relief proceeding, however, and it is perhaps not incumbent upon the Government to provide the evidentiary basis for its apprehensions in the same detail as would be necessary to establish a violation of the law. The Court has determined therefore to reject the proposal that the vote be passed through to the stockholders of Christiana and Delaware and instead proposes to include provisions in the final judgment that will preclude the shareholders of Christiana and Delaware from voting their allocable portion of du Pont's 63,000,000 shares of General Motors. These shares will be sterilized and voted by no one, with the result that the 18,483,497 shares of General Motors stock allocable to Christiana and Delaware will not be voted at any General Motors annual or special meeting.

In view of the fact that Christiana and Delaware are to be precluded from voting any of their shares of General Motors stock it seems appropriate that their officers and directors, as well as the members of their immediate families living in their households, should be similarly precluded. Accordingly, as in the case of the officers and directors of du Pont, the final judgment will preclude any person from exercising the pass-through vote or from voting any General Motors stock, who is at the time of any annual or special meeting of General Motors an officer or director of Christiana or Delaware or a member of the immediate family of such officer or director and living in his household.

In this connection it should be noted that while under the Government plan 19,670,115 shares of General Motors stock would be sold and therefore the votes eliminated, nevertheless, the vote on 7,739,467 shares of General Motors stock, or 2.8%, would still be left at the end of the 10-year period with the very groups to which the Government has pointed. Indeed, at the beginning of the 10-year period the vote on 10,860,111 shares, or 3.9%, would be in such groups. In contrast, under the provisions of the judgment referred to above, the votes with respect to more than 20,000,000 shares of General Motors stock would be sterilized * and there would be left with the entire group as to which the Government has raised questions somewhat less than the 2.8% which would be left with them under the Government's plan. Furthermore, well over half of such votes would be voted by the descendants of the owners of the 1899 Company, including the Delaware Trust

* The Court, in proposing to preclude the officers and directors of du Pont, Christiana and Delaware from voting the General Motors shares which they presently hold, is actually sterilizing a substantial number of shares of General Motors stock which could be voted under the Government's proposal.

Company, who in the Court's view have only a very remote relationship to the matters involved in this litigation.

It would seem inappropriate to permit Christiana to continue to vote the 535,500 shares of General Motors stock which it owns and preclude it from voting any part of the 63,000,000 shares owned by du Pont. The Court is not entirely satisfied, however, that it is within its authority to affect Christiana's ownership of these 535,500 shares in any way since it has not been alleged by the Government that such shares were acquired or are held in violation of Section 7, and there is no basis in the record on which the Court could properly conclude that such shares have been so acquired or so held. The Court believes, however, that a sterilization of these shares would be appropriate and directs that such a provision be included in the final judgment unless Christiana wishes to present reasons why the provision should not be included. In that event the Court will give further consideration to the matter.

[*Government Objections*]

The Court has given careful consideration to the objections which the Government in its Reply Brief has made to any judgment which would fail to divest du Pont of the legal title to the General Motors stock and would leave du Pont with any financial interest in General Motors. The Government objects to such a judgment, first, because it "will permit a continuance of concentrated voting power of du Pont in General Motors by reason of the voting rights which would be acquired by the stockholders of Christiana, Delaware and the du Pont family." (Government Reply Brief, p. 12). The Government's second objection to such a judgment is that the "common financial interest between the defendants will continue to influence the commercial relations between du Pont and General Motors." (Government Reply Brief, p. 15).

The Court believes that the first of these objections is completely met by the provisions which the Court intends to include in the final judgment which will (1) sterilize all of the General Motors stock which, under the du Pont plan, would be voted by the stockholders of Christiana and Delaware, and (2) preclude the officers and directors of du Pont, Christiana and Delaware from exercising the voting rights on any General Motors stock, whether such stock is held directly or by the du Pont Company. These provisions will in fact do more to eliminate whatever "concentrated voting power" the stockholders of du Pont might have in General Motors than would be accomplished by the Government's plan itself. Insofar as voting power in General Motors is concerned, sterilization of the General Motors stock owned by, and allocable to, Christiana and Delaware will be just as effective as the sale of that stock in accordance with the Government's proposal. Moreover, while the Government's proposal would permit the officers and directors of du Pont and the members of their family to continue to vote any General Motors stock which they presently own and to exercise the voting rights of the General Motors stock they might receive in a distribution by du Pont, the Court proposes to enter a judgment which will preclude these persons from voting any General Motors stock.* In this connection, it is the Court's belief that the voting restrictions it proposes to impose upon the officers and directors of du Pont, Christiana and Delaware will be more effective than the prohibitions which the Government would impose upon persons who are shareholders of Delaware. It is the officers and directors of du Pont, Christiana and Delaware who would be likely to perpetuate any common control of du Pont and General Motors and they are the persons who should be precluded from voting General Motors stock. For the foregoing reasons the Court has concluded that the Government's first objection to a judgment that would leave the du Pont Company with a financial interest in General Motors has no application to the judgment which the Court proposes to enter, because that judgment will include safeguards against the continuance of any "concentrated voting power" in General Motors that will be more effective than the Government's own proposal.

With respect to the Government's second contention, there is no rational basis on which the Court could find that such com-

* Presumably the Government's plan would operate on some portion of this stock, i. e., that which is held by shareholders of Delaware who are also shareholders and officers or directors of du Pont. As the Court has found, however, it is without jurisdiction to order the relief proposed by the Government against the stockholders of Delaware.

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mon financial interest as will exist between du Pont and General Motors under the judgment proposed by the Court can be expected to influence the commercial relationships between the two companies in any way. In the first place, the judgment will contain stringent injunctions against du Pont and General Motors dealing with each other on a non-competitive or preferential basis. In this respect, the restrictions are more drastic than those proposed by the Government. The Court has no reason to believe that these restrictions will not be observed by the parties, and has every reason to expect that any failure to observe them will be brought to the Court's attention. In many instances where the antitrust laws have been violated, injunctive provisions of the kind which the Court proposes to enter are the sole remedies against further violations. On the whole, these remedies appear to have been effective and there is no reason to believe they will not be similarly effective in this case.

In the second place, nothing in the record supports the view that in the particular circumstances of this case, du Pont's ownership of a bare legal title to the stock, unaccompanied by any voting rights or by any representation on the Board of General Motors, would or could have any effect on the commercial practices of General Motors. If General Motors were to have a continuing financial interest in du Pont rather than vice versa, the Court can appreciate that there might remain some incentive for General Motors to buy from du Pont in order to increase the latter's sales and profits. In that case, the owner of the financial interest would be making the buying decision and might be influenced to purchase from a company in which it held a substantial financial interest. In this case, however, the buying decision must be made by General Motors. It has no financial interest in du Pont and the Court is aware of no incentive which would operate to influence a General Motors employee to favor du Pont in any way.

The Court recognizes the force of the Government's argument that the Supreme Court's decision was not necessarily confined to the voting power which du Pont enjoyed in General Motors. The decision noted other factors which had operated, or might operate, in du Pont's favor as a supplier of General Motors. Upon analysis, however, it must be concluded that the ultimate source of all these avenues of influence is the voting power attached to du Pont's 63,000,000 shares of General Motors. Without that voting power, and without directors on the General Motors Board, du Pont is completely stripped of any potential power to penalize or reward the employees of General Motors in accordance with their demonstrated attitude toward du Pont's products. In the absence of this voting power, lines of communication, suggestions, established relationships and other attributes of ownership of which the Government complained are rendered impotent. These all may represent ways and means by which du Pont's will could be brought to bear on General Motors, but each springs from the voting power attached to the General Motors stock which du Pont owns; absent that voting power, these means are capable of accomplishing nothing.

The Government's principal concern appears to be that du Pont's continuing financial interest in General Motors will "force [it] to see that General Motors is the prime, if not the exclusive recipient of du Pont's research activities." (Govt. Reply Brief, p. 18) The Government does not suggest that there is any evidence that du Pont has favored General Motors over General Motors' competitors. Such a charge was made in the original complaint but was never proven and at the close of the trial in chief the Government did not even request the Court to make findings of fact that du Pont had so favored General Motors.* Needless to say, therefore, such a charge was not before the Supreme Court and played no part in that Court's determination that du Pont's stock interest in General Motors might result in monopolization of General Motors purchases of automotive fabrics and finishes in violation of Section 7 of the Clayton Act. And it is to be noted that in the hearing on relief the Government did not offer any evidence that du Pont had favored, or was favoring, or was likely to favor, General Motors in any way whatsoever. Indeed, in

* The passage from the Supreme Court opinion quoted by the Government in its Reply Brief (p. 19) does not indicate any evidence of du Pont favoring General Motors. In stating that du Pont would try to supply General Motors with "the best," the Supreme Court was discussing the point that the trade dealings between du Pont and General Motors had been above-board and that there had been no overreaching of General Motors by du Pont.

offering its evidence as to the course of trade relations between du Pont and General Motors, counsel for the Government specifically stated:

> "Let it again be clearly understood that the Government suggests no improper conduct on the part of the companies by the introduction of this evidence."

The Court recognizes that it is empowered to, and should, in appropriate circumstances, enjoin restrictive conduct even though there is no proof that the parties have actually engaged in that particular type of conduct. *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635] 332 U. S. 392, 400 (1947). It is out of deference, therefore, to the Government's naked suggestion that du Pont might favor General Motors rather than on the basis of any proof that du Pont has favored General Motors, that the Court proposes to include in the final judgment provisions which will specifically prohibit du Pont from entering into preferential arrangements with General Motors and from offering any product or service to General Motors on terms and conditions more favorable than those offered to competitors of General Motors. The Court is of the opinion that such provisions will be adequate to forestall any trade favoritism of the kind which the Government has suggested but not proven.

To order a divestment of du Pont's title, with the resulting tax penalties and market implications which the Court has heretofore described, merely to eliminate the possibility that du Pont might favor General Motors, would in the Court's opinion constitute a serious abuse of discretion. Even if there were proof, either at the trial in chief or at the hearing on relief, that du Pont had followed a course of action of favoring General Motors over the latter's competitors, the Court would be loathe to direct a divestment of legal title until it had at least been demonstrated that injunctive provisions of the kind proposed by the Court would be ineffective. In the absence of any proof of such conduct, and in view of the fact that the Government alleged and failed to prove such conduct, the Court believes that the Government's apprehensions do not constitute an adequate basis for the divestiture order which it proposes.

[*"Takedown" Plan*]

The takedown plan proposed by amicus Dallstream is ingenious and has merit. If the Court were persuaded that, in order to eliminate the effects offensive to the Clayton Act, it would be necessary to require the distribution of du Pont's legal title to the General Motors shares, the Court would give serious consideration to adopting the takedown plan. The plan, meritorious as it is, introduces complications into du Pont's capital structure. It also operates in different ways, and sometimes in a discriminatory manner, upon various categories of du Pont stockholders. Moreover, its adoption would impose an administrative burden upon this Court for many years to come. In the circumstances, therefore, since the Court has concluded that a distribution of du Pont's legal title to the General Motors shares is not necessary,* the Court believes that there is no justification at this time for involving du Pont and its shareholders in the complications of the takedown plan. It may be that the plan will have utility at some time in the future, particularly if a change in administrative or legislative policy were to produce the tax results contemplated by amicus Dallstream in recommending the plan. In such event any party may ask the Court to reexamine the plan in the light of circumstances then existing.

[*Modification—Tax Legislation or Regulation*]

The Court and the parties are aware of the pendency of bills previously referred to which, presumably, will be considered in the second session of the 86th Congress and which would, if enacted, substantially ameliorate the tax consequences of a distribution of du Pont's legal title to the General Motors shares. It is impossible, however, to foretell whether such legislation will be enacted and, if so, the form it will take. Quite possibly a change in policy on the part of the Internal Revenue Service might also affect the tax consequences of any such distribution. The Court should not be foreclosed from considering such new legislation or rulings nor should the parties be foreclosed from bringing them to the attention of the Court. While a distribution of the legal title to the General Motors shares

* In recommending the takedown plan for the Court's consideration amicus Dallstream himself recognized that the plan was not "an essential ingredient in a program of appropriate and equitable relief." (Dallstream Report, August 1958, p. 115.)

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by du Pont is not, in the opinion of the Court, at all necessary to remedy the effects offensive to the statute in view of the other provisions of the decree to be included, such a distribution would leave a more simplified structure from the corporate standpoint. Consequently, the final judgment should make specific provision for the possibility of such developments and should authorize any party to come before the Court and seek modification of the judgment in the light of any such developments.

Summary

The Court concludes that it has jurisdiction under Section 15 of the Clayton Act to order appropriate relief in this case not only against du Pont but also against General Motors, Christiana and Delaware; it is without power to order relief directly against the stockholders of Delaware who are also stockholders of du Pont because they are indispensable parties to any such relief and are not before the Court.

The Court has also concluded that under Section 15 of the Clayton Act it is not required to direct divestiture of the ownership of the 63,000,000 shares of General Motors acquired by du Pont in violation of the Clayton Act. Rather the Court has broad discretion under that section to order the relief it deems appropriate to eliminate the effects offensive to the Act and to do so consistent with the protection of the interests of all parties, including the shareholders of these four companies who are innocent of any wrongdoing.

The Government proposal is that the Court should order distribution by du Pont of the 63,000,000 shares of General Motors stock held by it in ten equal annual dividends and that the shares going to Christiana, Delaware and the stockholders of Delaware, a total of about 20,000,000, be delivered to a trustee and sold for their account within twelve months of receipt, about 2,000,000 shares a year. The 63,000,000 shares of General Motors stock have a current market value of over $3,500,000,000, and the 20,000,000 shares a market value of over $1,000,000,000.

The Internal Revenue Service has ruled that General Motors shares received as dividends by individuals and trusts would be taxed at the market value at the time of receipt as ordinary income, i. e., at rates from 20% to 91% (less dividends received credit). There would also be state income taxes in many cases. The Service has also ruled that the General Motors shares received by non-tax-exempt corporations would be taxed to them at the cost base on the books of du Pont, or at $2.09 per share and that, when sold by or for the account of such corporations, the gains over that base would be taxed at the capital gain rate of 25%. Thus, whatever market value the General Motors shares might have if the Government proposal went into effect, the tax impact on individual stockholders of du Pont would be enormous and the tax impact on corporations forced to sell, such as Christiana and Delaware, would also be great.

The Government decree would also have a serious impact on the market value of the stock of General Motors and of the stock of du Pont. The testimony adduced by the defendants, that of men of wide experience and great responsibility for investing funds and marketing securities, to that effect must be given great weight. The type of evidence introduced by the Government, consisting of data regarding a variety of security offerings, charts of stock movements and the flow of investment funds, and the testimony of economists without practical experience or management responsibility, cannot overcome the weight of such testimony. On the Government's own evidence, there would be a serious risk that the sales caused directly and indirectly by its proposed decree would depress the market value of the two stocks and cause substantial losses to the many thousands of direct or indirect holders of such stocks who cannot conceivably be called guilty persons or even persons aware of any illegality. The Court will not assume the responsibility of such risk.

Another factor that should be given some consideration is that the Government plan would seriously handicap General Motors from doing any common stock financing during the period of the plan, to its possible detriment and the injury of its stockholders.

The Court has concluded that the Government proposal is unnecessarily harsh and punitive and that there is an effective means of preventing any possible control of General Motors through use of the votes on the General Motors shares now held by du Pont either by du Pont or by persons whom the Government has any reasonable basis for claiming that they might act in

concert. The effective means is to divest du Pont of the votes on such General Motors shares and pass such votes through pro rata to du Pont stockholders, and then to enjoin the exercise of such votes as lodge in Christiana and Delaware and in officers and directors of du Pont, Christiana and Delaware, their spouses and dependents. By this means at least as many votes by persons claimed by the Government to belong to a group will be taken from them as would be the case if the Government's proposed decree were put into effect. A decree to this effect will make it unnecessary for the Court to make a determination whether any of the groups of persons whom the Government claims would act in concert would do so or whether, if they did act in concert, they would have a sufficient number of votes to control or influence General Motors.

The Court is of the opinion that there is nothing in the record which would support even by inference the conclusion that du Pont's possession of the bare legal title to General Motors stock, stripped of its right to vote and of its right to representation on the Board of General Motors, would create any possibility that the stock would have any influence on the practices and policies of General Motors or could be used in any way that would be inconsistent with the mandate of the Supreme Court.

The essential features of the final judgment which the Court has decided upon have been indicated in some detail in the foregoing discussions. Without intending to limit or modify in any way the matters which the Court has heretofore discussed, the basic features of the final judgment which the Court proposes to enter are:

1. Du Pont will be divested of the right to vote any of the 63,000,000 shares of General Motors stock which it owns and such shares will be voted hereafter by the stockholders of du Pont with the exceptions noted below.

2. Injunctive provisions will prohibit du Pont, Christiana and Delaware from acquiring any additional stock interest in General Motors and from attempting to influence General Motors in any way.

3. Christiana and Delaware will be prohibited from voting any of the 63,000,000 shares of General Motors that would otherwise be voted by them as stockholders of du Pont and the portion of such shares that are allocable to Christiana and Delaware will be sterilized along with the 535,500 shares of General Motors which Christiana presently owns.

4. No officer or director of du Pont, Christiana or Delaware will be permitted to vote any General Motors stock, either in accordance with the pass-through described above or otherwise.

5. No officer or director of du Pont, Christiana and Delaware will be permitted to serve as an officer or director of General Motors, and General Motors will be prohibited from having as an employee any employee of du Pont, Christiana or Delaware.

6. All preferential trade arrangements or understandings between du Pont and General Motors will be cancelled, and they will be prohibited from entering into any such arrangements or embarking on joint commercial ventures so long as du Pont owns General Motors stock. Any existing requirements contracts between the two companies will be canceled and they will not be permitted to enter into any such contract for a period of three years following entry of the final judgment herein, after which period requirements contracts of not more than one year's duration will not be prohibited.

7. Provision will be made for a review and reconsideration of the terms of the final judgment in the event the provisions thereof should prove in the future to be inadequate to curb the violation, and in the event of an administrative or legislative change in tax policy which would significantly alter the tax consequences of a distribution of the General Motors stock owned by du Pont.

8. Appropriate provisions will be included for retention of jurisdiction by the Court and for enforcement of the terms of the judgment.

The above and foregoing opinion of the Court constitutes the Findings of Fact and Conclusions of Law.

Final Judgment

WALTER J. LA BUY, District Judge [*In full text*]: Plaintiff having filed its complaint herein on June 30, 1949, and its amendments thereto on July 28, 1952 and January 16, 1953; all of the defendants having appeared and severally filed their answers to the

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amended complaint denying the substantive allegations thereof; this Court, on January 16, 1953, before the conclusion of the presentation of the plaintiff's case, having entered an order dismissing with prejudice the amended complaint as to certain individual defendants, and on February 16, 1953, at the close of the plaintiff's case, having entered an order dismissing without prejudice the amended complaint as to certain additional individual defendants, and on December 9, 1954, after trial, having entered a judgment herein dismissing this action as to all defendants; the plaintiff having appealed in certain respects from such judgment insofar as it applies to defendants E. I. du Pont de Nemours and Company, General Motors Corporation, Christiana Securities Company and Delaware Realty and Investment Company; the Supreme Court of the United States having held that there was a violation of Section 7 of the Clayton Act by defendant E. I. du Pont de Nemours and Company, and having remanded this cause to this Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects offensive to the Clayton Act; this Court having held further hearings pursuant to the mandate of the Supreme Court of the United States and having rendered an Opinion on October 2, 1959 which constitutes the Findings of Fact and Conclusions of Law [1959 TRADE CASES ¶ 69,461];

Now, therefore, it is hereby Ordered, Adjudged and Decreed As Follows:

I

[*Definitions*]

For the purposes of this Judgment:

A. "Du Pont" means E. I. du Pont de Nemours and Company; "General Motors" means General Motors Corporation; "Christiana" means Christiana Securities Company; "Delaware" means Delaware Realty and Investment Company.

B. "General Motors stock" means shares of General Motors stock of any class having voting rights.

C. "Du Pont stock" means shares of du Pont common stock having voting rights.

D. "General Motors stockholder" means any holder of record of General Motors stock.

E. "Du Pont stockholder" means any holder of record of du Pont stock.

II

[*Prior Judgment Vacated in Part*]

In conformity with the mandate of the Supreme Court, the Judgment of this Court of December 9, 1954, which dismissed the amended complaint finding no violation of Section 1 or Section 2 of the Sherman Act or Section 7 of the Clayton Act, is hereby vacated insofar as it adjudges du Pont not to have violated Section 7 of the Clayton Act, and it is hereby adjudicated that du Pont has violated Section 7 of the Clayton Act because, at the time of suit, there was a reasonable probability that its acquisition of General Motors stock was likely to result in the restraints condemned by that Section in the line of commerce consisting of automotive fabrics and finishes.

III

[*Divestiture*]

Du Pont and Christiana are each hereby directed to perform the acts and to take the steps provided for hereinafter in this Judgment to divest itself of all rights and interest in the General Motors stock which each owns except bare legal title, the right to receive dividends, the right to participate in the distribution of assets upon dissolution and any other right or interest which is reserved to them or either of them under the provisions of this Judgment. Du Pont, Christiana and Delaware are each hereby enjoined and restrained (i) from acquiring, directly or indirectly, any General Motors stock except such stock as may be distributed by General Motors with respect to General Motors stock held by them or as may be acquired by the exercise of rights issued with respect to such stock, provided that any stock so acquired shall be subject to all of the provisions of this Judgment in the same manner and to the same extent as if du Pont, Christiana or Delaware had owned such stock on the effective date of this Judgment; and (ii) from using or attempting to use, directly or indirectly, the stock ownership of du Pont or Christiana in General Motors, to influence or control General Motors in any manner whatsoever.

IV

[*Common Directors and Employees*]

A. General Motors is hereby enjoined and restrained from knowingly having as a director, officer, or employee any person who at any time after the expiration of

ninety (90) days following the effective date of this Judgment has served as a director or officer of du Pont, Christiana or Delaware, and from knowingly having as an employee any person who is at the same time an employee of du Pont, Christiana or Delaware.

B. Du Pont, Christiana and Delaware are each hereby enjoined and restrained from knowingly having as a director, officer, or employee any person who at any time after the expiration of ninety (90) days following the effective date of this Judgment has served as a director or officer of General Motors, and from knowingly having as an employee any person who is at the same time an employee of General Motors.

C. Du Pont, Christiana and Delaware and their officers and directors are hereby enjoined and restrained from nominating any person for election as a director of General Motors or from proposing any person for a position as an officer of General Motors.

D. All persons who are required by the provisions of Paragraphs A or B of this Section IV to terminate their positions as directors, officers or employees of General Motors, du Pont, Christiana or Delaware are hereby enjoined and restrained from influencing or participating in the selection, nomination or election of persons to fill any of the vacancies created by resignations required by the provisions of Paragraphs A or B of this Section IV in the company with which such person has terminated his association.

E. General Motors, du Pont, Christiana and Delaware shall be allowed ninety (90) days following the effective date of this Judgment to effect compliance with the provisions of this Section IV, and within thirty (30) days thereafter shall file with this Court a report, and furnish a copy of such report to the Attorney General, setting forth the action taken to effect such compliance.

V

[*Termination of Contracts*]

A. Du Pont and General Motors shall cancel and terminate, within ninety (90) days following the effective date of this Judgment, and, so long as du Pont, Christiana or Delaware owns, directly or indirectly, any General Motors stock, du Pont and General Motors are enjoined and restrained from entering into, any contract, agreement, or understanding between them

(i) which requires General Motors to purchase from du Pont any specified percentage of its requirements of any product, provided that following the expiration of three (3) years from the effective date of this Judgment they may enter into such contracts if limited to a period not longer than one calendar year or one automobile model year, or

(ii) which grants to either du Pont or General Motors exclusive patent rights or grants to du Pont preferential rights to manufacture or sell any chemical discovery made by General Motors.

B. Du Pont, Christiana and Delaware are each enjoined and restrained so long as du Pont, Christiana or Delaware owns, directly or indirectly, any General Motors stock from entering into or continuing any agreement, understanding or arrangement with General Motors for ownership or operation of any commercial, manufacturing or other business enterprise and from knowingly holding stock in any such enterprise in which General Motors holds stock, and General Motors is enjoined and restrained during such period from entering into or continuing any such agreement, understanding or arrangement with du Pont, Christiana or Delaware and from knowingly holding stock in any commercial, manufacturing or other business enterprise in which du Pont, Christiana or Delaware holds stock.

C. Du Pont is hereby enjoined and restrained, so long as du Pont, Christiana or Delaware owns, directly or indirectly, any General Motors stock, from dealing with General Motors with respect to any product developed by du Pont or any patent, process or discovery owned by du Pont or as to which du Pont has any proprietary interest, on terms or conditions more favorable than those on which du Pont is willing to deal with competitors of General Motors.

D. General Motors is hereby enjoined and restrained, so long as du Pont, Christiana or Delaware owns, directly or indirectly, any stock in General Motors, from dealing with du Pont with respect to any product developed by General Motors or any patent, process or discovery owned by General Motors or as to which General Motors has any proprietary interest, on terms or conditions more favorable than those on which General Motors is willing to deal with competitors of du Pont.

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VI

[*Exercise of Voting Rights Prohibited*]

A. Du Pont, Christiana and Delaware, and all persons who are directors or officers of du Pont, Christiana or Delaware, and the members of the family of any such director or officer who reside in the same household with him, are each hereby enjoined and restrained from exercising, directly or indirectly, voting rights in respect of General Motors stock which they or any of them hold of record or have the power to vote or the power to direct the vote, or would have the power to vote under the provisions of Section VII of this Judgment, and from attempting to influence, directly or indirectly, any person in any manner with respect to exercising voting rights in respect of any General Motors stock, provided however that nothing in this Paragraph shall prevent du Pont from performing acts required to be performed by the provisions of Section VII of this Judgment.

B. Du Pont, Christiana and Delaware are each hereby directed to give General Motors notice, promptly after the record date for each annual or special meeting of the stockholders of General Motors or other occasion on which General Motors stockholders are entitled to vote, of the names of the record holders, as of such record date, of the General Motors stock which is not to be voted in compliance with the provisions of Paragraph A of this Section VI together with an identification of the shares of General Motors stock held of record by them that are subject to such provisions. Except as provided in Section VII of this Judgment, or unless otherwise directed by this Court or any other court of competent jurisdiction, General Motors is hereby directed to disqualify any record holder of General Motors stock named in such notice from voting, either in person or by proxy, the shares of General Motors stock identified therein, at the annual or special meeting or other occasion for which such notice was given. General Motors shall be entitled to rely exclusively in complying with this Section VI upon the notices to be furnished to it by du Pont, Christiana and Delaware.

C. The provisions of this Section VI shall remain effective so long as du Pont, Christiana or Delaware owns, directly or indirectly, any General Motors stock.

VII

[*"Pass Through" of Voting Rights*]

A. The voting rights of the General Motors stock held by du Pont, or which may be acquired by du Pont in accordance with the provisions of Section III of this Judgment, shall be exercised in the manner provided in this Section VII by the du Pont stockholders as of the record date for the determination of General Motors stockholders entitled to vote except as prohibited by Paragraph A of Section VI of this Judgment and except that such voting rights shall not be exercised in favor of the election of any person nominated or designated by, or held out in any way to be a representative of, du Pont.

B. The number of shares of General Motors stock held by du Pont to be voted by each du Pont stockholder entitled to exercise such voting rights shall be determined, as of the record date for the determination of General Motors stockholders entitled to vote, as follows:

> The number of shares of General Motors stock held by du Pont at such date shall be divided by the number of shares of all du Pont stock outstanding and which would be entitled to vote at a meeting of du Pont stockholders as of such date, and each du Pont stockholder entitled to exercise the voting rights of the General Motors stock held by du Pont shall be entitled to vote the number of General Motors shares determined by multiplying the quotient by the number of shares of du Pont stock owned of record by such stockholder at such date.

C. The following steps shall be taken prior to each annual or special meeting of General Motors stockholders and prior to any other occasion on which General Motors stockholders are entitled to vote:

(1) Du Pont shall execute such instruments and take such other steps as may be necessary to authorize each du Pont stockholder who is entitled to vote the General Motors stock held by du Pont at the said meeting of the stockholders of General Motors, or other occasion, to vote in the manner hereinafter provided in this Section VII, the number of shares of General Motors stock held by du Pont as determined for each such stockholder in accordance with Paragraph B above, and du Pont shall

furnish to General Motors evidence of such authorization in form satisfactory to General Motors.

(2) Du Pont shall arrange to furnish, at its own expense, to each such stockholder a copy of the Notice of Meeting, Proxy Statement, proxy or proxies (which will represent such number of shares of General Motors stock as are determined for each such stockholder in accordance with Paragraph B above and shall be modified or supplemented in such manner as to empower each such stockholder freely and effectively to exercise the voting rights with respect to such shares of General Motors stock), and other proxy soliciting material prepared by General Motors for distribution to its stockholders in connection with any annual or special meeting or any other occasion on which General Motors stockholders are entitled to vote; shall arrange to furnish, at its own expense, to its stockholders such material as has been prepared by any person or group of persons making a solicitation of General Motors stockholders under and subject to applicable regulations of the Securities and Exchange Commission so as to achieve among du Pont stockholders substantially the same coverage as will be achieved among General Motors stockholders by the person or group of persons making such solicitation; shall arrange to inform each such stockholder of the approximate number of shares of General Motors stock which the holder of each share of du Pont stock is entitled to vote hereunder as such proxy holder; and shall arrange to notify each such stockholder of his right, in accordance with the provisions of this Section VII, to vote as such proxy holder and the means of exercising such right. The aggregate number of shares of General Motors stock evidenced by such proxies shall be voted to the last full share.

(3) Du Pont shall also arrange to furnish each such stockholder, at or prior to the time it furnishes the proxy soliciting material for each annual meeting of the stockholders of General Motors, a copy of the latest Annual Report of General Motors.

(4) Copies of all such material shall be furnished by du Pont to the Department of Justice at the same time as it is transmitted to stockholders of du Pont.

D. Anything to the contrary in this Judgment notwithstanding, if it shall appear to General Motors that the provisions of Paragraph A of Section VI may result in impeding the carrying out of any proposed corporate action required by law or by the certificate of incorporation or by-laws of General Motors to be approved by a vote of a specified portion of the outstanding General Motors stock entitled to vote, General Motors may apply to this Court for appropriate relief, after due notice and opportunity for hearing thereon, whereby the General Motors stock which, but for the prohibitions of said Paragraph A, could be voted by Christiana and Delaware as du Pont stockholders, may be represented and voted in respect of such proposed corporate action under such regulations and provisions as the Court shall specify; provided, however, that in no event shall any of the persons prohibited from voting General Motors stock by said Paragraph A be permitted to exercise any discretion as to how such stock shall be voted.

E. Du Pont and General Motors are each hereby directed to take all necessary and appropriate action to facilitate the exercise of voting rights of the General Motors stock owned by du Pont in accordance with the provisions of Sections VI and VII of this Judgment, which Sections shall not apply with respect to any annual or special meeting of General Motors held within one hundred and twenty (120) days from the effective date of this Judgment. In the event that General Motors deems it necessary to call a special meeting of stockholders within such one hundred and twenty (120) day period, the Department of Justice shall be given notice thereof and be informed of the purpose therefor at least twenty (20) days in advance of such meeting.

F. Within thirty (30) days from the effective date of this Judgment the Court will appoint a Monitor of the voting provisions of this Judgment. It shall be the duty of the Monitor to observe the operation of such provisions and to report to the Court following each General Motors annual or special meeting, or other occasion on which General Motors stockholders are entitled to vote, copies of which report shall be made available to the parties hereto. Du Pont, Christiana, Delaware and General Motors are required to cooperate with the Monitor in the execution of his duties. No information obtained by the Monitor in the execution of his duties hereunder shall be disclosed except to the extent necessary in

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the preparation and submission of the reports to the Court provided for above and upon written request of the Attorney General of the United States or his authorized representative. The Monitor shall provide all parties hereto with copies of all information submitted in response to such requests. No information obtained by means provided in this Paragraph F shall be divulged by any party, or by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

G. The expenses incurred by General Motors in carrying out the voting provisions of this Judgment shall, when approved by this Court, be paid by du Pont. The Monitor shall be entitled to receive reasonable compensation for services rendered hereunder and to reimbursement for reasonable and necessary expenses incurred in connection therewith, which compensation and reimbursement shall be fixed and allowed by this Court from time to time, and when approved by the Court shall be paid by du Pont.

VIII

[*Sale of Stock Permitted*]

Du Pont and Christiana shall each be authorized at any time or from time to time to sell or otherwise dispose of, for its own account, all or any part of the General Motors stock held by each of them provided, however, that du Pont or Christiana, as the case may be, shall prior to any disposition notify the Attorney General of the terms and conditions of the disposition including the identity of the prospective purchaser or transferee if known, except that prior notification shall not be required for any single disposition of fifty thousand (50,000) shares or less of General Motors stock unless the number of shares to be disposed of plus the number of shares disposed of in the preceding twelve-month period exceeds two hundred thousand (200,000) shares of General Motors stock, and provided further that in the event the Attorney General interposes an objection such disposition shall not be consummated until first approved by this Court after reasonable notice to all parties. No information as to any proposed disposition supplied to the Attorney General pursuant to this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in connection with proceedings to which the United States of America is a party in which objection is made to such disposition or as otherwise required by law.

IX

[*Contingent Modification—Tax Legislation*]

In the event that legislation should be enacted (for example, as is now provided with respect to distributions required under the Public Utility Holding Company Act of 1935, as amended, or the Bank Holding Company Act of 1956), or there should be a change in regulations or rulings of the Internal Revenue Service, which would substantially and significantly ameliorate the existing inequitable and burdensome tax consequences to du Pont stockholders attendant upon a distribution or other disposition of General Motors shares to du Pont stockholders, so as to make feasible and equitable a program or programs for such a distribution or disposition, or if the provisions of this Judgment should prove inadequate to remedy the violation of the Clayton Act, any party hereto may apply to this Court for modification of this Judgment in light of the circumstances then existing.

X

[*Written Consent of Officers and Directors*]

A. Du Pont, Christiana and Delaware are each hereby directed to secure from its respective directors and officers written consents to be bound by the voting provisions of this Judgment, such consents to be executed by each such director and officer and by each member of his family residing in the same household with him who holds power to vote or to direct the vote of any du Pont or General Motors stock and to be submitted to du Pont, Christiana or Delaware, as the case may be, and filed with this Court, within one hundred and twenty (120) days following the effective date of this Judgment, and within thirty (30) days following the initial election of a director or officer, and within thirty (30) days after the occurrence of an event which requires

a consent to be executed and submitted on behalf of a member of the family of a director or officer in accordance with the provisions of this Paragraph.

B. Du Pont, Christiana and Delaware are each hereby enjoined and restrained from having as a director or officer any person who fails to file consents executed by him and by the members of his family living in the same household with him in accordance with the provisions of Paragraph A of this Section X.

C. Du Pont, Christiana and Delaware are each hereby directed to provide a copy of this Judgment to each of its respective directors and officers and to each adult member of the family of each such director and officer residing in the same household with him within ninety (90) days following the effective date of this Judgment and within thirty (30) days following the initial election of a director or officer.

D. Du Pont and General Motors are each hereby directed to provide a copy of this Judgment to each of their respective subsidiaries within thirty (30) days following the effective date of this Judgment.

XI

[*Inspection and Compliance*]

For the purpose of securing compliance with this Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall be permitted, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice as to time and subject matter to du Pont, Christiana or Delaware at their respective principal offices, (1) to inspect during office hours all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of du Pont, Christiana or Delaware relating to any provisions of this Judgment, during which time counsel for du Pont, Christiana or Delaware, as the case may be, may be present; and (2) subject to the reasonable convenience of du Pont, Christiana or Delaware, and without restraint or interference from them, to interview regarding any such provisions any officer or employee of du Pont, Christiana or Delaware, who, together with du Pont, Christiana or Delaware, as the case may be, may have counsel present. The Attorney General or the Assistant Attorney General in charge of the Antitrust Division may apply to this Court from time to time for an order, upon good cause shown and after due notice and opportunity for hearing thereon, authorizing similar inspection of records and documents of General Motors and/or similar interviewing of officers and employees of General Motors, for such purposes and within such limits as may then be reasonably necessary to enforcement of this Judgment.

B. The Attorney General or the Assistant Attorney General in charge of the Antitrust Division may apply to this Court from time to time for an order, upon good cause shown and after due notice and opportunity for hearing thereon, requiring any defendant to submit in writing such report or reports with respect to matters contained in this Judgment as may then be reasonably necessary to enforcement of this Judgment.

C. No information obtained by means provided in this Section XI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Judgment or as otherwise required by law.

XII

[*Jurisdiction Retained*]

Jurisdiction is retained in order to enable any party hereto or any person enjoined or restrained hereby to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of this Judgment or any of the provisions thereof, or for the enforcement of compliance therewith and punishment of any violations thereof, and for the purpose of determining and assessing proper costs and allowances in this cause.

The effective date of this Judgment shall be 12:01 A. M., November 18, 1959.

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[¶ 69,462] State Wholesale Grocers, et al. v. The Great Atlantic and Pacific Tea Company, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 56C418. Dated September 8, 1959.

Robinson-Patman Price Discrimination Act

Private Enforcement and Procedure—Civil Damages for Antitrust Violations—Promotional Allowances in Violation of Price Discrimination Law—Class Actions—Intervention of Others After Trial on Issue of Liability.—Twenty retail grocers and two wholesale grocers, having established that suppliers of food products violated Section 2(d) of the Clayton Act by paying for advertising in a grocery chain's magazine without making such payments available to the chain's competitors on "proportionally equal terms," were permitted to bring into the action, under Rule 23(a)(3) of the Federal Rules of Civil Procedure (providing for "spurious class actions"), other retail and wholesale grocers "similarly situated." The intervention was not untimely, since the joining of additional parties plaintiff at any earlier stage of the case might have delayed the orderly and expeditious fashion in which the liability issue was tried. Here, with the separation of the liability and damage issues for purposes of trial, Rule 23(a)(3) afforded an excellent mechanism whereby a handful of persons tested the legality of the suppliers' activities for all persons similarly situated. That activity having been branded as unlawful, the time was ripe for the intervention of all wronged parties.

As to the grocers' right to bring the class action, the two classes were adequately identified. The "retail class" consisted of retailers in the area who, during the pertinent period, resold the suppliers' products in competition with the favored retailer's stores, and to whom proportionately equal treatment was not made available. The "wholesaler class" consisted of wholesale grocers in the same area who, during that period, sold the suppliers' products to members of the retailer class. Differences between members of either class were insignificant, so long as there was a question of fact or law that was common to all members of the class. Further, the requirement of "common relief," which does not mean "joint relief," was satisfied by the charge that the same, but separate, action by defendants of equal standing (suppliers who had favored one customer over others) violated the same section of a statute, and that the unlawful action of each defendant damaged each of several plaintiffs in separate, different amounts. Also, the grocers adequately represented the members of the two classes for whom the action was brought.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.20.

For the plaintiffs: Marks, Marks & Kaplan, and Libit, Lindauer & Henry, all of Chicago, Ill.

For the defendants: Thomas R. Mulroy of Hopkins, Sutter, Owen, Mulroy & Wentz; Miller, Gorham, Wescott & Adams; and McBride, Baker, Weinke & Schlosser, all of Chicago, Ill.

For a prior opinion of the U. S. Court of Appeals, Seventh Circuit, see 1958 Trade Cases ¶ 69,089, in part affirming and in part reversing and remanding a decision of the U. S. District Court, Northern District of Illinois, Eastern Division, 1957 Trade Cases ¶ 68,772. For a prior opinion of the District Court, see 1956 Trade Cases ¶ 68,420.

Memorandum and Order

[Price Discrimination Action—Remand]

CAMPBELL, Chief Judge *[In full text]*: On remand of this case from the Court of Appeals, plaintiffs have moved for a ruling on the so-called "spurious class" suit issue left undecided both by this Court and the Court of Appeals. *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Company,* D. C., N. D. Ill., E. D., [1957 TRADE CASES ¶ 68,772], 154 F. Supp. 471; C. A., 7 Cir., [1958 TRADE CASES ¶ 69,089], 258 F. 2d 831. Since the pertinent facts appear in each of these reported decisions, I shall not repeat them in detail here.

["Spurious Class Suit"]

Plaintiffs consist of twenty retail grocers and two wholesale grocers located in the

Chicago Metropolitan Area. They seek to bring into this action the retail and wholesale grocers similarly situated who accept their invitation to join. Defendants, General Foods Corporation, Hunt Foods, Inc., and Morton Salt Company oppose the propriety of the class suit contending (1) that plaintiffs have not shown that they are entitled to bring a spurious class suit and, (2) in the alternative, that it is too late at this stage of the instant proceeding for the intervention of additional parties plaintiff.

Rule 23(a)(3) of the Federal Rules Civil Procedure, which governs spurious class suits, provides as follows:

> "a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Whether Plaintiffs are Entitled to Bring a Class Suit

[*Classes Defined*]

Defendants contend that neither the retail grocer nor the wholesale grocer class has been adequately identified. I do not agree. As to the plaintiff retailers, I think it has been clearly established that the class consists of retail grocers situated in the Chicago Metropolitan Area who, during the period pertinent to this suit, resold products of the defendant suppliers in competition with at least one store of the favored retailer, A. & P., and to whom proportionately equal treatment was not made available. The wholesaler class consists of all wholesale grocers situated in the same area who, during that period, sold the defendant suppliers' products to members of the retailer class. I attach little significance to the fact that there may be certain differences between the various members of either class so long as there is a question of fact or law common to all members within that particular class.

[*Common Relief*]

The propriety of the class suit is also challenged on the ground that common relief is not sought against the defendants. Counsel for defendants interpret the requirement of "common relief" as provided in Rule 23(a)(3) to mean that the claims of the plaintiffs must emanate from the same original source, citing *Kainz v. Anheuser-Busch, Inc.*, 7 Cir. [1952 TRADE CASES ¶ 67,221], 194 F. 2d 737, in support of their position. Defendants take the position that inasmuch as it is not claimed here that the three defendant suppliers have joined or acted together, the several claims of the plaintiffs emanate from three, separate and distinct sources, thus destroying the element of common relief.

A reading of the pertinent portion of the Court of Appeals' opinion in the *Kainz* case, *supra*, might prove helpful. In rejecting the contention that the phrase "common relief" means "joint relief", as that phrase is used in Rule 23(a)(3), the court stated, at page 743 of 194 F. 2d:

> "* * * 'Common relief' for persons having separate causes of action who may recover only several judgments, it seems to us, must mean, in order to give life to the purpose of the rule, relief emanating from the same original source, either by way of grant, contract, tort or statute, where the claims of all beneficiaries flow from the same fountain but are allowed not in a joint judgment but in several judgments. Strictly speaking, this may not be common relief in many senses, but it is separate relief for each growing out of a common source of right to recover. The same character of right to recover exists in several; in that sense, when there are common issues of fact and law, we think, the relief is common within the meaning of the rule. To hold otherwise is to destroy the so-called spurious class entirely, for, if the relief to be recovered by several members of the class in separate judgments must be a common or joint judgment, then the whole provision is meaningless. The rule clearly contemplates, we think, relief in the form of separate similar judgments, emanating from the same source in law and grounded upon common questions of fact."

In view of the language of the *Kainz* case, I think the Rule is satisfied where, as here, it is charged that the same, but separate, action by defendants of equal standing (that is, suppliers who have favored one customer over others) violated the same section of a statute, and that the unlawful action of each defendant damaged each of several plaintiffs in separate, different amounts.

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[*Adequacy of Representation*]

Defendants also urge the Court to hold that the plaintiffs do not adequately represent the members of either of the two classes for whom ths suit is brought. An examination of the entire record of this case convinces me that this contention is without merit.

Whether the Proposed Intervention Is Untimely

[*"Liability" Issue Concluded—Time Ripe for Intervention*]

It is argued that intervention at this point of the instant proceeding would be untimely since it comes at a time more than 3½ years after the suit was instituted and 2½ years after the proofs have been closed on the issue of liability. Defendants contend that it would be fundamentally unfair to them to allow intervention at this juncture of the case and caution that objectional procedural consequences might develop if such a practice is permitted.

Of course, defendants' contentions might be true in most cases. In the instant case, however, the issues of liability and damages were separated for purposes of trial. Trial of the issue of liability has been concluded. There is, at least, one element of the liability facet of this case which remains for decision. I think it clear that the joining of additional parties plaintiff at any earlier stage of the present case would have at that time served no useful purpose and might well have hampered, or at least delayed, the orderly and expeditious fashion in which the issue of liability was tried. With the separation of the issues of liability and damages for purposes of trial, Rule 23(a)(3) afforded the Court, as well as the parties, with an excellent mechanism whereby a handful of persons with a standing sufficient to complain might, on behalf of all such persons similarly situated, test the legality of the defendants' activity which affected all such persons. That activity having been branded as unlawful by the Court of Appeals, the time is now ripe for the intervention of all wronged parties.

[*Speeding Up Trials*]

A rule of procedure must possess a certain quality of usefulness. With respect to the Rule under consideration, it should, if nothing else, serve to speed up trials such as the instant suit, while at the same time avoid multiplicity of suits. Intervention of additional parties plaintiff before or during the trial of liability would have appreciably delayed the submission of that issue for decision and would have nullified one of the purposes for which the Rule was adopted. I think Judge Lindley's comments in the *Kainz* case, *supra,* with respect to Rule 20(a) and Rule 23 (a)(3), are particularly apropos here. He said at page 744 of 194 F. 2d:

> "We fully appreciate the difficulty encountered by trial courts in attempting to give to these two rules the force we have attributed to them. Both, interpreted as we feel they must be, are innovations at odds with earlier ideas of proper law and equity practices. It was once axiomatic that multifariousness of claims was to be avoided and that multiplicity of parties could be permitted only in cases far afield from those of the so-termed spurious class. The latter, obviously, has unity only as an expedient invented and introduced into modern practice for the purpose of reducing multiplicity of suits and speeding up trials. We know the invention has novelty; whether it possesses also the other quality sought, utility, is not yet fully proved. However, sensing as we do that these novel insertions into our rules of procedure were inspired by certain specific supposedly beneficent purposes, it is our duty to give them effect. Perhaps in a case such as this, where each of the parties is entitled to a jury trial, where the transactions are voluminous, complex and intricate and the possible parties so numerous as to be beyond possibility of retention in the memory of any trier of the facts, it may eventuate that the expedient provided is not efficacious in improving practice and procedure. But that possibility does not authorize us so to interpret the rules as to nullify them."

I think the entire procedure employed in this case demonstrates most effectively that Rule 23(a)(3) possesses the quality for which Judge Lindley was searching; that is, the quality of utility. Defendants' conduct has been put to test and has been found unlawful. The facts elicited to test defendants' activity, as distinguished from the facts which establish the present plaintiffs' standing to complain, while being common to all present plaintiffs, should be common to all plaintiffs seeking to intervene. The latter must establish their standing to complain (that is, their membership in the class) and, like the present plaintiffs, the amount of

their individual damages. That this comes at a date so long after the suit was instituted and the issue of liability tried is immaterial especially in view of the fact that most of this time was consumed in establishing the illegality of defendants' conduct before the Court of Appeals.

Intervention at this time, admittedly, presents its problems. However, I cannot concede that the Court, with the aid of able and experienced counsel, lacks the necessary tools to cope with them. It is no secret that the calendar of this court is already overcrowded. To force all plaintiffs who seek to intervene to file a new action, with its accompanying gamut of pre-trial discovery, would necessarily overburden the individual calendar of the particular judge of this court to whom it would be assigned, not to mention the fact that said action might later, perhaps, be consolidated with the instant one. At the same time, I cannot perceive how the defendants' rights would be prejudiced by intervention. If it shall later appear that any of those rights might be put in jeopardy, the resources of the court would be available to protect them. In summation, I think the procedures utilized in the instant case demonstrate most effectively the proper employment of the Rules and the tools available to a trial court. While I do not attempt to conclude that these procedures should be followed in every case such as this, since each case must be judged by its own peculiar facts, I do conclude that those procedures were most appropriate in the instant suit.

[*Other Issues*]

I am not unmindful that there is at least one issue that remains for decision. This issue, if decided in defendants' favor, would completely dispose of this suit. The other issues that may remain for decision might either bar some plaintiffs' rights if decided favorably to defendants or further define each class. It should be noted that what has been said in this memorandum shall be without prejudice to such of the issues as remain for the Court's decision.

[*Ruling—Pre-trial Conference*]

For the reasons stated, the class suit issue is decided in plaintiffs' favor and the cause is set for pre-trial conference on September 28, 1959, 4. P. M., for the purpose of setting a reasonable date within which additional plaintiffs must intervene or be barred.

[¶ 69,463] Rosenthal v. Drug Loft, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 49, page 11, dated September 8, 1959; 142 N. Y. L. J., No. 55, page 11, dated September 16, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement—Contempt—Affidavits Describing Persons Who Allegedly Made "Unfair" Sales—Discrepancy Between Description and Actual Appearance of Defendant's Sales Personnel.—A plaintiff in a fair trade enforcement action was denied a motion to punish a defendant for alleged violations of an injunction where the defendant denied the charges and claimed that there was a wide discrepancy between the three persons comprising the sales personnel of its store and the descriptions given, in the plaintiff's moving affidavits, of the persons who allegedly made the "unfair trade sales." The court, after viewing and interrogating the defendant's sales personnel, agreed with the defendant's contentions that the plaintiff's affidavits must, of necessity, be considered false.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Fair Trade Action—Contempt*]

LORETO, Justice [*In full text*]: Motion to punish defendant for contempt for violating the injunctive provision in a judgment entered November 12, 1958, which prohibited defendant from selling retail drugs, toiletries, below fair trade prices established by the manufacturer or distributor. The motion is opposed by defendant who denies the charges made, claiming, in addition, that there are only three persons in attendance in its store and that the description of these sales persons in the affidavits of the shoppers,

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submitted in support of the motion, does not reasonably correspond with the actual appearance, size and weight of any of its sales force. This court, under the circumstances, cannot resolve the matter on the papers submitted. Testimony must be taken concerning the disputed issues. Accordingly, the matter is respectfully referred to Hon. Jacob Marks, official referee, to take proof of the parties on the issues raised and to report to the court with his recommendations. Pending the coming in of the report, the final disposition of this motion will be held in abeyance.

[*Contempt Denied—False Affidavits*]

The order and the opinion herein dated September 2, 1959, are recalled and said order is hereby rescinded. They are at variance with the decision rendered after argument on the record. The attorney for the defendant has called this error to the attention of the court and the attorney for the plaintiff. It occurred by reason of the fact that when the file reached chambers after processing by the clerk's office and finally came to the court's attention for disposition several weeks had elapsed. A great volume of the summer motion and *ex parte* work in the meantime had been the subject of hearings, study and disposition by the court. As there was no notation in the file of the court's prior disposition of the motion and the court did not have particular recollection of it, the motion was considered solely upon the affidavits, which raise an issue that the court referred for determination by said order. That issue had been resolved by the court. On the argument of the motion, the defendant's attorney claimed that there was a wide discrepancy between the only three persons who comprise the personnel of the defendant's store serving customers and the description given in the moving affidavits of the persons whom plaintiff asserted made the unfair trade sales at the defendant's store. Defendant's attorney urged that those affidavits must, of necessity, be considered false and that therefore the motion should be denied. He presented those persons whom the court viewed and interrogated. The plaintiff's attorney took the position that such action was irrelevant to the determination of the motion before the court (S. M. p. 7). The court agreed with the contention of the attorney for the defendant and upon the affidavits submitted, as well as the record then made in court and from the bench denied the motion. That decision should have been entered in an order. The stenographic minutes of the argument and hearing not before the court at the time the order of September 2, 1959, was made and entered, are now made part of the record. Plaintiff's motion is denied. Submit order on notice.

[¶ 69,464] Traster v. Juron Cosmetics, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 41, page 23. Dated August 26, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses—Price Violations by Enforcing Party.—An owner of a retail pharmacy, in a fair trade enforcement action against a defendant who had allegedly violated fair trade contracts, was denied a temporary injunction where the defendant did not deny selling below fair trade prices, but claimed that the plaintiff was doing the same thing and did not, therefore, come into court with clean hands. In *De Candido v. Wagonfeld,* 1959 TRADE CASES ¶ 69,443, it was held that price violations by a plaintiff constituted a valid defense.

See Fair Trade, Vol. 1, ¶ 3452.34.

[*Fair Trade Action—Defenses*]

CAPOZZOLI, Justice [*In full text*]: Motion for temporary injunction is denied. Plaintiff, a retail pharmacy store owner, seeks to enforce the fair trade contracts against defendant. He claims that defendant had continued to violate said contracts even after notice and by this motion seeks a temporary injunction. Defendant does not deny plaintiff's claim of selling below the contract price, but resists this motion on the grounds that plaintiff is doing the same

thing and therefore does not come before the court with clean hands. In a decision recently handed down by Mr. Justice Hofstadter (*De Candido v. Wagonfeld* [1959 TRADE CASES ¶ 69,443], published N. Y. L. J., August 21, 1959, on the front page) it was held a valid defense that plaintiff also sold the products of the manufacturers listed in the complaint at prices less than the alleged fair trade prices mentioned therein. Therefore, the drastic relief requested by plaintiff is denied. His remedy is by a prompt trial of the issues involved.

[¶ 69,465] De Candido v. Imperial Drug Exchange, Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 38, page 3. Dated August 21, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement—Person Who May Maintain Suit—"Any Person Damaged Thereby"—Necessity for Competition Between Retailers—Distance of More Than Mile Between Stores.—A retail pharmacy's motion for a temporary injunction against a defendant shown to have been guilty of repeated and continual unlawful price cutting was not defeated by the fact that the plaintiff's place of business was located in a residential district and the defendant's store was located in a manufacturing area more than a mile away.

See Fair Trade, Vol. 1, ¶ 3330.34.

[*Fair Trade Action*]

LORETO, Justice [*In full text*]: Plaintiff moves for a temporary injunction in enforcement of the Feld-Crawford Act. He has made a clear case for the relief sought as the moving affidavits show repeated and continual unlawful price cutting by defendant's sales clerks. The defenses alleged, in wholly conclusory fashion, are without merit and incapable of defeating plaintiff's application. The circumstance that plaintiff's place of business is in a residential district and defendant's store is located in a manufacturing area more than a mile away from plaintiff's pharmacy does not defeat plaintiff's right to obtain a temporary injunction. Accordingly, the motion is granted. Settle order which shall also provide for a bond in the sum of $500 and an early trial.

[¶ 69,466] Gillette Co. v. Riteprice Merchandise Corporation.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 34, page 3. Dated August 17, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Enforcement Activity or Policy—Failure to Proceed Against All Violators.—A manufacturer's alleged failure to proceed against all violators of its fair trade program was held insufficient as a matter of law to defeat its application for a temporary injunction against a defendant which had not denied selling the manufacturer's products below fair trade prices.

See Fair Trade, Vol. 1, ¶ 3440.34.

[*Fair Trade Action—Defenses*]

FLYNN, Justice [*In full text*]: Motion to enjoin the defendant *pendente lite* from selling plaintiff's products at prices below the minimum established pursuant to General Business Law, section 369(a) et seq. is granted. The affidavit in opposition fails to raise any genuine issue to defeat the relief applied for. The alleged sales are not denied and the alleged failure of the plaintiff to proceed against all violators is insufficient as a matter of law to bar the relief sought (*Seagram Distillers Corporation v. Ackerman*, 263 App. Div. 1016). Settle order.

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[¶ 69,467] The Upjohn Company v. Park Row Merchandise, Inc.

In the United States District Court for the Southern District of New York. Civ. 140-97. Filed September 21, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Inability to Sell Products at Fair Trade Prices.—A fair trader was granted a preliminary injunction prohibiting the sale of its products below fair trade prices where its allegations of the alleged violations were corroborated by the defendant's statements, in its brief and opposing affidavits, that it could not sell the fair trader's products at the fair trade prices. The fact that the defendant could not do business except by violating the fair trader's rights is no reason why a preliminary injunction should not be granted.

See Fair Trade, Vol. 1, ¶ 3420.

Fair Trade—Defenses to Enforcement Action—Lack of Enforcement—Delay Induced by Defendant's Assurances That It Would Adhere to Fair Trade Prices.—A fair trader's motion for a preliminary injunction was not defeated by the defendant's assertion that the fair trader had been guilty of delay in seeking relief. It was established that any such delay was induced by the defendant's assurances, subsequent to the institution of the action, that it would adhere to the fair trade prices.

See Fair Trade, Vol. 1, ¶ 3440.34.

Memorandum

[*Fair Trade Action*]

MURPHY, District Judge [*In full text*]: Plaintiff's motion for a preliminary injunction is granted. Its allegations that defendant is violating § 369-b of the General Business Law of the State of New York, in that defendant is selling plaintiff's products below their fair trade prices, is amply supported, and in fact corroborated by defendant in its brief and opposing affidavit where it is stated that defendant cannot sell plaintiff's products at their fair trade prices.

That defendant cannot do business except by violating plaintiff's rights is no reason why a preliminary injunction should not be granted.

[*Delay*]

As to the asserted delay of plaintiff in seeking this relief it is fairly established by plaintiff's affidavits and oral argument that any such delay was invited and occasioned by defendant's assurances subsequent to the institution of this suit that it would discontinue its infringing acts and adhere to the schedule of fair trade prices. Any apparent laches on the part of plaintiff was therefore induced by defendant's representations upon which it invited plaintiff to rely.

[*Injunction Granted*]

Accordingly, the injunction will issue.

Settle order before October 1, 1959, and submit therewith an undertaking in the sum of $5,000.

[¶ 69,468] Olin Mathieson Chemical Corp. v. Spear & Co., Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 41, page 4. Dated August 31, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses—Lack of Control Over "Concessionaire"—Sign on Outside of Building Advertising "Discount" Prices.—A defendant's alleged lack of control over a "concessionaire" using its premises was insufficient to defeat a plaintiff's motion for a temporary fair trade injunction where a sign on the *outside* of the defendant's building advertised "discount" prices.

See Fair Trade, Vol. 1, ¶ 3252.34.

[*Fair Trade Action*]

SPECTOR, Justice [*In full text*]: Motion for a temporary injunction is granted. Defendant relies solely on its lack of control over a "concessionaire" using its premises and selling the products in question. However, the reply affidavit of Mannie Zemsch clearly indicates that a sign on the *outside* of defendant's building advertises "Lowest Discount Prices—Cosmetics, Health Aids, Toiletries, Vitamins." Settle order.

[¶ 69,469] Jaynor Chemists, Inc. v. City Drug Co., Inc.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 57, page 12. Dated September 18, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Defenses to Enforcement Action—Acquisition of Merchandise Before Receipt of Notice of Fair Trade Program.—In a fair trade enforcement action, a motion for a temporary injunction was granted where there was abundant proof that notice had been given to the defendant of the fair trade program, and the defendant failed to make any statement that the articles were acquired before receipt of such notice.

See Fair Trade, Vol. 1, ¶ 3268.34.

Fair Trade—Defenses to Enforcement Action—Price Violations by Enforcing Party—Insufficient Proof.—In a fair trade enforcement action, there was insufficient proof of the enforcing party's alleged sales below fair trade prices to defeat its application for a temporary injunction.

Fair Trade, Vol. 1, ¶ 3452.34.

[*Fair Trade Action*]

GREENBERG, Justice [*In full text*]: Plaintiff moves for a temporary injunction in enforcement of the Feld-Crawford Act. Defendant urges that plaintiff neither alleges nor proves that violation occurred after notice of the fair trade program and acquisition of the articles sold below the fair trade prices. There is abundant proof of notice given to the defendant while it makes no statement that the articles sold were acquired before receipt of notice. There is insufficient proof to indicate that two shoppers made purchases from the plaintiff below the fair trade prices and to defeat the present application. Defendant's violations may not be thus excused. The motion is granted. Bond is fixed in the sum of $250. Settle order.

[¶ 69,470] Duro-Test Corporation v. Theodore W. Donaghy.

In the New York Supreme Court, Jefferson County. Dated June 19, 1959.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies—State Antitrust Laws—Contracts in Restraint of Trade—Salesman's Agreement Not to Compete with Former Employer—Validity—Reasonableness As to Time and Territory.—A company engaged in the selling of fluorescent and incandescent light bulbs and tubes was entitled to a temporary injunction enforcing a salesman's agreement not to compete with the company, for a period of one year after the termination of his employment, within the particular New York counties in which he had formerly sold for the company. However, it was not entitled to a temporary injunction enforcing the salesman's agreement that he would not, for a similar period, solicit any of the company's customers. That provision appeared to restrain him from selling, in his particular line, in any territory in the United States in which the company did business. To that extent, the provision might be found void and unenforceable as a contract in restraint of trade and in violation of the New York antitrust law.

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Nevertheless, upon a trial of the action, the other provisions of the employment contract, particularly the provision which restricted the salesman's activities within the particular territory in which he had formerly sold for the company, might well be found valid and enforceable. Also, the injunction would not deprive the salesman of the right to earn a livelihood, since he was then employed as a sales manager for the entire State of New York and the territory covered by the injunction covered only a small portion of that area.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.34.

For the plaintiff: Dunk, Conboy, McKay & Bachman, Watertown, N. Y. (Lawrence Conboy, of counsel).

For the defendant: Giles, Fuller & Goodwin, Watertown, N. Y. (Roy A. Fuller, of counsel).

[*Contracts In Restraint of Trade—Restrictive Employment Contract*]

HUDSON, Justice [*In full text except for omissions indicated by asterisks*]: The plaintiff has instituted this action against the defendant for a permanent injunction restraining the defendant for a period of one year ending November 11, 1959 from entering the employ or service of the Industrial Electronics Corporation, a competitor of the plaintiff, or any other rival concern engaged in the same line of business as the plaintiff.

[*Temporary Restraining Order Sought*]

Plaintiff further seeks a temporary restraining order so enjoining the defendant pending the trial of the action.

[*Damages Sought*]

Plaintiff also seeks to recover damages for any loss sustained by reason of the alleged violation of the contract between the parties relating to the employment of the defendant by plaintiff as well as such other and further relief as to the Court may seem just and proper.

On instituting the action, the plaintiff brought on, by order to show cause, an application for a temporary injunction restraining the defendant from entering into or continuing in the employ or service or otherwise acting in aid of the business of the Industrial Electronics Corporation or any other rival concern engaged in the same kind of business as the plaintiff, pending the trial.

[*Employment Contract*]

The defendant made a cross motion pursuant to Rule 106, subdivision 4 of the Rules of Civil Practice for the dismissal of the plaintiff's complaint on the ground that the same does not state facts sufficient to constitute a cause of action. Annexed to the plaintiff's complaint and made a part thereof were the contracts between the parties designated as "sales representative contract", Exhibit 1 being dated November 9, 1953 and Exhibit 2 being dated April 24, 1956. It is alleged that Exhibit 2 superseded Exhibit 1 as of the date thereof. It is undisputed that the defendant was in the employ of the plaintiff as salesman from 1953 up to the month of November, 1958; that during such time the defendant was the exclusive sales representative of the plaintiff within the counties of Oswego, Jefferson, St. Lawrence, Lewis, Clinton, Hamilton, Essex and Franklin and parts of Herkimer and Oneida Counties. As such exclusive sales representative, the defendant was entitled to commissions upon all orders for its products sold and shipped into the exclusive sales territory set apart for the defendant under the contract. Specific provision for the payment of compensation was contained in the contract subject to the right reserved to the plaintiff under certain conditions to make changes in the schedule of commissions, payments, bonus payments and prices to be charged. Any such change, however, was required to apply generally to all sales representatives of the company. The contract provided that the term of employment covered by the contract was one year but that the same would be considered to continue in full force and effect unless either party notified the other to the contrary within thirty (30) days of the expiration date of such contract or that such contract could be terminated by either party at any time by giving to the other ninety (90) days' notice of the intention to so terminate it. The right was also reserved to the company to terminate the contract for certain specific violations of the terms of employment without notice.

[*Restrictions*]

Under the provisions of paragraph 11 of the contract, a restriction was placed upon and accepted by the sales representative, of employment in competition with the plaintiff for a period of one (1) year after the termination of his employment. The sales representative also acknowledged the secret and confidential nature of certain customer's lists, information and knowledge of the company's business. Paragraph 11 of said contract reads as follows:

"11. The parties recognize that the Sales Representative, through his association with the business of the Company, has come into possession of important information and knowledge of the Company's business, including customers lists, or that he may be expected to do so in the future, and the Sales Representative agrees that such information and customers lists are of a secret and confidential nature. The Sales Representative will, under no circumstances, make any such information or knowledge available to any individual, firm or corporation other than the Company. The Sales Representative further agrees that during the term of his employment hereunder and for a period of one (1) year after the termination thereof for any reason whatsoever he will not in any way, directly or indirectly, solicit, divert, take away or attempt to solicit, divert or take away any of the present customers of the Company or any customers of the Company who shall become such during the term of his employment, or seek to cause any such customer to refrain from patronizing the Company or assist any other person or persons so to do during the same period. The Sales Representative further agrees that during the period of one (1) year following the termination of his employment hereunder for any cause whatsoever, he will not within the territory assigned to him at such termination and any other territory which may have been assigned to him prior to such termination become employed by, or active on behalf of any person, firm or corporation engaged in the business of selling or distributing any of the products sold by the Company during the course of his employment, and that he will not in any way engage in competition with the Company within said territory."

[*Termination—Retention of Customer List*]

Many of the facts pertinent to a consideration of the motions presently before the Court are not seriously disputed. It appears from the moving papers, and I believe is undisputed, that the defendant terminated his employment November 11, 1958, by letter addressed to the plaintiff on that date. He retained the list of customers which had been turned over to him by the plaintiff at the time of his employment together with the names of such other customers acquired by him during the period of his employment by the plaintiff, claiming that such list of customers belonged to him as his own personal property and refused to turn the same over. The defendant entered the employ of the Industrial Electronics Corporation, a direct competitor of the plaintiff in November, 1958 and as an employee of Industrial Electronics Corporation, solicited a large number of the former customers of the plaintiff whom he had solicited and serviced during his employment by the plaintiff. Although it does not appear in the moving papers, it was conceded by the defendant upon the argument of the motion, that his employment by the Industrial Electronics Corporation was not in the capacity of a sales representative or salesman in the sense that he had formerly been employed by the plaintiff but rather that he had been employed by Industrial Electronics Corporation as their New York State Sales Manager. In such capacity he was in charge of salesmen over the entire State of New York including the territory in which he had had exclusive representation as sales representative for the plaintiff. It appears from the moving papers and was not disputed that the defendant solicited former customers of the plaintiff and did so in company with a salesman of the Industrial Electronics Corporation whom he was training to solicit business in such territory and whom he introduced to his former customers of the plaintiff as qualified to supply them with the products manufactured and sold by the plaintiff and the Industrial Electronics Corporation. The products in question are fluorescent and incandescent light bulbs and tubes used almost entirely by commercial and industrial concerns and being sold under a long life guaranty.

[*Cross Motion to Dismiss*]

I will first take up the defendant's cross motion to dismiss the plaintiff's complaint inasmuch as a determination of such motion in favor of the defendant would make a

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determination of the plaintiff's motion unnecessary.

The defendant urges that the contract annexed to the complaint is unenforcible and void for the reason that it is indefinite, uncertain and lacking in mutuality and in any event is unenforcible and void as being in restraint of trade and in violation of section 340 of the General Business Law. * * *

[*Legality of Contract*]

* * *

I will next consider the contention of the defendant that the contract is unenforcible as being in restraint of trade, contrary to public policy, and in violation of section 340 of the General Business Law.

[*Scope of Restriction*]

While it may well be that upon a trial of this action, it will be found that the provisions of paragraph 11 of the contract, Exhibit 2, annexed to the complaint which reads as follows:

> "The Sales Representative further agrees that during the term of his employment hereunder and for a period of one (1) year after the termination thereof for any reason whatsoever he will not in any way, directly or indirectly, solicit, divert, take away or attempt to solicit, divert or take away any of the present customers of the Company or any customers of the Company who shall become such during the term of his employment, or seek to cause any such customer to refrain from patronizing the Company or assist any other person or persons so to do during the same period."

are too broad in their scope because they would appear to restrain the defendant from engaging as a salesman in his particular line of business in any territory in the United States in which the plaintiff does business and, to such extent, would be unenforcible, nevertheless, the other provisions of paragraph 11 of the contract might well be found, upon such trial, to be enforcible as between the parties particularly the provision thereof which restricts the employment of the defendant within the territory assigned to him under the contract for a period of one (1) year after the termination of his employment thereunder. In my opinion the authorities recognize the enforceability of contracts of employment which are reasonably limited as to the time limit of the restriction and the area covered by the restriction.

McCall Co. v. Wright, [198 N. Y. 143]; *Todd Protectograph Co. v. Hirschberg,* 100 Misc. 418, 165 N. Y. S. 906; Sec. 340, General Business Law.

[*Contract Not Unlawful*]

I do not feel that the contract provision in question is contrary to public policy or in restraint of trade and, therefore, in violation of section 340 of the General Business Law. The defendant's motion to dismiss the plaintiff's complaint under Rule 106, subdivision 4 is denied.

[*Temporary Injunction*]

I will next consider the application of the plaintiff for a temporary injunction. As I have previously pointed out, the defendant entered the employ of the plaintiff in 1953 and continued in such employ until November, 1958. The terms of his employment were covered by the contracts, Exhibits 1 and 2, annexed to the complaint. The exclusive territory granted to the defendant under the provisions of both contracts was clearly and definitely set forth. No claim of breach of contract has been made by the defendant. Both contracts specifically provide that the sales representatives agreed that information and knowledge of the company's business, including customers' lists are of a secret and confidential nature. The contract, Exhibit 2, under which the defendant was employed for the last two and a half years contains the specific provision that he would not, for a period following the termination of his employment, become employed by or active on behalf of one engaged in the business of selling or distributing products of his employer within the territory assigned to him under the contract. He also agreed to give ninety (90) days' notice of the termination of his employment and to surrender any list of customers which had been turned over to him including any customers obtained by him thereafter. It is contended by the plaintiff that such actions on the part of the defendant constitute a breach of the contract by him and it was not disputed that the defendant did violate those provisions of the contract. The moving papers set forth specific instances wherein the defendant did solicit many of the customers whom he serviced on behalf of the plaintiff during his

employment in the territory exclusively reserved to him under his employment contract and such solicitation occurred almost immediately following the termination of his employment with plaintiff. This was not denied by the defendant.

It appears to the court that the action of the defendant comes clearly within the equitable principles laid down in *McCall Company v. Wright, supra,* and the many cases which have followed the pertinent general principles of law laid down thereunder. See also,

Foster et al. v. White, 248 A. D. 451, affd. 273 N. Y. 596; *Clark Paper & Mfg. Co. v. Stenacher,* [236 N. Y. 312]; *Todd Protectograph Co. v. Hirschberg, supra.*

[*Competing in Specific Territory Enjoined*]

As I have previously indicated, I do not believe that the plaintiff is entitled to any injunctive relief of a temporary nature to enforce the provisions of paragraph 11 of the contract, Exhibit 2, annexed to the complaint which provides that he shall not for a period of one year after the termination of the contract, solicit, divert, take away or attempt so to do any of the present customers of the company, or any customers who shall become such during the term of his employment. I do believe, however, that the plaintiff is entitled to a temporary injunction pending the trial of this action in respect to that portion of paragraph 11 of the contract, Exhibit 2, annexed to the complaint, which reads as follows:

"The Sales Representative further agrees that during the period of one (1) year following the termination of his employment hereunder for any cause whatsoever, he will not within the territory assigned to him at such termination and any other territory which may have been assigned to him prior to such termination become employed by, or active on behalf of any person, firm or corporation engaged in the business of selling or distribution of any of the products sold by the Company during the course of his employment, and that he will not in any way engage in competition with the Company . . . within said territory."

[*Unreported Decisions*]

In coming to this conclusion, I am not unmindful of two decisions of the Special Term, which as far as I have been able to ascertain have not been reported. One was submitted by the defendant, entitled *"Duro-Test Corporation v. Edward H. Ward"*. This action was instituted in the Supreme Court of Cayuga County. The defendant therein moved to dismiss the complaint and the Special Term, Hon. James C. O'Brien, Justice, under date of October 8, 1958, held that the contract was too broad in its terms and was unenforcible. The other was submitted by the plaintiff, entitled *"Duro-Test Corporation v. George A. Slawsky"*. This action was instituted in Supreme Court, Albany County. Justice Harry E. Schirick, under date of April 18, 1958, upon an application for a temporary injunction restraining the defendant from continuing in the employ of the Industrial Electronics Corporation, held that under the same or a very similar contract to the one involved herein and under similar circumstances, a court of equity would grant injunctive relief. It should be noted that Judge Schirick restricted the effect of the temporary injunction to the territory embraced in the counties in which the employee had been given an exclusive territory under the contract. Justice O'Brien's memorandum decision does not indicate the factual background which was before him upon the motion to dismiss the complaint and I am unable to determine whether the same circumstances existed there as do here. The provisions of the contract are not set forth.

[*Trial Required*]

I believe in the present case that the facts and circumstances presented by the moving papers and conceded upon the oral argument of counsel, present facts which require a trial of the issues. It may well be upon such a trial, that the complaint may not be sustained. It seems to me, however, that under the reasoning of Justice Schirick, upon the application before him, that a temporary injunction should be granted under the facts here presented covering only the territory assigned to the defendant in paragraph "4" of the contract dated April 24, 1956. The granting of the temporary injunction herein will not deprive the defendant of any right to earn a livelihood as it appears without dispute that he is presently employed as the sales manager for the entire State of New York for the Indus-

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trial Electronics Corporation. The territory covered by the injunctive relief constitutes a very small portion of the State.

[*Temporary Injunction Granted*]

The motion for temporary injunction is granted without costs. Order accordingly.

[¶ 69,471] Lakeside Oil Co., Inc. v. Harold H. Slutsky.

In the Wisconsin Supreme Court. August Term, 1959. No. 31. Filed October 6, 1959.

Appeal from a judgment of the Circuit Court for Milwaukee County. ROBERT C. CANNON, Circuit Judge. Affirmed.

Wisconsin Antitrust Laws

Combinations and Conspiracies—Contracts in Restraint of Trade—Salesman's Agreement Not to Compete with Employer—Reasonableness as to Time and Territory.—A company engaged in the selling of gasoline and oil through service stations and tank car deliveries was properly granted an injunction enforcing an employment contract by which a salesman agreed that he would not "re-enter the gasoline and petroleum business in Milwaukee county for a space of two (2) years" after the termination of his employment. It is the rule in Wisconsin that such restrictive covenants in employment contracts should be reasonably necessary for the protection of the legitimate interests of the employer and, at the same time, should not be oppressive and harsh on the employee or injurious to the interests of the general public. Reasonableness as to time depends upon the period required to obliterate, in the minds of the employer's customers, the identification formed during the period of the employee's work. Here, two years was not an unreasonable length of time. As to the territorial restriction, it was limited to a single county in which the employer did 75 per cent of its business. That restriction was no broader than was reasonably necessary. Further, the covenant was not unduly harsh or oppressive on the employee. Considering his contention that he had high blood pressure and limited schooling, the court noted that the employee's health did not require that he must engage only in the sale of petroleum products in Milwaukee county. Further, there was no economic depression making jobs scarce. In addition, the restriction was reasonable with respect to the interest of the general public, since it did not create any shortage of employees, or of that type of service, and did not stifle competition or create a monopoly.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.

For the appellant: Raskin, Zubrensky & Padden, Milwaukee, Wis.

For the respondent: Charles L. Goldberg and Francis X. Krembs, Milwaukee, Wis.

[*Contracts in Restraint of Trade—Restrictive Employment Contracts*]

Suit by Lakeside Oil Co. for an injunction against the defendant, Harold H. Slutsky, a former employee, to enforce the restrictive covenant of his employment contract not to compete after the term of employment directly or indirectly with the plaintiff for a period of two years in Milwaukee county. The defendant appeals from the judgment granting the injunction.

Slutsky started to work for the plaintiff as a gasoline and oil salesman on April 4, 1957 under a written contract dated March 30, 1957. The contract provided it could be terminated on ten days' notice by either party and "in the event your employment is terminated with this company you agree not to re-enter the gasoline and petroleum business in Milwaukee county for a space of two (2) years, either directly or indirectly".

Prior to his employment with the plaintiff Slutsky had no experience in the gasoline and petroleum business. He had previously worked as a clerk and for fourteen years had operated a grocery store. Because of his high blood pressure he could not physically exert himself and was advised by his doctor to sell the grocery store.

Slutsky's primary duties with the plaintiff were to secure new customers and service them. He developed his own customers for fuel oil or gas to industrial and residential users. Some leads he received from the plaintiff. He received on-the-job train-

ing and had access to the plaintiff's sales or delivery records. Excepting for a few months he was the only full time salesman employed by the plaintiff. During his employment Slutsky secured, according to his testimony, about 7 industrial accounts and some 30 to 40 domestic customers and made sales in Milwaukee, Waukesha and Dane counties. No special knowledge of gasoline or fuel oil was required in the selling. Customers were obtained primarily upon the basis of the defendant's personal salesmanship and the faith and trust the defendant could engender in the customer. The president of the plaintiff never met or saw the majority of the new customers acquired by the defendant.

The business of the plaintiff was competitive and there was very little difference in the products or the prices. Seventy-five percent (75 percent) of the plaintiff's business was done in Milwaukee county, where it sold gas through 4 service stations to the retail trade and through tank car deliveries to commercial accounts and fuel oil to domestic and industrial users. Customers of the plaintiff were not always steady and the contacts with them were sporadic.

After working 15 months Slutsky decided to go into business for himself. He gave as his reason his high blood pressure. The defendant voluntarily terminated his employment on August 31, 1958, pursuant to a proper notice given to the plaintiff. Some time the following month the defenant with Helmut Dreyfuss incorporated the Marquette Oil Company for the purpose of engaging in the business of selling petroleum products. This company started business in Milwaukee county on October 1, 1958. The defendant was originally a stockholder, a director and officer of the company and was to receive $150 per week while working. He invested $2,500 in capital stock and loaned the company $12,500. Dreyfuss did likewise. The wives of Dreyfuss and the defendant were also officers.

On October 10, 1958 a temporary injunction was issued by the trial court and after a trial a permanent injunction was entered on March 3, 1959. After the issuance of the temporary injunction the defendant apparently ceased being a director, officer and stockholder of the Marquette Oil Company but has a contract to repurchase his stock. Additional facts will be stated in the opinion.

[*Opinion*]

HALLOWS, Justice [*In full text*]: Slutsky contends the contract constitutes a general restraint of trade and is therefore illegal under sec 133.01, stats. In *Pulp Wood Company v. Green Bay Paper & Fiber Company* (1914), 157 Wis. 604, 147 N. W. 1058, this court discussed the "rule of reason" applicable to cases within the general purview of this section and pointed out that the validity of a particular contract depended upon the facts and the incident to which competition was restricted or trade obstructed. The case of *State v. Lewis & Leidersdorf* (1930), 201 Wis. 543, 230 N. W. 692, cited by the defendant, applies to an entirely different set of facts and is not in point here. This contract on its face is not illegal under sec. 133.01, stats.

[*Reasonable Restraints*]

Contracts not to compete after a term of employment being in the general class of contracts in restraint of trade may be illegal if the restraint is unreasonable. Restatement of Contracts, secs. 514 and 515. But a contract by an employee not to compete with his employer after a term of employment within such territory and during such time as may be reasonably necessary for the protection of the employer without imposing undue hardship on the employee is a reasonable restraint. Restatement of Contracts, sec. 516; 36 Amer. Jur., Monopolies, sec. 78, p. 554; *Eureka Laundry Company v. Long* (1911), 146 Wis. 205, 131 N. W. 412; 28 Amer. Jur., Injunctions, sec. 105, p. 604.

[*Wisconsin Statute*]

In 1957 the legislature enacted sec. 103.465, stats., which provided that a covenant by an employee not to compete with his employer after the term of his employment within a specified territory and during a specified time is lawful and enforceable if the restrictions imposed are reasonably necessary for the protection of the employer. This section also provides that such restrictive covenant imposing an unreasonable restraint is void and unenforceable even as to so much of the covenant or performance as would be a reasonable restraint. Prior to the passage of this section this court held in *Fullerton Lumber Company v. Torborg* (1954), 270 Wis. 133, 70 N. W. 2d 585, that such a contract imposing an unreasonable

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restraint would be enforced to the extent that such restraint was reasonable. The rationale was that when the terms of a restrictive covenant were not otherwise invalid only the excess of territory or time was contrary to public policy and unenforceable. The rule respecting the unenforceability of unreasonable restraints not to compete laid down in the *Torborg* case has been changed by sec. 103.465, stats., 1957.

However, this section does not change the prior law of what constitute unreasonable restraints because the section only requires the restrictions as to time and place to be reasonably necessary for the protection of the employer. If such a contract is void for other reasons, such as public policy, or sec. 113.01(1), stats., or creates an undue hardship upon the employee a court of equity will not enforce it.

[*Wisconsin Rule*]

Contracts not to compete after a term of employment have been the subject matter of much litigation in the United States. There is a multitude of cases collected in the various text books and especially enlightening annotations are to be found in 9 A. L. R. 1456, 20 A. L. R. 861, 29 A. L. R. 1331, 52 A. L. R. 1362 and 41 A. L. R. 2d 15. However phrased the rule requires that a restrictive covenant not to compete after a term of employment should be reasonably necessary for the protection of the legitimate interests of the employer and at the same time should not be oppressive and harsh on the employee or injurious to the interests of the general public. This is the rule in Wisconsin. *Eureka Laundry Company v. Long, supra; Milwaukee Linen Supply Company v. Ring* (1933), 210 Wis. 467, 246 N. W. 567.

[*Protection of Employer—Necessity for Restriction*]

The first question to be determined under the rule is whether there is a need for any restriction of the activities of the defendant for the protection of the plaintiff. An employer is not entitled to be protected against legitimate and ordinary competition of the type that a stranger could give. There must be some additional special facts and circumstances which render the restrictive covenant reasonably necessary for the protection of the employer's business. Many cases have found such special facts in the nature of the relationship between the employee and the customers of the employer. This opinion has the customer contact theory. See Anno. 41 A. L. R. 2d 15. If under this theory the most important single asset of most businesses is their stock of customers the protection of this asset is the legitimate interest of the employer.

Here Slutsky was hired as a salesman to develop customers for the plaintiff. The mere opportunity of Slutsky to become acquainted with the customers would not determine a reasonable necessity, but Slutsky's personal relationship with the customers, whom he obtained by his own prsonality and salesmanship and whom, in most cases, the plaintiff did not know personally, amounted to such control or influence that Slutsky would be able to take such customers away from the plaintiff. Slutsky not only developed the customers but he also serviced them. The plaintiff's business is highly competitive; there is very little or no variation in price or difference in the products sold. Sales made by Slutsky were due not to price or the fact they involved the plaintiff's product but to the customers' confidence in Slutsky or his personal relationship with the customers. To his customers Slutsky was identified with the plaintiff's business. This was due in part because he was the main contact with the customers; the sales took place primarily at the customer's home or place of business. He was no mere order-taker but a salesman with some authority and standing. Under such circumstances the plaintiff has a great need for protection from the competition of his former employee. Some or most of these elements were recognized in *Eureka Laundry Company v. Long, supra,* and *Fullerton Lumber Company v. Torborg, supra.*

[*Trade Secrets—Special Knowledge*]

The defendant argues he did not become the possessor of trade secrets or acquire any special knowledge so as to be in a position to damage the plaintiff. This argument is generally advanced in cases involving an employee's breach of his affirmative promise to work for the employer and no covenant not to compete exists. In such cases the question is the damage caused by the defendant by the breach of his affirmative promise. That is not the case here. If Slutsky had possessed technical trade

secrets that fact would be an additional ground for the necessity of protecting the plaintiff. The defendant, however, does retain the advantage of some special knowledge of the source of supply, methods of distribution and of the names and special needs of the plaintiff's customers. He had access to the records of the plaintiff and received on-the-job training. Slutsky knew nothing about the petroleum products industry when he was hired by the plaintiff. Undoubtedly he believed that he had acquired enough skill and experience in the plaintiff's type of business during his 15 months of employment to enable him to start a competing business for himself. This is not a suit to enjoin Slutsky from using ordinary business methods or generally obtainable information or his talents as a salesman.

[*Reasonableness as to Time—Two Years*]

Slutsky was paid to develop customers for the plaintiff. He should not now be allowed to take such customers away from the plaintiff without giving his former employer a reasonable chance to keep them. This raises the question of whether the restriction of two years is reasonable. Reasonableness in this respect depends upon the period of time required to obliterate in the minds of the plaintiff's customers the identification formed during the period of the defendant's employment. After what period of time will a customer cease to be influenced in regard to the plaintiff's business by the personal relationship with Slutsky? An analysis of the cases on this point indicates that when an employee's contacts with the customers are regular and frequent a shorter period of time is needed by the employer than when, as here, the contacts are made at relatively long intervals. The plaintiff's customers did not buy fuel oil to heat their homes daily, weekly or monthly but generally on a heating season basis. In *Eureka Laundry Company v. Long, supra,* a two year restraint was held reasonable for a route salesman making frequent and regular customer contacts. Many cases have held two years to be reasonable under such circumstances. See cases in Anno. 41 A. L. R. 2d 15, at 179. Two years under the facts of this case cannot be held to be an unreasonable length of time in which to allow the plaintiff to protect his business from the defendant.

[*Reasonableness as to Territory—One County*]

The next question is whether the restraint is reasonable as to territory. Slutsky made sales in Milwaukee, Waukesha and Dane counties. Seventy-five percent (75 percent) of the plaintiff's business is done in Milwaukee county. Restriction is limited to Milwaukee county and does not include other territory in which the plaintiff does business and in which Slutsky was active. The restriction is confined to the area where Slutsky principally operated. It was stated by this court in *Wisconsin Ice & Coal Company v. Lueth* (1933), 213 Wis. 42, 250 N. W. 819, that such a restriction would be proper if limited to such territory as constituted the field of the employee's activities but could go no further. On the facts of that case it was held that the restriction involved was broader than was called for by the necessities of the case. Considering the area of the plaintiff's business, and especially the area of the defendant's activities, the nature of the products and the other facts this restriction is not broader than is reasonably necessary.

[*Effect on Salesman*]

The defendant contends that the enforcement of the covenant would cause serious and harmful consequences to the defendant because of his high blood pressure and his limited schooling. Testimony is clear that the defendant can engage in any business which does not require strenuous physical effort. The defendant is not prevented from engaging as a salesman or as a proprietor of a business or in any other occupation which does not require physical effort. Slutsky's health does not require that he must engage only in the sale of petroleum products in Milwaukee county. Slutsky is a high school graduate and a successful salesman. He has managed to acquire ownership of his home and some income-producing real estate. At age 40, and even without a college education, there is no great hardship on him to use his talents as a salesman in other fields of endeavor.

In determining the harshness of a restrictive covenant on an employee this court can take judicial notice of present prevailing conditions of employment and the special training of the defendant for the specific occupation. *Milwaukee Linen Supply Com-*

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pany v. Ring, supra. Here the defendant has only 15 months' experience in this business, all of which he acquired in the employment of the plaintiff. He brought no special knowledge, trade secrets or experience in the industry to the plaintiff. What he has learned he has learned from his employment by the plaintiff. Neither are we in an economic depression when jobs are scarce. While the keeping of his promise may be inconvenient to the defendant and may now be undesirable from his standpoint it is not unduly harsh or oppressive on him in relation to the relatively greater harm to the employer if the covenant is not enforced.

[*Public Interest*]

In considering the reasonableness in respect to the interest of the general public there must be weighed the interest of the public in having access to the employee's particular services during the time and in the area restricted with the benefits that accrue to the public from such restrictive covenants in creating opportunities for employment. Employment opportunities are a concern of the general public. Likewise this contract does not create any shortage of employees or of this type of service or stifle competition or create a monopoly. The plaintiff is a small company. For most of the time the defendant worked for the plaintiff he was the sole salesman. Whether the defendant competes or does not compete with the plaintiff will have no effect on the public generally. The enforcement of this covenant will not create any danger that the defendant might become a public charge. He has ability as a salesman, in which occupation he can support himself and his family without causing damage to the plaintiff, which he agreed not to do.

The plaintiff [sic] contends the findings and conclusions are not supported by the evidence. It is true that the finding as to the exact number of accounts which the defendant developed is not sustained by the evidence. However, the record does establish the defendant developed 30 to 40 residential accounts and 7 industrial and commercial accounts. This appears to be a partial list. The exact number of customers is not material in this case. The discrepancy in the finding is unimportant and can be disregarded. *Lambertson v. Lambertson* (1921), 175 Wis. 398, 184 N. W. 708; sec. 274.37, stats. The other findings objected to are either supported by the evidence or are reasonable inferences which the trial court could draw from the evidence before it.

[*Threatened Injury—Remedy at Law*]

The last contention of the defendant is that the plaintiff failed to plead and prove that his injury is irreparable and that there is no adequate remedy at law. However, the complaint alleges that irreparable damage will accrue from the breach of the contract by the defendant and the damage from such breach is impossible to determine. It is true that the plaintiff proved no actual damage with the exception of the loss of one account. It is reasonable to assume that actual damage was prevented because a temporary injunction was granted within 10 days after the defendant's company commenced business. In seeking an injunction it is not necessary to prove that the defendant has suffiered irreparable damage but only that he is likely to suffer such damage. The remedy at law may be inadequate because of the difficulty or impossibility of measuring the damages. *Butterick Publishing Company v. Rose* (1910), 141 Wis. 533, 124 N. W. 647. These rules are well established and fundamental in equity jurisprudence.

The purpose of an injunction is to prevent damage, not to compensate for it. The defendant agreed not to cause any damage to the plaintiff. Such damage is threatened and would be irreparable in its very nature. A court of equity would grant it special relief in such a case.

[*Judgment Affirmed*]

By the Court. Judgment appealed from is affirmed.

[¶ 69,472] Clyde E. Clapper v. The Original Tractor Cab Company, Inc., and Stanley Williams.

In the United States Court of Appeals for the Seventh Circuit. September Term and Session, 1959. Nos. 12470, 12471. Dated September 30, 1959.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable for Antitrust Violations—Defense of Conspiratorial Patent Infringement Action—Defense Attorneys' Fees as Part of "Damages" to Be Trebled Under Antitrust Laws.—A tractor cab company and one of its officers, having successfully defended a patent infringement suit which had been instituted against them as a part of a conspiracy in violation of the antitrust laws, and having successfully prosecuted a counterclaim based on the plaintiff's antitrust violation, were entitled to the inclusion of attorneys' fees incurred by them in the defense of the infringement action as an element of the *compensatory damages* which they sustained by reason of the plaintiff's antitrust violation. Thus, their attorneys' fees of $28,244.31, along with their other damages, would be trebled under Section 4 of the Clayton Act. The trial court had awarded those fees under Title 35 of the United States Code, § 285 (providing for reasonable attorneys' fees to the prevailing party in "exceptional" *patent* cases), and had specifically declined to include the fees as an element of the damages to be trebled under the antitrust laws; however, the usual bases for awarding attorneys' fees in patent cases, bad faith or inequitable or unconscionable conduct, were absent. On the other hand, the trial court's reference to the plaintiff's "use" of the patent, in the finding that the case was "exceptional," could have had reference only to the plaintiff's antitrust violation.

The court also sustained both the fact and the amount of the trial court's separate award of $25,000 in attorneys' fees to the defendants for the prosecution of their antitrust counterclaim. The plaintiff contended that the award was "grossly disproportionate to the amount of compensatory damages proved—$27,611.35," and the defendants, itemizing in excess of 3700 hours expended by their attorneys on the antitrust action, and arguing that the present court had previously computed fees for experienced trial lawyers in Chicago at $40.00 per hour, contended that the award was inadequate. Observing that the "result" might be properly taken into consideration in fixing attorneys' fees, and that the result "should be measured by the amount of damages found," the court concluded that there had been no abuse of the trial court's discretion.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725.

Private Enforcement and Procedure—Civil Damages for Violations of Antitrust Laws—Damages Recoverable—Measure of Damages—Loss of "Potential Sales"—Accountant's Computations.—Antitrust counterclaimants, having been awarded $27,611.35 as compensatory damages for a plaintiff's antitrust violations, including $20,169.00 awarded for the loss of "potential sales" to two companies which stopped doing business with them as a result of patent infringement notices sent by the plaintiff pursuant to a conspiracy, were not entitled to a remand of the cause for a re-computation of the damages to include losses from other "potential sales." Loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain, by competent proof, what the amount of his loss actually was. Thus, damages may not be determined by mere speculation or guess, but it is sufficient if the evidence shows the extent of the damages as a matter of "just and reasonable inference, although the result is only approximate." Here, the defendants first calculated the average number of units sold per dealer. That calculation, which was based on sales made at a time when they sold directly to dealers (684 in number) and had no distributors, was applied to a later period when the defendants had distributors serving 17,450 dealers. "Estimated potential sales" were then calculated by applying the "annual percentage growth in tractor population in the United States." After calculating the "total estimated profits," the defendants' accountant then subtracted "realized profits" and arrived at the figure of $1,284,203.93, profits that allegedly "could have

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been realized on the estimated potential sales except for the antitrust violations" of the plaintiff. The trial court found that theory of computing "estimated potential sales" to be unrealistic, noting that it assumed certain climatic conditions, the absence of "peaks and valleys in annual sales," and continuous handling of their product, by their dealers and distributors, throughout the years involved. The reviewing court agreed that the theory did not meet the standard of "just and reasonable inference."

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.400.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable for Antitrust Violations—Elements Which Must Be Established—Proximate Cause—Sufficiency of Proof.—A tractor cab company and one of its officers, having successfully asserted an antitrust counterclaim in a patent infringement action, were not entitled to have the cause remanded for re-computation of the damages to include losses "attributable" to a "working arrangement" under which they operated as suppliers manufacturing parts for one of the patentee's licensees. There was no preponderance of the evidence to show that the patentee and its licensees, through any conspiratorial act, had caused the defendants' losses arising out of that working arrangement.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.350, 9011.

Private Enforcement and Procedure—Suit for Civil Damages—Antitrust Law Violations as Defenses—Unlawful Patent Licensing Agreement—Treble Damage Counterclaim by Alleged Party to Conspiracy.—A tractor cab company and one of its officers, in a treble damage counterclaim charging a patentee with conspiring to violate the antitrust laws, were not estopped from denying the validity of the patent in question or from asserting the plaintiff's violation of the antitrust laws because, contrary to the patentee's assertion, they had not brought themselves "under the cloak of the group license" which was apparently conceded to be a violation of Sections 1 and 2 of the Sherman Act. The trial court found that the defendants entered into a "working arrangement" with one of the patentee's licensees, but that they operated only as suppliers manufacturing parts for that licensee and did not become licensees under the disputed patent nor parties to the conspiracy.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.155.

Private Enforcement and Procedure—Suit for Civil Damages—Antitrust Counterclaim in Patent Infringement Action—Counterclaimants' Costs of Suit—Attorneys' Fees as "Costs"—Transcript of Trial—Unidentified Photostats.—In a patent infringement action in which the defendants successfully prosecuted a counterclaim based on the patentee's antitrust violations, the court rejected the plaintiff's contention that attorneys' fees, under Section 4 of the Clayton Act (providing for the recovery of treble damages and "the cost of suit, including a reasonable attorney's fee"), are meant to be included as an item in the usual "costs" taxed against the unsuccessful litigant. Also, there was no abuse of discretion in the trial court's allowance of costs for a copy of the transcript of the trial and for certain unidentified photostats. Further, the trial court properly rejected the plaintiff's contention that the major portion of the costs were attributable to a period in the litigation in which he had no interest.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725, 9011.800.

For the plaintiff: Thomas E. Scofield.

For the defendant: J. Preston Swecker.

Before: SCHNACKENBERG, PARKINSON and KNOCH, Circuit Judges.

[*Patent Infringement Action—Antitrust Counterclaim*]

KNOCH, Circuit Judge [*In full text except for omissions indicated by asterisks*]: This action was originally brought April 14, 1950, by Clyde E. Clapper and Lee Flora for infringement of Clapper Patent No. 2,452,834 (Hot Air Deflector for Tractors) and Flora Patent No. 2,461,974 (Enclosure for Tractors). The original defendants, The Original Tractor Cab Company (hereinafter called "Original") and Stanley Williams (its president and a director) joined licensees of Clapper and Flora as cross-

defendants.[1] Original and Williams counterclaimed for misuse of patents and violation of the anti-trust laws.

[*Settlement*]

By settlement in December 1954, Flora dismissed his claim for patent infringement and defendants agreed not to proceed against him or the cross-defendants under the counterclaim.

[*Amended Complaint*]

Clapper then filed an amended complaint setting up five causes of action, three of which Clapper allowed to be dismissed. Only one seems to be pursued in this Court: the claim of patent infringement.

[*Trial Court's Ruling*]

The District Court found the Clapper patent invalid, dismissed the claim for unfair competition, found no breach of contract by defendants, held that the settlement of December 1954 did not discharge Clapper from liability under the counterclaim and awarded defendants attorneys' fees incurred in connection with both the patent and the anti-trust phases of the case, as well as damages for anti-trust violation.

Clapper, appealed, relying on the following alleged errors in the Trial Court's rulings and judgment:

"(1) Exclusion of Plaintiff's Exhibits 199 and 200 relating to the settlement of Dec. 14, 1954.

"(2) Denying Plaintiff's Motion to Dismiss Defendants' Counterclaim since such cross action should have been released and dismissed by the settlement of Dec. 14, 1954.

"(3) Adjudicating the Clapper patent invalid.

"(4) Awarding defendants attorneys' fees for prosecution of the patent defense phase of the case based upon its being an exceptional case.

"(5) Denying Plaintiff's Motion under Rule 37(b)(2), F. R. C. P., to discipline and penalize defendants for failure to comply with the Court's orders with respect to the production of documents and discovery under Rule 34.

"(6) Awarding defendants damage under their counterclaim for antitrust violation when no damage was proved which was the proximate cause of any alleged violation.

"(7) Making a separate award of attorneys' fees to defendants for prosecution of the antitrust phase of the case when no damage was proved which was the proximate cause of the alleged violation.

"(8) Refusing to consider defendant Williams' breach of the contract made with plaintiff Clapper.

"(9) Awarding Defendants' costs in the case."

[*Damages—Attorneys' Fees*]

Defendants assert that the District Court erred in failing to include attorneys' fees, awarded for defense of the patent infringement action, as a part of the compensatory damages to be trebled under section 4 of the Clayton Act. They argue that the patent infringement action was filed as part of the conspiracy in violation of the antitrust laws. They contend further that the District Court erred in failing to include damages for loss of potential sales and in awarding attorneys' fees at less than a sum proportionate to the skill and time involved. Their position is that the cause should be remanded with directions to recompute fees and damages in accordance with the foregoing.

[*History of Case*]

A brief reference to the history of this litigation is appropriate here. On March 17, 1945, Clapper applied for Letters Patent, and in May, 1945, gave an exclusive license to Bearing Distributors (later Comfort Equipment Co., and hereinafter called "Comfort"). In 1948 the U. S. Patent Office declared two interferences involving applications of Flora and one Halligan.

Flora had licensed Cab-Ette Co. (hereinafter called "Cab-Ette") and Halligan had licensed the Fort Dodge Tent and Awning Co. (later Burch Manufacturing Co., hereinafter called "Burch").

[*License Agreement*]

In April, 1948, Clapper, Flora, Halligan and their licensees and attorneys met to settle the interferences. The result of their efforts was the License Agreement of August

[1] *Comfort Equipment Co. v. Steckler*, 7 Cir. [1954 TRADE CASES ¶ 67,731], 212 F. 2d 371 (1954). Two of the licensees moved to dismiss Original's counterclaim and cross-complaint on the ground that proper venue did not exist. The Trial Court overruled the motions, whereupon the two licensees sought writs of mandamus, which this Court denied.

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3-4, 1948, whereby Flora and Clapper jointly licensed Comfort, Burch and Cab-Ette.

In the summer of 1948, Original began manufacture of the accused device. On November 24, 1948, Clapper sent Original notice of infringement of his patent. In August, 1949, Clapper's attorney sent a second notice to Original and sent notices of infringement to Original's distributors threatening suits for patent infringement. This suit was instituted April 14, 1950, as indicated.

[*Government Suit*]

The group license was terminated by agreement April 6, 1953, (effective November 15, 1952) during the pendency of a civil suit brought, about a year after the initial patent infringement suit, by the Department of Justice, in the Western District of Missouri, against Flora, Clapper, and their licensees, for antitrust violation. That action was terminated by consent decree dated October 27, 1953. The District Court found *inter alia:*

> "59. By the Agreement of August 3-4, 1948, the patentees, Clapper and Flora, granted a non-exclusive and non-transferable license to Comfort, Cabette and Burch to manufacture and sell tractor covers. The limitations imposed on the licensees by said Agreement, that the licensees would manufacture the inventions 'at their respective * * * named addresses and in no other place or places'; and that no other license would be granted 'without obtaining the written consent thereto of the remaining parties to the Agreement;' that if a license so granted was terminated, as provided in Paragraph 8 thereof Flora or Clapper, respectively, shall be at liberty to license other licensees; that the parties would 'mutually agree upon procedure for the disposition' of infringement suits; and that the parties set up a 'litigation fund' to be used for that purpose, all are elements of illegality when used for an illegal purpose, as they were."

[*Antitrust Violation*]

It is apparently conceded that the joint License Agreement violated sections 1 and 2 of the Sherman Act.

[*Validity of Patents*]

After the consent decree in the Missouri case, a license was twice offered to Original and twice declined by Original, which was then contesting the validity of the patents in this cause, although prior to suit, Original had sought a license from plaintiffs.

The group License Agreement had provided for a litigation fund, of which Clapper was trustee. He directed the policing of the licensed patents. When the License Agreement terminated, the litigation fund, out of which costs of this suit had been paid, was divided between Clapper and Flora to maintain this action which was then still pending.

Clapper moved for admission of exhibits 199 and 200 as pertinent to the then pending questions of attorneys' fees, possible release of Clapper from liability under the counterclaim for antitrust violation, and Clapper's assertion that defendants had not complied fully with the District Court's order requiring production of documents. Exhibit 199 was described in the aforesaid motion as a conformed copy of the Agreement dated December 14, 1954, executed by Flora, Cab-Ette, Comfort and Burch (the three licensees) and four attorneys for defendants. Exhibit 200 was described as a conformed copy of waiver and release of attorneys' lien executed by the same four attorneys. Both documents are set out in plaintiff's appendix at pages PA-431 to 435.

The District Court found that nothing would be gained from admission of these documents and overruled the motion. However, the District Court plainly indicated that full consideration had been given to the contents of these documents, remarking that the Court stood on its prior ruling that Clapper had not been released by the terms of the settlement and covenant not to sue the other alleged joint tort-feasors. The District Court went on to say that the waiver and release of attorneys' lien meant only that the attorneys would not look to Flora, Comfort, Burch, and Cab-Ette for payment of fees. The defendants were not parties to the release and were not thus precluded from recovering fees and costs as provided by the antitrust laws. The District Court also found that defendants had made satisfactory production. We cannot agree with plaintiff that denial of admission of these exhibits constituted error on the part of the Trial Court.

* * *

[*Patent Invalid—Lack of Invention*]

The Clapper patent is directed toward utilizing the heat of a tractor engine to

warm the operator and facilitate use of the tractor in cold weather. Clapper describes it as including the tractor, its frame, the engine and the fan which creates a current of air over the engine, a flexible cover surrounding the engine compartment forming a cowling between the hood and steel bow mounted in front of the operator to constitute a passageway for the heated air to the operator.

Clapper did not invent a new tractor. Any conventional tractor could be used. The cowl and bow are found in early patents for automobiles. These include a number of patents not cited by the Patent Examiner, thus weakening the presumption of validity which attaches to a patent by virtue of its issuance. *Johnson Laboratories, Inc. v. Meissner Mfg. Co.*, 7 Cir. (1938) 98 F. 2d 937, 943. Channelling heat back to the operator is also found in early automobile patents, notably Standish. Similar combinations are found in earlier patents such as Winet and Weiland. Clapper employed old elements known to prior art, freely available to skilled artisans, to perform their old functions. We cannot say that the finding of invalidity was clearly erroneous. On the contrary it was well supported by the record and the law. *A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147, 152-3 (1950); *General Time Corp. v. Hansen Mfg. Co.*, 7 Cir. (1952) 199 F. 2d 259, 265. In view of the District Court's careful analysis of the prior art, it is unnecessary for us to do more than refer to the District Court's findings.

[*Attorneys' Fees for Defense of Infringment Action—Element of Antitrust Damages*]

Clapper sees no justification for awarding defendants attorneys' fees for prosecution of the patent defense. The District Court found the patent infringement suit was instituted by Clapper and Flora as a part of the conspiracy in violation of the anti-trust laws. If that was the ground for considering the patent action "exceptional", Clapper believes that "purging of such stigma" removed the case from that category. Clapper considers the "stigma" to have ended when, following settlement of the anti-trust violation on December 5, 1954, he proceeded individually and in his own right, without support or influence of Flora or their three licensees. He argues that he was under no disability to collect damages for patent infringement following cessation of the anti-trust violation. As defendants point out, however, as late as 1955, Clapper was still seeking injunction and damages for the preceding 6-year period.

Clapper cited patent cases in which awards of attorneys' fees by District Courts have been reversed. In these cases the Court of Appeals found that characterization of the cases as "exceptional" was erroneous as a conclusion of law and unsupported by the record as a finding of fact. In the case before us the District Court's finding of fact No. 71 states this to be an "exceptional" case, and directs award of attorneys' fees for that reason. Defendants argue that the award is inadequate. They liken the situation here to that in *Kobe, Inc. v. Dempsey Pump Co.*, D. C., Okla. (1951) [1950-1951 TRADE CASES ¶ 62,801], 97 F. Supp. 342, affirmed 10 Cir., (1952) [1952 TRADE CASES ¶ 67,312]; 198 F. 2d 416, cert. den. 344 U. S. 837. There attorneys' fees incurred in defense of a patent infringement suit were held to be recoverable as damages sustained through anti-trust violations. Here the District Court declined to include the attorneys' fees incurred in the patent infringement defense as an element of damages in the anti-trust action (to be increased three-fold). The District Court stated that attorneys' fees were awarded because of the exceptional circumstances. Finding No. 71 reads:

> ". . . Said sum, however, is not to be included as an element of damages in the antitrust action to be increased threefold, as defendants would have the court do. It is to be awarded counsel for the defendants by reason of their representing the successful parties in the patent infringement action, and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact."

However, the District Court made no specific finding that the adverse party had been guilty of bad faith, inequitable, or unconscionable conduct "in the case concerning the validity of the patent." These are the usual bases for awarding attorneys' fees in patent cases. *Continental Art Co. v. Bertolozzi*, 7 Cir. (1956) 232 F. 2d 131, 134; *Wilson v. Seng Co.*, 7 Cir. (1952) 194 F. 2d 399, 404; *Apex Electrical Mfg. Co. v Altorfer Bros. Co.*, 7 Cir. (1956) [1956 TRADE CASES ¶ 68,550], 238 F. 2d 867, 874. On the other hand, the District Court's reference to use of the patent by the patentee

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and his licensees can have reference only to the anti-trust violations. The record of this eight-year long litigation fully supports such a finding, and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the anti-trust action.

[*Compliance With Discovery Orders*]

Clapper charges the Trial Judge with error in denying motion under Rule 37(b)(2), Federal Rules of Civil Procedure, to discipline and penalize defendants for alleged failure to comply with the District Court's orders respecting production of documents and discovery under Rule 34. The District Judge gave careful, complete and repeated consideration to this question, and, after hearing evidence, found that full discovery had been made.

In listing the contested issues, Clapper includes the following:

"9. Did defendants' misrepresentations concerning the loss of records by fire and their refusal and failure to comply with plaintiff's request for discovery and with the Trial Court's order for the production of documents impose undue, unwarranted and unlawful hardship and expense upon plaintiff in making his proofs

(a) respecting damage allegedly suffered by defendants as charged in their counterclaim;

(b) respecting the character, purpose and duration of the Original Tractor Cab-Cab-Ette working arrangement in the fall of 1949;

(c) respecting the breach by defendant Williams of the Clapper Williams contract entered into at the Chicago meeting of September 12, 1949."

However, the issue is not argued in the brief. Defendants, noting that fact in their brief, presume the issue to have been abandoned. The reply brief does not indicate otherwise. Review of the record before us shows the finding of the Trial Judge to be fully supported.

[*Damages—Proximate Cause*]

It is Clapper's position that defendants actually proved no damage of which the antitrust violation was a proximate cause. The District Court in this regard found:

"68. The evidence shows direct loss was suffered by the defendant, Original, in salaries, wages and other expenses of shutdown from August 22 to September 23, 1949, in the total amount of $2,561.45. . . ."

"69. The evidence shows that the defendant, Original, had negotiated for financing for continued operation which had to be dropped entirely by the shutdown following the notices sent by the plaintiff in concert with others, in August, 1949, the cost of which to the defendant, Original, was $317.20, which it is entitled to recover.

"70. The evidence shows that the defendant, Original, had expended for advertising the sum of $4,563.70, which was rendered valueless by the forced shutdown in August, 1949, as a result of said notices of infringement sent to the defendant and to its distributors."

"72. The evidence shows that there has been a direct loss of sales by defendant, Original, to Farm Equipment Sales Co. and Stover-Winsted Co. as a consequence of the notices of infringement sent pursuant to the conspiracy created by the License Agreement of August 3-4, 1948.

. . .

"Following the time Stover-Winsted Co. and Farm Equipment Sales Co. stopped doing business with the defendant, Original, the evidence shows that during the years 1949 through the first eleven months of 1956, Farm Equipment Sales Co. purchased from Comfort Equipment Company 9,084 covers. . . ."

"74. The losses heretofore stated resulted in damage to the business and property of the defendant, Original, as a consequence of the illegal conspiracy of the plaintiff Clapper, and Flora and their licensees acting in concert. For such damage, defendant, Original, is entitled to recover the following amounts of compensatory damages:

(1) Costs resulting from forced stoppage of production, from August 22, 1949, through September 23, 1949	$ 2,561.45
(2) Expenses incurred in finance negotiations.	317.20
(3) Advertising costs rendered useless by reason of forced work stoppage.	4,563.70
(4) Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
(5) Loss of potential sales to Stover-Winsted Co. for the years 1949 through the first five months of 1952.	7,905.60
Total	$27,611.35"

Review of the record shows ample support for these findings which cannot be held to have been clearly erroneous.

[*Treble Damages*]

The total figure of $27,611.35 was trebled under section 4 of the Clayton Act, which brought it to $82,834.05, against which the District Court credited the $110,000 payment made by Flora and the three licensees, leaving a balance in Clapper's favor, which in turn was credited against attorneys' fees of $28,244.31 awarded for defense of the patent infringement suit as an "exceptional" case. As indicated above, in our opinion, this latter sum should have been included in the compensatory damages sustained by defendants as a result of the antitrust violation.

[*Attorneys' Fees—Antitrust Phase of Case*]

Clapper protests the separate award of attorneys' fees to defendants for prosecution of the antitrust phase of the case, again, on the ground that defendants failed to prove any damage which was the proximate result of the alleged antitrust violation. As indicated above, this Court concurs in the District Court's findings to the contrary.

[*Amount—Percentage of Damages*]

Clapper also takes issue with the amount of $25,000 attorneys' fees allowed, as grossly disproportionate to the amount of compensatory damages proved—$27,611.35. The District Court arrived at this figure after disallowing the defendants' claim for $141,035.00 as not having a realistic relation to the amount of compensatory damages awarded. The District Court, in this aspect of the case, relied on *Milwaukee Towne Corp. v. Loew's, Inc.*, 7 Cir. (1951) [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561, where this Court reduced attorneys' fees allowed by the Trial Court from about 50% to about 17% of the damages awarded.

The District Court also referred to *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 8 Cir. (1952) [1952 TRADE CASES ¶ 67,218] 194 F. 2d 846. In that case the Court of Appeals considered a fee of 40% of the damages to be such as to (p. 859) "shock the conscience." The Court reduced a fee awarded in the sum of $150,000 to $100,000, including fees on appeal, which was considered to be reasonable after study of the entire record and briefs.

The District Court in the case before us noted that $25,000 was only a little less than the compensatory damages found to have been sustained by defendants, and ventured to say that except for the difficulty of proof, the actual damage suffered as a direct result of the antitrust violation would have been found to be far greater.

Defendants argue that this Court has set down no percentage requirements in the *Milwaukee Towne* case; that we computed fees for experienced trial lawyers in Chicago at $200 per day ($40 per hour for a 5-hour day) plus $20 per hour for assistants to counsel, and thus allowed $75,000, apparently for less than 2000 hours expended. Here defendants' counsel itemized in excess of 3700 hours expended solely on the antitrust action, which does not include time in excess of 100 days expended in the patent infringement aspect of the matter. Dedendants point out that the *Milwaukee Towne* opinion contains a favorable reference to fees of $30,000 awarded for 1300 hours in *Bigelow v. R. K. O. Radio Pictures, Inc.*, 7 Cir. (1945) [1944-1945 TRADE CASES ¶ 57,402], 150 F. 2d 877. In the *Bigelow* case this Court agreed that the conspiracy had been established but reversed the judgment on the question of damages. The Supreme Court, [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251 (1946) affirmed our holding with respect to the conspiracy but reversed our holding as to proof of damages. Defendants also cite *Emich Motors Corp. v. General Motors Corp.*, 7 Cir. (1950) [1950-1951 TRADE CASES ¶ 62,577], 181 F. 2d 70. There the cause was retried after appeal to this Court and grant of certiorari by the U. S. Supreme Court [¶ 1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558 (1951). On retrial, the bulk of the claims for damage was found to be barred by the Statute of Limitations [1956 TRADE CASES ¶ 68,249], 229 F. 2d 714 (1956). The case is, therefore, of little assistance to us here.

In *Milwaukee Towne* (p. 571) this Court did say that allowances for services should be determined in the same manner as for those of a trial lawyer in any other kind of a case of comparable magnitude. However, this Court also said that the result might properly be taken into consideration in fixing a reasonable attorneys' fee and that in

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a case of this character, the result should be measured by the amount of damages found.

Defendants contend that the measure of fees is that stated in *Cape Cod Food Products v. National Cranberry Assn.*, D. C., Mass. (1954) [1954 Trade Cases ¶ 67,769], 119 F. Supp. 242, 244:

> ". . . The rate is the free market price, the figure which a willing, successful client would pay a willing successful lawyer. Sometimes the figure may seem high."

and in *Darden v. Besser,* 6 Cir. (1958) [1958 Trade Cases ¶ 69,067] 257 F. 2d 285, 286:

> "While the allowance of reasonable attorneys' fees is always a matter of delicacy . . . the object always, of course, is to allow just and fair compensation for the services rendered, considering the time and skill employed, the experience brought to bear, and the result achieved."

Clapper further disputes the value of counsel's services on another ground. He maintains that counsel's task was made exceptionally easy by the fact that the same proofs needed in the instant case to prove violation of the antitrust laws and the existence of a conspiracy, had already been made and the issues resolved in the Kansas City case: *Mason City Tent and Awning Co. v. Clapper* [1956 Trade Cases ¶ 68,553], 144 F. Supp. 754, (1956). In that case $5,000 attorneys' fees were awarded. Counsel for Mason City, et al. in that case, Clapper adds, was also principal counsel for defendants here. Exhibits, interrogatories, pleadings etc. were markedly similar in both cases. Associate counsel in the two cases were not the same, but Clapper argues that their qualifications were much the same. He relies on *Bordonaro Bros. Theatres v. Paramount Pictures,* D. C., N. Y. (1953) [1953 Trade Cases ¶ 67,570] 113 F. Supp. 196, where attorneys' fees of $18,000 had been awarded in an earlier trial, but only $4,500 allowed on a second trial, which the Court there held to be substantially less demanding, although proof of continuing conspiracy was required for the second trial.

Defendants in reply point out that when their counterclaim was filed in 1950 and for several years afterward, Original alone was contesting the efforts of Clapper and his co-conspirators to control the market in tractor covers. Counsel for defendants were obliged to meet objections of Clapper and Flora to joining the licensees as cross-defendants, as well as claims of estoppel, *pari delicto* and the like, all of which required briefing, argument and trial. This case was pending for eight years. On the other hand, the *Mason City* case was not filed until June 11, 1954. Thus the *Mason City* case, although tried first, was greatly simplified by the discovery and preparation made for this case, rather than the reverse.

[*Attorneys' Fees as "Costs"*]

Clapper reasons that use of the italicized wording in section 15, Title 15, U. S. C., means that attorneys' fees are part of the costs in an antitrust action:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover . . . *the cost of suit, including a reasonable attorney's fee.*"

We cannot agree that attorneys' fees are meant to be thus included as an item of the usual "costs" taxed against the unsuccessful litigant. Clapper further concludes that the attorneys' fees for defendants' counsel are barred for the period up to and including December 14, 1954, the date of the order dismissing Flora and the licensees. That order stated:

> "4. That no costs be awarded to any party litigant designated in this Order, the respective parties litigant bearing their own costs."

Two of the named parties litigant are Original and Williams.

The District Court considered it unreasonable that Clapper should be completely exonerated from payment of all costs and attorneys' fees for a period of time during which he was as much a litigant as at any other time during the long controversy concerning a conspiracy from which he reaped the greatest benefit. However, the District Court specifically stated that the Court was not wholly ignoring Clapper's theory, and in determining a reasonable attorneys' fee, the Court would consider, as a weight factor, the recovery made and the attorneys' fees received in connection with the $110,000 paid by Clapper's co-conspirators.

[*No Abuse of Discretion*]

It appears to this Court that the learned Trial Judge in the exercise of his discretion

to set attorneys' fees, in the antitrust action, gave studied attention to all of the pertinent factors impinging on this delicate matter. We find no abuse of discretion in this regard, and conclude that interference with the amount set would be unwarranted in this case.

[*Estoppel*]

Clapper also assigns as error the District Court's refusal to consider defendant Williams' alleged breach of a contract made with Clapper. Clapper asserts that on September 12, 1949, in Chicago, after denial of Williams' request for a license, Clapper made an oral agreement with Williams (afterwards confirmed in writing) whereby Williams agreed that Original would discontinue manufacture of the accused device in return for Clapper's permission to dispose of the inventory on hand. Clapper charges that Williams breached this agreement by making an arrangement with one of the licensees, Cab-Ette, to allow continuance of manufacture and sale of the accused device, which was then designated "Original Cab-Ette" and marked with the patent numbers of both the Flora and Clapper patents. Defendants paid a royalty to Clapper on all Original Cab-Ette covers made during the life of this arrangement, which terminated by the end of November, 1949. At that time, defendants changed the designation from "Original Cab-Ette" to "Original Half/Cab," and notified Clapper that they were resuming manufacture. It was this action, Clapper says, which led to the filing of the complaint in this case on April 14, 1950.

Clapper contends that defendants' conduct in this connection estops them from denying the validity of the Clapper patent and from asserting violation of the antitrust laws because they had brought themselves under the cloak of the group license of August 3-4, 1948.

As in the case of contested issue No. 9, mentioned above, these propositions are set forth in the list of contested issues in Clapper's brief, but are not included in the argument. In their brief in answer, defendants presume these issues have been abandoned. Clapper does not contradict that presumption in his reply brief, although he includes the following in his "conclusions":

"3. That when defendants could not obtain a license under plaintiff's patent through legitimate channels they breached an agreement with plaintiff to discontinue infringement and negotiated a clandestine arrangement with one of plaintiff's licensees, the Cabette Co., in order to continue in business under the pale of plaintiff's patent rights."

The District Court did not refuse to consider these issues. We need not labor the point; it is sufficient to quote the District Court's findings:

"35. The spokesman for the several parties to the Agreement of August 3-4, 1948, upon rejecting the application of the defendants for a license under the Clapper patent, in the meeting on September 12, 1949, informed the defendants that the defendant, Original, would be given a limited period of time within which to dispose of its stock of tractor covers then in course of manufacture and that if the defendants then ceased the manufacture of tractor covers, no action for patent infringement would be instituted. The evidence does not establish that an agreement was reached between the plaintiff and defendants in that meeting in Chicago on September 12, 1949, or subsequently. Any proposals made to the defendants in that meeting were in furtherance of a conspiracy in violation of antitrust laws, . . . Plaintiff has alleged and relies upon the theory that a contract was entered into between the defendants and the several parties to the Agreement of August 3-4, 1948, and that he, plaintiff Clapper, has been damaged as a result of the breach of said contract on the part of the defendants. There is no evidence in the record of damages to the plaintiff flowing from the alleged breach, even if it were assumed that an agreement was reached, which the court does not find.

"36. Thereafter, the defendants entered into a working arrangement with Cabette, formed for the use of the Original facilities to manufacture parts of tractor covers for Cabette, which working arrangement became effective the latter part of October, 1949. A proposed contract to formalize the working arrangement was reduced to a writing dated November 4, 1949. Before the execution thereof by both parties, disagreement arose, and the proposed contract was not executed. The working arrangement was terminated by mutual consent. A proposed settlement contract dated November 23, 1949, was prepared. Before the execution by both parties, a controversy arose, and the contract was unexecuted by both parties.

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"37. The defendants prior to the filing of this action by the plaintiff, had no knowledge of the terms and provisions of the License Agreement of August 3-4, 1948, except with respect to the place of manufacture of the tractor covers with the permission of Clapper.

"38. The defendants discontinued the manufacture and sale of the Original products and entered into a working arrangement with Cabette. This arrangement was made in order to afford Cabette the working facilities of Original whereby Original could manufacture parts for Cabette, and at the same time, it was a means of keeping Original in operation.

"39. During the working arrangement between Cabette and the defendants, the defendants notified the plaintiff that they were discontinuing the manufacture and sale of tractor covers in accordance with the direction by the spokesman for the group at the meeting in Chicago, as aforesaid, on September 12, 1949, which notice was retracted, however, after the discontinuance of the working arrangement with Cabette in November, 1949.

"40. During the working arrangement with Cabette, the defendants operated only as suppliers for Cabette by direction of the latter and did not thereby become licensees under the Clapper patent nor parties to the conspiracy; whereby the defendants are not estopped from contesting the validity of the Clapper patent nor from claiming damages for violation of the antitrust laws, according to the first cause of action of the amended complaint."

[*Costs*]

Lastly Clapper urges that the District Court erred in awarding defendants costs in this action. Clapper attributes the major portion of the costs to the period of the venue dispute concerning the cross-defendants, in which he alleges he had no interest. Further he relies on the terms of the order of dismissal following the settlement between Flora, the licensees, and defendants, whereby the District Court directed that the respective parties litigant bear their own costs. Clapper's position is that this is the law of the case up to the date of that order (December 14, 1954) and that he had a right to rely on it to free him from costs which he otherwise would have shared with Flora and the three licensees.

The District Court found Clapper to have been as much a litigant to the venue issue, involving his co-conspirators (and the appeal taken therefrom) as at any other time, and held Clapper not to have been relieved, by the order of December 14, 1954, from payment of a just portion of the costs during the venue litigation. The District Court considered the costs in detail and disallowed a great bulk of the defendants' original bill of costs.

Here, and in the District Court, Clapper raised objections to the item of $744.44 paid for carbon copy of transcript of the main trial. The District Court found that it was a custom of long standing, in that Court, that in any case where a party ordered a transcript of evidence, the original must be furnished to the Trial Judge and the expense of same borne by the party ordering the transcript or as the Court otherwise directs. In view of the complexity of the case, the District Court thought it was reasonable for counsel to have a transcript of the evidence and minutes of trial, plus one copy for use in conduct of the trial and post-trial procedures. The District Court disallowed reporter's fees and charges for transcript of oral arguments.

Clapper also objects to costs for photostats which are unidentified. When this objection was addressed to the Trial Judge, the latter indicated regret that an itemized list had not been kept identifying each document with an explanation of its use. The Trial Judge said that ordinarily he would sustain the objection, but that in this case, the judge himself personally recalled many conferences and informal agreements among counsel with respect to furnishing copies of documents, and, as this was a matter within the Court's judicial discretion, and the amount of $207.98 was also supported by oath of counsel, he allowed that sum as costs. In view of all the attendant circumstances, we cannot say that there was an abuse of discretion with respect to allowance of costs.

[*Damages—Loss of Potential Sales*]

Defendants' position is that the District Court erred in awarding inadequate damages. They ask that this cause be remanded for recomputation of the damages to include losses from potential sales and losses attributable to the arrangement with CabEtte. Defendants cite a number of cases to support their contention that losses of profits may be determined by the calcula-

tions of a certified public accountant according to proper accounting practices. None of these cases involved the precise method of calculation used here. The District Court describes defendants' method as follows:

". . . Briefly and generally, the theory of the defendant, Original, as explained by its president, Williams, and its accountant, Morgan, involved the process of taking the number of dealers the defendant, Original, had prior to the summer of 1949, at which time it changed its sales methods from dealers over to distributors. Williams explained he was very careful in making his calculations in order to stay on the conservative side. In his survey of existing dealers, he found there were 901 dealers listed. But of the 901 dealers he could find only 684 cards showing actual sales to such dealers. Therefore in his calculations he used the figure of 684 dealer cards as the basis from which to test the average potential sales to the established dealers. Among the 684 dealers, he found that 336 had sent orders in and had purchased half/Cabs. The 336 dealers purchased 1,275 half/Cabs. By taking the number of purchases of half/Cabs and relating them to the number of dealers who had actually purchased half/Cabs, he found that the company sales amounted to three and eighty hundredths half/Cabs per dealer. By relating the company sales of half/Cabs to all of its dealers, he found that the company's average sales of half/Cabs per dealer amounted to 1.86 half/Cabs.

"After the establishment of the distributorships, Williams made a survey in order to determine the total number of dealers served by the distributors. It was found that the distributors serviced 17,450 dealers. Commencing with the year 1949, the first year defendant, Original, had distributors, and the first year of the impact of the conspiracy, the defendant, Original, estimated the sale of one unit to each dealer served by its distributors. Thus, it estimated its potential sales for the year 1949 at 17,450 units. Taking the year 1950 as the base year and applying the annual percentage growth in tractor population in the United States and applying such percentages of tractor population growth to the subsequent years to and including the year 1956, and by applying the estimated unit sales per dealer of 1.86, defendant thereby arrived at the respective total unit potential sales for the years 1950 through 1956. . . .

"By eliminating what defendants' accountant determined to be abnormal operating expenses by reason of the impact of the conspiracy and the attendant litigation, the accountant arrived at an adjusted net unit profit per half/Cab. By further applying the estimated unit potential sales as estimated by Williams according to his estimated sales per dealer as related to tractor population growth, defendant established a different and higher net unit profit through the commensurate savings in overhead costs per unit due to the greater estimated production. By applying the greater net unit profit to the respective annual estimated potential sales, the accountant arrived at the total dollar profits which defendants claim could have been realized on potential sales except for the impact of the conspiracy for the period 1949-1956, which amounted to $1,364,200.10. From this was deducted the actual profit realized from sales of half/Cabs as reflected by the accountant's pro-forma earnings statement adjusted to eliminate the abnormal effects of the conspiracy and litigation. The realized profits from actual sales of half/Cabs during the period amounted to $79,996.17. Subtracting the realized profits from the total estimated profits, the accountant arrived at the figure of $1,284,203.93, which the defendants claim represents the total profits that could have been realized on the estimated potential sales except for the antitrust violations by plaintiff Clapper, together with Flora and their licensees."

[*Cases Considered*]

In *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 7 Cir. (1946) [1946-1947 TRADE CASES ¶ 57,447], 153 F. 2d 907, 914, the District Court based judgment on the evidence of a certified public accountant who tabulated each of plaintiff's sales made at 65 cents (to meet unfair price-cutting) and also calculated the amount of each item had it been sold at 75 cents. The difference between the two totals was the amount on which judgment was based.

Central Coal and Coke Co. v. Hartman, 8 Cir. (1901) 111 Fed. 96, concerned a "club" formed to control the price of coal in Kansas City, Kansas, and Kansas City, Missouri. When plaintiff withdrew from the "club" his former associates refused to sell to him except at prices only 50 cents per ton less than that established for retail sale to consumers. In that case the Court of Appeals reversed a judgment for plaintiff on the ground that speculations, guesses and esti-

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mates of witnesses were insufficient bases for recovery. The Court mentioned (page 98)

> ". . . the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. (Citing cases.)"

The Court then set forth the exception to the general rule: that loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was.

Kiefer-Stewart Co. v. Seagram & Sons [1950-1951 Trade Cases ¶ 62,737], 340 U. S. 211 (1951) involved an agreement among competitors in interstate commerce to fix maximum resale prices of their products. When plaintiff refused to subscribe to that policy, his name was struck from the list of authorized distributors. The opinion of the Supreme Court does not touch on the method of computing damages but deals solely with reversing this Court's decision that a violation of the Sherman Act had not been proved. In the opinion of this Court, reported at [1950-1951 Trade Cases ¶ 62,627] 182 F. 2d 228 (1950), the method of computing damages was never reached. Study of the briefs in the *Kiefer* case indicates that the primary objection to testimony of the accountant was that his evidence was based on hearsay in that certain books and records were not in evidence. He testified as to the actual dollar volume of sales during 1946, 1947, 1948 and the first quarter of 1949. He then testified to costs and expenses based on actual experience which Kiefer would have incurred had it realized, in 1947, 1948 and the first quarter of 1949, the additional volume of sales necessary to bring its actual sales to the level of 1946. He also testified to the resulting percentage of profit to sales and resulting total amount of profit which would have been realized on such additional volume of sales. The accountant was employed by a firm which had audited Kiefer's books for more than twenty years. There had been a showing that the books and records were voluminous in character. A member of the corporation and the auditor testified to the accuracy of the books and records. In spite of the burden involved, Kiefer's counsel had twice offered to produce the books in court. The District Court refused to permit proof that only one-third of the drop-off in sales volume was attributable to a general statewide decline in the volume of wholesale business after 1945, such proof being based only on check of the Indiana Alcoholic Beverage Commission's figures on liquor stamp sales.

In *William H. Rankin Co. v. Associated Bill Posters of U. S., etc.*, 2 Cir. (1930) 42 F. 2d 152, the Trial Court permitted the Treasurer to show by his compilations, based on net profits of the business in 1911 and his knowledge of business conditions when free of the defendants' unlawful interference, what he considered would have been the probable yearly earnings from July 1913 to June 30, 1918, and to explain how he arrived at his figures. The Court of Appeals said that whatever might be said of the weight of the testimony, that was entirely for the jury.

The Trial Judge sitting as jury in the case before us weighed the evidence adduced by defendants and found their theory of computing estimated potential sales to the unrealistic. The Trial Judge noted *(inter alia)* that the theory assumed each of the distributors and dealers would continuously handle and sell the product throughout the years involved, although one firm included in the list of dealers discontinued the sale of tractor cabs in 1952 or 1953. It also assumed climatic conditions and the absence of peaks and valleys in annual sales, which the Trial Judge said was inconsistent with the actual experience of defendants' competitors.

In *Twentieth Century-Fox Film Corp. v. Brookside Th. Corp.*, 8 Cir. (1952) [1952 Trade Cases ¶ 67,218], 194 F. 2d 846, Brookside Theatre Corp. charged that it had been driven out of business and had been forced to turn over its theatre to one of the defendants. The Trial Court admitted evidence of a certified public accountant who had examined the books produced by defendants to show the operations and profits of the theatre after the sale by Brookside.

In *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359 (1927) the Court found that there was substantial evidence to show that prior to 1910 Southern Photo Co. had an established business in selling to professional photographers supplies largely purchased from Eastman. Southern also took on a non-conflicting line of goods for amateurs. When, because of the monopoly, Southern was no longer able to supply professionals, it lost most of its established trade in such goods, although the business

was so organized that Southern would have been able to handle Eastman's goods with no increase in its general expenses and no additional cost except that incident to handling such goods themselves. Plaintiff sought to recover, as loss of profits, the amount of its gross profits on Eastman's goods during the four years preceding the period in suit, which was shown, less the additional expense (which was estimated) which would have been incurred in handling defendant's goods during the four year period in suit.

Eastman objected to this use, as a standard, of profits earned during the four years Southern had been Eastman's customer, on the ground that Southern had participated in Eastman's unlawful acts and was in *pari delicto*. However, there was evidence from which the jury could have concluded otherwise, and uncontradicted, affirmative evidence that under Eastman's restricted terms of sale, the dealers' profits did not exceed those on sale of goods of other manufacturers not parties to the monopoly.

In *Story Parchment Co. v. Peterson Co.*, 282 U. S. 555 (1931) three companies maintained uniform prices and enjoyed a substantial monopoly of the interstate trade in parchment paper. The Trial Court submitted two items of damage for the consideration of the jury: (1) the difference, if any, between the amounts actually realized by Story and what it would have realized from sales at reasonable prices but for the acts of the defendants and coconspirators; and (2) the extent to which the value of Story's property had been diminished by such acts. The Court there found that there was evidence from which the jury could have found that, in pursuance of the conspiracy, goods had been sold below the point of fair profit and below cost of production. In that case, the evidence also included a detailed showing that current prices were higher during a period antedating the unlawful combination, and that there had been price cutting afterward. The Court held that it was fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices. Story put in evidence of prices received before and after. The Court said that while damages may not be determined by mere speculation or guess, it was sufficient if the evidence showed the extent of the damages as a matter of just and reasonable inference, although the result was only approximate.

[*"Theory of Computation" Rejected*]

We agree with the District Court that defendants' theory of computation as described above, does not meet this standard of "just and reasonable inference."

In *Bigelow v. R. K. O. Radio Pictures* [1946-1947 Trade Cases ¶ 57,445], 327 U. S. 251 (1946), to demonstrate the damages suffered from a discriminatory system of motion picture showings, petitioners introduced a comparison of earnings, during a five year operation of their own theatre with earnings, during the same period, of one of respondents' theatres (comparable in size, but inferior in location, equipment, and attractiveness to patrons) which had been allowed to exhibit pictures ahead of petitioners. Other evidence dealt with petitioners' operation during a period when it had been able to find and show some films which had not been selected by respondents' theatres and thus had not been previously shown there. This period was contrasted with operations after the practice of showing double-features made it almost impossible to find any films which had not been selected for previous showing in respondents' theatres. The Supreme Court found these two classes of evidence not to be mutually exclusive, and the Court further held that the evidence of damage was sufficient to support the jury's verdict. Here, too, the Court said (page 264)

> ". . . even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly."

That is what the District Court did in the case before us.

It appears to us, as it did to the District Court, from a study of the record, that there is no preponderance of evidence to show that Clapper (and his licensees) through any conspiratorial act caused the losses arising out of the working arrangement with Cab-Ette.

In view of the position we have adopted with respect to the issues discussed, it would only unduly lengthen this opinion to

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comment in detail on other arguments, advanced by counsel for both parties, which were considered by this Court.

[*Ruling*]

The judgment of the District Court is affirmed in all respects except as to failure to include attorneys' fees and expenses incurred in the patent infringement defense as an element of damages in the antitrust action. As to that aspect of the case only, the judgment is reversed and the cause is remanded for entry of order in conformity with this opinion.

In part affirmed. In part reversed and remanded with directions.

[Concurring and Dissenting Opinion]

PARKINSON, Circuit Judge, concurring in part and dissenting in part.

[*Attorneys' Fees as "Damages"*]

I concur in that part of the result reached by Judge Knoch in his opinion which affirms the judgment of the District Court. However, I am compelled to respectfully dissent to that portion of the opinion reversing for failure to include attorney fees and expenses incurred by counsel for Original in the defense of the patent infringement phase of the case as an element of treble damages in the antitrust action under the counterclaim.

The District Court made the award under authority of 35 U. S. C. A. § 285 by reason of the *exceptional* circumstances involved in the case concerning the validity of the patent and its use by Clapper and his licensees but specifically declined to include the award as an element of damages in the antitrust action under the counterclaim.

15 U. S. C. A. § 15 provides that one who shall be injured in his business or property by reason of anything forbidden in the antitrust laws shall recover threefold the damages sustained by him, plus the cost of suit including a reasonable attorney's fee.

It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body, *Kepner v. United States,* 1904, 195 U. S. 100, 124, or, as stated by the Supreme Court in another way, "where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." *Case v. Los Angeles Lumber Co.,* 1939, 308 U. S. 106, 115.

When 15 U. S. C. A. § 15 was enacted by Congress, the word "damages" had acquired, through judicial interpretation, a well understood legislative meaning and it did not include attorney fees incurred in defending civil actions. *Oelrichs v. Spain,* 1872, 82 U. S. 211, 231; *Flanders v. Tweed,* 1872, 82 U. S. 450, 453; *Tullock v. Mulvane,* 1902, 184 U. S. 497, 511; *Missouri, Kansas, etc., R'y Co. v. Elliott,* 1902, 184 U. S. 530, 539-540; *Straus v. Victor Talking Mach. Co.,* 2 Cir., 1924, 297 Fed. 791, 797. There is nothing in the Act to the contrary, and, in my opinion, any legal basis for an attorney fee allowance in the successful defense of the patent infringement phase of this action could emanate from and find its source only in 35 U. S. C. A. § 285.

As I read the case of *Kobe, Inc. v. Dempsey Pump Co.,* 10 Cir., 1952 [1952 TRADE CASES ¶ 67,312], 198 F. 2d 416, I am impressed with the thought that the question of the right to include counsel fees incurred in the successful defense of a patent infringement suit as an element of damage in an antitrust action was not squarely raised and decided by the Tenth Circuit, although the District Court so held. However, if the Tenth Circuit did so decide, I am constrained to disagree and am of the opinion that the Second Circuit was correct in its decision in *Straus v. Victor Talking Mach. Co.,* 297 Fed. 791.

[*Would Affirm Judgment*]

The District Court made an award of $25,000 for the services of counsel for Original in the antitrust action under its counterclaim pursuant to 15 U. S. C. A. § 15 and made an award of $28,244.31 for the services and expenses of counsel for Original in the defense of the patent infringement action under the complaint pursuant to 35 U. S. C. A. § 285. I am convinced the refusal of the District Court to include the latter award as an element of treble antitrust damages is not erroneous under the circumstances here.

I would affirm the judgment of the District Court in its entirety.

[¶ 69,473] Independent Iron Works, Inc. v. United States Steel Corporation, Bethlehem Pacific Coast Steel Corporation, Bethlehem Steel Company, and Kaiser Steel Corporation.

In the United States District Court for the Northern District of California, Southern Division. Civil No. 35080. Dated September 30, 1959.

Sherman and Clayton Acts

Combinations and Conspiracies—Monopolies—Proof of Unlawful Conspiracy—"Conscious Parallelism"—Steel Producers' "Similar Conduct" as Basis for Inference of Conspiracy—Refusal to Sell to Fabricator.—Steel producers charged with violating Sections 1 and 2 of the Sherman Act by conspiring to withhold steel from a "fabricator and erector" of structural steel were each granted a directed verdict on the ground that their alleged "similar conduct" was insufficient to support an inference of a conspiracy. Similar conduct, as such, does not establish a conspiracy; there must be a "sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action." Further, an inference of conspiracy is permissible only if the "similar" conduct is in apparent contradiction to the concern's own self-interest. Here, the crux of the plaintiff's claim was that, during a 1955 steel shortage, each of the producers refused to sell it all the steel it wanted to purchase. The plaintiff inferred that the refusals were conspiratorial since each of the producers, in "rationing" its supplies, considered its own customers' past purchases. However, that was not the kind of "parallel conduct" which would support an inference of a conspiracy. Each of the producers, acting individually, was legally entitled to sell or not to sell to any customer, or to sell to him as much as the producer saw fit. Also, past purchases afford a logical and reasonable guide for distribution during a shortage period. Further, any inference of agreement or any suggestion of "parallelism" was negated by the dissimilarities in the actual methods of allocation which each of the producers followed. Finally, the plaintiff's own evidence refuted the existence of any conspiracy to withhold steel from it.

Also, no conspiracy could be inferred from the fact that each of the producers was "vertically integrated," or from each producer's alleged "favoring" of its own "integrated" fabricating shops. Other claims by the plaintiff, including its contentions that the producers (1) "artificially" created the 1955 steel shortage, (2) engaged in unlawful bidding practices, and (3) conspired to fix prices, were not supported by the evidence.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360, 2005.785; Monopolies, Vol. 1, ¶ 2520.30, 2610.

Combinations and Conspiracies—Monopolies—Relevant Market—Products Used in Fabrication of Structural Steel in Seven Western States.—A treble damage action charging steel producers with conspiring to withhold steel from a California "fabricator and erector" of structural steel involved only a fragment of the steel industry in the United States, centering on "structural shapes and plates" sold by the producers for use in the fabrication of structural steel in seven Western states. Thus, inquiries regarding the distribution of "the total ingot tonnage of all types of steel produced by the several defendants" were not germane to the simple issue of whether or not the producers conspired to limit supplies of *structural* steel sold to the plaintiff in the competitive area.

See Combinations and Conspiracies, Vol. 1, ¶ 2005; Monopolies, Vol. 1, ¶ 2540.10.

Combinations and Conspiracies—Monopolies—Proof of Unlawful Conspiracy—"Vertical Integration"—Steel Producers' "Favoritism" Toward Own Fabricating Shops as Evidence of Conspiracy.—Steel producers "vertical integration," that is, the fact that each of them not only manufactured structural "shapes and plates," but also operated fabricating shops which used those products in competition with the plaintiff, a "fabricator and erector" of structural steel, did not support an inference of a conspiracy. Vertical integration is clearly legal. Further, there was no evidence that any of the producers had acquired any facilities pursuant to an agreement with any other producer. In addition, the alleged "favoritism" of each of the producers in supplying "disproportionately large quantities of steel to its own

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fabricating shops," even if true, would suggest normal conduct rather than conspiratorial conduct. Thus, the fact that each of the vertically integrated producers had favored its own fabricating shops would be no evidence that they had conspired to do so jointly rather than doing so individually. In any event, however, the facts refuted the argument that such favoritism had been shown. Over the years, the producers' respective shares of the national fabricating market had been declining. Moreover, during a shortage, each of the producer's fabricating shops were "rationed" in the same manner as other customers and faced the same problem of operating within limited supplies.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.865; Monopolies, Vol. 1, ¶ 2610.170.

Combinations and Conspiracies—Monopolies—Price Fixing—Agreement Between Competitors to Fix Prices—"Standardized Commodity"—Price Uniformity as *Prima Facie* Showing of Agreement to Fix Prices.—A "fabricator and erector" of structural steel, in a treble damage action charging steel producers with conspiring to restrain and monopolize trade in the steel industry, failed to sustain its charges of a price fixing conspiracy. The plaintiff had never contended that the prices it paid for steel were higher than "reasonable or competitive prices." Also, steel is a "standardized" product. The law is clear that proof of price uniformity in the sale of a standardized commodity, with or without price leadership, is not sufficient to make a *prima facie* showing of an agreement to fix prices. Furthermore, the testimony of the plaintiff's own purchasing agent showed differences in the prices of steel, rather than uniformity. In fact, such differences in prices were substantial enough to be determinative of the mill from which the plaintiff bought. Thus, there was no evidence from which a reasonable inference of a price agreement could be drawn.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181; Monopolies, Vol. 1, ¶ 2610.600.

Combinations and Conspiracies—Monopolies—Exclusion from Trade—Bidding Practices—Reduction of Quoted Prices After Bidding.—A "fabricator and erector" of structural steel failed to sustain its charges that steel producers which also operated fabricating shops had conspired to take fabricating jobs away from it "by reducing the prices they quoted to general contractors after the bidding." There was no evidence that any producer had ever reduced its price after the bidding, and no evidence of any concerted action between the producers regarding bidding. Out of 835 jobs on which the plaintiff had bid in 1955, it offered evidence of only two alleged instances of such bidding practices. In one case, a producer had been unable to get its quotation to the successful general contractor prior to the opening of the bids. In the second case, another producer, after bidding on a job to a contractor in two parts, inquired of the contractor, after the bidding, whether its bid on the steel portion of the job was not low. In both instances the contractor accepted the plaintiff's bid. Finally, the court noted that, in 1955, the plaintiff obtained contracts on a larger percentage of the work on which it had bid than the 10 per cent it expected "under normal conditions" and "in fair competition."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.503, 2005.660; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Practices—Production Control—"Artificial" Creation of Nationwide Steel Shortage.—"A fabricator and erector" of structural steel, in its treble damage action charging steel producers with conspiring to restrain and monopolize trade, failed to sustain its contention that a 1955 nationwide steel shortage was "artificially" created by the producers. The facts showed that the demand for structural steel products outstripped the available supply, and that customers' orders exceeded the producers' capacity. Published statistics showed that bookings of fabricrated structural steel rose to an all-time record in 1955, and that the steel industry was operating at close to 100 per cent of capacity throughout most of the year. Thus, the producers were engaged in maximum production efforts during the shortage.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.760; Monopolies, Vol. 1, ¶ 2610.800.

Interlocking Directorates—Transactions Between Common Carriers and Business Organizations with Common Directors—Competitive Bidding Under Clayton Act, Section 10—"Lowest" Bid Not "Most Favorable" Bid.—A railroad's acceptance, from a steel

producer with a common director, of bids which were not, in dollar amount, the lowest bids submitted, did not support any inference of a conspiracy, or a violation of Section 10 of the Clayton Act. That section, which requires a common carrier to hold competitive bidding when purchasing from any concern which has on its board of directors a person who is also a director of the common carrier, requires the carrier to accept the "most favorable" bid rather than the "lowest" bid. Here, there was uncontradicted testimony that the railroad scrupulously followed the provisions of Section 10 and the applicable regulations of the Interstate Commerce Commission, and that the bid of the steel producer, in each instance where it was accepted, was the most favorable to the railroad. There was no evidence of any conduct by the steel producer which was calculated to influence the award of the jobs involved, other than the mere submission of bids in compliance with the applicable statutory requirements. There is nothing in the statute, its legislative history, or the regulations of the Interstate Commerce Commission to support the plaintiff's "legal contention" that Section 10 requires a supplier which has a director in common with a carrier to sell "to any and all persons who wish to compete against such supplier in bidding to the carrier."

See Interlocking Directorates, Vol. 1, ¶ 4420.60.

Private Enforcement and Procedure—Suit for Civil Damages—Trial—Burden of Establishing *Prima Facie* Case—Sufficiency of Evidence to Go to Jury—Speculation, Surmise, or Conjecture—Directed Verdicts.—Steel producers charged with conspiring to restrain and monopolize trade in violation of Sections 1 and 2 of the Sherman Act, and a steel producer charged with conspiring to prevent free and competitive bidding on railroad car underframes in violation of Section 10 of the Clayton Act, were each granted a directed verdict. The plaintiff, a "fabricator and erector" of structural steel which relied upon the defendants' alleged "similar conduct" as the basis for drawing an inference of a conspiracy, was entitled to the benefit of all favorable inferences which could be drawn from the evidence, but it still had the burden of establishing a *prima facie* case. Thus, the plaintiff had to rely upon reasonable and logical inferences from the evidence in the record, and could not go to the jury on the basis of speculation, surmise, or conjecture.

See Private Enforcement and Procedure, Vol. 2, ¶ 9014.05.

For the plaintiff: Hildebrand, Bills & McLeod (by Clifton Hildebrand), Oakland, Cal.; and Caplan, Berlin, O'Grady & Doll (by Julian Caplan), San Francisco, Cal.

For the defendants: McCutchen, Doyle, Brown & Enersen (by Morris M. Doyle, John N. Hauser, and Frederic A. Sawyer), San Francisco, Cal., for United States Steel Corp.; Pillsbuy, Madison & Sutro (by James Michael, George A. Sears, and William C. Miller), San Francisco, Cal., for Bethlehem Pacific Coast Steel Corp. and Bethlehem Steel Co.; and Thelen, Marrin, Johnson & Bridges (by Max Thelen, Jr., and Gordon Johnson), San Francisco, Cal., for Kaiser Steel Corp.

Opinion

[*Treble Damage Action—Steel Industry*]

WOLLENBERG, District Judge [*In full text*]: This is a private antitrust action for treble damages. Plaintiff is a fabricator and erector of structural steel, located in Oakland, California. The defendants, against whom the case proceeded to a jury trial (all other defendants having been dismissed) are United States Steel Corporation, the affiliated companies of Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation, and Kaiser Steel Corporation.

[*Conspiracy and Monopoly Charged*]

The complaint, originally filed on November 28, 1955, and subsequently amended, alleges three causes of action. The first and second counts charge a conspiracy between the several defendants, under sections 1 and 2 of the Sherman Act, to restrain and monopolize or attempt to monopolize [1] trade in the sale of structural shapes and plates and in the fabrication of structural steel. The crux of plaintiff's claims is that it was unable to purchase from the several defendants all of the structural steel products it desired during the period in suit, *i.e.*,

[1] Plaintiff's alternative claims of *independent* monopolization and individual attempts to monopolize by each of the defendants find no support in the evidence.

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January 1, 1955, to November 28, 1955. The third count is against United States Steel alone, charging a conspiracy with Southern Pacific Company (not named a defendant) to prevent free and competitive bidding on railroad car underframes, in violation of section 10 of the Clayton Act.

[*Pretrial Order*]

Numerous pretrial conferences were held during which the factual and legal issues were extensively explored. Each of the parties presented both orally and in detailed memoranda a full exposition of their respective positions. These proceedings eventuated in the court's pretrial order of June 19, 1959, defining the issues and the scope of proof at trial.

[*Motions*]

Plaintiff, at the trial, first presented its evidence on the issues of violation of the antitrust laws. When plaintiff rested its case on liability, defendants severally moved to dismiss the first and second clauses of action under Rule 41(b) and for directed verdicts under Rule 50(a) of the Federal Rules of Civil Procedure. United States Steel similarly moved with respect to the third cause of action.

[*Relevant Market*]

In passing upon these motions, several preliminary observations are warranted.

This case involves only a fragment of the steel industry in the United States. It centers on structural shapes and plates sold by the defendants for use in the fabrication of structural steel in the seven Western States. The distribution of the total ingot tonnage of all types of steel produced by the several defendants is not relevant to this action. Such inquiries are not germane to the simple issue here of whether or not defendants conspired to limit supplies of *structural* steel sold to plaintiff in this competitive area.

[*Prior Litigation—Release*]

Plaintiff bases its claim on acts of defendants in the year 1955 up to November 28th.[2] Plaintiff does not claim damages for acts of defendants prior to January 1, 1955, since plaintiff settled prior litigation and executed a release of all claims existing as of December 31, 1954.

[*Conspiracy to Withhold Steel—Evidence*]

At pretrial, plaintiff stipulated to confine its proof to certain designated jobs in the year 1955 but desired additionally and for background purposes to introduce evidence of certain pre-1955 jobs. Accordingly, for the limited purpose of attempting to establish the prior existence of the alleged conspiracy, the court permitted evidence pertaining to the 13th Street Freeway and Teaching Hospital jobs. Such pre-1955 evidence was not admitted against Kaiser. Plaintiff stipulated (Tr. 951-952) that "up to February 1, 1955, Kaiser Steel Corporation met the requirements of Independent Iron Works as Independent Iron Works called on them to do so, in quantity, in time, and also was a good, adequate and prompt supplier." The undisputed evidence respecting these two pre-1955 jobs contradicts, rather than supports, plaintiff's claim of conspiracy. Plaintiff's purchasing agent admitted that Bethlehem "offered quite a considerable tonnage of plate" when he needed it; indeed, Bethlehem offered plaintiff a larger tonnage than plaintiff chose to accept. Additionally, Bethlehem's delivery performance with respect to the 13th Street Freeway job was better than that of Kaiser, who plaintiff stipulated met plaintiff's requirements in quantity and on time. These undisputed facts leave no room for any inference of a conspiracy to withhold steel from plaintiff.

The U. C. Teaching Hospital job was fabricated by the Moore Dry Dock Company, who received the job at the inception of the Korean War in 1950. Mr. J. R. Moore, vice president of that company, called as a witness by plaintiff, testified that wartime demands for steel, Government controls, and his inability to obtain priorities for this job affected Bethlehem's[3] ability to fill Moore's orders. Mr. Moore further testified that in the face of these problems "Bethlehem nevertheless made a definite effort to try to help out Moore Dry Dock Company in supplying steel for

[2] Plaintiff's cause of action, being founded upon an alleged continuing conspiracy and repeated refusals to sell, comes within the purview of the Ninth Circuit's decision in *Flintkote Company v. Lysfjord,* [1957 TRADE CASES ¶ 68,674], 246 F. 2d 368 (9th Cir. 1957), certiorari denied (1957) 355 U. S. 835; accordingly, evidence of postcomplaint acts was inadmissible.

[3] Notably the evidence with respect to this job is silent as to U. S. Steel and plaintiff stipulated that pre-1955 evidence was not offered against Kaiser.

it for the U. C. Hospital job." This is demonstrated by the fact that during the years when Moore was fabricating the job it received about three times the tonnage of steel it had bought from Bethlehem in prior years. Here again these undisputed facts repudiated any reasonable suggestion of a conspiracy to withhold steel.

[*"Conscious Parallelism"*]

Turning then to 1955, plaintiff relies exclusively upon the defendants' alleged similar conduct as the basis for drawing an inference of conspiracy.

[*Principles*]

On these motions plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence. The plaintiff, however, still has the burden of establishing a *prima facie* case. He must rely upon reasonable and logical inferences from the evidence in the record. Plaintiff can not go to the jury on the basis of speculation, surmise or conjecture. *Wolfe v. National Lead Company* [1955 TRADE CASES ¶ 68,094], 225 F. 2d 427, 433-434 (9th Cir. 1955).

In following these principles in the instant case, the court's way has been made easier by the remarkable absence of any real conflicts in the evidence. Despite the size of the record, the basic facts are not in dispute.

[*Similar Conduct Which Contradicts Self-Interest*]

In deciding whether evidence of defendants' conduct can reasonably support an inference of conspiracy, there must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action. Proof of parallel business conduct is not a substitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. *Theatre Enterprises, Inc. v. Paramount* [1954 TRADE CASES ¶ 67,640], 346 U. S. 537 (1954). As stated in *United States v. Borden Co.* [1953 TRADE CASES ¶ 67,461], 111 F. Supp. 562, 579 (N. D. Ill. 1953): "Reasonable businessmen will act similarly when presented with the same problem." The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy.

An inference of conspiracy is permissible only where the conduct was adopted by a competitor "in apparent contradiction to its own self-interest." *Milgram v. Loew's Inc.* [1950-1951 TRADE CASES ¶ 62,938], 192 F. 2d 579, 583 (3rd Cir. 1951). An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices. *Chorak v. RKO Radio Pictures* [1952 TRADE CASES ¶ 67,267], 196 F. 2d 225, 229 (9th Cir. 1952), certiorari denied (1952) 344 U. S. 887.

These are the general standards against which can be measured plaintiff's factual contentions in this case, recognizing always, however, that plaintiff is entitled to the benefit of all reasonable inferences which may be drawn from the evidence in this record.

[*"Artificial" Shortage*]

Plaintiff first contends that the nationwide shortage of steel which commenced in the middle of 1955 was "artificially" created by the defendants. The undisputed facts, however, are to the contrary. The demand for structural steel products increased tremendously in the second quarter of 1955. The demand quickly outstripped the available supply. The customers' orders greatly exceeded the defendants' productive capacity.

Published and uncontradicted statistics show that the bookings of fabricated structural steel rose from 3,161,611 tons in 1954 to 4,651,312 tons in 1955, an all-time record. On the production side, similar published and uncontroverted statistics demonstrate that the steel industry was operating at close to 100% of capacity throughout most of 1955. During the shortage defendants were engaged in maximum production efforts.

Such uncontradicted evidence leaves plaintiff's theory of "artificial" shortage without support. "* * * one must always measure what is claimed by plaintiff to have theoretically happened against what is mathematically proved by defendants to have actually happened." *United States v. Natl. Malleable & Steel Castings Co.*, CCH [1957] TRADE CASES, par. 68,890 (N. D. Ohio 1957), aff'd *per curiam* [1958 TRADE CASES ¶ 69,164], 358 U. S. 38 (1958).

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[*Vertical Integration—Legality*]

Plaintiff next seeks to support its claims by the fact that each of the defendants is vertically integrated. That is, each defendant not only manufactures structural shapes and plates but also operates fabricating shops which use those products in competition with the plaintiff and other fabricators. United States Steel and Bethlehem have had such fabricating facilities for many years; Kaiser acquired its facilities in 1955. There is no evidence in the record that any defendant acquired any facilities pursuant to understanding or agreement with any other defendant. The mere fact that each defendant is vertically integrated does not support an inference of conspiracy. Vertical integration is clearly legal. *United States v. Columbia Steel Co.* [1948-1949 Trade Cases ¶ 62,260], 334 U. S. 495, 525-526 (1948).

[*Favoritism Toward Own Shops—Legality*]

Plaintiff further argues, however, that each defendant supplied disproportionately large quantities of steel to its own fabricating shops. Even if true, this alleged favoritism of defendants' own fabricating shops would suggest normal, rather than conspiratorial conduct. In *Dipson Theatres v. Buffalo Theatres* [1950-1951 Trade Cases ¶ 62,896], 190 F. 2d 951, 960, 961 (2nd Cir. 1951), cert. den. 342 U. S. 926 (1952), the court in commenting on the evidence that

> "it was the policy of each [defendant] to favor theatres in which they had an interest,"

said,

> "This was to be expected, and the *fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually"*; they "could legally favor their own theatres" (emphasis added).

In any event, undisputed facts refute plaintiff's argument. Over the years the defendants' respective shares of the national fabricating market have been declining. Moreover, during the shortage each defendant's fabricating shops were rationed in the same manner as other customers and faced the same problems of operating within their limited supplies.

[*"Rationing" Based on Past Purchases*]

The crux of plaintiff's claim is that during the shortage in 1955, each defendant refused to sell plaintiff all the steel it wanted to purchase. Plaintiff would draw an inference of conspiratorial refusals from allegedly "parallel conduct" in that each defendant, in rationing its available supply, gave some consideration to its customers' past purchases.

[*Right of Customer Selection*]

It is settled law, however, that each defendant, acting individually, was legally entitled to sell or not to sell to any customer or to sell him as much as he saw fit. *Times-Picayune v. United States* [1953 Trade Cases ¶ 67,494], 345 U. S. 594, 625 (1953).

> "If a manufacturer may sell to whom he pleases, it is entirely logical that he may restrict his sales as to quantity, and sell to his customers such quantities as he may see fit." *Fosburgh v. California & Hawaiian Sugar Refining Co.*, 291 Fed. 29 (pp. 36-37) (9th Cir. 1923).

And "an allocation system alone, without further factors, is not inherently illegal as a method of distribution in times of scarce supply." *Banana Distributors v. United Fruit Company* [1958 Trade Cases ¶ 69,057], 162 F. Supp. 32, 42 (S. D. N. Y. 1958).

The *Banana* case recognizes the logic and good business sense of some method of rationing in a shortage period. Any other approach, as the testimony here shows, would leave many customers with no steel at all. The broad similarity of business conduct, in the sense that each defendant considered as one factor of its distribution policy its respective customers' past purchases, is not the kind of "parallel conduct" which will support an inference of conspiracy. Past purchases afford a logical and reasonable guide for distribution during a shortage period. Wholly apart from this broad similarity, however, the evidence shows dissimilarities in the actual methods each defendant followed which militate against any suggesion of "parallelism."

[*Methods of Rationing—Differences*]

United States Steel's method was more formalized and mathematical than the methods of the other defendants. The tonnages of steel which each customer could order from each of its mills—so-called "entry limits"—were calculated with reference to the customers' purchases in 1953, 1954 and

the first six months of 1955. The customer was notified in advance as to what his tonnages would be for the following quarter. These entry limits were generally intended as the maximum amounts which a particular customer could purchase. Exceptions, however, were made—notably in plaintiff's case—where the customer received additional tonnages.

Bethlehem's method differed from the methods of the other defendants. It was unique in that it differed within the Bethlehem organization itself. In considering past purchases as one of the factors affecting sales during the shortage, the top sales management reviewed sales records over a number of years in making broad decisions covering all types of steel products; at the next level the product manager for plates looked exclusively to 1954, whereas the product manager for structural shapes started out using 1954 but later on took into account 1952 and 1953 as well as 1954; Mr. Cort, in charge of sales on the West Coast, was not bound by any of these recommendations but made his own determinations. In the case of plates he followed the product manager's recommendation and used 1954; in the case of structural shapes he considered customers' purchases in 1953 and 1954, to the end of providing each customer with the largest tonnage he had bought in either of those years. In all instances Bethlehem's consideration of a customer's prior purchases was intended to provide a minimum of monthly tonnage.

The tonnages which Kaiser provided its customers were for the most part worked out by direct negotiation with the customer. To the extent it gave consideration to past purchases, it looked to the year 1954. Kaiser, unlike the other defendants, frequently gave so-called "job protection," *i. e.*, an assurance to furnish all of a particular type of steel needed by a customer for a specific job.

Other differences in the defendants' respective distribution methods are undisputed in the record. The foregoing examples are sufficient to illustrate that as soon as generalities are put aside, the many divergencies in the defendants' practices show such a lack of "parallel conduct" as to negate any inference of agreement. Indeed, plaintiff's own purchasing agent testified, "that 1955 was a very confusing year insofar as allocations, and *various mills operated differently*" (emphasis added).

[*Lower Receipts—Admissions*]

Plaintiff repeatedly urges that its total receipts of steel were lower in 1955 than in 1954. Yet the undisputed testimony shows that when steel was in ample supply at the end of 1954 and during the first part of 1955, plaintiff placed very few orders. Accordingly, its receipts were low in the first half of 1955.

In this regard the admissions made by plaintiff's purchasing agent while under cross-examination also are illustrative. Job by job, order by order, and shipment by shipment the witness admitted, on cross-examination, that Bethlehem had accepted all orders tendered by plaintiff for steel, had filled all such orders, and that Bethlehem's performance was satisfactory. Similar, though less detailed, admissions were made regarding the performances of United States Steel and Kaiser. Thus, plaintiff's own evidence flatly refutes the existence of any conspiracy to withhold steel from plaintiff.

[*Delays in Deliveries—Causes*]

In much the same vein is the evidence regarding the claimed lateness of deliveries. The defendants admit that there were some minor delays in the shipments of plaintiff's orders. The evidence explaining the causes of such delays is not disputed. Steel strikes, shipping strikes, and other unavoidable circumstances such as an unprecedented flood at the Bethlehem mill and interferences in production due to efforts to expand capacity reasonably account for the delays that occurred. Indeed, in the light of such circumstances, the extent of the delays appears minimal. For example, the admissions of plaintiff's purchasing agent show that only 4% of Bethlehem's shipments were late and these were justifiably explained by the circumstances previously mentioned.

[*Bidding Practices*]

Two further matters in connection with the first and second causes of action warrant mention.

Plaintiff also contends that the defendants conspired to take fabricating jobs away from the plaintiff by reducing the prices they quoted to general contractors after the bidding. Out of 835 jobs which plaintiff bid on in 1955, it offered evidence of only two alleged instances of such bidding practices. In one case Kaiser had been unable

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to get its quotation to the successful general contractor prior to the opening of the bids. The contractor rejected Kaiser's offer and awarded the job to plaintiff. In the second case Bethlehem had bid a job to a contractor in two parts and after the bidding had inquired of the contractor whether Bethlehem's bid on the steel portion of the job was not low. Here again the contractor chose to accept the combined bid of plaintiff.

There was no evidence that any defendant ever reduced its price after the bidding, nor any evidence of any concerted action between the defendants regarding bidding. Finally, plaintiff's president testified that "under normal conditions" and "in fair competition" plaintiff would normally expect to get about 10% of the work on which it bid. In 1955 plaintiff bid on 174,041 tons of fabricated work and actually obtained contracts for 19,733 tons—or better than the 10% it expected.

[*Price Fixing Conspiracy*]

Plaintiff's complaint also charges a price-fixing conspiracy. However, plaintiff has never contended that the prices it paid for steel were higher than reasonable or competitive prices nor is there any evidence from which a reasonable inference of price agreement could be drawn.

Steel is a standardized product. The law is clear that even where there is proof of price uniformity in the sale of a standardized commodity, with or without price leadership, that is not sufficient to make a *prima facie* showing of agreement to fix prices. *United States v. Int. Harvester Co.*, 274 U. S. 693 (1927).

Furthermore, the testimony of plaintiff's own purchasing agent showed, not uniformity, but differences in the actual prices of steel. Indeed, the actual differences in mill prices, together with freight costs, are of such a substantial nature as to be determinative of the mill from which plaintiff will buy.

[*No Inference of Conspiracy*]

As to the remaining charges in the first and second causes of action of the complaint, plaintiff either offered no evidence at all or the charges were so patently unsupported as not to warrant discussion herein. In reviewing separately the evidence relating to each of plaintiff's contentions, the court has not overlooked giving consideration to them in their entirety. The record as a whole has been reviewed and whether plaintiff's charges are taken singly or collectively, the conclusion is inescapable that no logical or reasonable inference of conspiracy between the defendants could be drawn.

[*Clayton Act, Section 10*]

It remains to consider briefly the third cause of action against United States Steel Corporation alone. This involves the narrow issue whether that defendant violated section 10 of the Clayton Act in connection with the bidding on certain freight car underframe jobs for the Southern Pacific Company. Considerable evidence was offered and received at the trial solely with respect to this third cause of action.

Section 10 of the Clayton Act requires a common carrier engaged in interstate commerce to hold competitive bidding when purchasing goods or supplies from any concern which has on its board of directors a person who is also a director of the common carrier. It is undisputed that during the period herein involved, Mr. James B. Black was a director of both defendant United States Steel and the Southern Pacific Company.

Preliminarily, United States Steel disputes whether an alleged violation of section 10 of the Clayton Act may be the subject of a private treble damage action. In this case the court need not pass upon that issue, for it is of the opinion that the record in any event fails to show a violation of section 10.

The evidence relates to the acts and conduct of Southern Pacific and United States Steel in connection with a number of bids for car frames between September, 1953, and October, 1955. The uncontradicted testimony of Mr. M. C. Nystrom, general purchasing agent of Southern Pacific, was that Southern Pacific scrupulously followed the provisions of section 10 of the Clayton Act and the applicable regulations of the Interstate Commerce Commission relating to competitive bidding.

[*"Lowest Bid" Not "Most Favorable" Bid*]

There is no evidence of any conduct by defendant United States Steel calculated to influence the award of the jobs involved other than the mere submission of its bids in compliance with the applicable statutory

requirements. The fact that Southern Pacific accepted United States Steel's bids on certain jobs, although such bids were not in dollar amount the lowest of the bids submitted, will not support any inference of conspiracy between United States Steel and Southern Pacific or of any wrongdoing by United States Steel. Section 10 of the Clayton Act requires the carrier to accept the "most favorable" rather than the lowest bid, and the uncontradicted testimony of Mr. Nystrom was that the bid of United States Steel in each instance where it was accepted was, under all the circumstances, the most favorable to Southern Pacfic.

In essence, plaintiff's legal contention is that section 10 should be so construed as to require a supplier which has a common director with a carrier to sell steel or other material to any and all persons who wish to compete against such supplier in bidding to the carrier. There is nothing in the statute, its legislative history or the regulations of the Interstate Commerce Commission to support such an interpretation of the statute.

[*Judgment for Defendants*]

The motions of the defendants are granted and the clerk is hereby directed to enter verdict and judgment in favor of each of the defendants, United States Steel Corporation, Bethlehem Pacific Coast Steel Corporation, Bethlehem Steel Company, and Kaiser Steel Corporation on both the first and second causes of action herein, and in favor of defendant United States Steel Corporation on the third cause of action herein, together with their costs.

[¶ 69,474] Merton Shapiro, Bennard Shapiro, Morton J. Sablosky, and Lillian Schultz, individually and trading as the Arcadia Theatre v. Paramount Film Distributing Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., United Artists Corporation, RKO Radio Pictures, Inc., Warner Brothers Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Stanley Warner Management Corp., William Goldman Theatres, Inc., and Fox Philadelphia Building, Inc.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 20075. Filed September 30, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Applicable State Statute of Limitations—Pennsylvania One-year or Six-year Statute.—A Federal district court in Pennsylvania held that a Pennsylvania six-year statute of limitations (governing actions in trespass on the case), rather than a Pennsylvania one-year statute (governing "forfeiture" actions), was applicable to a treble damage action commenced before the effective date of the Federal four-year statute. In the absence of a Federal statute, the Federal courts use the appropriate statute of limitations of the state in which they are sitting. Thus, the court had to use the statute of limitations which the Pennsylvania courts would apply to a similar suit. In *Gordon v. Loew's, Inc.*, 1957 Trade Cases ¶ 68,783 and 68,820, the Court of Appeals for the Third Circuit held that a New Jersey statute governing actions "for any forfeiture upon any penal statute" was applicable to a treble damage action under Section 4 of the Clayton Act. However, that decision only established the "approach to be taken," namely, that Federal courts employing a state statute of limitations for Federal purposes must give it the scope and meaning that the state courts give to it in analogous suits under state law. Here, the Pennsylvania Supreme Court, in such an analogous suit, had clearly indicated that it would not apply the Pennsylvania one-year statute to a private action under Section 4 of the Clayton Act.

As to a defendant which was joined *after* the effective date of the Federal four-year statute of limitations (January 7, 1956), that statute was applicable.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100.

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For the plaintiff: Nochem Winnet of Fox, Rothschild, O'Brien & Frankel, and William A. Gray, Philadelphia, Pa.

For the defendants: Arlin M. Adams, Philadelphia, Pa., for Paramount Film Distributing Corp.; and Louis J. Goffman, Philadelphia, Pa., for Warner Bros. Pictures Distributing Corp. and Stanley Warner Management Corp.

Memorandum Opinion sur Proposed Pretrial Order re Applicability of Pennsylvania Act of March 26, 1785, 2 Sm. L. Section 6 (12 P. S. § 44) [1]

[*Applicable Statute of Limitations*]

VAN DUSEN, District Judge [*In full text*]: The statute of limitations applicable to private suits for treble damages brought under § 4 of the Clayton Act [2] is a matter of federal law. In the absence of a federal statute, the federal courts use the appropriate statute of limitations of the state in which it is sitting.[3] This state statute does not operate of its own force but because it is adopted federal law.[4]

[*Federal Statute Not Applicable*]

There is no federal statute which provides a limitation period for this particular antitrust action. Congress recently enacted a statute of limitations for actions brought under § 4 of the Clayton Act, but this law did not become effective until January 7, 1956.[5] This action was commenced on January 4, 1956, against all but one of the defendants. In *Chattanooga Foundry v. Atlanta,* 203 U. S. 390 (1906), it was held that the fore-runner of 28 U. S. C. A. § 2462, which provides a limitation period for

> "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, . . ."

did not apply to a suit for treble damages under the Sherman Act. Thus, this court must use the statute of limitations which the Pennsylvania courts would apply to a similar suit.

[*Pennsylvania One-year Statute*]

The defendants assert that the Act of March 26, 1785, 2 Sm. L. § 6 (12 P. S. § 44), governs this action and that any award of damages must be limited to the year preceding the commencement of this action. That Act provides as follows:

> "All actions, suits, bills, indictments or informations, which shall be brought for any forfeiture, upon any penal act of assembly made or to be made, whereby the forfeiture is or shall be limited to the commonwealth only, shall hereafter be brought within two years after the offense was committed, and at no time afterwards; and that all actions, suits, bills or informations, which shall be brought for any forfeiture, upon any penal act of assembly made or to be made, the benefit and suit whereof is or shall be by the said act limited to the commonwealth, and to any person or persons that shall prosecute in that behalf, shall be brought by any person or persons that may lawfully sue for the same, within one year next after the offense was committed; and in default of such pursuit, that then the same shall be brought for the commonwealth, any time within one year after that year ended; and if any action, suit, bill, indictment or information, shall be brought after the time so limited, the same shall be void, and where a shorter time is limited by any act of assembly, the prosecution shall be within that time."

[*"Approach to Be Taken"*]

In support of their contention, defendants cite the Court of Appeals for the Third Circuit's decision in *Gordon v. Loew's Incorporated.*[6] In that case, the court held that a New Jersey statute of limitations governing "All actions at law brought for

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[1] This question was raised at the first pre-trial conference on August 6, 1959, at which time it was agreed that the defendants and plaintiffs would submit briefs on the matter by the 1st and 14th of September 1959, respectively, in order that a ruling could be made (see Document No. 77, pp. 10-18, in the Clerk's file).

[2] 15 U. S. C. A. § 15.

[3] *Chattanooga Foundry v. Atlanta,* 203 U. S. 390 (1906); *Gordon v. Loew's Incorporated* [1957 TRADE CASES ¶ 68,783 and 68,820], 247 F. 2d 451, 454 (3rd Cir. 1957).

[4] 28 U. S. C. A. § 1652; *Campbell v. Haverhill,* 155 U. S. 610 (1895). Also see *Board of County Commissioners of the County of Jackson, Kansas, v. United States,* 308 U. S. 343, 349-352 (1939).

[5] 15 U. S. C. A. § 15(b).

[6] [1957 TRADE CASES ¶ 68,783 and 68,820], 247 F. 2d 451 (3rd Cir. 1957).

any forfeiture upon any penal statute . . . ." [7] applied to a suit under § 4 of the Clayton Act for treble damages. An examination of the basis for the decision, however, shows that it only establishes the approach to be taken in resolving the question presented. The court pointed out in *Gordon* that when the federal courts employ a state statute of limitations for federal purposes, they must give it the scope and meaning that the state courts give to it in analogous suits under state law.[8] The court then referred to a recent New Jersey case which held that the state Rent Control Act, providing for treble damages in suits by a tenant against his landlord for violations of that Act, was a penal statute for statute of limitation purposes.[9] Our inquiry must, therefore, be directed to the problem of how the courts of Pennsylvania would characterize a statute similar to § 4 of the Clayton Act in applying the Act of 1785.

[*Pennsylvania Decision*]

In *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 146 A. 2d 714 (1958), the Supreme Court of Pennsylvania had occasion to consider the applicability of the Act of 1785 to the Forest Tree Seedling Act, which provides that anyone who purchases trees from the Commonwealth must promise to pay a penalty of three times the value of any trees resold for ornamental use.[10] The court held that the Act of 1785 did not apply. The court cites Justice Holmes' opinion in the *Chattanooga Foundry* case [11] in support of its conclusion.[12] This is a clear indication that the Supreme Court of Pennsylvania would not apply the Act of 1785 to a private action under § 4 of the Clayton Act. Therefore, this court cannot apply that statute.

[*Six-year Pennsylvania Statute*]

It has been conceded by all parties that, in the event that the Act of 1785 does not apply to this action, the six-year Pennsylvania statute for actions in trespass on the case [13] should be employed with respect to all defendants except Fox Philadelphia Building, Inc., and that the recent four-year federal statute [14] should be used for the latter since it was not joined as a defendant until April 26, 1956, which was after the federal statute became effective.

The contentions of counsel for defendant Twentieth Century-Fox Film Corporation were disposed of by this court in *County Theatre Company v. Paramount Film Dist. Corp.*, 166 F. Supp. 221 (E. D. Pa. 1958).

[*Order*]

Counsel for plaintiffs will submit an order consistent with this opinion within one week.

[¶ 69,475] Mesabi Iron Company v. Republic Steel Corporation and Armco Steel Corporation.

In the United States District Court for the District of Delaware. Civil Action No. 2095. Dated October 5, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Stay of Action Pending Disposition of Appeal in Case Involving Same Issue.—The United States District Court for the District of Delaware, in a mining company's treble damage action against two steel companies, deferred ruling on a motion to dismiss and stayed further proceedings until the United States Court of Appeals for the Eighth Circuit, in a case involving the same parties, decides whether or not it will dismiss an anitrust counterclaim or permit the filing of an amended answer alleging substantially the same antitrust violations as those charged in the present action. The other action, which is on appeal from a Federal district court in Minnesota, was brought by a mining company owned by the two defendants herein, against the plaintiff in the present action, seeking construction

[7] N. J. S. A. 2A:14-10.
[8] [1957 TRADE CASES ¶ 68,783 and 68,820], 247 F. 2d 451, 455 (3rd Cir. 1957); cf. *Momand v. Universal Film Exchange*, 43 F. Supp. 966, 1008 (D. Mass. 1947), 53 Col. L. Rev. 68 (1953), and 65 Harv. L. Rev. 1457 (1952).
[9] *Addis v. Logan Corp.*, 23 N. J. 142, 128 A. 2d 462 (1957).
[10] 32 P. S. § 454.
[11] *Supra*, p. 2.
[12] 394 Pa. 205, 216; 146 A. 2d 714, 719.
[13] 12 P. S. § 31.
[14] 15 U. S. C. A. § 15(b).

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of certain leases and assignments between the two mining companies. Hence, it would be a waste of judicial effort for the present court to decide now the motion to dismiss, before a determination of that same issue by the 8th Circuit Court of Appeals.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.

For the plaintiff: Arthur G. Logan, Vincent A. Theisen, and Aubrey B. Lank (Logan, Marvel, Boggs and Theisen), Wilmington, Del., and Jesse Climenko, Bernard D. Fischman, Herbert L. Scharf (Gallop, Climenko & Gould), New York, N. Y., of counsel.

For the defendants: William S. Potter (Berl, Potter & Anderson), Wilmington, Del.; Walter J. Milde, George H. Rudolph and Richard W. Pogue (Jones, Day, Cockley & Reavis), and William J. De Lancy, Cleveland, Ohio, of counsel, for Republic Steel Corporation.

Memorandum Opinion

[*Treble Damage Action*]

WRIGHT, Chief Judge [*In full text*]: The plaintiff, Mesabi Iron Company (Mesabi), has commenced this action against Republic Steel Corporation (Republic) and Armco Steel Corporation (Armco), seeking damages and injunctive relief against Republic and Armco for alleged violations of the Federal antitrust laws.[1]

[*Motions*]

Republic has moved to dismiss the action because the complaint fails to state a claim upon which relief can be granted, or in the alternative, to stay the action pending the determination of various disputes which have arisen between Mesabi and Reserve Mining Company (Reserve).[2] Republic and Armco each owns fifty percent of the outstanding stock of Reserve.[3]

[*Proceedings in Another Court—Appeal Pending*]

Prior to the commencement of this action, suit was instituted in the State Courts of Minnesota and removed to the United States District Court, 5th Division Minnesota, seeking construction of certain leases and assignments between Reserve, plaintiff therein, and Mesabi, and certain named individuals.[4] Mesabi filed a motion in the Minnesota action requesting leave to amend its answer to include, by way of counterclaim, the alleged violation by Reserve, Republic and Armco of the Federal antitrust laws and to bring in additional parties. The antitrust violations alleged in the counterclaim are substantially the same as those in the complaint filed here.

The Minnesota Federal District Court held that as it then viewed the matter, neither monopoly or restraint of trade were relevant at that time but that its "ruling thereon will be held in abeyance until necessity therefor and in order to protect Mesabi's claims in connection therewith."[5] Mesabi has appealed the decision and it is now before the 8th Circuit Court of Appeals.[6]

[*"Standing" to Bring Suit*]

At the outset the parties have placed squarely before this court the question of whether Mesabi has standing to sue for antitrust violations in the light of *Harrison v. Paramount Pictures, Inc.*,[7] and *Melrose Realty Co. v. Loew's Inc.*,[8] both decisions of our own Circuit Court.

If this court should decide Mesabi has no standing to sue, this phase of the litigation would be terminated. If the court concluded Mesabi had standing, it would have the alternative of hearing all factual and legal issues in dispute of certifying the issue of standing to the Circuit Court for a dispositive finding to avoid time consuming and costly litigation.[9]

[*Ruling Deferred*]

Another Federal forum has yet to decide whether it will dismiss the antitrust counterclaim or permit the filing of an amended

[1] 15 U. S. C. A. § 1 *et seq.*
[2] *Reserve Mining Company v. Mesabi Iron Company*, 172 F. Supp. 1 (D. Minn. 1959).
[3] Complaint, paragraph 5.
[4] Note 2, *supra.*
[5] 172 F. Supp. 1, 10.
[6] *Mesabi Iron Company, Appellant, v. Reserve Mining Company, Appellee*, Nos. 16250, 16251.
[7] [1953 TRADE CASES ¶ 67,568], 115 F. Supp. 312 (E. D. Pa. 1953), aff'd [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405 (3d Cir. 1953) cert. denied 348 U. S. 828 (1954).
[8] [1956 TRADE CASES ¶ 68,358], 234 F. 2d 518 (3d Cir. 1956), cert. denied, 352 U. S. 890 (1956).
[9] 28 U. S. C. A. § 1292(b) as amended.

answer alleging antitrust violations by the same parties, among others, to this action. If this court were to decide now the motion to dismiss before determination of this issue by the 8th Circuit Court of Appeals, it would result in a waste of judicial effort.

After careful deliberation, in the light of the aforementioned considerations, the court is convinced it should defer ruling on defendant's motion to dismiss and that any further proceedings in this litigation should be stayed pending final ruling by the Circuit Court of Appeals for the 8th Judicial Circuit.[10]

[*Future Procedures*]

Adoption of this procedure will permit the court to chart a course most suitable from the standpoint of judicial efficiency. After decision by the Circuit Court of Appeals of the 8th Circuit, the court upon proper application could:

1. Entertain an application for a further stay in proceedings.

2. Deny the motion to stay and grant the motion to dismiss if the court determines such a ruling correct.

3. Deny the motion to dismiss and if the circumstances so warrant certify the question raised by the *Harrison* and *Melrose* cases, *supra,* to the Circuit Court of Appeals for the 3d Circuit under 28 U. S. C. A. § 1292(b) as amended.

4. Consider any other motion or combination of motions that might be appropriate.

[*Case Stayed*]

Accordingly, the case at bar will be stayed pending disposition of the appeal now pending before the 8th Circuit.

Let an order in conformity herewith be submitted.

[¶ 69,476] Kentucky Rural Electric Cooperative Corporation v. Moloney Electric Co.

In the United States District Court for the Western District of Kentucky, at Louisville. Civil Action No. 3526. Dated July 7, 1959.

Robinson-Patman Price Discrimination Act

Price Discrimination—Brokerage Commissions Under Clayton Act, Section 2(c)—Seller's Payment of Commissions to *Buyer's* Agent—Manufacturer's Payment of Commissions to Buyer-owned "Distributor"—Legality.—An "arrangement" under which a manufacturer of electrical equipment and supplies paid "commissions, brokerage or discounts" to a "distributor" which was owned and controlled by the purchasers (rural electric cooperatives engaged in generating and distributing electric energy) was illegal under Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act. An "intermediary or broker may not receive fees from the seller which he in fact turns over to the buyer." Here, all of the manufacturer's sales through the "distributor" were to "member" cooperatives (those which owned the "distributor"), or to "participating" cooperatives which, along with the "member" cooperatives, shared in the profits which the "distributor" derived from the commissions and discounts.

See Price Discrimination, Vol. 1, ¶ 3520.535.

Private Enforcement and Procedure—Suit for Civil Damages—Antitrust Violations as Defense—Action Based on Manufacturer's Refusal to Continue Illegal Brokerage "Arrangement."—A manufacturer of electrical equipment and supplies, in a treble damage action charging it with "terminating" one of its "distributors" and thereby discriminating in favor of competing distributors in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, and Section 3 of the Robinson-Patman Act, was granted summary judgment on the ground that the "arrangement" which the "distributor" sought to continue violated the brokerage prohibitions of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. If a plaintiff proves his own violation of law in proving his case, then no court will aid him to recover. Thus, where parties are in *pari delicto,* the law will leave them where it finds them. Here, the "distributor" asserted that its suit was "for a tort resulting from the violation of a statute," not for a breach of contract, and that, under the United States Supreme Court's recent decision in *Kelly v.*

[10] Note 6, *supra.*

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Kosuga, 1959 TRADE CASES ¶ 69,283, and other cited cases, its recovery was not defeated by the antitrust illegality of the "arrangement." Rejecting that argument, the court concluded that "if it be tort for the defendant to refuse to continue the transactions with the plaintiff, which by the terms of the statute are unlawful both as to the plaintiff and defendant, then neither plaintiff nor defendant has a valid claim against the other arising out of the alleged tortious refusal to continue such transactions banned by the statute."

See Private Enforcement and Procedure, Vol. 2, ¶ 9040.20.

For the plaintiff: Philip P. Ardery, Louisville, Ky.

For the defendant: Malcolm Y. Marshall and Richard F. Newell, of Ogden, Brown, Robertson & Marshall, Louisville, Ky.; and William H. Ferrell, of Keefe, Schlafly, Griesedieck & Ferrell, St. Louis, Mo.

Memorandum

[*Price Discrimination Action*]

SHELBOURNE, District Judge [*In full text*]: This suit was instituted January 6, 1958, by the Kentucky Rural Electric Cooperative Corporation, plaintiff, against Moloney Electric Company, defendant, seeking to recover three times the alleged damage of $367,000.00, or an aggregate of $1,101,021.00, plus reasonable attorney's fees, under the provisions of the Robinson-Patman Act, Sections 13, 13a, 15 and 22, Title 15, United States Code.

The defendant is a manufacturer of electrical equipment and supplies. It is the contention of the plaintiff that it was a distributor, supplier, jobber and manufacturer's sales representative; that in April, 1949, plaintiff began business as a distributor of electrical transformers manufactured by the defendant, and from that date until October 15, 1955, was the distributor of transformers to rural electric cooperative corporations in Kentucky and as such sold approximately $4,000,000.00 worth of defendant's transformers, maintaining and operating warehousing facilities for defendant's products in Kentucky; that on October 15, 1955, pursuant to previous notice, defendant refused to accept further orders, and arbitrarily and without right terminated the previously existing arrangement; that such termination had the effect of lessening competition between distributors, suppliers, jobbers and manufacturer's sales representatives of electrical equipment, and tended to create a monopoly and to destroy and prevent competition; that this was an unlawful discrimination in favor of certain distributors, suppliers, jobbers and manufacturer's sales representatives in competition with plaintiff; that thereby the defendant has prevented plaintiff from obtaining similar electrical equipment and supplies on the same basis existing prior to October 15, 1955, and that plaintiff has thereby been damaged.

December 31, 1958, plaintiff filed its amended complaint, reducing the amount of damages sought to $472,666.20, three times the actual damage sustained alleged to have been $157,555.40.

The defendant, by its answer to the original and to the amended or substituted complaint, denied the material allegations of the complaint as amended and, by its Fifth Defense, alleged that all of the sales of defendant's equipment through the plaintiff were to rural electric cooperative corporations engaged in the business of generating and distributing electric energy; that 98.14 per cent of such sales were to rural electric cooperative corporations which owned the plaintiff corporation, and the remaining 1.86 per cent of the total sales were made to rural electric cooperative corporations which were entitled to share and participate in all of the profits of the plaintiff upon the basis of each of such distribution cooperatives' purchases of the products and service distributed and made available by the plaintiff; that the plaintiff was acting as agent and representative of both the member cooperatives and participating cooperatives, and that the member cooperatives were the owners of the plaintiff corporation which was subject to the direct and indirect control of the member cooperatives.

The defendant alleged that the paying or granting by the defendant to the plaintiff and the receiving or accepting by the plaintiff from the defendant of commission, brokerage or other compensation or discount upon the purchase by the member cooperatives and the participating cooperatives of transformers and other equipment manufactured by the defendant was unlawful by reason of the provisions of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, and that the agreement between the plaintiff and the defendant for the making of such payments, allowances, discounts or commissions was illegal, unenforceable, and void.

[*Motion for Summary Judgment*]

Two or more pre-trial conferences were had, discovery processes employed by counsel in the case and, on February 5, 1959, defendant filed its motion for a summary judgment. This motion has been briefed, and there is substantially no dispute between the parties as to the facts. As Judge Parker stated in the case of *Oliver Bros., Inc., v. Federal Trade Commission* (CA 4) [1932-1939 TRADE CASES ¶ 55,212], 102 F. 2d 763, 766, "* * * the controversy here is over the conclusions to be deduced from the facts rather than over the facts themselves; * * *."

[*"Distributor" Owned by Buyers*]

The plaintiff, Kentucky Rural Electric Cooperative Corporation, is not an operating rural electric cooperative corporation; it does not generate, transmit or distribute electrical energy, but it is styled by counsel in this case a "super cooperative" owned and controlled by the operating cooperatives. In its by-laws, one of its recited purposes is to purchase materials, supplies and equipment for its members. The plaintiff, while acting as defendant's distributor, agent or broker, did not seek to obtain orders from purchasers other then rural electric cooperative corporations. The complaint of the plaintiff here is that Moloney Electric Company on and after October 15, 1955, refused to pay commission or disceant upon sales of Moloney's equipment through the plaintiff to member and participating cooperatives.

[*Brokerage Payments Under Clayton Act, Section 2(c)*]

Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act, Section 13 (c), Title 15, United States Code, provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

It is the contention of the defendant that under this statute it is unlawful for a seller to pay a commission, discount or brokerage to either (1) the buyer, or (2) an intermediary who is acting in fact for or in behalf of the buyer, or (3) an intermediary who is subject to the direct or indirect control of the buyer, and that the statute likewise makes the acceptance or receipt of any such commission, discount or compensation unlawful.

[*Commissions Distributed to Buyers*]

All of the member cooperatives owning the plaintiff corporation and the participating cooperatives at each year's end shared in the profits derived by the plaintiff from the commissions and discounts paid by the defendant to plaintiff in proportion or on a basis of their respective purchases of Moloney's products.

The plan of operation consummating sales to member cooperatives during the period from April, 1949 to October, 1955, was for the plaintiff to take from a member or participating cooperative an order for Moloney equipment and forward such order to Moloney at St. Louis. The ordered equipment was billed direct to the ordering cooperative at the usual or ordinary retail price, and the defendant Moloney would then forward the commission, brokerage or discount to the plaintiff. Moloney has not indicated an unwillingness to continue to sell its equipment to the member and participating cooperatives, but declines to pay to plaintiff the discount or brokerage formerly done.

[*Cases Considered*]

In *Oliver Bros. v. Federal Trade Commission, supra,* the following interpretation of Section 2(c) of the statute from the Report of the House and Senate Conference Committee is quoted on page 768:

> " 'This subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting

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in fact for or in behalf, or subject to the direct or indirect control, of the other.'"

And, on page 770 of the opinion, Judge Parker said;

"No one would contend that without violating this section, a broker representing the seller could give his commissions to the buyer; * * * We may assume that under the section it is permissible for a broker to render services to both buyer and seller and to receive from both compensation for the services rendered; but this is a very different thing from the buyer himself receiving the compensation."

In the case of *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission* (CA 3) [1932-1939 Trade Cases ¶ 55,242], 106 F. 2d 667, 673, with respect to Section 2(c), the court said, "We * * * believe that paragraph (c) expresses an absolute prohibition of the payment of brokerage or compensation in lieu thereof to the buyer upon the buyer's own purchases." The court stated in that case that the question presented is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors, and said:

"We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both the buyer and seller. For this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. * * * The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. * * * In short, a buying and selling service cannot be combined in one person."

In *Biddle Purchasing Co. v. Federal Trade Commission* (CA 2) [1932-1939 Trade Cases ¶ 55,180], 96 F. 2d 687, 691, that court said:

"It is clear that the statute [referring to 2(c)] prohibits payments of brokerage by the seller to the buyer or his agent or representative or controlled intermediary except for services rendered."

* * *

"Congress must have intended that payments by sellers should not be made to buyers through any one acting as agent for the buyer."

[*Fees May Not Be Turned Over to Buyer*]

The intermediary or broker may not receive fees from the seller which he in fact turns over to the buyer. See also *Webb-Crawford Co. v. Federal Trade Commission* (CA 5) [1940-1943 Trade Cases ¶ 56,303], 109 F. 2d 268; *Quality Bakers of America v. Federal Trade Commission* (CA 1) [1940-1943 Trade Cases ¶ 56,060], 114 F. 2d 393; *Jarrett v. Pittsburgh Plate Glass Co.* (CA 5) [1940-1943 Trade Cases ¶ 56,241], 131 F. 2d 674; *Fitch v. Ky.-Tenn. Light & Power Co.* (CA 6) [1940-1943 Trade Cases ¶ 56,280], 136 F. 2d 12; *Modern Marketing Service Inc., v. Federal Trade Commission* (CA 7) [1944-1945 Trade Cases ¶ 57,383], 149 F. 2d 970; *Federal Trade Commission v. Herzog* (CA 2) [1944-1945 Trade Cases ¶ 57,393] 150 F. 2d 450; *Southgate Brokerage Co. v. Federal Trade Commission* (CA 4) [1944-1945 Trade Cases ¶ 57,396], 150 F. 2d 607; *Independent Grocers A. D. Co. v. Federal Trade Commission* (CA 7) [1953 Trade Cases ¶ 67,479], 203 F. 2d 941.

[*Antitrust Violations as Defense*]

Plaintiff's counsel seeks to avoid the teaching of the above cases as to the meaning of Section 2(c) by such cases as *Bruce's Juices v. American Can Co.* [1946-1947 Trade Cases ¶ 57,553], 330 U. S. 743; *Kiefer-Stewart Co. v. Seagram & Sons* [1950-1951 Trade Cases ¶ 62,737], 340 U. S. 211; *Moore v. Mead Service Co.* (CA 10) [1950-1951 Trade Cases ¶ 62,876], 190 F. 2d 540; *Noerr Motor Freight v. Eastern Railroad Presidents Conference,* [1957 Trade Cases ¶ 68,827], 155 F. Supp. 768.

The sole question decided in the case of *Bruce's Juices,* as stated by the Supreme Court, is whether notes given for purchases are unenforceable if the quantity discount plan violates the Act (Robinson-Patman Act). At page 750 of the opinion the Court said:

"The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction a violator may be fined or imprisoned. * * * Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

However, on page 755, the Court continued:

> "This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of the statute. *Continental Wall Paper Co. v. Lewis Voight and Sons Co.*, 212 U. S. 227."

On page 756 of the opinion in *Bruce's Juices, supra,* citing *McMullen v. Hoffman,* 174 U. S. 639, the Supreme Court said,

> "If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover."

We think plaintiff's reliance upon the *Kiefer-Stewart* case, *supra,* is likewise unfounded. Kiefer-Stewart's suit against Seagram charged the latter with conspiracy with other distillers to maintain a fixed maximum retail price for liquor by selling only to wholesalers who agreed to maintain the fixed maximum retail price. Seagram's defense was that Kiefer-Stewart had entered into illegal agreements, fixing minimum retail prices, with other Indiana wholesalers. Hence, the suit was not between parties who had entered into the same illegal contract the alleged breach of which constituted the gravamen of the suit. The Supreme Court held this defense unavailing.

Following the *Kiefer-Stewart* opinion, in the case of *National Transformer Corp. v. France Mfg. Co.* [1954 TRADE CASES ¶ 67,824], 215 F. 2d 343, 361, the Court of Appeals for the Sixth Circuit said:

> "It may be here emphasized that a contract which cannot be performed without violation of a statute is illegal and void. Where parties are in *pari delicto* the law will leave them where it finds them, and all relief is refused because of the public interest. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353, 51 S. Ct. 476, 75 L. Ed. 1112. The defendant may assert the invalidity of an agreement, even though he is a participator in the wrong. *Standard Lumber Co. v. Butler Ice Co.*, 3 Cir., 146 F. 359. The defense of illegality is allowed, not as a protection to the defendant, but as a disability to the plaintiff."

See also *Pennsylvania Water & P. Co. v. Consolidated G. E. L. & P. Co.* (CA 4) [1954 TRADE CASES ¶ 67,641], 209 F. 2d 131.

Plaintiff also relies on the Supreme Court's opinion in *Kelly v. Kosuga* [1959 TRADE CASES ¶ 69,283], 358 U. S. 516. The *Kelly* case was likewise a suit to recover the purchase price of commodities sold to it. The defense was sought to be made that the sale was pursuant to an agreement which violated the Sherman Antitrust Act. The Supreme Court, on page 518 of its opinion, said:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act, has not met with much favor in this Court. This has been notably the case where the plea has been made by the purchaser in an action to recover from him the agreed price of goods sold."

[*Alleged Tort, Not Contract*]

The plaintiff here disavows any intent or purpose that its suit is based on a breach of contract. Conversely, it states that it is for a tort resulting from the violation of a statute. The answer to that contention seems obvious to this Court: if it be tort for the defendant to refuse to continue the transactions with the plaintiff, which by the terms of the statute are unlawful both as to plaintiff and defendant, then neither plaintiff nor defendant has a valid claim against the other arising out of the alleged tortious refusal to continue such transactions banned by the statute.

[*Summary Judgment Granted*]

There being no substantial dispute as to the facts here involved, we believe the authorities referred to herein and cited by counsel in their briefs entitle the defendant to a summary judgment. Counsel for defendant will submit an appropriate judgment, upon notice to plaintiff's counsel, in accordance with the rules of this Court.

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[¶ 69,477] Schwegmann Brothers Giant Super Markets v. Sidney J. McCrory, Commissioner of Agriculture & Immigration of the State of Louisiana.

In the Louisiana Supreme Court. No. 44,550. Dated June 1, 1959.

Appeal from the Nineteenth Judicial District Court, Parish of East Baton Rouge, Division "C." JOHNSON, Judge.

Louisiana Orderly Milk Marketing Act

Sales Below Cost—Louisiana Orderly Milk Marketing Act—Constitutionality—Delegation of Legislative Price Fixing Power—Due Process.—The Louisiana Orderly Milk Marketing Act (prohibiting, among other practices, sales below cost, rebates or discounts from invoice prices, and trade concessions "with the intent or with the effect" of injuring competitors or creating a monopoly), by permitting the Louisiana Commissioner of Agriculture & Immigration to fix minimum prices to go into effect only if approved by two-thirds of the producers of milk products in a given marketing area, does not violate the "due process" guarantees of the Louisiana and Federal Constitutions by delegating to private persons the legislative power to fix minimum prices. Rejecting that argument along with the further contention that the Act failed to provide adequate standards for the Commissioner's exercise of certain discretionary functions, the court noted that the legislature may make the operation of a statute contingent upon the existence of certain conditions, and may delegate to some executive or administrative board the power to determine the existence of such facts and to carry out the terms of the statute. As to the contention that the Act did not meet the criteria under which the legislative power to fix prices could be invoked, the court cited as controlling its own ruling, in *Louisiana Wholesale Distributors Assn. v. Rosenzweig,* 1948-1949 TRADE CASES ¶ 62,262, that the Louisiana Unfair Sales Act, a "comparable example of constitutional regulatory legislation," was within the "police power" of the legislature. Price control, like any other form of regulation, is unconstitutional only if it is arbitrary, discriminatory, or demonstrably irrelevant to a policy the legislature is free to adopt.

Further, a provision to the effect that proof of the prohibited acts "shall be *prima facie* evidence of a violation" was only a rule of evidence and did not create a "presumption of guilt" in violation of any "due process" guarantees. The court also rejected the contentions that the Act created an undue burden on interstate commerce, and that it was arbitrary, unreasonable, and indefinite.

See Price Discrimination, Vol. 1, ¶ 3903; Sales Below Cost, Vol. 2, ¶ 7111.20.

For the appellant: Stone, Pigman & Benjamin; Saul Stone; Paul O. H. Pigman, and Walter J. Wadlington, III, New Orleans, La.

For the intervenors: Frank H. Peterman, Alexandria, La.

For the appellee: Jack P. F. Gremillion, Atty. Gen.; George M. Ponder, Asst. Atty. Gen.; and N. Cleburn Dalton, Special Asst. Atty. Gen., Baton Rouge, La.

[*Louisiana Orderly Milk Marketing Act—Constitutionality*]

FOURNET, Chief Justice [*In full text*]: The plaintiff, Schwegmann Brothers Giant Super Markets, a commercial partnership engaged in the business of selling, at retail, food and other commodities and conducting three very large establishments in New Orleans and its environs, sought an injunction in the Nineteenth Judicial District Court for the Parish of East Baton Rouge against the Commissioner of Agriculture & Immigration of this State, Sidney J. McCrory, restraining enforcement of the provisions of Act 193 of the Legislature of 1958, known as the Orderly Milk Marketing Act, and attacking its constitutionality on various grounds. Certain producers and processors of milk and milk products, domiciled in various parts of the State, twenty-one in number,[1]

[1] These are: Blu-Ribon Dairies, Inc., Parish of Rapides; Claiborne Creameries, Inc., Parish of Claiborne; Nick FaKouri, d/b/a Clover Farm Creamery, Parish of St. Landry; Farmers Dairies, Inc., Parish of Lincoln; Walter Bison, d/b/a Fair View Farm Dairy, Parish of Caddo; John S. Green, d/b/a Green Brothers Dairy, Parish of Morehouse; Guth Dairies, Inc., Parish of Calcasieu; Charles Hamel, d/b/a Hamel's Dairy, Parish of Caddo; Briley Spears, d/b/a Leading Dairy, Parish of Calcasieu; Louisiana Creamery, Inc., Parish of East Baton Rouge;

were allowed to intervene and join with the defendant in defending the legality and constitutionality of the Act. After a full hearing[2] there was judgment decreeing that the rule *nisi* be recalled, vacated and set aside and plaintiff's suit be dismissed at its cost; and the plaintiff has appealed.

[*Purpose of Act*]

The said Act—a supplement and amendment to Part VII of Chapter 4 of Title 40 of the Revised Statutes and designated R. S. 40:940.1-940.15—according to its title, is "* * * to protect and preserve the orderly marketing of milk, milk products and frozen desserts listed or referred to herein * * *,"[3] and contains a preamble declaring the Legislature's recognition of the development in the State of unfair competition and trade practices in the sale and distribution of those products, its further recognition of the necessity to protect and preserve orderly marketing and to prevent certain unfair trade and marketing practices, and expressing the lawmakers' intent to prevent the economic destruction of many dairy farmers and others dealing in said products because of discriminatory trade practices engaged in by certain financially strong business organizations to stifle competition—thus presenting "a situation detrimental to the health, welfare and economy of the people of this State." Among the practices engaged in by the plaintiff and other large chain stores, and sought to be abolished by provisions of the Act, were a system of rebates or discounts from invoice prices; trade concessions, including the furnishing of display and storage equipment, contributions for free use of refrigeration equipment, advertising paid for by those from whom the dairy products were bought; and trucking of the product from North Louisiana, the entire length of the State (by financially powerful distributors and processors not parties here) and offered for sale at prices cut in half and substantially below the market in the locality from which the product was shipped.

[*Practices Prohibited*]

The first section of the Act lists the items covered by its provisions, i. e., the various kinds of milk, milk products and "frozen desserts" (40:940.1); the next section contains a definition of terms, including "Non-processing Retailer" which fits plaintiff's business, and "Cost" which "shall include the cost" of the product to the non-processing retailer plus cost of doing business—which latter shall include but not be limited to labor costs, including executive salaries, cost of receiving, cooling, processing, packaging, manufacturing, rent, depreciation, power, supplies, selling costs, delivery costs, storing, maintenance of plant and equipment, advertising, transportation, all types of licenses, taxes, fees, insurance, and all other costs of doing business as determined by the Commissioner, and cost shall be allocated proportionately to each unit of product sold "and in no case can any item or unit be sold for less than the unit cost; * * *."[4] (940.2) By the following section (940.3), headed "Disruptive Sales Practices," it is declared to be a violation for a processor,

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Glen O. Dunmire, Jr., d/b/a Lynn's Dairy Products, Parish of Caddo; J. B. Davis, d/b/a The Milk House, Parish of Franklin; John P. White, d/b/a Pelican Creamery, Parish of Iberia; D. Stafford O'Shee, d/b/a Quality Ice Cream Company, Parish of Rapides; Jesse H. Cutrer, Jr., d/b/a Red Bird Ice Cream Company, Parish of Washington; E. Leroy Miller, d/b/a Sanitary Dairy Products Company, Parish of Webster; S. J. Phillips, d/b/a Spring Valley Dairy, Parish of Caddo; William G. Broussard, d/b/a Vermilion Creamery, Parish of Vermilion; Watson's Ice Cream Factory, Inc., Parish of Calcasieu; C. A. Stewart, d/b/a C. A. Stewart Dairy, Parish of Washington; and Clyde DeLaughter, d/b/a Bogalusa Dairy Products, Parish of Washington.

[2] It was stipulated that the evidence offered on the application for a preliminary injunction should be considered by the Court as evidence on behalf of all parties on the application for permanent injunction without further trial.

[3] The title further declares that the Act is one "to prevent disruptive trade practices; specifying the items covered by this act; defining the terms used therein; authorizing the establishment of minimum prices under certain conditions; providing regulations for the sale, transfer or other disposal of the products mentioned and for trade practices connected therewith; establishing license requirements; vesting in the Commissioner of the Louisiana Department of Agriculture and Immigration certain powers, duties and functions; providing penalties and establishing remedies for the violation of this Act; repealing all laws or parts of laws in conflict herewith."

[4] There is a proviso that "in the absence of specific evidence that the cost of doing business as herein defined for a non-processing retailer is less than eight per cent, the cost of doing business * * * shall be presumed to be not less than eight per cent of the invoice price and this cost shall be calculated to the nearest half cent per sales unit. * * *" (940.2)

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handler, distributor or bulk milk handler[5] to do certain described acts, including

> (a) "To discriminate in price between non-processing retailers or between consumers who purchase any of the products listed * * * where such products are offered for sale in the same size and type of container" (b) "To give or offer any discount or rebates on products sold * * *" (c) "To furnish, give, lend, sell or rent any signs and display material except those advertising only his own products,"

and the name or products of the non-processing retailer are not to be included in such signs or display material—except in the case of installations in place as of July 30, 1958.[6] The method is then provided (940.4) of arriving at minimum prices to producers so as to achieve orderly marketing, and is reproduced in full in the margin.[7]

[*Sales Below Cost*]

Succeeding sections (940.5 and 940.6), prohibiting certain acts by processors, handlers and/or distributors, need not be detailed. With reference to sales by a non-processing retailer, the Act provides (940.7):

> "No non-processing retailer shall with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, advertise, give, offer to sell or sell within the state of Louisiana, any of the items listed or referred to * * * for less than cost, as defined in R. S. 40:940.2. Proof of the advertising, giving, offer to sell or sale of such products by a non-processing retailer for less than cost to such non-processing retailer shall be *prima facie* evidence of a violation of this Section."

Like provisions are applicable to sales by bulk milk handlers (940.8), followed by prohibition (940.9) of combination sales involving milk products with any other commodity or service at a price less than the aggregate of the prices for each, with intent or effect of injuring a competitor, destroying competition or creating a monpoly.[8] Rebates, dis-

[5] The producer is the dairy farmer who obtains the raw milk from the cow and sells it to the processor, handler or distributor; the processor or handler (who may also in some cases be a distributor, or who may sell direct to the consumer) is the one who processes (i.e., cools, pasteurizes, homogenizes, flavors, etc.) the milk and packages it before it is delivered to the seller for sale to the public; a distributor is one who sells the products for purpose of resale or further processing; and a bulk milk handler is one who furnishes milk in cans, tank cars or tank trucks to the processor or handler. (Definition of terms, 940.2)

[6] The remaining violations enumerated in this subparagraph are: (d) "To make payments of money, credit, gifts or loans to non-processing retailers or their employees, or for rental for the storage or display of any of the products" covered by the Act; (e) "To sell any non-processing retailer any new fixture or equipment for less than a mark-up" as specified, and "any used equipment sold to a non-processing retailer by processor, handler, distributor, or bulk milk handler shall be sold" on the basis of price arrived at in a certain way; (f) "To make any loan" or guarantee or underwrite any financial obligation of a non-processing retailer; (g) to extend credit to a non-processing retailer to exceed 60 days, and delinquent accounts beyond 90 days subjects the non-processing retailer to revocation of his license; (h) to make or maintain repairs to the equipment of the non-processing retailer at less than usual charges; (i) to make a gift to him of money or merchandise, soda fountain, carbonator, services or material, or to help him conduct his business (except as permitted elsewhere); (j) to sell any product listed in the Act at "dock prices at places other than the point of processing," and if at the point of processing, the dock price shall be augmented by any transportation cost to place of distribution. The final violation is (k) refusal by a handler, processor or distributor to accept milk from a milk producer as a result of the latter's affiliation with a cooperative association. (940.3)

[7] "Upon written request of 50 per cent or more of the dairy farmers who regularly supply milk to a milk marketing area, the commissioner shall determine, by official order, after public hearing in which all interested persons shall be given reasonable opportunity to be heard, the appropriate area to be included in the marketing area and minimum prices to be paid for milk by processors or handlers, distributors or bulk milk handlers for milk received. Such minimum prices in any milk marketing area within the state shall be beneficial to the public interest, protect the dairy industry of the state, and insure a sufficient quantity of pure and wholesome milk for inhabitants of this state. In determining the minimum prices, the commissioner shall take into consideration the following factors operative in each marketing area; the quantity of fluid milk produced and disposed of; the cost of dairy feed, farm labor, and other economic conditions affecting the production and sale of milk in the area. The commissioner shall, upon approval by ⅔ of the producers voting at a referendum in the marketing area, require payment of such appropriate minimum prices for milk in the respective marketing areas."

[8] By further provision of the subsection, "Proof of the advertising, giving, offering to sell or sale of such product with any other commodity or service at a combined price which is less than the aggregate of the price for which such product and the other commodity or service are offered for sale shall be prima facie evidence of a violation of this Section." (940.9)

counts, and other trade practices by processors, handlers or distributors with intent to destroy competition are prohibited (940.10) except upon final liquidation of business, items sold under court order, where the prices of similar or comparable products are made in good faith to meet legal competition, or bids are made in response to invitation from governing bodies. Non-processing retailers as well as other named handlers of milk are required (940.11) to be licensed by the Commissioner; the method for obtaining the license and provision for revocation are incorporated in this Section. The Commissioner, designated "the instrumentality of the state" for administering the Act and "to execute the legislative intent herein expressed" (940.12), is vested with certain powers deemed appropriate and necessary to that end, including subpoena power; he promulgates regulations pertaining to the purchases and sales of the affected products, and is empowered to issue licenses for the sum of one dollar annually. He is further authorized to assess against those who process or handle any of the products listed, certain fees to cover the cost of administering the provisions of the Act (940.13), the said fees and other monies to be deposited in the state treasury to the credit of a revolving fund, the assessments to be adjusted so that the fund does not exceed a stated amount (940.14). Penalties for violation of the Act are set out in the final paragraph (940.15).

[*Evidence—Price-cutting and Other Practices*]

The market practices which led to this enactment are disclosed by the record, wherein is revealed a system developed by plaintiff under which it received rebates or discounts from the invoice prices [9] in addition to trade concessions, such as contributions for its free use of refrigeration, display and storage equipment, and advertising furnished and paid for by those from whom it bought dairy products. There was also the practice by large distributors and processors of trucking merchandise great distances from one end of the State to the other, and selling it to big chain stores at prices cut in half below the current market in that locality. In the words of the Trial Judge,

> "It does not take much imagination to realize the result of such practices on the small dairies and processors who could make some money at a fair current market price with fair competition, but who were not financially strong enough to meet such abnormal competition."

But the effect of such practices is denied by the plaintiff, who asserts that official statistics of the U. S. Department of Agriculture [10] covering the period from 1945 to 1957 reflect an expanding and prosperous dairy industry in Louisiana, showing an increase in quantity, price and cash receipts significantly larger than that of neighboring states and three times the national average; and counsel assert that

> "What the witnesses [intervenors and other witnesses for defendant] were unknowingly describing was competition in a free economy."

In giving his carefully prepared Reasons the Trial Judge observed:

> "The evidence in this case, some of which has been referred to briefly herein, convincingly sustains the already well known fact that the all-power combination of volume buying and adequate financial resources has developed demands and requirements which the small producer, processor and retailer cannot meet. Nor is it shown that the effect of such a combination has profited the consumer."

One brief reference was to an ice cream processor of Lake Charles who, said the Trial Judge,

> "explained that his company had been in business for 44 years and that it had made a profit every year except in the last 5 years his business lost money 3 out of the 5 years, and that one more year with the necessary outlay to meet the discount, rebate, trade concessions and contributions required to hold customers would have put his company out of business. This manner of testimony was repeated by all the witnesses for the defense. It is further shown that the short period of a few months after August 1, 1958, when Act 193 went into effect, has brought equal and wholesome relief from

[9] One of the plaintiff-owners in this case testified that plaintiff first deducted 5% of the invoice price of milk and milk products, then added a cost mark-up of 6% of the remainder.

[10] The publications introduced as exhibits by plaintiff are: *Dairy Statistics,* U. S. Dept. of Agriculture (Oct. 1957); *Milk—Farm Production, Disposition, and Income,* 1956-1957, U. S. Dept. of Agriculture; *The Farm Income Situation,* U. S. Dept. of Agriculture (Sept. 1956).

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this disruptive pressure which brought about its enactment. There is no testimony that the discontinuance of these practices * * * has resulted in any material general increase in the retail price to the consumer." [11]

[*Delegation of Legislative Power*]

The plaintiff's first and most seriously urged contention is that the Act unlawfully delegates legislative power, including the power to fix prices, in violation of State and Federal due process guarantees. The unlawful delegations are said to be found (a) in Section 904.4, which permits the Commissioner of Agriculture to fix a minimum price, to go into effect only if approved by two-thirds of the producers in a given marketing area (as defined by the Commissioner)—thus effecting an unlawful delegation to private persons of legislative authority to fix minimum prices, because the producer controls whether any minimum price will be fixed and can effectively control, through use of the veto power, any change in a price once set; (b) in Section 940.1, in that the State Board of Health is given authority to define one of the major product groups regulated by the Act,[12] without providing any sort of standard; thus the State Board of Health can control the scope of the Act and "legislate" by extending or narrowing its definition of frozen desserts at will; (c) in a failure to provide adequate standards for exercise by the Commissioner of certain discretionary functions, in violation of the requirements of due process; e. g., by Section 940.2(14), the Commissioner is allowed to create and define "Disruptive Trade Practices" other than those set forth elsewhere in the Act; [13] by Section 940.11 he is given discretion to grant, withhold or revoke licenses; by Section 940.2(12) he has authority to determine "cost" by

[11] Other testimony to the same effect was (a) By a processor and small distributor in Webster and Claiborne Parishes, who got caught in a "milk war" between two major concerns in Monroe and Shreveport, with the result that milk in super markets in his locality dropped from 52 cents to 39 cents a half gallon—yet the price where the milk was processed, bottled and put up for wholesale distribution by one of those major concerns was 49 cents a half gallon and it then had to be hauled 100 miles to a dock plus 30 miles from there to the witness' area; (b) By a man in the milk business for some 30 years in the Alexandria area, who described the same situation when a big distributor, which bottled and processed the milk 130 miles away, started selling to chain stores below cost; (c) By an ice cream manufacturer of Claiborne Parish who lost accounts because he had to refuse to give discounts and rebates and to furnish free a refrigerated cabinet for storage and display of non-dairy foods such as frozen foods, meats, etc.; and who also lost accounts to a "big chain" which quoted a price of 50 cents per half gallon for ice cream when the list price was 80 cents; (d) By a dairyman in Lake Charles, who at one time had employed 38 people but because of the loss of approximately one-third of the volume of his business due to the tactics being used in the milk industry had found it necessary to reduce his force considerably—his loss of business having been caused in large part because milk imported from Shreveport was selling in Lake Charles for 39¢—the while the same quantity and quality were being sold in Shreveport for 45¢; (e) By a retail grocer, who stated that the volume of his business on all items fell off because he was having to buy milk at a higher price than the selling price of his competitors, made possible because they were getting discounts and he was not; and (f) By a disinterested witness, with wide knowledge and experience in the field of marketing and utilization of milk and milk products, who testified concerning the practice of big chains of selling at a loss in a particular area but maintaining the prices in another area to make up the losses. This witness, who, under authority of the U. S. Secretary of Agriculture, had prepared the Federal orders under which milk was being sold in the Shreveport area, stated that the procedure for determining a fair minimum price under the Louisiana statute was identical to that under the Federal Act except for the jurisdiction. With reference to the "loss leader" sales of milk, he aptly observed: "Therefore, I think it could be concluded properly that the Shreveport housewife was subsidizing the Lake Charles housewife to some extent."

[12] Section 940.1, after listing the various kinds of milk and milk products covered by the Act, provides: "Also, all frozen desserts as defined in Section 1 of Chapter XXV of the Sanitary Code of the State of Louisiana as revised through February 22, 1957, including any subsequent revisions." The said Section 1 defines a frozen dessert as "any sound and clean, frozen or partially frozen combination of two or more of the following: Milk or milk products, vegetable fat, animal fat, other food products approved by the Louisiana State Board of Health, eggs or egg products, nutritive sweetening ingredients, artificial sweetening ingredients (used only in diabetic desserts), water, confection (defined in Section 5), nut meats, fruit or fruit juices, citric or other organic food acid or other wholesome flavoring agents and colors together with harmless stabilizer, and shall be deemed to include ice cream, fruit ice cream, nut ice cream, ice milk, frozen malt ice cream, french ice cream, milk sherbert, ices or water ices, mellorine, olarine, sherine, and icicle bars."

[13] That paragraph provides "Disruptive Sales Practices" means those practices which are prohibited in R. S. 40:940.3 or such other practices as may be determined by the commissioner to be disruptive of orderly marketing. (R. S. 40:940.2(14))

determining what items must be considered as "costs of doing business."[14] and ultimately to define a crime, since other sections (940.5, "Sales by a processor, handler or distributor" and 940.7, "Sales by a non-processing retailer") declare certain sales below "cost" as defined in the Act to be a violation of its provisions, with attendant criminal penalties. The authorities relied on in the main are *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160; *City of Alexandria v. Alexandria Fire Fighters Ass'n*, 220 La. 754, 57 So. 2d 673; *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. G. S. Mkts.* [1956 TRADE CASES ¶ 68,400], 231 La. 51, 90 So. 2d 343; *State v. Maitrejean*, 193 La. 824, 192 So. 361; and *State v. Chisesi*, 187 La. 675, 175 So. 453.

Defendant and intervenors counter with a denial that private individuals fix minimum prices, contending that Section 940.4 sets out factors for the Commissioner to take into consideration in determining the minimum prices in each marketing area, and in that way standards are prescribed for carrying out the legislative will; that private individuals at a referendum and upon approval of two-thirds of the milk producers voting, merely approve such minimum prices —following which the Commissioner shall require payment of such minimum prices, and therefore no arbitrary discretion is vested in him. Relied on are the cases of *Currin v. Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441, and *U. S. v. Rock Royal Cooperative*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446.

[*Administrative Law—Principles*]

Due to the complexity of our social and industrial activities, the decisions display an increasing tendency to hold as non-legislative the authority conferred upon commissions and boards to determine the facts or state of things upon which the law intends to make its action depend. It is now well settled that the Legislature may make the operation or application of a statute contingent upon the existence of certain conditions, and may delegate to some executive or administrative board the power to determine the existence of such facts and to carry out the terms of the statute.[15] So long as the regulation or action of the official or board authorized by statute does not in effect determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within prescribed limits some fact upon which the law by its own terms operates, such regulation is administrative and not legislative in its nature.[16] The United States Supreme Court has aptly observed that while powers of administration and legislation are quite distinct,

> "the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done, there would be indefinite confusion in the laws, and in an effort to detail and particularize they would miss sufficiency both in provision and execution * * * If this were not so, the many administrative agencies created by the state and national governments would be denuded of their utility, and government in some of its most important exercises become impossible."[17]

[*Cases Considered*]

The case of *Currin v. Wallace, supra* (83 L. Ed. 441), has important points of similarity to the instant case; the Secretary of Agriculture, authorized by Congress to investigate the handling, inspection and marketing of tobacco and to establish standards by which type and grade might be determined, was empowered to designate the markets in which tobacco was to be bought and sold *if* two-thirds of the growers, voting at a special referendum, favored it, and that provision was attacked as an unconstitutional delegation of legislative power to individuals; but the Court declared that the required referendum was merely a con-

[14] The term "cost," defined in 940.2(12), is composed of the various factors there listed, "and all other costs of doing business as determined by the commissioner." For a more complete quotation see the third paragraph of this opinion.

[15] For a further statement of these principles, and pertinent authorities, see *City of Alexandria v. Alexandria Fire Fighters Ass'n*, 220 La. 754, 57 So. 2d 673.

[16] See Annotation, Delegation of Legislative Power, 79 L. Ed. 479, 481 *et seq.*

[17] *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 59 L. Ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296.

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dition under which the Secretary was to be bound in the exercise of his administrative powers under the Act.

> "The intention of Congress is clear that markets thus ascertained shall be designated subject to the prescribed conditions and as rapidly as facilities for inspection are available. We find no unfettered discretion lodged with the administrative officer. The requirement of a referendum, as already noted, calls for the expression of the wishes of the growers and the Secretary acts merely as an administrative agent in conducting the referendum." (83 L. Ed. at 452)

The case of *United States v. Rock Royal Cooperative, supra* (83 L. Ed. 1446), is very much in point, treating as it does of an order of the Secretary of Agriculture regulating the handling of milk in the New York metropolitan area, which order had provisions similar to our Orderly Milk Marketing Act. There, a section of the Agriculture Marketing Agreement Act of 1937, 7 USC § 601, under which the Secretary of Agriculture fixed a fluctuating minimum price based on wholesale butter prices in New York, was attacked as an invalid delegation of power.[18] In rejecting the attack, the Supreme Court of the United States said:

> "While it is true that the determination of price under this section has a less definite standard than the parity tests of Section 2 and 8e, we cannot say that it is beyond the power of the Congress to leave this determination to a designated

[18] That suit was instituted by the United States for a mandatory injunction requiring the defendant milk cooperatives and milk handlers to comply with Order No. 27 of the Secretary of Agriculture regulating the handling of milk in the New York Metropolitan area, and also, if it should be found that defendants were not subject to that Order, then alleging violation of Official Order No. 126 issued by the Commissioner of Agriculture and Markets of the State of New York. The two orders were in *pari materia*, one covering milk moving in interstate commerce, and the other covering milk in intrastate commerce. The Commissioner of Agriculture and Markets of the State of New York was permitted to intervene as party plaintiff, and sought an injunction commanding the defendants to comply with his Order No. 126 or, if it did not apply, then to comply with the Order of the U. S. Secretary of Agriculture. The answers challenged the two orders as contrary to the Fifth and Fourteenth Amendments to the Constitution, and challenged the Act of Congress as involving improper delegation of legislative power. It appears that in the final analysis the controversy revolved almost entirely around Order No. 27, backed by the Statute under which it was issued, a provision of which authorized the Secretary, if he finds after a hearing that minimum prices with a base period purchasing power are unreasonable, to fix minimum prices so as to reflect the prices of available supplies of feed and other economic conditions; it also provided for a use of voluntary agreements as to certain specified commodities, including milk, and for orders instead of agreements when the Secretary of Agriculture had reason to believe that issuance of an order would tend to effectuate the declared policy of the Act, and after notice and an opportunity for hearing; in such Order the Secretary was required to set forth a finding upon the evidence introduced at the hearing, and that the issuance of the Order and the terms and conditions thereof would tend to effectuate the declared policy (Section 1 declares that the disruption of orderly exchange of commodities impairs the purchasing power of farmers, thus destroying the value of agricultural assets to the detriment of the national public interest). Orders may only be issued after hearing upon a marketing agreement which regulates the handling of the commodity, and do not become effective unless approved by a majority of the handlers—but notwithstanding the refusal or failure of handlers to sign a marketing agreement relating to the commodity the Secretary of Agriculture, with approval of the President, may issue an order if he determines that the refusal or failure of the handlers to sign such agreement tends to prevent the effectuation of the declared policy with respect to the commodity and that the issuance of the order is the only practical means of advancing the interest of the producers. In such a case the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during the period, in the production for market of the commodity within the area, or by two-thirds of those engaged in the production of the commodity for sale in the marketing area. A referendum is authorized to determine whether the issuance of the order is approved by the producers.

Among pertinent observations made by the Court in the course of a lengthy examination of the Act, including phases with which we are not here concerned, is one distinguishing the case of *Schechter Poultry Corp. v. United States*, [1932-1939 TRADE CASES ¶ 55,072], 295 U. S. 538, 79 L. Ed. 1584, 55 S. Ct. 837, 97 A. L. R. 947, cited by the plaintiff here as "probably the leading case on the subject of the constitutional delegation of legislative power," as follows: "Unlike the language of the National Industrial Recovery Act condemned in the A. L. A. *Schechter Poultry Corp.* case, the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices * * *. Under the RecoveryAct, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out * * *. While considerable flexibility is provided * * *, it gives opportunity only to include provisions auxiliary to those definitely specified."

administrator, with the standards named. The Secretary must have first determined the prices in accordance with Section 2 and 8e, that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary." (83 L. Ed. at 1472)

The Court observed that milk belongs to that category of commodities that for many years has been subjected to the regulatory power of the State, and with reference to an attack on another pertinent provision of the same Act, disposed of the matter in these words:

"By subsection 19 it is provided that for the purpose of ascertaining whether the issuance of such an order is approved 'the Secretary may conduct a referendum among producers,' The objection is made that this is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation." (Citing *Currin v. Wallace, supra*) (83 L. Ed. at 1472.)

Plaintiff's counsel have been diligent in envisaging situations which they consider possible and view with alarm, but we think such fears are unwarranted at this time in the absence of a shred of showing that such happenings, contrary to the intent and purpose of the enactment, might occur. An Act of the Legislature is presumed to be legal until it is shown to be unconstitutional, and the lawmakers would indeed be hard put to draft legislation were it necessary to cover every conceivable contingency or to foresee and prohibit acts of an irresponsible administrator. The purpose and intent of the subject statute is clearly expressed, and the Commissioner of Agriculture, specifically declared to be the instrumentality of the State for the purpose of administering its provisions, is given the duty "to execute the legislative intent herein expressed." The Supreme Court of the United States, speaking in the *Rock Royal* case, said:

"* * * It is well settled therefore that it is no argument against the constitutionality of an Act to say it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied."

[*No Unlawful Delegation*]

We therefore think that the objections raised by plaintiff on the ground that the Act unlawfully delegates legislative power in certain of its provisions are without merit. The authorities cited in support are distinguishable for various reasons, and in view of our further conclusions set out below are not controlling here.

[*Due Process—Price Fixing*]

The plaintiff next contends that the Act violates the due process clauses of the State and Federal Constitutions because the power to regulate private business by coercive price fixing is a legislative function, to be invoked under special circumstances and only when the measure bears a real, substantial and reasonable relation to the public welfare, and is neither arbitrary nor discriminatory—a criterion which the Act fails to meet.

[*Controlling Decision*]

The trial judge, in disposing of this issue, relied in great measure on the case of *Louisiana Wholesale Distributors Ass'n v. Rosenzweig* [1948-1949 TRADE CASES ¶ 62,262], 214 La. 1, 36 So. 2d 403, observing that the "Unfair Sales Law," R. S. 51:421 *et seq.*, under attack there, is a comparable example of constitutional regulatory legislation, and that he deemed the decision controlling. In this we think he was eminently correct.

In that case the defendant Rosenzweig, as a defense to the charge that he had violated the Unfair Sales Act, contended that such a statute is, in fact, a price fixing statute and class legislation, precluding him from freely contracting with regard to his property, in violation of due process and equal protection guarantees of the Federal and State Constitutions. This Court, observing that the simple question posed (*i.e.*, constitutionality *vel non* of the Unfair Sales Act) had been answered adversely to the

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defendant's contention by the courts of thirty states which had reviewed the similar acts adopted by their respective legislatures, and that the underlying principle upon which those decisions are based has the support of opinions of the Supreme Court of the United States, quoted at length from "the leading case on this subject, *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469," which posed the question of the constitutionality of a New York milk control law adopted for the purpose of thwarting harmful competition,[19] and contained many pertinent observations that were equally applicable in the case then under consideration. Among these were that

> "'So far as the requirement of due process is concerned, * * * a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied and judicial determination to that effect renders a court *functus officio*. * * * And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. * * * Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity * * * The constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.'"
>
> (214 La. at 10 *et seq.*, quoting from 78 L. Ed. at 957 *et seq.*)

We then said:

> "Such acts have consistently been held not to be price fixing statutes. They merely fix the level below which producers and distributors may not sell without injury to a competitor and, ultimately, to the community."

Our conclusion was that

> "in adopting this state's Unfair Sales Act for the protection of our economic structure and to prevent the creation or perpetuation of monopolies, the legislature was acting well within its police power." (214 La. at 14.)

[*Alleged Distinctions*]

Plaintiff's counsel, realizing that their argument on this phase of the case is foreclosed by the above decisions, advance the thesis that principles announced in the *Nebbia* case are applicable only where emergency legislation has grown out of legislative study—because the New York milk control law, adopted in 1933, was the result of study by a joint legislative committee whose activities extended for nearly a year, following which a comprehensive report was submitted; and counsel say that in the absence of such emergency and study there is lacking any basis which the *Nebbia* case might otherwise furnish for the regulation of milk marketing and distribution under the subject Act. Those statements are without substance, particularly in view of the principle for which the *Nebbia* case was subsequently cited by the same Court, when it said:

> "Recently, upon a reexamination of the grounds of state power over prices, that power was phrased by this Court to mean that 'upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.'"[20]

Equally unimpressive is the assertion that the *Rosenzweig* case is not controlling because we there concluded the Unfair Sales

[19] The defendant complained that the Board's order fixing minimum prices discriminated unfairly against him as a "cash and carry" dealer in milk since his rivals in the trade who had no store but only a wagon and delivery route were allowed to sell pints of milk as low as he did, with delivery to the customer's door as a bonus.

[20] *United States v. Rock Royal Cooperative*, 207 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446, 1468, citing *Nebbia v. New York*, 291 U. S. 502, 537, 78 L. Ed. 940, 957, 54 S. Ct. 505, 89 A. L. R. 1469.

Act was *not* a price fixing statute, whereas the Act under attack *is* a price fixing statute —and differences between provisions of the two Acts, termed "significant" and "critical," are enumerated in brief. Suffice to say that the distinctions made are not of controlling importance, and additional discussion would serve no useful purpose.

[*Presumption of Wrongful Intent*]

It is further objected by plaintiff that the Act creates a presumption of guilt (ignoring the presumption of innocence fundamental under our law) in violation of due process guarantees of both Federal and State Constitutions; that a series of new crimes has been created by Sections 940.5 through 940.10, in that the doing of any one of a number of otherwise harmless acts with the intent or the effect of injuring a competitor, destroying competition, creating a monopoly, etc., is a crime, and while the intent or effect are necessary before the act becomes criminal, those elements are supplied by making the commission of the act *prima facie* evidence of violation of the section—the fatal defect being the presumption of the wrongful intent or injurious effect which are essential elements of the crime.

Reference to the wording of the various provisions complained of readily shows that counsel's analysis is not wholly accurate; they declare that none of the groups or individuals (as therein defined) who handle the products covered by the Act, "with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly," shall do a described thing, and *proof of the doing of the thing* "shall be *prima facie* evidence of a violation of this Section." Penalties for such violation are set out in 940.15, and that section makes clear that punishment is by Court action—the subsection declares that "violation of this Subpart shall be a misdemeanor, punishable by fine not to exceed $500 in the discretion of the court," and refers to injunctions at the suit of any person aggrieved as well as to suits against the violator in the courts of competent jurisdiction.

In *State v. Elkin,* 177 La. 427, 148 So. 668, this Court had for consideration the constitutionality of a statute (Act 209 of 1914) declaring that failure to pay a worthless check within ten days after written notice to the drawer of its non-payment "shall be *prima facie* evidence of intent to defraud, within the meaning of this act," and held that the provision did not strip the accused of a presumption of innocence without due process of law, observing

> "In other words, under [Section 1] the statute, the guilty knowledge of the drawer that his check is worthless when issued constitutes fraudulent intent upon his part. The Legislature has declared that failure to pay the check, within ten days * * * shall be *prima facie* evidence of such guilty knowledge or fraudulent intent. There is nothing unreasonable or arbitrary in this clause of the statute. * * * The presumptive clause bears directly upon the guilty knowledge of the accused, and provides a rational relation between the fact proved and that presumed."

Also,

> "An accused person in this state is permitted to testify in his own behalf, and his testimony is weighed according to the rules of evidence applicable to other witnesses. The presumption of intent to defraud under the statute is *prima facie* and rebuttable and, therefore, does not deprive an accused of the opportunity to submit all the facts bearing upon the issue." (177 La. at 432.)

And in *Yee Hem v. United States,* 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904, the Court said:

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption."

The following, from an earlier pronouncement of the Court, was quoted approvingly:

> " 'Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. * * * 'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some

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rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.'" (69 L. Ed. at 906.)

[*Burden on Interstate Commerce*]

While counsel oppose on numerous other grounds—*i.e.*, that the Act is arbitrary, unreasonable and capricious; is so vague, general and indefinite in numerous instances as to be impossible of reasonable, fair and practical administration, etc.—we think that enough has been said to show that those objections are clearly without merit. And the argument that the statute creates undue burdens on interstate commerce and contravenes the commerce clause of the Federal Constitution is fully answered by the United States Supreme Court, when, in treating of a Pennsylvania statute creating a milk control board with authority to fix a minimum price to be paid producers (*e.g.* farmers), where a milk receiving plant within the state which purchased the commodity for shipment out of the state sought to justify its failure to comply with the statute's requirements by claiming that it was engaged in interstate commerce, the Court said:[21]

"* * * One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation. * * * The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. * * *"

[*Judgment Affirmed*]

For the reasons assigned, the judgment appealed from is affirmed.

[¶ 69,478] Food Town, Inc. v. Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana.

In the Louisiana Supreme Court. No. 44,551. Dated June 1, 1959.

Appeal from the Nineteenth Judicial District Court, Parish of East Baton Rouge, Division "C." JOHNSON, Judge.

Louisiana Orderly Milk Marketing Act

Price Discrimination—Sales Below Cost—Louisiana Orderly Milk Marketing Act—Constitutionality.—For the reasons assigned in *Schwegmann Bros. Giant Super Markets v. McCrory,* 1959 TRADE CASES ¶ 69,477, a consolidated case which was decided on the same day, the Louisiana Supreme Court affirmed a trial court's judgment sustaining the constitutionality of the Louisiana Orderly Milk Marketing Act.

See Price Discrimination, Vol. 1, ¶ 3903; Sales Below Cost, Vol. 2, ¶ 7111.20.

For the appellant: White & May, Baton Rouge, La.

For the intervenors: Frank H. Peterman, Alexandria, La.

For the appellee: Jack P. F. Gremillion, Atty. Gen.; George M. Ponder, Asst. Atty. Gen.; and N. Cleburn Dalton, Special Asst. Atty. Gen., Baton Rouge, La.

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[21] *Milk Control Board of the Commonwealth of Pennsylvania v. Eisenberg Farm Products,* 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752, at 756.

FOURNET, Chief Justice [*In full text*]: The issues presented for our determination and relief sought in this case are identical with those in *Schwegmann Brothers Giant Super Markets v. Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana* [1959 TRADE CASES ¶ 69,477], No. 44,550 on the docket of this Court, the cases having been consolidated for trial in the Court below and for argument on appeal here; the decision in the *Schwegmann* case is, therefore, controlling here.

For the reasons assigned in *Schwegmann Brothers Giant Super Markets v. Sidney J. McCrory, Commissioner of Agriculture and Immigration of the State of Louisiana* [1959 TRADE CASES ¶ 69,477], No. 44,550, handed down this day, the judgment appealed from is affirmed.

[¶ 69,479] Willena Hall, et al. v. J. D. Hall, Jr., et al.

In the Texas Court of Civil Appeals, Fifth Supreme Judicial District, Dallas, Texas. No. 15,468. Delivered June 5, 1959.

Appeal from a District Court of Dallas County.

Texas Antitrust Laws

Combinations and Conspiracies—Exclusive Dealing Under Texas Antitrust Laws—Legality of "Licensing" Agreement Where Patent Application Rejected.—Provisions of a "licensing" agreement (1) purporting to grant "exclusive permits" for the manufacture and sale of an alleged invention called a "window unit for doors" and (2) imposing numerous restrictions on the sale of the product were made illegal under the Texas antitrust laws by the Patent Office's rejection of the application for a patent and the absence of trade secrets. Among the restrictions imposed were agreements by the licensees to refrain from manufacturing or selling the product for five years after the termination of the licensing agreement, and to sell only on a "nonexclusive basis" through door manufacturers and building materials dealers.

See Combinations and Conspiracies, Vol. 1, ¶ 2323.46, 2329.

Combinations and Conspiracies—Texas Antitrust Laws—Antitrust Illegality of "Licensing" Agreement as Defense to Partner's Accounting Action for Share of "Royalties."—A partner was not permitted to set up the antitrust illegality of a patent "licensing" agreement as a defense to his partner's accounting action for a share of the "royalty" payments received under the illegal agreement. The trial court concluded that the agreement was illegal and void under the Texas antitrust laws and that, since the partnership had "as one of its purposes the entering of an illegal licensing agreement," the plaintiff was not entitled to an accounting from his partner. While the licensing agreement was made illegal under the Texas antitrust laws by the fact that the Patent Office rejected the patent application (the "licensing" agreement purported to grant "exclusive permits" to manufacture and sell the alleged invention and imposed numerous sales restrictions), the reviewing court noted that the plaintiff was in the military service when the agreement was entered into, and had no knowledge of the rejection of the patent application. When the licensees discovered that the patent application had been rejected, they terminated the licensing agreement, in accordance with the terms of the agreement itself, but permitted the partnership to retain the royalty payments already made. Thus, the plaintiff could not justly claim any further royalties from the licensees. However, as between the partners themselves, there was a fiduciary relationship. The defendant could not, because of his own wrong against the licensees, refuse to do equity to his partner.

See Combinations and Conspiracies, Vol. 1, ¶ 2407.46.

For the appellants: Rawlings, Sayers, Scurlock & Eidson, and Joe F. Orr, all of Fort Worth, Texas.

For the appellees: Grady, Johnson, Bell & Lee, Dallas, Texas, and L. L. James, Tyler, Texas.

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Dixon, Chief Justice [*In full text except for omissions indicated by asterisks*]: Willena Hall and Wilbert Hall, appellants here, plaintiffs in the trial court, on August 19, 1953 sued H. D. Hall, J. D. Hall, Jr., J. D. Hall, Sr., Don Hall, Robert Hall, The Visador Corporation, and the Visador Co., a partnership or joint stock association composed of J. D. Hall, Jr., Don Hall, Robert Hall, "and many others." The plaintiffs are mother and son. H. D. Hall is the father of Wilbert Hall and the divorced husband of Willena Hall. The other individual defendants are the grandfather, uncle, and cousins of Wilbert Hall.

The relationship of the parties is more easily understood after a study of the family tree, which we copy from appellants' brief:

J. D. Hall, Sr.	H. D. Hall	Wilbert Hall
	M. Wellena Hall (divorced 7-29-52)	Milton Hall (witness)
	J. D. Hall, Jr.	Don Hall
		Robert Hall

In their suit appellants seek an accounting and in the alternative, damages in the amount of $250,000.00 claimed to be due them in connection with alleged rights and royalties under the terms of a licensing agreement dated February 27, 1951 wherein Wilbert Hall is named as licensor and J. D. Hall, Jr., and J. D. Hall, Sr. are named as licensees. Though the instrument names only Wilbert Hall as licensor, appellants plead that at the time the agreement was executed Wilbert Hall and his father H. D. Hall were business partners and all rights as licensors really belonged to Wilbert Hall and his father H. D. Hall equally as partners. Willena Hall claims an interest under the terms of a judgment of divorce from H. D. Hall obtained by her in the District Court of Tarrant County, Texas, on July 29, 1952.

[*Judgment Below*]

After a trial without a jury judgment was rendered July 19, 1958 that appellants take nothing by their suit.

[*Facts*]

H. D. Hall had been in the lumber business. His son Wilbert Hall was an employee when he was not attending college. In 1948 a fire destroyed the business, leaving H. D. Hall heavily in debt. In 1949 H. D. Hall and his son Wilbert, then 22 years of age, formed a partnership, which was conducted in the name of Wilbert Hall alone because of the creditors of H. D. Hall. This partnership was operated in Fort Worth, Texas, under the name of "Doorlight Company". Its name was later changed to "The Visador Products Company".

[*Application for Patent*]

On March 23, 1950 an application for a patent was filed for the partnership, but in the name of Wilbert Hall, for an alleged invention called a window unit for doors, which in the application is described as follows:

> "This invention relates to a window unit designed for use in connection with hollow doors, the primary object of the invention being to provide a window in the form of a sliding panel which when moved to its open position, permits conversation between persons on the outside and inside of the door, without opening the door."

On August 4, 1950 Wilbert Hall was called into the military service. According to H. D. Hall the partnership business was thereupon "discontinued". According to Wilbert Hall he was merely on leave of absence from the partnership during his military services.

Following the departure of Wilbert Hall into the Navy, H. D. Hall set up a place of business in Irving, Texas. His other son, Milton Hall, claims to have been a partner with his father in this business. The claim is denied by H. D. Hall. Milton is not a party to this suit, but it was stipulated by the parties hereto that the Irving business of H. D. Hall is not involved in this litigation.

On January 8, 1951 Wilbert Hall executed a power of attorney to his father H. D. Hall, granting to H. D. Hall broad powers to act for and in behalf of Wilbert Hall. A second but similar power of attorney was later executed when the partnership name was changed to "The Visador Products Company".

[*Application Rejected*]

On January 9, 1951 the Patent Office rejected all claims made in the application for a patent for the window unit. Appellees contend that this amounted to a rejection of the application. Be that as it may, after the filing of an amended application the Patent Office on August 20, 1953 again denied all claims and marked its notice of rejection. "This rejection is *FINAL*."

[*Basis of Suit—Licensing Contract*]

On February 21, 1951 J. D. Hall, Sr. and J. D. Hall, Jr. entered into a five year licensing agreement with H. D. Hall acting for himself and by power of attorney for Wilbert Hall and their partnership. This is the contract which is the basis of appellants' suit. It recites that the application for patent for "Door Lights" is pending. Appellees were not aware of the fact that the Patent Office had already, under date of January 9, 1951, rejected all claims made in Wilbert Hall's application for a patent. H. D. Hall did not tell them of that fact. Appellees allege that they were induced to enter into the contract by H. D. Hall's representation that the patent would be granted.

[*Exclusive License—Restrictions*]

The licensing agreement is much too long to copy here, but it is necessary to notice some of its terms. It contains these provisions: licensees are granted an exclusive license to manufacture "The item" according to the invention in the territory comprising the "Continental U. S. A. only"; licensees are to pay licensor a stipulated royalty on each and every product manufactured under the terms of the agreement and according to the invention, including several types of door lights, and including also vents, and louvers; licensees agree to mark plainly every light made in accordance with licensor's trademark "Visador", and the patent pending, or patent numbers; licensees shall have the right to terminate and cancel the agreement at any time they so desire; but licensee agrees following termination not to manufacture or sell the products described in the contract for a period of five years following termination; licensees agree that articles manufactured must be sold on a "nonexclusive basis" through door manufacturers and building materials dealers only.

The licensees, J. D. Hall, Sr. and J. D. Hall, Jr., as partners under the name of Doorlite Company, began manufacturing and marketing the products described in the licensing contract. J. D. Hall, Sr. invested $40,000.00 capital in the business. The business prospered. During the latter part of its first year of operation the royalties paid were nearly $1,000 per month. Later a corporation was formed, "Visador Corporation," which took over the partnership business of licensees. Still later the corporation was dissolved and a partnership or joint stock company was formed and named "The Visador Company". The personnel of the reorganized company consisted of fifteen persons, members of the Hall family; some of whom were acting as trustees of other members of the family. The Company did a gross business of about $280,000.00 in 1952, $360,000.00 in 1953, $590,000.00 in 1954 and $800,000.00 in 1955.

Meantime H. D. Hall was having domestic trouble. On January 15, 1952 his wife, Willena Hall, one of the appellants herein sued him for divorce. H. D. Hall testified that he thereupon informed Willena Hall that the application for a patent had been denied, that J. D. Hall, Sr. and J. D. Hall, Jr. did not know of this fact, and if they discovered the truth (as they would, if she went through with her divorce), they would cancel the licensing agreement. H. D. Hall further testified that he urged his wife to abandon her divorce suit in order that he might continue to collect royalties. Willena Hall refused to discontinue her divorce action, so H. D. Hall soon thereafter confessed the facts to J. D. Hall, Jr.

[*Cancellation Agreement*]

Immediately upon learning that the patent application had been rejected, J. D. Hall, Jr. terminated the licensing contract. On January 21, 1952 a written cancellation agreement was entered into by H. D. Hall acting for himself, for Wilbert Hall, and for the H. D. Hall-Wilbert Hall partnership on the one hand, and J. D. Hall, Sr. and J. D. Hall, Jr. on the other hand.

[*Royalties Retained*]

This cancellation agreement recites that the consideration for the licensing contract had been the obtaining of a patent by Wilbert Hall, which consideration had wholly failed because of the denial of the application for the patent. Therefore in consideration of mutual releases, the licensing contract was declared null and void, and J. D. Hall, Sr. and J. D. Hall, Jr., their heirs and assigns, were released and discharged from all claims, past and future, in connection with the licensing agreement. It was further provided that Wilbert Hall, H. D. Hall and the Visador Products Company might retain all the money theretofore paid them whether or not paid under and by virtue of the licensing contract.

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[*Appeal—Accounting Sought*]

In their first, second, third and fourth points on appeal appellants in substance allege error on the part of the trial court in failing to hold that Wilbert Hall was entitled to an accounting from his father H. D. Hall for royalties actually paid to H. D. Hall for the partnership.

The application for a patent was filed March 23, 1950 in the name of Wilbert Hall only. However in the licensing agreement of February 27, 1951 the licensors are stated to be "Wilbert Hall and/or H. D. Hall and for the Visador Products Co., ..." Wilbert Hall testified that his father had a partnership interest in the application. The trial court found as a fact that the application was filed for the "H. D. Hall . . . Wilbert Hall partnership." Considerable sums of money were paid to H. D. Hall as royalties pursuant to said licensing contract. When the licensing contract was cancelled on January 21, 1952, the written cancellation agreement expressly provided that "Wilbert Hall, H. D. Hall and the Visador Products Company may have and retain whatever money or funds they have heretofore received . . . whether . . . paid them under and by virtue of the aforesaid contract or not." It is undisputed that there has not been an accounting between Wilbert Hall and H. D. Hall for the money so received by H. D. Hall for the partnership.

[*Texas Antitrust Laws—Antitrust Illegality as Defense*]

The trial court concluded that the licensing agreement violated the Texas Anti-Trust Laws and the common law rule against monopolies and was therefore void; and that the "partnership of Wilbert Hall and H. D. Hall having as one of its purposes the entering of an illegal licensing agreement, Wilbert Hall is not entitled to an accounting from his father."

It is our opinion that Wilbert Hall is entitled to an accounting from H. D. Hall; and that he is entitled to be paid by H. D. Hall his, Wilbert's, part of the payments received by H. D. Hall in behalf of the partnership, which money under an express provision in the cancellation agreement, might be retained by Wilbert Hall, H. D. Hall and the Visador Products Company.

It was not illegal for Wilbert Hall to enter into a partnership with his father in 1949. It was not illegal for him to file the application for a patent on the window unit in 1950. It was not illegal for him to execute the written power of attorney to his father on January 8, 1951, while he was in the military service. There are no pleadings and no evidence to show that Wilbert Hall knew when he filed the application for a patent that it would be denied. In fact the uncontradicted evidence is that neither Wilbert Hall nor his mother Willena Hall actually knew that the application had been denied until the divorce matter came up in 1952, at which time Wilbert Hall came home on a leave of absence. By that time the licensing contract of February 27, 1951 had already been entered into by H. D. Hall with J. D. Hall, Sr. and J. D. Hall, Jr.

Of course, H. D. Hall, acting for the partnership, knew at that time that the Patent Office on January 9, 1951 had rejected all claims under the application. And certainly constructive knowledge of this rejection could be imputed to Wilbert Hall as a partner of H. D. Hall. Nevertheless J. D. Hall, Sr. and J. D. Hall, Jr., the victims of H. D. Hall's fraud, chose to allow the Wilbert Hall—H. D. Hall partnership to keep the money paid to the partnership prior to the cancellation agreement of January 21, 1952.

The relationship between the two partners, Wilbert Hall and H. D. Hall, was fiduciary in nature. It does not lie in the mouth of H. D. Hall, who has obtained possession of the partnership's funds, to refuse to do equity to his partner, because of the wrong originally perpetrated by H. D. Hall on J. D. Hall, Sr. and J. D. Hall, Jr. The case of Wilbert Hall against H. D. Hall is made without going into the illegal transaction. H. D. Hall will not be permitted to set up the illegality of the licensing contract in order to defeat Wilbert Hall's recovery under his suit for an accounting. *Lewis v. Davis,* 145 Texas, 468, 199 S. W. 2d 146; *Amer. Refining Co. v. Gasoline Products Co.,* 294 S. W. 967; *Floyd v. Patterson,* 72 Tex. 202, 10 S. W. 526; *DeLeon v. Trevino,* 49 Tex. 88; *Brooks v. Martin,* 69 U. S. 70, 17 L. Ed. 732; 10-A Tex. Jur. 288. Appellants' first, second, third and fourth points on appeal are sustained.

* * *

[*Antitrust Violation*]

In their eighth point appellants say that the trial court erred in holding that the

licensing contract was in violation of the Anti-Trust Statutes of the State of Texas, Arts. 7426 V. A. C. S. The licensing contract purported to grant exclusive permits to manufacture and sell the products named together with numerous restrictions pertaining to their sale. The rejection of the application for patent and the fact that trade secrets were not involved made these exclusive permits and restrictions objectionable under our Anti-Trust Statutes. Appellants' eighth point is overruled.

* * *

In their eleventh point appellants take the position that they are entitled to an accounting from appellees even if it be held that there is some provision in the licensing contract in violation of the Anti-Trust Statutes. We have already held that Wilbert Hall is entitled to an accounting from H. D. Hall for royalties actually paid to the partnership prior to cancellation, but is not entitled to any royalties thereafter. Mrs. Willena Hall had her property settlement with H. D. Hall upon obtaining her divorce on July 29, 1952. The royalty payments had been made to H. D. Hall before the divorce. The licensing contract had been cancelled and the payments had ceased before Willena Hall obtained her divorce. Neither of appellants may justly claim any royalty payments to be due following the cancellation of the licensing contract regardless of whether the contract contained provisions in violation of the Anti-Trust Statutes. Their eleventh point is overruled.

* * *

[*Reversed in Part—Affirmed in Part*]

The judgment of the trial court in favor of H. D. Hall that Wilbert Hall take nothing in his suit for accounting against H. D. Hall for royalties actually paid to H. D. Hall for Wilbert Hall—H. D. Hall partnership is reversed and the cause as between said parties, remanded for another trial.

The judgment in favor of appellees that appellants take nothing is affirmed except as otherwise held in the next preceding paragraph hereof.

Reversed and remanded in part, and affirmed in part.

[¶ 69,480] Eli Lilly and Company v. Sav-on Drugs, Inc.

In the Superior Court of New Jersey, Chancery Division, Union County. Civil Action, Docket No. C-2465-58. Decided September 29, 1959.

New Jersey Fair Trade Act

Fair Trade—Person Who May Maintain Suit—Foreign Corporation—Failure to Comply with "Qualification" Statute—"Doing Business"—Burden on Interstate Commerce.—An Indiana corporation engaged in the production of pharmaceutical products was not entitled to maintain a fair trade enforcement action in New Jersey because it had transacted business there without complying with the foreign corporation "qualification" provisions of the New Jersey Corporation Act. Under that statute, a foreign corporation "transacting business" in New Jersey cannot maintain an action "upon any contract made by it in this state" without first having obtained a "certificate that it is authorized to transact business in this state" from the New Jersey Secretary of State. The court, rejecting the plaintiff's contention that it was not transacting business in New Jersey, found that it maintained a local office and 18 "detailmen" who visited retailers, physicians, and hospitals "to acquaint them with the plaintiff's products." The plaintiff's fair trade contracts with New Jersey retailers were Indiana contracts, since they were subject to acceptance there. However, the defendant was a non-signer who was liable only because of the New Jersey Fair Trade Act, the sole basis for the suit. Thus, the court rejected the claim that the action was based on a tort, holding that the relationship between the plaintiff and the defendant was based upon a contract made in New Jersey, created by the New Jersey Fair Trade Act as a result of contracts signed by others in New Jersey. Hence, the action against the non-signer was based on a New Jersey contract and the "qualification" statute was therefore applicable. Also, New Jersey has a "retaliatory" or "mutual spite" statute. Thus, because the Indiana corporation law bars both contract *and* tort actions by foreign corporations which have not "qualified" to do business there, the present action is barred in New Jersey.

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The court also rejected the plaintiff's contention that application of those regulatory provisions would impose a burden on interstate commerce which was forbidden by the "commerce clause" of the Federal Constitution. To hold that the simple requirements of the New Jersey "qualification" statute was a burden on interstate commerce, so as to exempt the plaintiff from its provisions, would be indulgence in an unwarranted legalism.

See Fair Trade, Vol. 1, ¶ 3115, 3330.32.

Fair Trade—Enforcement Action Against Noncontracting Retailer—Notice of Fair Trade Contract.—The fact that a retail drug company had not signed a fair trade contract was no defense to an action under the New Jersey Fair Trade Act where the retailer admitted having notice of the fact that the fair trader had such contracts in force in the state.

See Fair Trade, Vol. 1, ¶ 3258.32, 3268.32.

Fair Trade—Enforcement Action—Sales Which May Be Excepted from Price Restrictions—Repackaging—Failure to Remove Trademark.—It was doubtful if a retailer's alleged repackaging of fair trade products under its own name constituted a good defense to a fair trade enforcement action where a bottle marked in evidence disclosed that the fair trader's name and trademark appeared on the label. The retailer "was obviously seeking to gain the benefit of plaintiff's good will."

See Fair Trade, Vol. 1, ¶ 3236.32, 3290.

For the plaintiff: Lorentz and Stamler, Newark, N. J. (Joseph H. Stamler and Melvin P. Antell, appearing).

For the defendant: Lum, Fairlie & Foster, Newark, N. J. (William F. Tompkins, Newark, N. J., and Warren E. Dunn, Lyndhurst, N. J., appearing).

Opinion

[*Fair Trade Enforcement by Foreign Corporation*]

SCHERER, Judge [*In full text*]: Plaintiff is a corporation of the State of Indiana not authorized to transact business in the State of New Jersey. It does not have a certificate from the Secretary of State as required by N. J. S. 14:15-4: It filed the present suit to compel the defendant to comply with minimum prices fixed for the resale of plaintiff's products, in accordance with N. J. S. 56:4-3 *et seq.*, generally known as the Fair Trade Act. The facts are substantially undisputed and appear in the affidavits filed by both parties.

[*Fair Trade Contracts*]

Plaintiff is one of the largest dealers of pharmaceutical products in this country, if not in the world, and its products are distributed throughout the United States and in foreign countries. Its office and principal place of business is in Indianapolis, Indiana. Plaintiff's products within the United States are sold to selected wholesale distributors and in interstate commerce. It is said that the business done in New Jersey represents 2.7% of its domestic sales. Plaintiff does not sell directly to the retail trade, but its products reach the retail trade through wholesale distributors. Plaintiff says that it leases no sales office, owns no real estate, and maintains no warehouse or other place of business in this state. Its products are "fair traded" in New Jersey under the above cited statute and it claims to have approximately 1500 contracts in effect in this state signed by retailers of its products, under which these retailers agree to maintain the minimum price structure fixed by plaintiff.

Defendant is a retail drug company with stores in Plainfield and Carteret. Defendant did not sign any contract, but it admits having notice of the fact that plaintiff has fair trade contracts in force and that it is, therefore, bound by the provisions of the Fair Trade Act, unless its other defenses are sustained. Even though a non-signer, defendant must maintain plaintiff's minimum price structure. N. J. S. 56:4-6; *Lionel Corp. v. Grayson-Robinson Stores* [1954 TRADE CASES ¶ 67,717], 15 N. J. 191 (1954), appeal denied [1954 TRADE CASES ¶ 67,877], 99 L. ed. 677, 348 U. S. 859 (1954).

[*Trading Stamps*]

The complaint charges that defendant sold plaintiff's products below the minimum

prices fixed by it, in that in some instances, while selling at the minimum prices, it gave to its customers "S. & H. Green Cooperative Cash Discount Stamps," which are redeemable for merchandise, thus in effect lowering the prices of plaintiff's products below the minimum by the amount of the discount represented by the stamps. Whether this constitutes willfully and knowingly advertising or selling plaintiff's products at less than the prices stipulated by it—which defendant denies—need not be now decided. See *E. R. Squibb & Sons and Eli Lilly Company v. Charline's Cut Rate, Inc.* [1950-1951 TRADE CASES ¶ 62,661], 9 N. J. Super. 328 (Ch. Div. 1950); *Bristol-Myers Co. v. Picker* [1950-1951 TRADE CASES ¶ 62,755], 96 N. E. 2d 177 (Ct. App. N. Y. 1950); *Bristol-Myers Co. v. Lit Brothers, Inc.* [1932-1939 TRADE CASES ¶ 55,227], 6 A. 2d 843 (Sup. Ct., Pa. 1939); *Weco Products Co. v. Mid-City Cut Rate Drug Stores* [1940-1943 TRADE CASES ¶ 56,242], 131 P. 2d 856 (Dist. Ct. App., Cal. 1942); *Sperry and Hutchinson Co. v. Margetts* [1954 TRADE CASES ¶ 67,747], 15 N. J. 203 (1954). Defendant is charged also with violating the minimum price structure by selling other products of the plaintiff below the minimum prices in cases where no stamps were given. Plaintiff originally applied for an interlocutory injunction (R. R. 4:67) to enjoin all sales by defendant below minimum prices until final hearing.

[*Repackaging—Trademark Not Removed*]

Defendant admitted the sales but denied that in an instance the sales were below minimum prices or that there were any willful and knowing sales below such prices, in violation of N. J. S. 56:4-6. With respect to the sales made of products other than those with which stamps were given, defendant states that it made up packages from bulk shipments and that the products of plaintiff were packaged under defendant's name and, therefore, they were exempt under the provisions of N. J. S. 56:4-5(1). It is doubtful that this constitutes a good defense because the bottle which was marked in evidence clearly disclosed that the plaintiff's name and trademark appeared on the label and defendant was obviously seeking to gain the benefit of plaintiff's good will. This may not be done. *Johnson & Johnson v. Weissbard* [1932-1939 TRADE CASES ¶ 55,159], 121 N. J. Eq. 585, 586 (E. & A. 1937).

[*Defense—Non-compliance with "Qualification" Statute*]

The substantial defense interposed is that plaintiff, being a foreign corporation, was required as a condition precedent to transacting business in this state to file with the Secretary of State, under N. J. S. 14:15-3, a copy of its certificate of incorporation and a statement providing information required by that section, and, as a preliminary to instituting suit in this state "upon any contract made by it in this state," was required to obtain a certificate from the Secretary of State under N. J. S. 14:15-4. It is conceded that neither of the last cited sections has been complied with by the plaintiff.

Plaintiff's application for an interlocutory injunction was denied on the ground that its right to relief was not clear as a matter of law, in view of the above mentioned legal defenses. *General Electric Co. v. Gem Vacuum Stores,* 36 N. J. Super. 234 (App. Div. 1955); *Wilentz v. Crown Laundry Service, Inc.,* 116 N. J. Eq. 40 (Ch. 1934); *Allman v. United Brotherhood of Carpenters &c.,* 79 N. J. Eq. 150, 155 (Ch. 1911).

[*New Jersey "Mutual Spite" Statutes*]

The matter is now before the Court on defendant's motion to strike the complaint and for summary judgment on the ground that the plaintiff is transacting business in this state contrary to N. J. S. 14:15-3 and, being a foreign corporation, is precluded from bringing this action under N. J. S. 14:15-4. As an integral part of these defenses, the defendant urges the provisions of N. J. S. 14:15-5, where it is provided as follows:

> "14:15-5. Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations.
>
> When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents, doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their

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agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

[*"Onerous" Requirements of Indiana Statute*]

The State of Indiana has a similar statute, and the requirements of that state upon foreign corporations are much more onerous than those imposed by our statute. The Indiana statute (Burns Annotated Statutes of Indiana) provides:

"25-314: Penalties. No foreign corporation transacting business in this state without procuring a certificate of admission or, if such a certificate has been procured, after its certificate of admission has been withdrawn or revoked, *shall maintain any suit or proceeding in any of the courts of this state upon any demand, whether arising out of contract or tort;* and every such corporation so transacting business shall be liable by reason thereof to a penalty of not exceeding ten thousand ($10,000), to be recovered in any court of competent jurisdiction in an action to be begun and prosecuted by the attorney general in any county in which such business was transacted.

"If any foreign corporation shall transact business in this state without procuring a certificate of admission, or, if a certificate has been withdrawn or revoked, or shall transact any business not authorized by such certificate, such corporation *shall not be entitled to maintain any suit or action at law or in equity upon any claim, legal or equitable whether arising out of contract or tort, in any court in this state;* and it shall be the duty of the attorney general, upon being advised that any foreign corporation is so transacting business in this state, to bring action in the circuit or superior court of Marion County for an injunction to restrain it from transacting such unauthorized business and for the annulment of its certificate of admission, if one has been procured. * * *." (Emphasis supplied)

[*Burden on Interstate Commerce*]

Plaintiff argues that it is not doing business in this state and that, even if it be held that it is, the above cited provisions of our Corporation Act do not apply to it because its goods are distributed solely in interstate commerce, thus exempting it from the provisions of any regulatory state statute of the kind above quoted, and that to apply to it the provisions of N. J. S. 14:15-3, 4 and 5 is to impose a burden upon interstate commerce which is forbidden by the commerce clause of the Federal Constitution (United States Constitution, Article I, Sec. 8, Clause 3).

Plaintiff countered the motion to dismiss with a renewal of its motion for interlocutory injunction on the ground that, if the defendant's motion should be denied, then plaintiff's motion should be granted because then its right to relief as a matter of law would be clear, thus eliminating the reason for the original denial of its motion.

I.

[*"Doing Business"*]

Is the plaintiff doing business in New Jersey? The facts in the affidavits filed in support of the respective motions differ in only one material respect. Defendant says that plaintiff's salesmen, or "detailmen" as plaintiff calls them, in New Jersey accept orders for the purchase of plaintiff's products, while plaintiff denies this to be true and says that, even though on occasions its representatives may receive an order for the purpose of transmitting the same to the wholesaler and that such orders are subject to acceptance or rejection by such wholesaler. In view of the result reached, this fact is immaterial, but it will be assumed that the plaintiff's statement is correct.

[*Facts*]

The facts are these: plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building. (The September 1959 issue of the Newark Telephone Directory lists the plaintiff both in the regular section and in the classified section under "Pharmaceutical Products" as having an office at 60 Park Place, Newark.) The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino "for all expenses incidental to the maintenance and operation of said office." There is a secretary in the office, who is paid directly by the plaintiff on a salary basis. There are eighteen "detailmen" under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commissions. Many, if not all of them, reside in the State of New Jersey. Whether plaintiff pays unemploy-

ment, or other taxes to the State of New Jersey is not stated. It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is "promotional and informational only." On an occasion, these detailmen, "as a service to the retailer," may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also made available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield store. Plaintiff says that all of its fair trade contracts and orders for its products are subject to acceptance in Indiana, and therefore none of them constitutes a contract made, or order taken, in this state.

[*Plaintiff's Contention*]

Despite the above recited facts, plaintiff insists that it is not doing business in New Jersey. It concedes that, perhaps for the purpose of having service of process made upon it in a suit in which it is a defendant, it might conceivably be properly served within this state. But, it says that, although it may be subject to the jurisdiction of the state courts and amenable to service of process therein when it is sued, it is not subject to the statute regulating foreign corporations or prescribing the conditions of their doing business in that state. 146 A. L. R. 942. The difference, it is claimed, is ascribable to the fact that the power of a state to subject a foreign corporation engaged in interstate commerce to local regulations is limited and restricted by the commerce clause of the Federal Constitution. On this subject, more hereafter.

[*No Statutory Definition*]

The New Jersey Corporation Act does not define "transacting any business" in this state. Our Supreme Court, in *A & M Trading Corp. v. Pennsylvania R. Co.*, 13 N. J. 516 (1953), quoting with approval from *Yedway v. M. A. Richards Corp.*, 137 N. J. L. 448 (Sup. Ct. 1948), observed that doing business is a term that is not susceptible of precise definition automatically resolving every case, and that each case turns upon its own circumstances.

To hold under the facts above recited that plaintiff is not doing business in New Jersey is to completely ignore reality. A corporation thus acting within this state should not be permitted to take advantage of the laws of this state which promote its business, such as the Fair Trade Act (which is the sole basis for this suit), and yet not comply with reasonable regulatory provisions of our Corporation Act. As is noted in 146 A. L. R. 957, where this subject is discussed in detail, many corporations selling products in the several states act, with a studied purpose, to avoid the necessity of conforming to state laws or becoming subject to service of process. *Thew Shovel Co. v. Superior Ct.*, 95 P. 2d 149 (App. Ct., Cal. 1939).

Most of the cases in which the question of whether a corporation is or is not doing business in a particular state has arisen are those in which service of process was attempted to be made upon a foreign corporation or a tax was sought to be assessed. See *Miklos v. Liberty Coach Co.*, 48 N. J. Super. 591 (App. Div. 1958); *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. ed. 95 (1945); *McGee v. International Life Ins. Co.*, 355 U. S. 220, 2 L. ed. 2d 223 (1957); *A & M Trading Corp. v. Pennsylvania R. Co., supra; Westerdale v. Kaiser-Frazer Corp.*, 6 N. J. 571 (1951). The present case is the converse of those cited. Here, the plaintiff seeks not to avoid service, but to be permitted to sue.

If, as stated in the *Miklos* case (quoting from the *International Shoe Co.* case), at p. 598,

> "that in order to subject a foreign corporation to a judgment *in personam*, if it be not present within the territory of the forum, it have 'certain minimum contacts with (the forum) such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice,"' "

so the plaintiff here, in the interest of fair play and substantial justice, should not object to complying with the requirements of the Corporation Act and securing a certificate to do business here, thus enabling

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it to maintain its suit. This, however, the plaintiff refuses to do. It has been held that such a certificate is secured timely if taken out pending an action. *Lehigh, &c., Co. v. Atlantic S. & R. Works,* 92 N. J. Eq. 131, 148 (Ch. 1920). It has been stated that the effect of the *International Shoe Co.* case was to establish a rule that, where a foreign corporation is present within the state, the court looks not only to the regulatory (sic), continuity and extent of the corporate activity within the state, but also to whether the cause of action asserted resulted from the corporate activity within the state and the convenience to the parties. *Fletcher, Corporations,* Sec. 8713.1, pp. 419-420.

Plaintiff cites *Remington Arms Co. v. Lechmere Tire & Sales Co.,* [1959 TRADE CASES ¶ 69,347], 158 N. E. 2d 134 (Sup. Jud. Ct., Mass. 1959), as an example of a case where a foreign corporation, under facts quite similar to those here, was held not to be doing business in Massachusetts and was not required to secure a certificate to do business as a condition precedent to securing relief under the local Fair Trade Act. The suit was started under the Massachusetts Fair Trade Act, and the defenses here interposed were there set up, but overruled. Plaintiff was granted an injunction. The Massachusetts court held that Remington was not doing business within that state and had a right to use the facilities of the Massachusetts courts. Significantly, however, the court said, at p. 138, that its findings were based upon earlier decisions and that it had not been asked to reconsider those in the light of subsequent United States Supreme Court decisions broadening the scope of local regulations, dealing with foreign corporations. It would appear, therefore, that, if this precise point had been been argued, the result might have been different.

[*Plaintiff was "Doing Business" in State*]

Applying the tests set forth in the cited authorities to the undisputed evidence disclosed by the affidavits, the conclusion is inescapable that the plaintiff was in fact doing business in this state at the time of the acts complained of and was required to, but did not, comply with the provisions of the Corporation Act.

II.

Plaintiff contends that it is excepted from any requirement to comply with foreign corporation provisions of our Corporation Act because it is engaged entirely in interstate commerce, and that it is unlawful for any state to impose such regulations upon interstate commerce as will constitute a burden thereon.

Not all state regulations affecting foreign corporations constitute a burden upon interstate commerce, thereby rendering them unconstitutional. *General Electric Co. v. Packard Bamberger & Co.,* [1954 TRADE CASES ¶ 67,643], 14 N. J. 209, 221 (1953). The regulation is only unlawful if it materially restricts the free flow of commerce across state lines. In *Southern Pacific Co. v. Arizona,* 325 U. S. 761, 89 L. ed. 1915, 1925 (1945), the court said:

> "* * * There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

Plaintiff relies heavily for support of its argument on *International Text Book Co. v. Pigg,* 217 U. S. 81, 54 L. ed. 678 (1910). There, the court struck down a Kansas statute requiring a foreign corporation to secure a certificate to do business as a condition precedent to instituting suit. A comparison of the Kansas statute with ours will show that the requirements of that statute were much more onerous than those in our statute. It is interesting to note, also, that the court did not specifically pass upon the requirement that the corporation have a certificate before instituting suit, but held that, since this section of the statute was so connected with the other sections held unconstitutional as to be inseparable, it, too, had to fall. The court went on to say, at p. 687:

> "* * * How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. * * *."

This case was followed by our former Supreme Court in *Federal Schools, Inc. v. Sidden,* 14 N. J. Misc. 892 (1936), but the decision in that case rested not upon any alleged illegal interference with interstate

commerce, but upon the fact that the contract sued upon, being one made outside of New Jersey, was not interdicted by the provisions of then Section 98 of the Corporation Act (now N. J. S. 14:15-4).

The trend and philosophy of the more recent cases has been in favor of upholding, rather than striking down, reasonable state regulations of foreign corporations. This is illustrated by the very recent case of *Portland Cement Co. v. Minnesota,* 3 L. ed. 2d 421, 79 S. Ct. (1959), in upholding a state income tax imposed upon a foreign corporation. In sustaining the right of a state to exact an income tax from a foreign corporation upon that portion of its profits derived from activities within the state, the court said, at p. 429:

> "* * * While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. * * *."

As early as 1908, the Supreme Court, in *Galveston, H. & S. A. R. Co. v. Texas,* 52 L. ed. 1031, 210 U. S. 217 (1908), said:

> "It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. * * *."

If the levying of an income tax on the business of a foreign corporation which is generated within a state is not a burden upon interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden upon interstate commerce?

It must also be borne in mind that the cause of action here sued upon arises only because of the provisions of our Fair Trade Act. Such contract as the plaintiff relies upon would be illegal except for the provisions of that statute. *General Electric Co. v. Packard Bamberger & Co., supra.* Can it be said that there is anything unfair about requiring a foreign corporation, which seeks to take advantage of a cause of action given it by one of our laws, to comply with the provisions of the other as a condition to taking advantage of the other statutes? To pose the question is to suggest the answer.

[*Reasonableness of "Qualification" Statutes*]

In the *General Electric Co.,* case, the court said that, although the power of Congress over interstate commerce may be exclusive as to a direct statutory regulation of interstate commerce as such, the states are authorized under pertinent decisions of the United States Supreme Court (citing cases) to enact regulations which affect all business done in the state, if such regulations are reasonable and not burdensome to interstate commerce. The simple requirements of our Corporation Act are reasonable and cannot be called burdensome. To hold that these regulations constitute such a burden upon interstate commerce as to exempt the plaintiff from the provisions thereof is to indulge in an unwarranted legalism.

The cases of *Seagram Distillers Company v. Corenswet* [1955 TRADE CASES ¶ 68,108], 281 S. W. 2d 657 (Sup. Ct., Tenn. 1955); *State v. Ford Motor Co.,* 38 S. E. 2d 242 (Sup. Ct., S. C. 1946); *Bulova Watch Co. v. Anderson* [1955 TRADE CASES ¶ 68,036], 70 N. W. 2d 243 (Sup. Ct., Wis. 1955), cited by plaintiff in support of its position, have been examined, and the holdings there do not require any change in the result here reached.

III.

[*State Where Contract Made*]

Finally, it is argued that the provisions of N. J. S. 14:15-4 do not apply because that section precludes the maintaining of an action in this state only "upon any contract made by it (the foreign corporation) in this state." Admittedly, the 1500 contracts made by plaintiff with its retailers are Indiana contracts, since they were subject to acceptance there, and it is said that the orders received for plaintiff's products are likewise subject to acceptance in Indiana.

That this statute is ordinarily limited to contracts made in this state has been held in several cases. *Federal Schools, Inc. v. Sidden, supra* (and the numerous cases therein cited); *Protective Finance Corp. v. Glass,* 100 N. J. L. 85 (Sup. Ct. 1924); *Lehigh, &c., Co. v. Atlantic S. & R. Works, supra.* None of these cases was a suit upon a cause of action arising only out of one of our statutes. Also, this argument does not take into consideration the provisions

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of N. J. S. 14:15-5 (sometimes referred to as a "mutual spite" or "retaliatory" statute). Most states, including, as above noted, Indiana, have such statutes.

[*Nature of Action As to Non-signer—Tort or Contract*]

The Indiana statute bars suits arising out of contract, as well as tort, whether such actions are at law or in equity. Plaintiff argues that its action is one in tort and therefore not precluded by the Corporation Act. It would seem, however, that the action is one on contract because, while the defendant is a non-signer of a fair trade contract, it is liable under the statute since other persons have signed such contracts. Non-signers have been held to be bound to the same degree as signers. See *Old Dearborn D. Co. v. Seagram-Distil. Corp.* [1932-1939 Trade Cases ¶ 55,141], 299 U. S. 183, 81 L. ed. 109 (1936); *Lionel Corp. v. Grayson-Robinson Stores, supra.*

Quaere: Under these circumstances, is not the relationship of the plaintiff and the defendant one of a contract made in the State of New Jersey, created by the Fair Trade Act as a result of the signing of other contracts by persons in New Jersey?

N. J. S. 14:15-5 was discussed in *Ex-Cell-o Corp. v. Farmers Coop., Dairies Ass'n.,* 28 N. J. Super. 159 (App. Div. 1953), but its provisions were not applied because the defense was first raised on appeal, and not below. That opinion indicates — without stating reasons—that this may be a disfavored defense. But, when timely raised, as here, it should not be so considered. No valid reason is given by plaintiff why the provisions of the statute should not be applied, except the argument concerning interstate commerce heretofore disposed of. In *Babe Kaufman Music Corp. v. Mandia,* 127 N. J. Eq. 480 (Ch. 1940), this defense was interposed and the court, after reviewing the retaliatory provisions of the New York Corporation Law—the plaintiff being a corporation of New York—refused to enforce the contract.

[*Action Barred*]

While it is clear that the provisions of N. J. S. 14:15-4 apply, and that the relationship between plaintiff and defendant is based upon a contract made in this state by virtue of the Fair Trade Act, it is also clear that the provisions of N. J. S. 14:15-5 are applicable and, based upon the retaliatory provisions of the Indiana statute, the plaintiff's suit is barred. The plaintiff's application for an interlocutory injunction, therefore, is denied.

[*Summary Judgment*]

Since the affidavits disclose palpably that there is no genuine issue as to any material fact, the defendant is entitled to a summary judgment dismissing the complaint, with costs. R. R. 4:58-3; *Frank Rizzo, Inc. v. Alatsas,* 27 N. J. 400, 405 (1958).

A judgment may be presented in accordance with these conclusions.

[¶ 69,481] United States v. New England Concrete Pipe Corporation; Hume Pipe of N. E., Incorporated; and Concrete Pipe Machinery Company.

In the United States District Court for the District of Massachusetts. Civil Action No. 57-631-A. Filed September 30, 1959.

Case No. 1349 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Price Fixing—Circulating Cost Information—Concrete Pipe.—A concrete pipe manufacturer was prohibited by a consent decree from (a) suggesting to any other manufacturer any price, bid, quotation, or other term to be used in the sale of concrete pipe, (b) entering into any understanding with any other manufacturer or any association to fix prices, bids, quotations, pricing methods, discounts, or other terms or conditions of sale, (c) circulating any price list or price quotations in advance of the publication of such lists or quotations to customers generally, (d) circulating any price list or making any bid which had been

established by agreement, or (e) exchanging the amount or other terms of any bid in advance of filing. Also, the manufacturer was prohibited from circulating to any other manufacturer any cost information or formulae for computing costs.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.065, 2011.181, 2011.218; Monopolies, Vol. 1, ¶ 2610.600.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Participation in Trade Association Activities.—A concrete pipe manufacturer was prohibited by a consent decree from being a member of or participating in the activities of any association of manufacturers of such pipe with knowledge that the activities are in violation of the decree.

See Combinations and Conspiracies, Vol. 1, ¶ 2017.121; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Boycotts.—A concrete pipe manufacturer was prohibited by a consent decree from entering into any plan or program to boycott or otherwise refuse to do business with any person.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533; Monopolies, Vol. 1, ¶ 2610.720.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Allocation of Markets.—A concrete pipe manufacturer was prohibited by a consent decree from (1) suggesting to any other concrete pipe manufacturer the customers, areas, or towns and cities in or to which concrete pipe is or is not to be sold or offered for sale by such other manufacturer or (2) entering into any agreement with any other concrete pipe manufacturer or association to allocate customers, territories, or markets for the sale of concrete pipe.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.468; Monopolies, Vol. 1, ¶ 2610

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Exclusive Use of Machinery.—A manufacturer of concrete pipe manufacturing machinery was prohibited by a consent decree from granting exclusive use of such machinery to a concrete pipe manufacturer and the latter was prohibited from securing these exclusive rights.

See Combinations and Conspiracies, Vol. 1, ¶ 2005; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Consent Decree—Practices Enjoined—Restraints on Product Use.—A firm engaged in manufacturing concrete pipe manufacturing machinery was prohibited by a consent decree from entering into or continuing in effect any agreement with any concrete pipe manufacturer which would restrain such manufacturer's use or disposition of such machinery after purchase.

See Combinations and Conspiracies, Vol. 1, ¶ 2005; Monopolies, Vol. 1, ¶ 2610.

Department of Justice Enforcement and Procedure—Consent Decree—Permissive Provisions—Bona Fide Negotiations and Joint Bidding.—A concrete pipe manufacturer was permitted (a) to enter into negotiations concerning bona fide sales to other concrete pipe manufacturers and (b) to participate with any other concrete pipe manufacturer in a joint venture agreement whereby a single bid is submitted and the assets of the parties are combined for the performance of the contract where each party could not singly bid on or perform the contract.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321.48.

Department of Justice Enforcement and Procedure—Consent Decree—Specific Relief—Determination of New Prices.—A concrete pipe manufacturer was directed to determine prices for concrete pipe based on its own manufacturing and overhead costs, the margin of profit individually desired, and other lawful considerations and to put such independently determined prices into effect in place of its prevailing prices. However, the manufacturer was not prohibited from deviating from, modifying, or otherwise changing such prices for the purpose of meeting competition, reducing excessive inventory, or for other lawful business reasons.

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See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8301.45, 8321.48, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General, and William D. Kilgore, Jr., Baddia J. Rashid, Richard B. O'Donnell, John J. Galgay, Richard L. Shanley, and Gerald R. Dicker, Attorneys, Department of Justice.

For the defendants: William F. Byrne and Edmund Burke, Boston, Mass.

For a prior consent decree entered in the U. S. District Court, District of Massachusetts, see 1958 Trade Cases ¶ 68,925.

Final Judgment

BAILEY ALDRICH, Circuit Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on June 28, 1957, and the defendants New England Concrete Pipe Corporation and Concrete Pipe Machinery Company, having appeared herein, and the plaintiff and said defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or admission by plaintiff or such defendants in respect of any such issue;

Now, Therefore, before any testimony or evidence has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the plaintiff and New England Concrete Pipe Corporation and Concrete Pipe Machinery Company, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Sherman Act*]

The Court has jurisdiction of the subject matter herein and of the parties signatory hereto. The complaint states claims upon which relief may be granted against defendants New England and Concrete Machinery under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation or other legal or business entity;

(B) "Concrete pipe manufacturer" means a person engaged in the business of manufacturing concrete pipe;

(C) "Concrete pipe" means concrete sewer pipe or concrete drain culvert pipe, plain or reinforced, or both of them;

(D) "New England" means defendant New England Concrete Pipe Corporation, with its principal place of business in Newton, Massachusetts;

(E) "Concrete Machinery" means defendant Concrete Pipe Machinery Company, with its principal place of business in Sioux City, Iowa.

III

[*Applicability of Judgment*]

The provisions of this Final Judgment applicable to a defendant signatory hereto shall apply also to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

[*Cost Information*]

New England is enjoined and restrained from collecting from or circulating, reporting or recommending to any concrete pipe manufacturer any costs or averaged costs of manufacture or sale of concrete pipe or any formulae for computing any such costs.

V

[*Pricing Practices*]

New England is enjoined and restrained from:

(A) Urging, influencing or suggesting, or attempting to urge, influence or suggest, to any other concrete pipe manufacturer any price, bid, quotation, or other term or condition to be used by such other manufacturer or manufacturers in the sale of concrete pipe;

(B) Entering into, adhering to, maintaining or claiming any right under any contract,

combination, agreement, understanding, plan or program with any other concrete pipe manufacturer or manufacturers or any association or central agency of or for such manufacturers to fix, determine, establish or maintain prices, bids, quotations, pricing methods, discounts or other terms or conditions of sale of concrete pipe to be used by New England or by such other manufacturer or manufacturers;

(C) Circulating to, or exchanging with any concrete pipe manufacturer any price list or price quotations applicable to concrete pipe in advance of the publication, circulation or communication of such price lists or price quotations to its customers generally;

(D) Circulating, exchanging or using in any manner, any price list or purported price list or making any bid, containing or purporting to contain any prices or terms or conditions for the sale of concrete pipe which had been agreed upon or established by agreement between two or more concrete pipe manufacturers;

(E) Disclosing to or exchanging with any other concrete pipe manufacturer or manufacturers the amount or other terms or conditions of any concrete pipe bid by New England or by such other manufacturer or manufacturers in advance of the filing of such bids; and

(F) Being a member of, contributing anything of value to, or participating in the activities of any association or central agency for concrete pipe manufacturers with knowledge that the activities are in violation of any of the provisions of this Final Judgment.

VI

[*Allocation of Markets—Boycotts*]

New England is enjoined and restrained from:

(A) Urging, influencing or suggesting, or attempting to urge, influence or suggest to any other concrete pipe manufacturer the customers, areas or towns and cities, in or to which concrete pipe is to be sold or offered for sale or in or to which concrete pipe is not to be sold or offered for sale by such other manufacturer;

(B) Entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other concrete pipe manufacturer or manufacturers or any association or central agency of or for such manufacturer or manufacturers to allocate customers, territories or markets for the sale of concrete pipe;

(C) Entering into, adhering to, maintaining or enforcing any contract, agreement, understanding, plan or program to boycott or otherwise refuse to do business with any person.

VII

[*Determination of New Prices*]

New England is ordered and directed, not later than sixty (60) days following the date of the entry of this Final Judgment, individually and independently (1) to review its then prevailing prices for concrete pipe, (2) to determine prices for concrete pipe based on its own manufacturing and overhead costs, the margin of profit individually desired and other lawful considerations, and (3) in place of its then prevailing prices, to establish the prices determined under (2) above, which prices shall become effective not later than one hundred and fifty (150) days following the date of the entry of this Final Judgment. Nothing contained herein shall prevent New England from deviating from, modifying or otherwise changing the price list as established herein, for the purpose of meeting competition, reducing excessive inventory, or for other lawful business reasons.

VIII

[*Permissive Provision*]

Nothing contained in the provisions of Sections V, VI and VII above shall be deemed (1), to invalidate, prohibit or restrain bona fide negotiations between New England and any other concrete pipe manufacturer or manufacturers concerning bona fide sales to one another, or (2), to enjoin New England from entering into, participating in, or maintaining with any other concrete pipe manufacturer or with any one acting for or in behalf of any other concrete pipe manufacturer, a joint venture agreement whereby a single bid will be submitted and the assets and facilities of each of the parties thereto will be combined for the sale and installation of concrete pipe of such monetary value or in such quantities that each party to the joint venture could not singly bid on or perform the contract. Provided, however, that such joint ventures shall not be used or permitted to circumvent or evade any of the

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other provisions of this Final Judgment or to implement other activities in derogation thereof.

IX

[*Exclusive Use by Purchaser*]

New England is enjoined and restrained from:

(A) Asserting, or threatening to assert, any rights to the exclusive use of any pipemaking machinery in any designated area under (1) a contract dated May 31, 1927, between McCracken Machinery Company of Sioux City, Iowa and G. S. Rutherford of Painesville, Ohio, (2) a contract dated September 26, 1934 between P. A. Lucy, Receiver of McCracken Machinery Company of Iowa and New England; and (3) a contract dated February 15, 1936 between Concrete Machinery and New England;

(B) Entering into or continuing in effect any other agreement or contract with Concrete Machinery or any other manufacturer of concrete pipemaking machinery having the purpose or effect of securing to New England the exclusive use of any concrete pipemaking machinery in any designated area.

X

[*Cancellation of Exclusive Use Contracts*]

New England and Concrete Machinery are ordered and directed to cancel forthwith the contracts described in Section IX(A) herein and to file with this Court, and with the plaintiff, a report setting forth the fact and manner of their compliance with this Section X.

XI

[*Granting Exclusive Use—Restrictions on Use*]

Concrete Machinery is enjoined from entering into or continuing in effect any contract or agreement with any concrete pipe manufacturer having the purpose or effect of (1) securing to such manufacturer the exclusive use of any concrete pipemaking machinery in any designated area within the New England States; or (2) restraining such manufacturer's use or disposition of any pipemaking machinery after purchase of such machinery from Concrete Machinery; Provided, however, that this Section XI shall not be deemed to prohibit Concrete Machinery, until payment therefor is completed, from restricting the movement or substitution of parts of machinery sold by conditional sales contract or chattel mortgage.

XII

[*Inspection and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to New England and Concrete Machinery made to its principal office, be permitted, subject to any legally-recognized privilege, (a) reasonable access, during the office hours of such defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendants, relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of such defendants, and without restraint or interference, to interview officers and employees of such defendants who may have counsel present, regarding such matters. Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, New England and Concrete Machinery shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section XII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

XIII

[*Jurisdiction Retained*]

Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

[¶ 69,482] United States v. McDonough Co., et al.

In the United States District Court for the Southern District of Ohio, Eastern Division. Criminal No. 7368. Dated October 13, 14, and 15, 1959.

Case No. 1429 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Defendant's Plea of *Nolo Contendere*—Sentences—Jail Terms and Fines.—In a criminal action charging five corporations and four of their officers with conspiring to fix the prices of hand tools, the court accepted the defendants' pleas of *nolo contendere* on the recommendation of the Government. The court noted that it never looked with favor upon such pleas, and that of all of the factors that could be taken into consideration, the paramount one was whether the public interest would be better served by the acceptance or rejection of the pleas. From the Government's statement that it saw no public harm by the acceptance of the pleas, the court assumed that the public interest would be better served by the acceptance of the pleas. The court noted that if the Government were of the opinion that the public interest would be better served by the rejection of the pleas, it would reject such pleas. The defendants, according to the court, stand before it as if they had pleaded guilty.

Although the court accepted the Government's recommendations as to the amount that each of the defendants should be fined ($20,000 as to three of the corporations, $15,000 as to two of the corporations, and $5,000 as to the individual defendants), it ruled that a fine in a case of this character was not a sufficient deterring factor to cause others who might contemplate violating the Sherman Act and those who were involved in the instant case from committing further violations, and, therefore, the individuals should be sentenced to ninety days in jail, as a further deterrent factor. The court noted that there was no difference between a plea of *nolo contendere* and a plea of guilty insofar as punishment is concerned, and that it "has no sympathy with the argument that this is a first case" in which jail sentences were imposed on a plea of *nolo contendere* because it did not "think the Congress would have put jail sentence in the statute if they didn't intend for a court to use it if it thought it was proper." In determining the sentences, the court considered the background and participation of each of the defendants in the alleged conspiracy. The court granted a stay of execution for a period of thirty days to enable the individual defendants to arrange their affairs and to permit the reception of evidence as to whether or not incarceration would endanger the life of an individual defendant because of his physical condition.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.860, 8029.700.

For the Government: Ralph M. McCareins and Robert Eisen, Department of Justice, Antitrust Division, Chicago, Ill.

For the defendants: C. Edward McDonough, Parkersburg, W. Va., for McDonough Co. and F. Bliss Winn; John D. Holschuh, Columbus, Ohio, and Robert W. Murphy and Charles Houchins, Chicago, Ill., for Borg-Warner Corp.; Robert H. Hoffman, Columbus, Ohio, and John Ladd Dean, Cleveland, Ohio, for The Union Fork and Hoe Co. and John T. Mains; Robert Taft, Jr., and Murray Monroe, Cincinnati, Ohio, for The Wood Shovel and Tool Co.; and Byron Ford and James A. Gorrell, Columbus, Ohio, and John A. Watson, Cleveland, Ohio, for True Temper Corp., William G. Rector, and Robert R. Raymond.

[Hearing on October 13, 1959]

[*Pleas of Nolo Contendere*]

The Court [MELL G. UNDERWOOD, District Judge, *In full text except for omissions indicated by asterisks*]: *United States of America v. McDonough Co., et al.*, Criminal No. 7368.

Mr. McCareins: The Government is ready for trial, Your Honor.

The Court: I understand the defendants are also ready.

This matter is before the Court upon the propriety of accepting a plea of *nolo contendere* in this case on behalf of each de-

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fendant. The Court has never looked with favor upon such pleas. At the hearing on October 5 the Government stated it did not oppose the acceptance of these pleas.

Of all the factors that may be taken into consideration, the paramount one is whether the public interest will be better served by acceptance or rejection of the pleas. However, the Government has not gone on record as opposing the acceptance of these pleas. Does the Assistant United States Attorney General desire to be heard further upon that question at this time?

Mr. McCareins: Just except for one statement. I am authorized to state that under all the circumstances of this case—briefs have been served on us, which I assume the Court has seen?

The Court: The Court has examined the briefs.

Mr. McCareins: —that the Government deems it appropriate that the Court accept these pleas. Now, I assume that implicit in that is that no harm will be done to the public interest by the acceptance of the plea.

The Court: If I understand you correctly, Mr. McCareins, you are indicating to the Court that the public interest would be better served by acceptance of these pleas, is that correct?

Mr. McCareins: I don't want to seem to be quibbling. I prefer to put it the other way, that we see no public harm. I understand the determination was made when the Government changed its position and concluded not to oppose the pleas, that implicit in that determination was that there would not be public injury.

The Court: That was the thought in the mind of the Court. In other words, since the Government does not oppose the acceptance of these pleas the Court must assume that the Government, while aware of the factors the Court must consider and especially the paramount factor of public interest, has concluded upon information available to it that the—and your statement—that the public interest would be better served by accepting these pleas than by rejection. For the Court to assume otherwise would require the Court to view the Government's position as inconsistent. That is, stating to the Court on the one hand that it does not oppose acceptance of the pleas, while believing on the other that the public interest would be better served by rejection. Surely the Government is not in this position. And, I think from your statement, although you haven't made it quite clear to the Court, that the Court has a right to assume that the public interest would be better served.

Mr. McCareins: Because of our interest in these cases generally, of which this is only one, that we would like to make it clear, of course, this is not affecting other cases and it is based upon the particular circumstances of this case. There is no general change in policy.

The Court: The Court may say to you at this time if the Government were of the opinion, based upon information and the evidence gathered by it in investigating and preparing this case, that the public interest would be better served by rejection of these pleas and would so state, then the Court would reject the pleas. But, I do not so understand you.

Mr. McCareins: That is right. We don't make such a statement.

The Court: Does counsel for the defendants desire to be heard further at this time?

Mr. Ford: I believe not, if the Court please.

Mr. Dean: No, Your Honor.

The Court: A motion has been made to the Court to withdraw the not guilty pleas entered in this case and to enter a plea of *nolo contendere,* is that correct, on behalf of each of the defendants?

Mr. Ford: Yes, sir.

Mr. Dean: Yes, sir.

Mr. Murphy: Yes, sir.

Mr. McDonough: Yes, sir.

Mr. Taft: Yes, sir.

The Court: In view of the statement of the Assistant Attorney General representing the Department of Justice made at a previous hearing, and particularly the statement made this morning to the effect that the public interest would perhaps be better served by acceptance of the pleas than by their rejection, the Court, although as indicated a moment ago never looking with favor upon such pleas, is inclined to follow the recommendations of the Department of Justice and accept the pleas of *nolo contendere* in each individual case; that is, on behalf of the corporation and on behalf of the defendants.

Mr. McCareins: Yes, sir.

The Court: Are all the defendants in court?

Mr. Dean: Yes, Your Honor.

Mr. Ford: They are, Judge.

The Court: The Court will hear the United States Attorney.

Mr. Eisen: May it please the Court, the Government—

The Court: Just one moment. I am quite sure that able counsel representing all of the defendants understand the effect of a plea of *nolo contendere.* For all purposes insofar as penalties are concerned it is in effect a plea of guilty before the Court. Do you so understand, in this particular case?

Go ahead.

* * *

The Court: Now, you have made certain recommendations to the Court. This is a criminal case. The Court wants to know something specifically about the background and participation of each of these defendants in this conspiracy. I wish you would take them up individually and be specific and advise the Court fully what their conduct was and what their participation was in the conspiracy.

Mr. Eisen: With regard to the individuals and the corporations?

The Court: And the corporations. In other words, the Court is desirous of knowing whether or not there is any difference in culpability of these defendants or whether they were all equally participating. Now, Mr. McCareins gave the Court some background but I don't think he discussed the individual defendants in his previous statement. Did you?

Mr. Eisen: With the Court's permission I would like to defer to Mr. McCareins now since he is most familiar with these specific individuals.

The Court: I wish you would tell me all about the case, Mr. McCareins. That is more important to this Court than the recommendation about fines, because the statute does also carry a jail sentence.

* * *

[Hearing on October 14, 1959]

[*Indictment*]

The Court: Have counsel for the Government and counsel for the defendants completed your statements to the Court?

Mr. McCareins: Yes, sir, we have, Your Honor.

The Court: Is there anything further?

Mr. Ford: Yes, sir, if the Court please.

The Court: Does counsel for the defendants desire to be heard further on behalf of the individual defendants who were indicted and entered a plea of *nolo contendere?*

Mr. Ford: No, if the Court please.

The Court: This indictment returned by the grand jury charges among other things that

> "For many years past, the exact date being to the grand jurors unknown, and continuing up to and including the date of the return of this indictment, the defendants named herein and others to the grand jurors unknown have engaged in a combination and conspiracy to fix prices and to eliminate competition in the sale of hand tools in unreasonable restraint of the aforesaid interstate trade and commerce in hand tools, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' as amended, 26 Stat. 209 Section 15 of the United States Criminal Code 1, commonly known as the Sherman Act."

It charges among other things that

"the combination and conspiracy herein charged has consisted of a continuing agreement, understanding, and concert of action among the defendants and others to the grand jurors unknown, the substantial terms of which have been and are that they agree:

(a) To fix and maintain uniform and non-competitive prices for hand tools sold by the corporate defendants;

(b) To hold meetings periodically for the purpose of discussing, arriving at and establishing uniform and non-competitive prices for hand tools sold by the corporate defendants;

(c) To exchange price lists and information affecting prices in advance of their publication to the trade;

(d) To standardize specifications and establish uniform grades for hand tools manufactured by the corporate defendants;

(e) To adopt and maintain a uniform system of discounts, due dates, and terms and conditions of sale in billing jobbers and distributors for hand tools purchased from the corporate defendants; and

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(f) To adopt and maintain uniform basing points, shipping terms, and freight charges and allowances;

(g) To establish and maintain uniform and noncompetitive suggested jobber and distributor resale prices for hand tools and to require their respective jobbers and distributors to adhere to such resale prices in selling hand tools;

(h) To supervise their respective jobbers and distributors in submitting bids to users of hand tools who purchase their requirements by inviting bids thereon, to prescribe the prices and terms to be quoted in such bids by their said jobbers and distributors, and to require their said jobbers and distributors to adhere to such prices and terms of sale."

The indictment further charges that

"In effecting and carrying out the aforesaid combination and conspiracy, the defendants by agreement and concert of action have done the things which as hereinbefore alleged they have conspired and agreed to do.

"The effects of the aforesaid combination and conspiracy, among other things, have been and are:

(a) To restrain the aforesaid interstate commerce in the sale of hand tools by eliminating price competition in the sale thereof;

(b) To deprive purchasers of hand tools of the benefits of free and open competition in the sale thereof;

(c) To increase the price of hand tools sold in interstate commerce."

[*Effect of Nolo Contendere Pleas*]

Now, with the approval of the Department of Justice and the recommendation of the Department of Justice, in effect, to the Court, the Court has permitted the defendants to enter a plea of *nolo contendere* to this indictment, which for all purposes and effects is a plea of guilty, as able and learned counsel well understand. The only saving grace of a plea of *nolo contendere* is what benefit you may gain in any civil actions for treble damages or otherwise which may arise as a result of this indictment. The defendants stand before the Court upon what the Court has just indicated, in the view of the Court, is a plea of guilty.

Able counsel have presented your version of this case at length. Counsel representing the Department of Justice and the United States have also made an able presentation of their case. However, after all the statements are considered and digested the bare and unvarnished fact exists that the defendants have violated the Sherman Act. While you have advanced various theories of why such violation took place, yet, you are before this Court saying that you have conspired to violate the Act. In other words, you are a violator of the law.

Now, the Congress has seen fit to impose or at least permit the Court under the law to impose very severe penalty. Counsel representing the Attorney General has made certain recommendations to the Court as to the fines that should be imposed in this case. The Court is not bound by those recommendations. They are, however, helpful to the Court because the Department of Justice has in its possession all of the factual background. No doubt the Government has spent thousands of dollars in investigating this case. The Court is aware of the fact that you have entered a plea of guilty which has perhaps saved the Government and also saved yourselves expensive litigation and the time of this Court. However, since the law does carry a maximum fine of $50,000 and a year's imprisonment, the Court is of the opinion that the recommendations made by the Attorney General of the United States are fair, and in view of that fact the Court is inclined to impose the fines which the Department of Justice recommends in this case.

[*Fine Alone Not Sufficient*]

However, the Court is of the opinion that the Department of Justice has not gone far enough. It seems to this Court, in cases of this character, that a fine is not a sufficient deterring factor to cause others who might contemplate violating the Sherman law and those who are involved here today from committing further violations, since perhaps it is not too difficult for the defendant corporations or the defendants to pay a fine, but there ought to be a further deterrent factor, and for that reason the Court will not follow the recommendations in every respect.

[*Fines Imposed on Corporations*]

However, it will assess a fine of $20,000 against True Temper, defendant True Temper Corporation; a fine of $20,000 against the defendant McDonough Co.; and a fine

of $20,000 against the defendant The Union Fork and Hoe Company.

At this point, before I impose a fine on the Wood Shovel and Tool Company, the Court understood that the officers of this company were granted immunity by reason of the testimony they gave before the grand jury?

Mr. McCareins: That's right.

The Court: And a further statement which you made in court as to Borg-Warner Corporation, that they did not participate actively after 1955. Is that correct?

Mr. McCareins: They didn't attend meetings after '55 but participated in this, what we call, surreptitious correspondence. They didn't continue to attend meetings but did take part in the correspondence, nor was there any disavowal of the benefits.

The Court: Were they in the picture initially?

Mr. McCareins: I would say we have no evidence that they were, for example, in the picture—let me correct that. I have a recollection of also involving Ingersoll as early as '49, rather mildly but interested in this sort of thing that early. I would say that they definitely were a part of it in '53.

The Court: In other words, they joined the conspiracy after it had once been—

Mr. McCareins: Yes, I would say that is a fair statement, that it had been in effect prior to their joining.

The Court: What was the situation with the Wood Shovel and Tool Company, or were they in from the start?

Mr. McCareins: It is very difficult for me to say, Your Honor. I have no definite information as to whether Wood was in there or not. Our first evidence, I should say, of Wood's participation I believe starts in about '53.

The Court: In view of those statements the Court will assess a fine against the Wood Shovel and Tool Company in the amount of $15,000; a fine against the Borg-Warner Corporation in the amount of $15,000.

[*Individuals—Fines and Jail Terms*]

Now, will the individual defendants step forward, please.

Does counsel desire to be heard further for these defendants?

Which is Mr. William Rector?

Mr. Rector: I am, sir.

The Court: Do you have anything to say as to why the judgment of the Court should not be pronounced against you?

Mr. Rector: No, Your Honor.

The Court: Mr. Robert R. Raymond, do you have anything to say as to why the judgment of the Court should not be pronounced against you?

Mr. Raymond: No, I do not, your Honor.

The Court: Mr. F. Bliss Winn, do you have anything to say as to why the judgment of the Court should not be pronounced against you?

Mr. Raymond [so in transcript]: I have not, Your Honor.

The Court: Mr. John T. Mains, do you have anything to say as to why the judgment of the Court should not be pronounced against you?

Mr. Mains: No, sir, Your Honor.

The Court: It will be the sentence of the Court, as to you, Mr. Rector, that you pay a fine of $5000 and that you be incarcerated in a jail to be designated by the Attorney General of the United States for a period of ninety days.

And as to you, Mr. Raymond, that you pay a fine of $5000 and that you be incarcerated in a jail to be designated by the Attorney General of the United States for a period of ninety days.

And as to you, Mr. Winn, it will be the judgment and sentence of the Court that you pay a fine of $5000 and that you be incarcerated in a jail to be designated by the Attorney General of the United States for a period of ninety days.

And as to you, Mr. Mains, that you pay a fine of $5000, that you be incarcerated in a jail to be designated by the Attorney General of the United States for a period of ninety days.

Now, a corporation acts through its officers. You gentlemen breathed life into this conspiracy, and your explanation is not sufficient to warrant this Court in not imposing more severe penalty than the Department of Justice has recommended for you.

You will be remanded to the custody of the Marshal.

You may recess court until two o'clock.

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[*Motions To Stay Execution of Sentences*]

Mr. Holschuh: If the Court please, on behalf of Borg-Warner, may we have some time for arrangement—

The Court: You can work that out with the Attorney General. If he won't agree the Court will give you time to pay your fine.

Mr. Ford: If the Court please, may we have these sentences deferred for a few days until these gentlemen can make arrangements?

The Court: Is there objection upon the part of the Department of Justice?

Mr. McCareins: There is not.

The Court: The Court realizes that you are all business men. Perhaps you ought to have some time to straighten up your business affairs. The Court will suspend the execution of sentence for a period of thirty days. You will report back here to the United States Marshal—

How much time do you want, Mr. Ford?

Mr. Ford: Well, thirty days.

The Court: Are they all officers of the company?

Mr. Ford: Yes.

The Court: I doubt if they need thirty days.

Mr. Ford: I think probably they will.

The Court: Maybe the Court spoke too rapidly.

Mr. Ford: I think thirty days; they will need at least that.

The Court: What are their duties? Do they have anyone to take their place?

Mr. Ford: I don't know. Mr. Rector is president of the company and certainly his place will be hard to fill. Thirty days, I think, would be satisfactory time.

The Court: The Court will take the request under consideration. The defendants will be remanded to the custody of the Marshal.

You may recess court until two o'clock.

[Hearing on October 15, 1959]

[*Motions To Stay Execution of Sentences*]

The Court: *United States v. McDonough Co., and others,* Criminal No. 7368. Counsel at the conclusion of the hearing yesterday indicated to the Court that you wanted to be heard on the motions to stay execution of sentence in this case; is that correct?

Mr. Ford: If the Court please, our motion last night was for a stay to enable the defendants to arrange their affairs so that they could serve their time.

The Court: Yes, the Court so understood that you were asking leave to straighten out your business affairs before the commencement of your sentence. Is that correct?

Mr. Ford: That's correct.

The Court: During the interim there has been filed with the Court certain medical statements, or, have they been filed? They were shown to the Court.

Mr. Dean: We have them for filing, Your Honor.

The Court: They were furnished to the Court and then you took them back into your possession. Do you have those statements with you?

Mr. Dean: Yes.

The Court: Now, do you care to be heard further on your stay, Mr. Ford?

Mr. Ford: Yes, I think so.

The Court: What are your reasons?

Mr. Ford: As the Court knows, I have been practicing law for a number of years.

The Court: I will take judicial notice of that fact and that you are a good lawyer. Go ahead.

Mr. Ford: Until the other day I kind of had the suspicion that I was, but that's been dispelled. In preparation for making a decision and advising my clients on the question of changing their plea we canvassed, I think, all of the anti-trust cases there and we didn't find a single, solitary case among hundreds of criminal anti-trust cases where *nolo contendere* pleas were entered of any jail sentences.

The Court: Now, let us get the record straight.

Mr. Ford: I say that from my—

The Court: Let us get the record straight. Is there any difference insofar as punishment is concerned between a *nolo* plea and a plea of guilty?

Mr. Ford: Perhaps not.

The Court: There is no perhaps to it. For all purposes, in effect it is a plea of guilty, is it not?

Mr. Ford: But, as I say, I have gone on precedent and therefore did not advise my

clients to be prepared for what might happen, and it is my responsibility.

The Court: You don't mean to indicate to the Court that you lawyers didn't understand the effect of a *nolo* plea, do you? I told your clients in the court room the effect of a *nolo* plea. If you didn't tell them, the Court advised them that the implications of a *nolo* plea were the same as a plea of guilty.

Mr. Ford: That's right. But, I didn't tell them beforehand because I didn't appreciate that fact. I might tell the Court, this is my first criminal anti-trust case, too, and it is my sole responsibility that I did not. It is entirely my fault that I didn't advise my clients what might happen and be prepared.

Now, it so happens that they are not prepared to serve at this time. Mr. Rector's wife day before yesterday had a major operation and she will be in the hospital for several weeks. They have three children at home. There are no servants, nobody to look after the place, and preparations have to be made where you are away for a quarter of a year to take care of many things in the home. These gentlemen both have responsible positions. I haven't had an opportunity to go into detail with them as to what their duties are, but I know that Mr. Rector is president of this corporation, has the direction of it, he has many decisions to make every day. The same thing is true of Mr. Raymond. He is vice president, people come to him for advice, for the making of decisions.

There has to be some arrangement made for the fixing of responsibility while they are away. I am sure the Court appreciates that, and the disruption that might result if such arrangements are not made. There are many employees in the corporation who will be affected. I think the confusion that may result if arrangements are not made for the fixing of responsibility may have an adverse effect on many people.

Now, very briefly, those seem to me are very moving considerations why the Court should not [so in transcript] grant some time and stay the execution until these men can arrange their affairs.

The Court: Are you speaking for all of them, Mr. Ford, or just Mr. Rector?

Mr. Ford: I am speaking for all of them, Judge, particularly Mr. Raymond and Mr. Rector. Not only that, these men have community responsibility. I am sure Mr. Rector would want to make some arrangements for the change of responsibility in his church work and his Better Business Bureau matters, and his other civic responsibilities. And I say again to the Court, this is entirely my fault. I feel very badly about it.

The Court: I have no sympathy with your statement, Mr. Ford. I think there were very able lawyers sitting at these tables in these proceedings and I don't think it is fair to the Court or to the Government or to yourselves to say at this time that you didn't fully understand what was going on. And I think furthermore, that your clients are businessmen, they are intelligent men, they have reached high positions in the business world. If they stood in this court room and didn't understand what was going on and what was told them, why, then their intelligence is below what the Court has a right to assume they have.

And, I don't think you should hold yourself responsible. I think you attorneys did a good job. You presented your case as you saw it. I think counsel for the Government did a good job. But, after all, the bare and true and unvarnished fact remains that they entered what was in effect a plea of guilty to price fixing. You may call it something else, but the legal effect and meaning of a plea of *nolo contendere* is that it is for all purposes a plea of guilty. The only thing it does is save you from meeting a prima facie case in case you are sued for treble damages under the Clayton Act. That is, your plea of *nolo contendere* is not admissible against you in a civil action. And, evidently you must have had in mind that fact when you were considering a plea of *nolo contendere*.

Mr. Ford: I think that is one of the things.

The Court: In other words, if you should be sued by any of your dealers as a result of this price fixing or this rigging of prices, your plea here cannot be introduced against you to make a prima facie case against you. So you did gain something by a plea of *nolo contendere*.

Mr. Ford: That's correct, and we gained something else.

The Court: And as to your statements as to prison sentence being imposed, why did

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the Congress put in a year's jail sentence if they didn't intend the courts to use it? Why did they raise the penalty from $5000 to $50,000? You could have been fined $50,000, you could have gotten a year in jail.

Mr. Ford: I appreciate all that.

The Court: You were only fined two-fifths of what the law provided. You were only given a third of a jail sentence of what the law provided.

Mr. Ford: That's correct. But, as I told the Court, the law, and necessarily so, was designed for the large and the small, the bad and the good, and it is up to the Court to render, in its sound discretion, justice in each case, because—

The Court: The Court attempts to do that. The Court wants to do justice. And, the Court is of the opinion under these circumstances that these gentlemen, occupying high and responsible positions in the business world and in their own companies, when they met in back rooms and rigged and fixed prices should have known what they were doing and should have known that they were violating the laws of the United States. I think that they are well enough informed as business men to know that the Congress by law has prohibited the rigging or fixing of prices. Price fixing is a very serious offense. So, I don't have much sympathy for your argument along that line.

Go ahead if you have anything else.

Mr. Ford: I just want to say, Judge—

The Court: Call Mr. Rector up here and Mr. Raymond so I can find out what their duties are.

Mr. Ford: All right, if the Court please.

The Court: Mr. Rector, what are your duties with your corporation?

Mr. Rector: I am president of True Temper Corporation.

The Court: And, what are your duties?

Mr. Rector: Well, the president in charge of sales, treasurer, comptroller and the merchandising vice president report to me.

The Court: Is there anyone to take your place?

Mr. Rector: We have no single person, no, sir. I am assuming my associates will do an able job in my absence.

The Court: The Court has no desire to harm your business as far as that is concerned. You do occupy a responsible position.

You were in the court room when the Court stated to you, asked your counsel if you knew the implications of a plea of *nolo contendere,* is that correct?

Mr. Rector: I was in the court room the full time, sir.

The Court: Were you misled by such a plea?

Mr. Rector: I don't believe I was misled. I was—

The Court: You are an intelligent man.

Mr. Rector: I was taking the judgment of Mr. Ford, my able counsel.

The Court: Well, he is an able lawyer, and I think you are an able businessman.

Mr. Rector: Thank you.

The Court: And, when you were told that the plea of *nolo contendere* was for all purposes and effects a plea of guilty, you understood the same punishment could be administered under such plea?

Mr. Rector: I don't believe there was any misunderstanding.

The Court: Very well. I think you are fair about it.

Now, Mr. Raymond, what are your duties and what is your official capacity?

Mr. Raymond: I am vice president and general sales manager of True Temper Corporation. My duties are to supervise the functioning of five of our operating divisions.

The Court: Were these medical affidavits submitted in behalf of either one of these men?

Mr. Ford: No, we have no medical affidavits.

The Court: These men are in good health?

Mr. Ford: Until yesterday morning I am sure they were in good health. I explained about Mr. Rector's wife, and we do not have as yet the doctor's statement on that but we have asked for it. If the Court wants it we will get it.

The Court: No. I am going to grant these men additional time before the commencement of sentence.

That will be all right at this time. The Court will hear the other gentlemen. Does anyone want to be heard on behalf of the other defendants?

Mr. Dean: I would like to be heard for Mr. Mains, if Your Honor please. Mr. Mains is, I believe, as Your Honor will remember, the vice president in charge of sales for Union Fork and Hoe. His responsibilities in that job are comparable, I believe, to those you have just heard described for the sales manager of the True Temper Company. He does not have an assistant in the sense that there is a lieutenant, you might say, overall for the duties he has to perform. His predicament for the interest of his company is about as you have heard described for this other company. He is wholly responsible for the sales program, which means the coordination of that program with the production in the company. By the nature of this business, which we described to you here the other day, there must be a flow in the different type of tools to meet the diversified orders. That whole coordination program is Mr. Mains' sole responsibility.

He is also in charge of the sales force; there are fifteen, I believe. And, in addition, carries his own direct responsibility and is on sales directly. The principal, most important customer of the company is his sole responsibility, which accounts for about 25 per cent of the business of the company today, and that coordination of that is his responsibility.

The Court: Would you call Mr. Mains up here.

Mr. Dean: Yes, I would.

The Court: Go ahead and complete your statement.

Mr. Dean: He could, of course, elaborate on what I said with regard to his duties. You have spoken a couple of times about the more personal aspect that I brought to Your Honor's attention in the affidavits I have here on the table before me. We do appeal also on account of Mr. Mains' present physical condition, and most particularly at this time he has these business problems also, that at Dr. George Nelson's reference Dr. John Meagher is in the process of a series of neuro-surgical examinations with him and has appointments for that, which does very much require his availability, Your Honor. We appeal to you for some time.

The Court: Now, you have a medical certificate?

Mr. Dean: Yes, I have two, the one of Dr. George Nelson, and of Dr. John Meagher.

The Court: Do either of those gentlemen make the statement that incarceration would endanger this man's life?

Mr. Dean: They say it would imperil his condition.

The Court: I don't quite understand that. As I indicated when you talked to me in chambers—

Mr. Dean: Yes, I remember that you did raise that point. I am not a doctor myself. Dr. John Meagher feels that it is a very serious thing. In the affidavit that I have from him he says that "it would be to the patient's absolute detriment to be incarcerated by reason of the fact that he needs at this time proper rest and vitamin intake, especially to avoid on account of this neurological condition any exposures, drafts and otherwise." We hope that the studies and treatment that he is having will, of course, relieve and control the situation which he has had for a number of years, not caused by this awful experience but perhaps it has been aggravated by this. It goes back, as you recall Doctor Nelson's affidavit, some five or six years. But, this is the additional reason why on this morning we appeal to Your Honor that we may have some time to prepare ourselves for this.

Now, as to this—

The Court: The Court read the affidavits. If you are raising the question that incarceration would endanger this man's life the Court will permit you to introduce medical evidence to that effect.

Mr. Dean: Thank you very much, Your Honor.

The Court: However, the Court will direct a physical examination by a court appointed doctor. I have no question, I know Dr. George Nelson, he is a high type, reputable specialist in this city.

Mr. Dean: I know you know.

The Court: But, nevertheless, I think the Government is concerned in this case and perhaps in all fairness to the parties concerned the Court ought to appoint a disinterested doctor.

Mr. Dean: Let me say here and now, Your Honor, that we of course would welcome that. I do want to urge this upon you in a more detailed way with regard

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to his condition. You asked me the specific question this morning as to what it would do to his health and life if he were incarcerated. I want to present that fully and carefully.

The Court: Now, it impairs anyone's health to go to jail. It is not a healthy place over there.

Mr. Dean: No.

The Court: But that alone is not sufficient. I think the rule governing such situations is whether or not locking this man up or incarcerating him would endanger his life. Now, this is not a vicious crime. The Court has no desire to incarcerate a man if it is going to imperil his life. But, the mere fact that it affects him otherwise is no excuse, because you couldn't take any man over to jail and say he wasn't affected, especially a business man.

Mr. Dean: I am sure all these men have been very, very much affected by the experience, and I quite understand your position, your Honor. I certainly would like to have the opportunity to have Mr. Mains examined during such time as you might allow us at this time.

The Court: The Court will appoint a physician or physicians to do that. However, the Court will expect you to pay the bill. There is no reason why the Government should be charged because you are raising the question of their health.

Mr. Dean: We would like to bring all this—

The Court: Now, is there anyone to take your place?

Mr. Mains: No, sir, there is not, sir. We are a company with a very small staff. That's in both the manufacturing, the production, sales of the company. I am in complete charge of the entire sales operation of our organization. I do not have a close assistant. In addition to supervising not only the salesmen, not only the connection with our production as Mr. Dean has outlined, but I also have the complete charge of taking care of our major accounts, and I would need some time, sir, to bring someone along and educate them in that regard.

The Court: The Court will check up your counsel's statement as to your physical condition and the Court will, at the conclusion of these proceedings, grant you time in which to straighten out your business affairs. However, you heard the questions asked Mr. Rector and the other gentlemen. Your counsel seems to be very much worried about his advice. The Court is not concerned with that. That affects client and attorney. But, you gentlemen were in court. You are an intelligent man. Not once but two or three times you were advised as to what a plea of *nolo contendere* was, it was in effect a plea of guilty. Did you so understand?

Mr. Mains: Yes, sir.

The Court: I think you are fair, too. Do you have anything else?

Mr. Dean: Thank you, Your Honor.

The Court: Is there anyone else?

Mr. McDonough: If it please the Court, I represent F. Bliss Winn, president of McDonough Co. in the Ames Division. Mr. Winn, until January of this year was sales manager or vice president in charge of sales of McDonough Co. In January of this year Mr. E. E. Alexander, the then president, retired and Mr. Winn stepped into his shoes. He thereupon created a considerable vacancy in the sales department. There were numerous accounts which had for many years been handled by him alone, substantial accounts, but he has not had an opportunity, had he been willing to, to turn over to anyone else and has continued to handle them. In addition he has taken on the duties of the chief executive officer with no vice president to relieve him in that regard.

All the matters that have been said as to these other defendant corporations as to their affairs would apply to Mr. Winn. There is this one additional factor, too, which I believe, since it is of considerable importance to the community in which Ames is located the Court would take into consideration. For some weeks Mr. Winn has been negotiating on behalf of Ames a labor contract with the AFL-CIO, which expired on November 1. He has been the chief negotiator for the company. That contract deadline is November 1 and if negotiations are not completed approximately 900 persons will be affected, it will probably result in strike. We believe if the negotiations may be permitted to resume that the issues, many of which have already been settled, may be completely ironed out, but that Mr. Winn has such a

personal touch with it and with the union official that it would be almost impossible for someone to step into his shoes at such a late stage of the negotiations after they have been going on for weeks.

Now, as to his personal affairs, of course he has the same problem no doubt that many of the other defendants have. Within the next ten days, I believe it is, his son who is in the army goes overseas. Of course he would like to see him off. His wife, who is a school teacher in Parkersburg —and incidentally, his wife became a school teacher because of a very great shortage of school teachers in the community. She had given up the profession sometime ago and went back to assist. But, some arrangements will have to be made by her since they have a younger son who reports in home before she does. Arrangements will have to be made for her to secure a replacement so she can be in the home.

Mr. Winn has certain financial obligations, as I assume most of us have, and he would have to make arrangements for an extension of time for payment of these. He is presently acting as the treasurer of the Union Mission Orphanage Drive in Parkersburg, Union Mission supplying housing for orphans or abandoned children, in excess of a hundred of them. He will have to make arrangements to account for funds in his hands and turn over that position to someone else. And, he is actively engaged presently in the industrial division of the United Fund Campaign. All these community projects in addition to his own personal projects.

Now, we did file with the Court, on yesterday, also an affidavit relating to his health, the affidavit disclosing that by reason of surgery at Mayo Clinic nearly two-thirds of Mr. Winn's stomach has been removed, and with the kind permission of the Court, since he has been incarcerated I have been taking his meals to him. I took his dinner to him last night and his breakfast about seven this morning.

The Court: Let the record be clear in that respect. You said he was ill and the Court permitted you to take his meals. But, I don't want it understood that any special meals are being sent in to anybody, to the other defendants here in this case, because the same treatment is afforded all Federal prisoners in jail.

Mr. McDonough: I did not mean to confuse that.

The Court: Due to his illness the Court told you you could take in the food.

Mr. McDonough: Yes, sir. So, we believe that these circumstances—

The Court: Would you call him up here, please.

Mr. McDonough: Mr. Winn?

The Court: Mr. Winn, what are your duties with the company?

Mr. Winn: I am the executive president of the company, sir.

The Court: Do you have anyone to take your place?

Mr. Winn: No, sir.

The Court: Now, your counsel has raised the question about your physical condition, that you have had major surgery. Is that correct?

Mr. Winn: Yes, sir.

The Court: I suppose the Court will have to take judicial notice of the fact that all you high pressured business men, lawyers and others, do develop ulcers and one thing and another.

Does your doctor say that incarceration would endanger this man's life, or will he say that?

Mr. McDonough: He will say so, sir. As I explained to the Court yesterday, by reason of the fact that we are from Parkersburg and the doctor is not a local doctor, I called Mr. Winn's doctor in Parkersburg at about eleven o'clock yesterday, just as soon as I left the court room, and asked him if he would dictate to my secretary in Parkersburg an affidavit which was put on the plane and flown up to here yesterday afternoon. Now, the doctor of course did not know, I assume, just exactly what facts the Court wanted the affidavit to set forth. The affidavit sets forth—

The Court: What I want to know is what I told other counsel. I want to know whether locking this man up would endanger his life. I know it might hurt his health. Jail is not a very agreeable place to be. But, that fact alone is not controlling.

Mr. McDonough: I can represent to the Court, and an affidavit will be obtained to that effect. In this affidavit the doctor does state that it would have critical effect upon him by reason of the abnormal size of his stomach and frequent feedings, the necessity for medication, the diet that he is on,

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bland diet, which is a strict diet which could not possibly be supplied in an institution, that it would have critical effect, and a statement could be obtained to just exactly that effect.

The Court: Now, the Court will tell you the same as it told other counsel, if you are raising the question as to this man's physical condition, that incarceration would endanger his life, you may present any medical evidence you have. But, the Court will direct that a court appointed medical expert or experts examine this man. The Court does that in fairness to the Government and the defendants. However, you will be expected to pay the expense of such an examination.

Mr. McDonough: Yes, sir. As I have previously indicated to the Court when I presented this affidavit on yesterday, we would welcome that opportunity if afforded to us.

The Court: The Court will perhaps designate a court appointed physician or physicians to examine these two men who claim to be ill.

Now, is there anything further?

Mr. McDonough: No, sir.

The Court: That is all, Mr. Winn.

Would Mr. Winn step back up here a moment.

Mr. Winn, you were in court during the entire proceeding in this case, were you not?

Mr. Winn: Yes, sir.

The Court: And, you heard the admonition of the Court and the statement of the Court at different times during the course of the trial, of the implications of a plea of *nolo contendere,* that it was in effect a plea of guilty?

Mr. Winn: Yes, sir.

The Court: Did you so understand?

Mr. Winn: I probably was under a misapprehension that there would be no restriction of freedom, but my answer to the question is yes, I did understand.

The Court: You heard the admonition of the Court—

Mr. Winn: Yes, sir.

The Court: —when the Court took your pleas, if you understood that the plea was in effect a plea of guilty insofar as punishment was concerned?

Mr. Winn: Yes, sir.

The Court: I think you are fair, too. I must say for you gentlemen that you have answered truthfully to the Court, because the Court did tell you at the time you changed your plea and asked you if you understood the implication of a plea of *nolo contendere.* I am glad that you gentlemen understood it even if some of your counsel did not, because I don't want it for a moment understood that you were taken advantage of in the matter. Because, the criminal statute under which you gentlemen are charged provides a penalty of a maximum fine of $50,000 and a year's imprisonment. So, when you changed your pleas you were taking all the chances, and the Court has no sympathy with the argument that this is a first case because I don't think the Congress would have put jail sentence in the statute if they didn't intend for a court to use it if it thought it was proper.

I sympathize with you gentlemen during all your troubles, but you are all intelligent men, you are bound to know what you did. You stand before the Court on a guilty plea. However, the Court has no desire to lock you up if it is going to endanger your life. I think you have had severe major surgery, according to your doctor's statement. However, the Court will have a disinterested specialist or specialists examine you at your expense.

Now, the Court is of the opinion—and, I understood the United States Assistant Attorney General has no objection to a stay of execution for a period of thirty days?

Mr. McCareins: The Government has no objection.

The Court: The Court, in view of the fact that you do occupy responsible positions in your business organizations, is going to grant you a stay of thirty days. You will return here at twelve o'clock noon on November 16 and report to the Marshal's office for the commencement of your sentence, unless there should be some finding to the contrary during the interim.

When will these men be available for physical examination?

Mr. McDonough: At the pleasure of the Court we will make them available.

The Court: Of course, that will be up to the doctors. I can't tell you when the doctors will see them.

Mr. McDonough: If the Court will designate the doctors, we are willing to—

The Court: I am not prepared to designate the doctors at this time.

Mr. McDonough: If the Court would advise us we would try to work out an agreeable time with the doctor.

The Court: The Court will take care of the doctor. This is a court appointed physician, it is not your physician. You can file anything you want to, any medical evidence you desire by your own physicians, but the Court, while it does not question the honesty and integrity of the family physician, nevertheless feels that his findings ought to be checked by a disinterested physician.

Mr. McDonough: When did Your Honor intend to designate the doctor?

The Court: I don't know. We have so many things to do. However, we will try to reach it. We will have thirty days time in which to have them examined. You will be advised.

Do you have something further?

Mr. McCareins: I have a question. Does the Court have any objection to the Government requesting counsel here that we may be furnished with whatever affidavits are supplied to you with respect to the health of these gentlemen?

The Court: Yes, I would suggest that you furnish counsel for the Government a copy of all medical evidence filed in this case. You will file it with the Court and furnish the Assistant Attorney General a copy of the evidence. And, you will be furnished a copy, if you so desire, of any findings made by a court appointed doctor.

Mr. McDonough: We will most certainly do that.

The Court: Do you want your doctor in the picture, too?

Mr. McCareins: No, nothing further.

The Court: The Court will permit the defendants to go until the date mentioned, November 16, at twelve o'clock, and their bonds will be continued.

Now, is there anything further? If not, you may recess court until two o'clock this afternoon.

[¶ 69,483] Revlon, Inc. v. American Mutual Company.

In the District Court of Oklahoma County, State of Oklahoma. No. 147665. Filed October 16, 1959.

Oklahoma Fair Trade Act

Fair Trade—Constitutionality of Oklahoma Fair Trade Act—Nonsigner Provision—Oklahoma Constitution.—The nonsigner provision of the Oklahoma Fair Trade Act was held unconstitutional on the grounds that (a) it delegates the legislative power of price fixing to private persons in violation of the Oklahoma Constitution, (b) it is repugnant to the due process clause of the Constitution in that it delegates to private persons resale price fixing powers that may be exercised, and which are exercised, arbitrarily, without legislative standards and guideposts, and (c) it violates the due process clause of the Constitution in that there is no real and substantial relation between fair trade price fixing and preventing of injury to the economic, social, and moral well being of the state, and the means adopted are not reasonable and appropriate for the accomplishment of the alleged purpose of the statute.

See Fair Trade, Vol. 1, ¶ 3085, 3258.38.

For the plaintiff: Granville Scanland, Oklahoma City, Okla.

For the defendant: Miskovsky and Miskovsky, by George Miskovsky, Oklahoma City, Okla.

Journal Entry of Judgment

A. P. Van Meter, District Judge [*In full text*]: This cause coming on to be heard before me, A. P. Van Meter, Judge of the District Court in and for Oklahoma County, Oklahoma, pursuant to regular assignment, on this 10th day of September, 1959, a regular court day of the July 1959 term of said Court, upon

The oral and written stipulations of facts, and

The issues drawn in the pleadings; and

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The plaintiff appearing by its attorney, Granville Scanland; and

The defendant appearing by its attorneys, Miskovsky and Miskovsky, by George Miskovsky; and

Thereupon, all the parties, in open Court, announce ready for trial:

Whereupon, the case proceeds to trial on the oral and written stipulations of facts and the issues drawn in the pleadings; and

The Court, after hearing the argument of counsel, took the cause under advisement, pending receipt of briefs to be filed by the parties; and

Now on this 8th day of October, 1959, the Court, after having received briefs from all parties in the case, and after having thoroughly reviewed the facts and the law, and being fully advised in the premises, finds:

[*Issue*]

That the defendant herein challenges the constitutionality of the Oklahoma Fair Trade Act, as found in the General Statutes of Oklahoma, Title 78, O. S. 1951, Sections 41-45; and

[*Nonsigner Provision Unconstitutional*]

The Court, having fully considered all the reasons suggested, argued, and briefed by both parties, further finds:

That the nonsigner provision of the Oklahoma Fair Trade Act, Title 78, O. S. 1951, Section 44, should be declared unconstitutional and void, for the following reasons:

The nonsigner provision of the Oklahoma Fair Trade Act delegates the Legislative power of price fixing to private persons, in violation of Article IV, Section 1, and Article V, Section 1, of the Oklahoma Constitution;

The nonsigner provision of the Oklahoma Fair Trade Act is repugnant to the due process clause of the State Constitution, in that it delegates to private persons resale price fixing powers that may be exercised, and which are exercised, arbitrarily, without Legislative standards and guideposts; and

The nonsigner provision of the Oklahoma Fair Trade Act violates the due process clause of the State Constitution, in that there is no real and substantial relation between fair trade price fixing and preventing of injury to the economic, social, and moral wellbeing of the State; and the means adopted are not reasonable and appropriate for the accomplishment of the alleged purpose of the Statute; and

Therefore, the Court finds:

That the judgment should be entered for the defendant;

That the plaintiff's application for injunction should be denied; and

That all costs of court incurred herein and incident hereto, and accrued and accruing herein, should be taxed to the plaintiff.

It Is Therefore Considered, Ordered, Adjudged and Decreed by this Court that judgment be, this date, to-wit: the 8th day of October, 1959, and hereby is, entered for the defendant, American Mutual Company, an unincorporated Association; and

It is Ordered by this Court that the application of the plaintiff, Revlon, Inc., for injunction, be, and the same hereby is, denied; and

It is Ordered by this Court that all costs of court incurred herein and incident hereto, and accrued and accruing herein, be, and the same hereby are, taxed to the plaintiff:

To all of which: The plaintiff Excepts, and Exceptions are allowed by the Court:

[*Appeal*]

Whereupon, the plaintiff, Revlon, Inc., a corporation, in open Court, gave notice of its intention to Appeal to the Supreme Court of the State of Oklahoma; and

The plaintiff praying on Appeal to the Supreme Court of the State of Oklahoma, and an extension of time within which to make and serve case-made:

It is Ordered by the Court that an extension of thirty (30) days, in addition to the time allowed by law, be granted to said plaintiff to make and serve case-made, the defendant to have three (3) days thereafter to suggest amendments, and the same to be settled on three (3) days' notice in writing by either party.

[¶ 69,484] **American Home Products Corporation v. Benny R. Homsey, Joe R. Homsey, and Sam Homsey, partners, d. b. a. American Mutual Company.**

In the District Court of Oklahoma County, State of Oklahoma. No. 147658. Filed October 16, 1959.

Oklahoma Fair Trade Act

Fair Trade—Constitutionality of Oklahoma Fair Trade Act—Nonsigner Provision—Oklahoma Constitution.—The nonsigner provision of the Oklahoma Fair Trade Act was held unconstitutional on the grounds that (a) it delegates the legislative power of price fixing to private persons in violation of the Oklahoma Constitution, (b) it is repugnant to the due process clause of the Constitution in that it delegates to private persons resale price fixing powers that may be exercised, and which are exercised, arbitrarily, without legislative standards and guideposts, and (c) it violates the due process clause of the Constitution in that there is no real and substantial relation between fair trade price fixing and preventing of injury to the economic, social, and moral wellbeing of the state, and the means adopted are not reasonable and appropriate for the accomplishment of the alleged purpose of the statute.

See Fair Trade, Vol. 1, ¶ 3085, 3258.38.

For the plaintiff: John G. Hervey and Hugh F. Owens, Oklahoma City, Okla.

For the defendants: Miskovsky and Miskovsky, by George Miskovsky, Oklahoma City, Okla.

Journal Entry of Judgment

A. P. Van Meter, District Judge [*In full text*]: This cause coming on to be heard before me, A. P. Van Meter, Judge of the District Court in and for Oklahoma County, Oklahoma, pursuant to regular assignment, on this 10th day of September, 1959, a regular court day of the July 1959 term of said Court, upon

The oral and written stipulations of facts, and

The issues drawn in the pleadings; and

The plaintiff appearing by its attorneys, John G. Hervey and Hugh F. Owens; and

The defendants appearing by their attorneys, Miskovsky and Miskovsky, by George Miskovsky; and

Thereupon, all the parties, in open Court, announce ready for trial:

Whereupon, the case proceeds to trial on the oral and written stipulations of facts and the issues drawn in the pleadings; and

The Court, after hearing the argument of counsel, took the cause under advisement, pending receipt of briefs to be filed by the parties; and

Now on this 8th day of October, 1959, the Court, after having received briefs from the parties in the case, and after having thoroughly reviewed the facts and the law, and being fully advised in the premises, finds:

[*Issue*]

That the defendants herein challenge the constitutionality of the Oklahoma Fair Trade Act, as found in the General Statutes of Oklahoma, Title 78, O. S. 1951, Sections 41-45; and

[*Nonsigner Provision Unconstitutional*]

The Court, having fully considered all the reasons suggested, argued, and briefed by both parties, further finds:

That the nonsigner provision of the Oklahoma Fair Trade Act, Title 78, O. S. 1951, Section 44, should be declared unconstitutional and void, for the following reasons:

The nonsigner provision of the Oklahoma Fair Trade Act delegates the Legislative power of price fixing to private persons, in violation of Article IV, Section 1, and Article V, Section 1, of the Oklahoma Constitution;

The nonsigner provision of the Oklahoma Fair Trade Act is repugnant to the due process clause of the State Constitution, in that it delegates to private persons resale price fixing powers that may be exercised, and which are exercised, arbitrarily, without Legislative standards and guideposts; and

The nonsigner provision of the Oklahoma Fair Trade Act violates the due process clause of the State Constitution, in that there is no real and substantial relation between fair trade price fixing and preventing of injury to the economic,

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social, and moral wellbeing of the State; and the means adopted are not reasonable and appropriate for the accomplishment of the alleged purpose of the Statute;

and

Therefore, the Court finds:

That judgment should be entered for the defendants;

That the plaintiff's application for injunction should be denied; and

That all costs of court incurred herein and incident hereto, and accrued and accruing herein, should be taxed to the plaintiff.

It Is Therefore Considered, Ordered, Adjudged and Decreed by this Court that judgment be, this date, to-wit: the 8th day of October, 1959, and hereby is, entered for the defendants, Benny R. Homsey, Joe R. Homsey, and Sam Homsey, partners, doing business as American Mutual Company; and

It is Ordered by this Court that the application of the plaintiff, American Home Products Corporation, a corporation, for injunction, be, and the same hereby is denied; and

It is Ordered by this Court that all costs of court incurred herein and incident hereto, and accrued and accruing herein, be, and the same hereby are, taxed to the plaintiff:

To all of which, the plaintiff Excepts, and Exceptions are allowed by the Court:

[*Appeal*]

Whereupon, the plaintiff, American Home Products Corporation, a corporation, in open Court, gave notice of its intention to Appeal to the Supreme Court of the State of Oklahoma; and

The plaintiff praying an Appeal to the Supreme Court of the State of Oklahoma, and an extension of time within which to make and serve case-made:

It is Ordered by the Court that an extension of thirty (30) days, in addition to the time allowed by law, be granted to said plaintiff to make and serve case-made, the defendant to have three (3) days thereafter to suggest amendments, and the same to be settled on three (3) days' notice in writing by either party.

[¶ 69,485] Cluett, Peabody & Co., Inc. v. J. W. Mays, Inc.

In the New York Court of Appeals. Argued May 14, 1959. Decided July 8, 1959.

Appeal from a judgment of the New York Supreme Court, Appellate Division, Second Judicial Department.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Selling Below Fair Trade Prices—Notice of Price Restriction—Defenses—Refusal of Fair Trader to Purchase Goods—Motion to Dismiss Appeal.—Rulings that (1) a nonsigner of a fair trade contract who purchased merchandise without knowledge that it was subject to a fair trade agreement did not violate the New York Fair Trade Act when it sold such merchandise below the prices specified in the fair trade agreement, and (2) a fair trader, in order to enforce its statutory rights against a nonsigner, is under no obligation to purchase fair traded goods from the nonsigner were affirmed. A motion to dismiss the appeal on the ground that, since the nonsigner sold all of the fair trader's goods, the question involved was moot was denied.

See Fair Trade, Vol. 1, ¶ 3268.34, 3460.

For the appellant: John F. Dooling, Jr., and Stephen Rackow Kaye.

For the respondent: Milton Kunen, Sidney A. Diamond, Cecilia H. Goetz, and Herman Schwartz.

Affirming a decision of the New York Supreme Court, Appellate Division, Second Judicial Department, 1958 Trade Cases ¶ 68,922, which reversed a decision of the New York Supreme Court, Kings County, 1957 Trade Cases ¶ 68,711.

[*Appeal*]

Appeal from a judgment in favor of defendant, entered January 17, 1958, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department which (1) reversed, on the law,

a judgment of the Supreme Court in favor of plaintiff, entered in Kings County upon a decision of a Special Referee (MEIER STEINBRINK, Special Ref.), enjoining defendant from advertising, offering for sale or selling at retail in New York State certain shirts manufactured by plaintiff bearing its trade-mark at less than the prices stipulated in plaintiff's fair-trade contract, except that, as to certain shirts purchased by defendant on March 15, 1957, defendant might offer to sell to plaintiff the balance of stock on hand at its cost and, if plaintiff refused, defendant could dispose of them at any price without reference to the fair-trade agreement, and (2) dismissed the complaint. The action was commenced to enjoin defendant from selling shirts manufactured by plaintiff at less than their fair-traded prices. On January 28, 1955 plaintiff, manufacturer of the widely advertised "Arrow" shirt, entered into a fair-trade agreement with a retailer in New York City providing minimum retail prices of three white shirt styles. Thereafter, more styles were added and the prices revised. Plaintiff sent written notice of the revised price schedule which became effective January 1, 1957 to its more than 400 customers in the metropolitan area. Defendant was not a customer and did not receive any notice. Approximately 20% of plaintiff's white shirts were not fair-traded. The advertisements of plaintiff's shirts in magazines of national circulation showed, without differentiation, suggested retail prices which the retailer was free to disregard and retail prices which were mandatory under the Fair-Trade Law. In March, 1957 defendant purchased a lot of plaintiff's shirts from an exporter. Defendant did not ask whether the shirts were price fixed and the exporter did not tell defendant. After purchasing the shirts defendant advertised them for less than their fair trade price. On the day the advertisement appeared, plaintiff wrote defendant that a fair-trade contract existed and stated the retail prices therein fixed. Defendant continued to sell the shirts at less than their fair-trade price and disposed of all the shirts. Section 369-b of the General Business Law provided that a retailer who had not signed a fair-trade agreement was guilty of unfair competition if he "Wilfully and knowingly" advertised and sold any commodity at less than the price stipulated in a fair-trade agreement covering such commodity. The Special Referee found that defendant had no knowledge of any fair-trade contracts when it purchased the shirts. In the Court of Appeals defendant argued that the statute was not violated by its purchase of plaintiff's shirts without knowledge of the existence of fair-trade agreements covering them, and that the statute was not violated by its subsequent sale of such shirts at less than fair-trade prices despite its after-acquired knowledge. Motion to dismiss the appeal on the ground that, since defendant sold all of plaintiff's shirts, the question involved was moot.

[*Ruling*]

[*In full text*] Judgment affirmed, with costs; no opinion. Motion to dismiss appeal denied.

Concur: Chief Judge CONWAY and Judges DESMOND, DYE, FULD, FROESSEL, VAN VOORHIS and BURKE.

[¶ 69,486] Richfield Oil Corporation v. Karseal Corporation.

In the United States Court of Appeals for the Ninth Circuit. No. 15,514. Opinion filed October 13, 1959.

Appeal from the United States District Court for the Southern District of California, Central Division. LEON R. YANKWICH, District Judge.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Exclusive Dealing Under Sherman Act, Section 1, and Clayton Act, Section 3—Agreements by Independent Service Stations to Deal Exclusively in Accessories Sponsored by Oil Company—Legality.—There was sufficient evidence to sustain a jury's verdict that an oil company violated the antitrust laws by requiring its independent service stations to deal exclusively in automobile accessories sponsored by the company, thereby denying a manufacturer of automobile polish "access" to those stations. The manufacturer offered testimony to the effect that (1) distributors of its polish were

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generally unsuccessful in selling the product to the company's independent service stations, (2) a representative of the oil company told one of the company's station operators to get the manufacturer's polish out of the window or they would both lose their jobs, (3) salesmen for the manufacturer were told not to come in when the oil company's men were around, (4) the manufacturer's polish was occasionally sold in the stations, but it was kept under the counter and not displayed, and (5) a merchandiser for the oil company told a station operator that he did not want to see the manufacturer's polish in the station. Thus, it was apparent that independent service station men were "threatened and discouraged" from purchasing the manufacturer's polish. The jury could have concluded that there was a "general pattern of exclusion" of the manufacturer's polish from the oil company's independent stations, and that the company was responsible for that exclusion. Those independent operators of the stations were not the company's employees, and it had no right to tell them "not to buy other products."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.690; Exclusive Dealing, Vol. 1, ¶ 4009.100.

Private Enforcement and Procedure—Suit for Civil Damages—Evidence Admissible to Prove Violations of Antitrust Laws—Effect of Clayton Act, Section 5—Prior Government Decree—*Prima Facie* Evidence or "Conclusive" Proof of Violations—Jury Instructions.—A trial court erroneously instructed a jury that a prior Government decree in which an oil company was held to have violated the antitrust laws by requiring its independent service stations to deal "exclusively" in automobile accessories sponsored by the company was *res judicata* in a private treble damage action, and precluded the company from controverting "the general proposition that such restrictions existed." Section 5 of the Clayton Act, which makes Government decrees *prima facie* evidence in private actions, refers to "estoppel" merely to define the area which the *prima facie* case covers. If that section made the Government decree *conclusive* evidence of the antitrust violation, rather than merely *prima facie* evidence which the oil company could rebut, it would deprive the company of its right to a jury trial on the violation issue. In the Government decree, it was held that the company had restrained trade in "waxes and polishes." Suppose, however, that the decree had also determined particularly a restraint against the manufacturer's polish. Applying the trial court's logic, this would have required him to instruct the jury that the Government decree was conclusive on the question of restraint against the manufacturer and its product, and that the only question left open to the jury was the question of the manufacturer's damages. That is not the law. The error, however, was not prejudicial, since the trial court's other instructions required the manufacturer to prove that the unlawful restraint was applied to its product, that it was damaged thereby, and the extent of its damages. Also, it could not be argued that the jury was prejudiced by being informed of the Government decree, since it was clearly admissible. Further, the oil company's objection to the trial court's jury instructions were not available on the appeal, because the error had been waived by the manufacturer's failure to state the grounds for its objections in accordance with Rule 51 of the Federal Rules of Civil Procedure.

Further, the evidence was sufficient to sustain the verdict. In view of the *prima facie* effect of the Government decree, all that the manufacturer had to do was show that the general restraint applicable to "waxes and polishes" referred to in the decree was actually applied to its own product. That was established, since it was apparent from the testimony that the oil company had "threatened and discouraged" its independent service station operators from purchasing the manufacturer's polish.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.225, 9012.350, 9012.500.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments—Causal Relation Between Antitrust Violations and Damage to Plaintiff—Sufficiency of Proof.—In an automobile polish manufacturer's treble damage action against an oil company which prevented its independent service stations from purchasing the manufacturer's polish, there was a clear "causal connection" between the alleged restraints and the damage suffered by the manufacturer. That causal connection was proved when the manufacturer showed that the illegal restraint had been applied to its product. It seemed patent that

the restraint, when applied, would result "in some loss of business." While there is a distinction between the quantum of proof required to establish the *fact* of damage as distinguished from the *amount,* here the impact of the oil company's exclusive dealing practices on the polish manufacturer was shown by evidence which the jury was entitled to, and did, believe.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.350.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Public Injury—Injury to One Person as Injury to "Public"—Prior Government Decree as Conclusive Proof of Public Injury.—A manufacturer of automobile polish, in its treble damage action against an oil company which "threatened and discouraged" its independent service stations from purchasing the manufacturer's polish, proved "public injury" when it proved the impact of the oil company's actions on it (the manufacturer) and its polish, since it was a member of the "public." The purpose of the antitrust laws is to protect the interstate market from illegal restraints. If such restraints are applied to one person in the interstate market, then free competition is hurt and damaged. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 1959 Trade Cases ¶ 69,316, the United States Supreme Court held that a combination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. . . ." Here, when the oil company hurt and damaged the polish manufacturer, "it hurt and damaged free competition, the touchstone of the antitrust laws." While the trial court was of the view that public injury was "conclusively established" by a prior Government decree entered against the oil company, the error was not prejudicial since "public injury" was proved by the manufacturer's proof of its own damages, and the trial court's other instructions left to the jury all of the proper elements of a treble damage case.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.900.

Private Enforcement and Procedure—Suit for Civil Damages—Sufficiency of Proof—"Just and Reasonable Estimate" of Damages—Lost Profits—Competitor's Sales of "Comparable" Product as Basis for Estimating Lost Profits.—A jury verdict of $7900 as the damage which a manufacturer of automobile polish suffered by reason of the fact that it was "denied access" to an oil company's independent service stations was not unjust or unreasonable. The quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage. Here, the jury was properly instructed that the plaintiff was entitled to an approximation of what its profits would have been if its rights had not been interfered with. The manufacturer could not prove precisely how many cases of polish "were *not* sold," but it presented to the jury a realistic formula to assist it in arriving at a just and reasonable verdict. The manufacturer offered proof that its product sold as well, or, in many instances, 3 to 7 times better, than a "comparable" product. Then, the manufacturer offered evidence that it was staffed, equipped, and able to produce sufficient polish to meet additional sales; that its net profit per case was $0.57; and that the oil company, during the pertinent period, had purchased 4707 cases of the "comparable" product. Then, contending that the jury could infer that its polish outsold the "comparable" product 3 to 1, the manufacturer estimated that, if it had not been "denied access" to the oil company's stations, 14,121 cases of its polish would have been sold at those stations. There was little difference between that formula and the computations made in personal injury cases. Both are tort actions and, in each case, the plaintiff cannot prove his "dollars and cents" damages to a mathematical certainty.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.400.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable—Attorneys' Fees—Reasonableness of Fees Allowed.—An oil company, on its appeal from a judgment entered on a jury verdict that it had violated the antitrust laws by preventing its independent service stations from purchasing a manufacturer's automobile polish, abandoned its objections to the reasonableness of a $7500 attorney's fee based on a trebled judgment of $23,700. In any event, the reviewing court did not consider the allowance unreasonable.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725.

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For the appellant: O'Melveny & Myers (William W. Alsup), and William J. DeMartini, Los Angeles, Cal.

For the appellee: Richard I. Roemer, Walter S. Binns, J. J. Brandlin, and Thomas G. Baggott, Los Angeles, Cal.

For a prior opinion of the U. S. Court of Appeals, Ninth Circuit, see 1955 Trade Cases ¶ 68,020.

Before: Stephens, and Fee, Circuit Judges, and James M. Carter, District Judge.

[*Treble Damage Action*]

James M. Carter, District Judge [*In full text*]: This is an appeal from a judgment entered on a jury verdict in a private treble damage action under the anti-trust laws. It presents two questions, (1) the sufficiency of the evidence to support the verdict and judgment, (2) the correctness of instructions given the jury on the effect of a prior decree in a government anti-trust case.

[*Attorney's Fees*]

There was originally presented a third question, the reasonableness of an allowance of $7500.00 attorney's fee based on the trebled judgment of $23,700.00. This point was abandoned by appellant Richfield during the oral arguments on the appeal. In any event we do not consider the allowance of such attorney's fee unreasonable.

[*Prior Proceedings*]

This case has been here before. In *Karseal Corporation v. Richfield Oil Corporation* (1955) [1955 Trade Cases ¶ 68,020], 221 F. 2d 358, this same panel of the court held that the amended complaint stated a cause of action and reversed a district court judgment dismissing the action. Reference is made to that decision for the pertinent allegations of the amended complaint.

This action was based upon a prior decree in the government's civil anti-trust action against the Richfield Oil Corporation, *United States v. Richfield Oil Corporation,* (S. D. Cal. 1951) [1950-1951 Trade Cases ¶ 62,878], 99 Fed. Supp. 280, affirmed *per curiam* in *Richfield Oil Corporation v. United States* (1952) [1952 Trade Cases ¶ 67,262], 343 U. S. 922, 72 S. Ct. 665, 96 L. Ed. 1334. That case will hereafter be referred to as the *Richfield* case.

The *Richfield* case held generally that Richfield's handling of its TBA items, (tires, batteries and accessories) was illegal and in violation of the anti-trust laws because of Richfield requirements by contracts and agreements of exclusive dealing by independent service stations in the TBA items supplied by Richfield. Included within "accessories" under the terms of the *Richfield* decree, were "automobile waxes and polishes." Karseal's wax and polishes were not expressly named in the *Richfield* decree. The trial court in the *Richfield* case concluded and found that the exclusive dealing practices and agreements had

> "the necessary and intended effect of denying manufacturers and suppliers of . . . automotive accessories, competitive to those manufactured or sponsored by Richfield, access to a substantial number of outlets." [1]

Karseal, claiming that it was within the target area of Richfield's violation of the anti-trust laws and was proximately damaged by Richfield's illegal acts, brought the present action, seeking damages in the sum of $135,000 and praying that the damages be trebled. After the reversal of the dismissal of the action in *Karseal v. Richfield* (*supra*), the case was transferred to another judge, (Honorable Leon Yankwich) and was tried to a jury. A verdict in the sum of $7900.00 was returned. The verdict was trebled and judgment entered for $23,700.00, attorney's fees and costs. The district court had jurisdiction of the cause, Sec. 4 of the Clayton Act. 15 U. S. C. A., Sec. 15. This court has jurisdiction of the appeal, 28 U. S. C. A., Secs. 1291, and 1294. The appeal was timely filed.

I

The Evidence is Sufficient to Support the Verdict and the Judgment

[*Sufficiency of Evidence*]

Richfield makes dual contentions—

(a) That there was not substantial evidence of an illegal restraint on Karseal's product, and (b) That there was insufficient evidence of damage.

[1] The quotation is from a conclusion of law. The findings were to the same effect.

A. Sufficiency of the evidence as to illegal restraint.

[*Proof Required*]

Flintkote Company v. Lysfjord (9 Cir. 1957) [1957 TRADE CASES ¶ 68,674], 246 F. 2d 368, cert. denied, 355 U. S. 835, states as follows:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly,' *Bigelow v. RKO Radio Pictures, Inc.*, [327 U. S. 251], *supra*, at p. 264. The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the amount of damage."[2] (p. 392). [Italics by the Court]

[*Prior Government Decree*]

The prior *Richfield* decree which was admissible and used in evidence against the appellant, determined that Richfield had violated the antitrust laws by agreements and understandings, written and oral, directly affecting and unreasonably restraining the course of interstate commerce in TBA automobile accessories, including waxes and polishes. Thus, the *Richfield* decree itself was *prima facie* evidence of the restraint of commerce in connection with waxes and polishes. There was substantial evidence that this restraint was not only applied to waxes and polishes generally, but to Karseal's product, "Wax Seal."

[*Rule on Appeal*]

Richfield's brief argues the evidence most favorable to its position as if the matter were now before a trial court or jury for decision.

The rule is clear that on appeal from a judgment based upon a jury's verdict, the verdict and judgment based thereon will be sustained if there is substantial evidence in the record in support thereof. We are required to view the evidence in a manner most favorable to the prevailing party, *Glasser v. United States*, (1942) 315 U. S. 60, 69, 62 S. Ct. 457, 87 L. Ed. 680; *Woodward Laboratories v. United States*, (9 Cir. 1952) 198 F. 2d 995; *Las Vegas Merchant Plumber Assn. v. United States*, (9 Cir. 1954) [1954 TRADE CASES ¶ 67,673] 210 F. 2d 732, 742; *Flintkote Co. v. Lysfjord, (supra)* p. 375. The prevailing party is entitled to rely upon evidence most favorable to its position.

[*Exclusion of Product—Threats*]

The testimony offered by Karseal consisted of distributors and salesmen for "Wax Seal," a former Richfield service station operator, a former merchandiser for Richfield, a former TBA man for Richfield and an independent service station operator and others. Without enumerating the testimony in detail, the record shows that distributors for "Wax Seal" were generally unsuccessful in their efforts to sell their product to Richfield TBA men and Richfield service stations; that a Richfield representative told the Richfield service station operator to get Wax Seal out of his window or they would both lose their jobs; that salesmen for "Wax Seal" were told not to come in when Richfield men were around; that "Wax Seal" was occasionally sold in Richfield service stations but kept under the counter and not displayed. A former merchandiser for Richfield testified that he would warn and threaten Richfield dealers who carried non-authorized TBA products. A Richfield merchandiser told a Richfield operator he did not want to see "Wax Seal" in the station.

Thus it was apparent to the jury that independent Richfield service station men were threatened and discouraged from purchas-

[2] Other cases to the same effect are: *Wolfe v. National Lead Co.*, (9 Cir. 1955) [1955 TRADE CASES ¶ 68,094], 225 F. 2d 427, cert. den. 350 U. S. 915; *G. & P. Amusement Co. v. Regent Theatre Co.*, (N. D. Ohio, 1952) [1952 TRADE CASES ¶ 67,360], 107 F. Supp. 453, 461; affirmed *per curiam* (6 Cir. 1954) [1954 TRADE CASES ¶ 67,888], 216 F. 2d 749; *Chiplets, Inc., v. June Dairy Products Co., Inc.*, (D. N. J. 1953) [1953 TRADE CASES ¶ 67,625], 114 F. Supp. 129, 143-144; *Turner Glass Corporation v. Hartford-Empire Co.*, (7 Cir. 1949) [1948-1949 TRADE CASES ¶ 62,379], 173 F. 2d 49; *Story Parchment Co. v. Paterson Parchment Paper Co.*, (1931) 282 U. S. 555, 562, and *Keogh v. Chicago & Northwestern Railway Co.*, (1922) 260 U. S. 156, 164-165.

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ing "Wax Seal" and when occasionally they did purchase, were required to conceal this fact from Richfield and hide the product from view. The jury, looking at the evidence most favorable to Karseal, could conclude that there was a general pattern of exclusion of "Wax Seal" from Richfield service stations, for which Richfield was responsible. As the trial judge stated during discussion with counsel, Richfield

> "had no right to tell the operators of stations, independent operators and not [Richfield] employees, not to buy other products."

[*Government Decree—Additional Evidence Required*]

In view of the *prima facie* effect of the prior antitrust decree, all that plaintiff was required to do, as far as proving restraint is concerned, was to show that the general, restraint applicable to waxes and polishes referred to in the prior decree was actually applied to the Karseal product, "Wax Seal."

[*Evidence Sufficient*]

There was sufficient evidence to warrant the jury's conclusion as to restraint.

B. The evidence as to damage was sufficient to sustain the verdict and judgment.

(a) *Causal connection between restraint and damage.*

[*General Rule*]

Richfield concedes that once Karseal had shown that the defendant had violated the antitrust laws, and the further fact that Karseal actually suffered damage to its business or property as a result of such violation, the jury was permitted to make a just and reasonable estimate of the amount of plaintiff's damage. But Richfield insists that there must be first, proof not only of an unreasonable restraint of trade by the defendant, but also a *causal connection* between defendant's act and a loss of anticipated revenue to plaintiff.

[*Restraint "Applied" to Product as Proof of Causation*]

Karseal concedes this general statement of the law but asserts that having shown the illegal restraint applied to its product, it had proved the causal connection between the defendant's wrongful act and the loss of revenue. We agree. It seems patent that the restraint applied would result in some loss of business.

[*Cases*]

Wolfe v. National Lead Co., (supra) is cited by Richfield for its holding that there was *no proof that the plaintiffs had suffered damage.* Richfield states,

> "In affirming the court pointed out the important distinction in the quantum of proof required as to the *fact* as distinguished from the *amount* of damages."

In the case at hand there was clear causal connection between the alleged restraints applied and damage suffered.

Contrast the factual basis in *Monticello Tobacco Co. Inc. v. American Tobacco Co.* (2 Cir. 1952) [1952 Trade Cases ¶ 67,300], 197 F. 2d 629, with the factual situation here. In *Monticello,* plaintiff could not prevail because of absence of a showing of *causal connection* between the illegal acts of the defendants and the "jobbers' refusals to handle plaintiffs' products." (p. 633). Here the impact of Richfield's exclusive dealing practices on Karseal was shown by evidence the jury was entitled to and did believe.

(b) *A just and reasonable estimate of damage.*

[*Lost Profits*]

How then is plaintiff to make a showing which will permit the jury to make a just and reasonable estimate of its damage? The Richfield brief concedes,

> "It is, of course, true that the quantum of proof required to establish the amount of damage is not and should not be as great as that required to establish the fact of damage. If there is substantial evidence that damage to the plaintiff in fact resulted from wrongful conduct of defendant, it is proper to permit the jury to make a just and reasonable estimate of the amount thereof. . . ."
>
> "A study of the adjudicated cases in this area readily dispels any impression that this question of damages is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in anti-trust legislation. *Story Parchment Co. v. Paterson, supra,* 282 U. S. at page 565, 51 S. Ct. 248," *Flintkote Company v. Lysfjord (supra)* p. 391. See the general discussion following the above quotation, pp. 391-394.

There is no particular way for a plaintiff, injured by a defendant's violation of the anti-trust laws to show precisely what sales it lost. It certainly cannot prove precisely

how many cases of "Wax Seal" were *not sold.*

To assist the jury in making a "just and reasonable estimate of damage," plaintiff offered proof which the jury could believe and consider, that "Wax Seal" sold on the free market, as well or in many instances 3 to 7 times better than a product known as "Mac's," and that "Mac's" was generally a comparable product. Evidence was offered which the jury was entitled to believe that during the period of time involved in this case that Richfield purchased from Mac's Super Gloss Company, 4707 cases of "Mac's" polish. Karseal then contended that the jury could infer that "Wax Seal" outsold "Mac's" 3 to 1, and that therefore had plaintiff not been denied access to the 3000 Richfield service stations during the six years between 1947 and 1953, that an estimate of approximately 14,121 cases of "Wax Seal" would have been sold at Richfield stations. Karseal offered evidence which the jury were entitled to believe, that it was staffed, equipped and able to produce sufficient "Wax Seal" to meet these additional sales. It also offered evidence, which the jury was entitled to believe, that its net profit per case of "Wax Seal" for the period in question was 57¢ per case.

Had the jury based its verdict on this computation, the result of course would have exceeded the verdict rendered by about $150.00 but the jury could have well taken into account that some "Wax Seal" was actually sold by the Richfield stations.

We do not see much difference between the suggested formula as an assist in arriving at just and reasonable damages, and a chart placed on a blackboard in a personal injury case, where plaintiff's lawyer outlines his computations as to loss of earnings, pain and suffering, and the various other items of damage. The plaintiff is not required to prove with mathematical certainty the amount of its damage resulting from a defendant's violation of the antitrust laws.

Story Parchment Company v. Paterson Parchment Paper Company, (supra) at pp. 562-563, states:

> ". . . It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. *The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount . . .*
>
> "Where the tort itself is of such a nature as to preclude the ascertainment of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, if will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making, were otherwise. . . .". [Emphasis added]

Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc. (2 Cir. 1949) [1948-1949 TRADE CASES ¶ 62,467], 176 F. 2d 594, at 597, states:

> ". . . Damages in such a situation necessarily cannot be assessed with mathematical precision; but the testimony of plaintiff's expert witness, Samuelson, 'while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted.' *William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada,* 2 Cir. 42 F. 2d 152, 155, certiorari denied *Associated Bill Posters of U. S. and Canada v. William H. Rankin Co.,* 282 U. S. 864, 51 S. Ct. 37, 75 L. Ed. 765. Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy. . . ."[3]

The record showed a restraint in interstate commerce on waxes and polishes which moved in interstate commerce, and particularly a restraint upon "Wax Seal" manufactured and sold by Karseal. It is patent that damage would result. The jury could conclude from the evidence that this restraint applied to Karseal was a planned and continuous one, and that it generally affected to a greater or less degree the

[3] See: *Eastman Co. v. Southern Photo Co.,* (1927) 273 U. S. 359; *Bigelow v. RKO Pictures,* (1946) [1946-1947 TRADE CASES ¶ 57,445], 327 U. S. 251.

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majority of the 3000 Richfield service stations. The jury had evidence before it which indicated that Karseal out-sold on the free market a comparable product such as "Mac's" and had evidence as to how much of the "Mac's" product was sold in Richfield stations during the time involved.

We equate the just and reasonable estimate of damage to the just and reasonable verdict the jury must render in a personal injury case. Both are Tort actions. In neither can the plaintiff prove to any mathematical certainty, what are the damages in dollars and cents.

Story Parchment Company v. Paterson Parchment Paper Company, (supra) at 565, states:

> ". . . There are many cases in which damages are allowed where the element of uncertainty is at least equal to that in the present case—as, for example, copyright and trade mark cases, cases of unfair competition, and *many cases of personal injury* . . .". [Emphasis added]

Under all the facts in the case the damages must have a reasonable and fair relationship to the type, extent and period of the restraint applied, the number of outlets affected by the restraint and the kind of product, its price and salability, the profit made on sales, and an estimate of the amount of profit lost by reason of the illegal activities of the defendant. There was here proof of such matters.

In *Flintkote Co. v. Lysfjord, (supra)* plaintiffs were in their first year of working for themselves with no prior record of the success of their business. In the case at hand there was proof of gross dollars sales of $130,000 in the year ending June 30, 1948 and gross dollars sales of $501,000, $675,000, $799,000, $621,000 and $686,000 in the following years. This was *not* proof of business activity prior to the application of the illegal restraints, but *during* the period thereof. We see no reason why a plaintiff who has a substantial volume of sales during a period of illegal restraints would not be damaged by such restraint even if its business started during such period of restraint. The jury might have believed such volume of business indicated no restraint and no damage, but it found to the contrary.

This case is not controlled by *Flintkote Co. v. Lysfjord, (supra)* or *Wolfe v. National Lead Co., (supra)*. Both are distinguishable. Here there was proof of illegal restraint, obvious causal connection between restraint and damage and proof of sufficient facts to permit the jury to make a just and reasonable *estimate* of damages.

[*Jury Instructions—Reasonableness of Verdict*]

Although Karseal sued for $135,000, its counsel realistically approached the problem and presented to the jury a realistic formula, not as exact proof of its damage but to assist the jury in arriving at a just and reasonable verdict. The instructions on damages, unchallenged, were fair and accurate and presented fully the applicable law on damages in this type of action.[4] Looking at the entire record, we cannot say that a verdict of $7900 as the damage suffered for restraint applied on a majority of 3000 service stations in a six year period was unjust or unreasonable.

[4] The court's instructions on damages were as follows:

I instruct you that the purpose of damage in an anti-trust action of this sort is to put the plaintiff in as good a position as if the illegal acts had never happened.

The law, therefore, allows you, as members of the jury, to arrive at an amount of damages which, in your judgment, under the proof in the case, equals the amount of plaintiff's profit lost as a result of defendant's illegal actions. In this regard, you cannot return a verdict based upon mere speculation, guesswork, or surmise, but the plaintiff, if you find it has suffered injury, is entitled by law to an approximation of what its profits would have been had its rights not been interfered with. Let's re-read that last sentence. In this regard, you cannot return a verdict based upon mere speculation, guesswork, or surmise, but the plaintiff, if you find it has suffered injury, is entitled by law to an approximation of what its profits would have been had its rights not been interfered with.

If you determine that defendant did in fact prevent some of its dealers from purchasing plaintiff's product Wax Seal, and that these dealers would otherwise have purchased plaintiff's product, plaintiff's right to recover is limited to the profits which plaintiff would have made on those sales which plaintiff's distributors would have made but for the action of defendant.

Where the plaintiff had an established business, and the future profits could be shown by past experience, it is permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is

II.

THE INSTRUCTIONS ON THE USE TO BE MADE BY THE JURY OF THE PRIOR DECREE

After giving the general instructions and explaining to the jury the substance of the prior equity decree, the court gave the following instructions which Richfield contends is error:

". . . The ordinary meaning of the phrase *'prima facie* evidence' is this: *'Prima facie* evidence' of a fact is such evidence as, in the judgment of the law, is sufficient to establish the fact, and, if

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afforded, although the result be only approximated.

If you come to a determination that the plaintiff has been damaged as a result of illegal acts upon the part of the defendant, you may arrive at the amount of such damages as follows:

First: You may consider the evidence regarding the relative amount of auto polish and auto wax sold in the independent service stations which were under written and oral contractual agreements with the Richfield Oil Corporation.

Second: You may consider, in connection with the foregoing, the amount of gross profit which the plaintiff derived from the sale of its product.

Third: You may consider the amount of plaintiff's auto polish and wax sold in service stations under contract with Richfield Oil Corporation in which plaintiff was able to place its product for sale.

The doctrine of proximate cause requires plaintiff to prove that but for oral agreements between defendant and service station dealers the injury complained of by plaintiff would not have occurred. If plaintiff did not suffer any injury to its business or property or if plaintiff was injured by causes other than acts of the defendant, then such injury was not proximately caused by the acts of the defendant and plaintiff is not entitled to recover from the defendant.

Plaintiff's right to recover is limited to actual damages, the amount of which can be determined with reasonable certainty from the evidence. Plaintiff is not entitled to damages which, as I stated before, are merely speculative, remote or uncertain. I do not mean to say that plaintiff would be precluded from recovery because of the fact that damages may not be exactly computed. Damages are recoverable if you are satisfied from the evidence that they may be reasonably approximated upon the evidence in the case. The question of the amount that plaintiff would be entitled to, if you conclude plaintiff is entitled to a recovery, is entirely and solely your responsibility, but it must be based upon some evidence in the case as a foundation that furnishes at least a reasonable approximation of damages that plaintiff has sustained, and cannot exceed the amount prayed in the complaint.

In determining damages you may consider the loss, if any, of profit which the plaintiff has suffered when deprived of the right to sell its products through retail service stations under contract to defendant, Richfield Oil Corporation.

In arriving at the extent of such damage suffered by the plaintiff, you may compare the amount of cleaner, auto polish, and wax sold in such service stations by one of the plaintiff's competitors whose products were not denied access to these stations under contract with Richfield Oil Corporation. After having selected a comparable product or products to plaintiff's product, you may ascertain the gross profit which plaintiff would have received from its sale of an equivalent amount of auto cleaner, polish and wax, had it not been denied access to retail stations under contract with the Richfield Oil Corporation. In no case may you award damage which exceeds the amount asked for in the plaintiff's complaint, and as to which testimony was given in the record.

However, the mere fact that the plaintiff may or may not have made as much profit as some competitor does not prove or disprove a violation of the antitrust laws. In a competitive system it is natural that some people will be more successful than others.

The question whether any injury to plaintiff's business or property was caused by the allegedly unlawful acts of the defendant is one that you should not consider prior to determining the issues whether there actually were oral agreements between defendants and service station dealers relating to plaintiff's product. If you decide against plaintiff on this question, it would not be necessary to consider the question of injury and it would be your duty to immediately return a verdict in favor of the defendant.

There is evidence that during parts of the period for which plaintiff claims damages plaintiff either had no distributor in some of the areas in which defendant does business or plaintiff's distributor in some areas made only limited efforts to make sales of plaintiff's product. Plaintiff was not injured by any act of defendant if a dealer did not buy plaintiff's product because he was not called on and requested to buy. Accordingly, if you should determine that defendant did in fact have agreements or understandings with its dealers which caused the dealers to refrain from purchasing plaintiff's product, plaintiff can recover only the profit it would have made on those sales which it proves were lost because of defendant's actions.

The fact that the Court has instructed you with respect to damages is not to be taken by you as an indication that the Court believes or does not believe that plaintiff is entitled to recover damages. Such instructions are given to you solely to guide you in arriving at the amount of your verdict only in the event you find from the preponderance of the evidence and instructions of the Court that plaintiff is entitled to recover. If from the evidence and the instructions of the Court you find that plaintiff is not entitled to recover, then of course you are to disregard entirely the instruction which the Court has given you concerning damages.

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not rebutted, remains sufficient for that purpose.

"But in this case the phrase '*prima facie*' has a different meaning. This arises from the fact that the section read to you uses the word 'estoppel.' An 'issue of fact' as to which the judgment operates as an estoppel' must be an issue as to an 'ultimate fact' such as is required in allegations of fact in good pleadings or in findings of fact in cases tried to the court and must be the ultimate fact without which judgment would lack support in an essential particular.

"When the plaintiff uses the decree to prove that restrictions applied to waxes and polishes, the defendant cannot controvert the general proposition that such restrictions existed. For that matter is what we call *res judicata.* He is 'estopped' to challenge the general fact. But he may still show that the restrictions were not enforced against the plaintiff's product and that, for this reason, the plaintiff suffered no damage.

"Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence that the defendant in an unreasonable manner prevented, access of the plaintiff's product to Richfield stations."

Other instructions on the use of the prior anti-trust decree are included in the footnote,[5] were not objected to by Richfield and were correct statements of law.

[5] The complete instructions given by the court insofar as the prior antitrust decree was concerned, are as follows: The court has admitted into evidence the decree, findings of fact, and conclusions of law entered in the case of the *United States v. Richfield Oil Corporation,* Civil Action 6896-Y. These findings and decree were entered in a civil suit instituted by the United States in this District against the defendant, Richfield Oil Corporation, charging a violation of the Anti-Trust Laws, by the defendant therein with respect to various trade practices and contracts used by the defendant in the sale and distribution of automobile accessories, including waxes and polishes. Among other things, it is provided by federal statute that a final decree or judgment obtained by the Federal Government in such a proceeding under the Anti-Trust Laws shall be *prima facie* evidence against a defendant named in judgment or decree as to all matters respecting which said judgment or decree would be an estoppel as between the Government and such defendant.

Such decree is *prima facie* evidence in this case as to any question which was put in issue and directly determined against defendant Richfield Oil Corporation.

"*Prima facie* evidence" means evidence which is sufficient standing alone and on its face, to establish the existence of a given fact or facts, and which, if not rebutted or overcome by other evidence, will remain sufficient to establish such fact or facts throughout the trial. I shall amplify this matter further on in the instructions.

The following matters among others were put in issue and directly determined in the *United States v. Richfield Oil Corporation* case against defendant and are *prima facie* evidence against the defendant in this case:

1. That the defendant has violated the Anti-Trust Laws by committing the following acts during the period involved in this case:

(a) By entering into contracts, agreements, and understandings, both written and oral, directly affecting and unreasonably restraining the course of interstate commerce in automobile accessories, including waxes and polishes.

(b) substantially lessening competition, foreclosing competition and attempting to create a monopoly in the sale and distribution of automobile accessories including waxes and polishes, and which

(c) unreasonably restrained and substantially lessened competition in interstate commerce in the six States of the Western Area in the sale and distribution of automobile accessories, including waxes and polishes, and

(d) which had the necessary and intended effect of denying the independent service station operators access to products including waxes and polishes competitive to those handled and sponsored by Richfield and

(e) confined the independent operators to the handling of and dealing in automobile accessories manufactured, including waxes and polishes handled or sponsored by Richfield.

The contracts between Richfield and the various stations related to many products. However, you are concerned only with them insofar as they relate to waxes and polishes.

2. More specifically, the following matters were put in issue and directly determined in the *United States v. Richfield Oil Corporation* case against defendant:

Richfield has for many years past, and was at the time of the decree, leasing and acquiring title to service station sites and entering into contractual relations with operators of service stations as retail outlets within the western area; that the term "service stations", as used aforesaid, refers to a retail outlet at which petroleum products and/or "automotive accessories" manufactured or "sponsored" by Richfield are sold to the motoring public. The term "automotive accessories" as used hereinabove, includes waxes and polishes and other like items. The word "sponsored," as used hereinafter, refers to those petroleum products and/or "automotive accessories" not manufactured or produced by Richfield but sold and distributed at service stations, the sale and distribution of which are handled or arranged for at service stations by Richfield; that TBA distributors are distributors appointed by Richfield who receive and handle the orders of Richfield service station operators for automobile accessories within a marketing area designated by Richfield; that Richfield has entered into various written and oral agreements and understandings with service station operators.

The evidence in this case relates to three different types of service stations. The first type, including approximately 1350 stations, involved a lease-out or "L-O" type of arrange-

(a) **Richfield has waived any error by failing to state the grounds for its objection.**

Though not raised by Karseal, we are concerned at the outset as to whether there was sufficient compliance with Rule 51, Rules of Civil Procedure, concerning objections to instructions given. Rule 51, Rules of Civil Procedure, provides in part:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating*

ment. These stations were either owned by Richfield or leased by Richfield from a third person. In either event, the station was then leased by Richfield to an independent operator. The only written agreement between Richfield and L-O station operators was a lease.

The second type, including approximately 280 service stations involved three written agreements or a so-called "3-C" type of arrangement. These stations were either owned or leased from third persons by an independent operator. Under the 3-C arrangement such stations were leased to Richfield and leased back by Richfield to the operator. At the same time, Richfield and operator entered into a sales contract for petroleum products. The only written agreements between Richfield and 3-C station operators were the two leases and the sales contract.

The third type, including approximately 1370 service stations, involved a so-called "337" arrangement. These stations were either owned or leased from third persons by the station operator. The station operator entered into two agreements with Richfield, one of which provided for the painting of the service station and equipment with Richfield's colors and insignia at Richfield's expense, and the other of which provided for the sale of petroleum products to the operator by Richfield. These were the only written agreements between Richfield and 337 station operators.

You are instructed that the foregoing written agreements standing alone were an entirely lawful and valid method of establishing the business relationship between Richfield and independent station operators distributing its products.

However, oral agreements between Richfield and the operators of the foregoing three types of stations are alleged to have been entered into at substantially the same time as the written agreements and relate to the handling by the operator at his service station of petroleum products and automotive accessories, including waxes and polishes, manufactured or sponsored by Richfield on an exclusive basis.

Beginning in 1944, Richfield inaugurated a new TBA program (TBA meaning tires, batteries, accessories) for distributing its automotive accessories to the L-O, 3-C and 337 dealer service stations. Since 1944, Richfield has sold and distributed automotive accessories, which it purchases from various manufacturers and suppliers, directly to the L-O, 3-C or 337 dealer service stations or through TBA distributors designated by it.

There is evidence that L-O station operators were instructed by Richfield that they were to deal in gasoline, oil and automotive accessories for which the sale to these operators was made or arranged by Richfield. Plaintiff contends that this resulted in agreements that L-O station operators would not deal in wax polish manufactured by plaintiff. Richfield contends that the instructions given by it to L-O station operators were directed primarily to major accessory items such as tires, tubes and batteries and that in actual fact L-O station operators were not prevented from handling and, in fact, did handle plaintiff's wax polish. Plaintiff has the burden of proving that there were oral agreements between Richfield and L-O station operators, which applied to plaintiff's wax polish, and that in fact such oral agreements were carried out with respect to plaintiff's wax polish.

Plaintiff also contends that such instructions were given and resulted in agreements that 3-C and 337 station operators would not deal in plaintiff's polish. Richfield contends that no such instructions were given and that in actual fact 3-C and 337 station operators were free to deal and, in fact, did deal in plaintiff's wax polish. Plaintiff has the burden of proving that there were oral agreements between Richfield and such station operators applicable to plaintiff's wax polish, and that such agreements were in fact carried out with respect to plaintiff's product, to their damage.

It is not enough in a private suit of this character for a plaintiff to show simply that there was a violation of the antitrust laws. It is essential that plaintiff establish not only the fact of such violation but also that it resulted directly and proximately in injury to its business or property. In this case plaintiff would not be entitled to any recovery unless it had shown to your satisfaction by a preponderance of the evidence that it had actually lost sales of its wax polish by reason of the allegedly unlawful acts of the defendant and/or that it suffered a loss of profits by reason thereof. . . .

Plaintiff alleges in its complaint that defendant prevented its dealers from purchasing the plaintiff's product Wax Seal from plaintiff's enfranchised distributors and their salesmen from July, 1947, when plaintiff was first organized, to January 3, 1953. You are instructed that in no event can plaintiff recover damages for any period subsequent to January 3, 1953.

The law provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent."

This means that there is made available to a private litigant, such as the plaintiff in this case, as *prima facie* evidence, any fact which was at issue and was determined in the Richfield-Government suit with respect to the defendant therein. The proof so offered, plus a showing that the conspiracy had an impact upon the plaintiff's product—Wax Seal—and that it suffered damage as a result, would be sufficient to establish a *prima facie* case. . . .

The ordinary meaning of the phrase *"prima facie* evidence" is this: *"Prima facie* evidence" of a fact is such evidence as, in the judgment

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distinctly the matter to which he objects and *the grounds of his objection . . .*". [Emphasis added.]

Counsel were given an opportunity out of the hearing of the jury to make their objections to the instructions given. Only two objections were made and both were of a most sketchy character. Counsel for Richfield stated:

> "The only ones to which we have objection Your Honor, are ones with respect to the effect of *'prima facie'* . . . And of the others, there were two instructions in which the words 'gross profits' were used."

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of the law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose.

But in this case the phrase *"prima facie"* has a different meaning. This arises from the fact that the section read to you uses the word "estoppel."

An "issue of fact" as to which the judgment operates as an "estoppel" must be an issue as to an "ultimate fact" such as is required in allegations of fact in good pleadings or in findings of fact in cases tried to the court and must be the ultimate fact without which judgment would lack support in an essential particular.

When the plaintiff uses the decree to prove that restrictions applied to waxes and polishes, the defendant cannot controvert the general proposition that such restrictions existed. For that matter is what we call *res judicata*. He is "estopped" to challenge the general fact. But he may still show that the restrictions were not enforced against the plaintiff's product and that, for this reason, the plaintiff suffered no damage.

Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence that the defendant in an unreasonable manner prevented access of the plaintiff's product to Richfield stations.

This for the reason that there was no finding in the government suit concerning plaintiff's special product "Wax Seal,"—let's read that again. This for the reason that there was no special finding in the government suit concerning plaintiff's special product "Wax Seal." You have before you evidence of both the plaintiff and the defendant with respect to the issue whether plaintiff's product was restrained and you should make your own determination on the basis of this evidence whether plaintiff's distributors and their salesmen were actually denied access to Richfield stations. . . .

At the risk of repetition, I reiterate that it is important that you understand the relation of this case to the government case decided in 1948. That case was instituted by the government of the United States. It was not a criminal case. It was a civil case in which the Government alleged that Richfield through tie-in agreements and other methods was guilty of certain practices which were in violation of the antitrust laws.

In that case, I found in substance that certain practices were in violation of the antitrust acts and I issued an injunction prohibiting Richfield from indulging in those acts in the future.

The findings and the decree in that case are before you. The findings are marked Plaintiff's Exhibit I and the Decree is marked Plaintiff's Exhibit I-A, which you may take with you to the jury room along with the other exhibits. In order that you may understand the proper relation of the findings and decree in that case to this one, I state again to you generally that the law provides that any person who has been injured or damaged by any acts in violation of the antitrust laws may bring an action for damages.

The Government's suit was not for damages and nobody was named as plaintiff except the Government of the United States. The object of the Government was to stop certain practices and witnesses were brought to show that those practices were indulged in.

Now, the law provides also, as you were informed at the beginning, that anyone who has been injured by these practices may bring a private suit for damages.

In that private suit, the plaintiff, the person who is injured who has been damaged, brings a suit just as anybody else would bring an action who claims to have been injured by someone else's wrongful act.

That is the type of suit we are trying here. The Government of the United States has nothing to do with this lawsuit. This is a private lawsuit between two private parties. However, the law provides that in any such action the parties may, if they want to, use the decree which the Court has entered in the Government case, and that decree shall be *prima facie* evidence of the facts that the court found. I have already explained to you fully the meaning of this phrase.

The decree merely finds that certain acts were done. For instance, with relation to the present lawsuit, the decree did find that certain restrictive practices were indulged in relating to the waxes and polishes but it does not specify what the waxes and polishes were. It merely said "waxes and polishes."

And that is the only purpose for which that decree may be considered by you. The decree in itself, does not make out a case for plaintiff. The plaintiff, Karseal, has to show that that prohibition against waxes and polishes was actually exercised as to its wax and that by reason of the exercise of that policy as to it, it was damaged by losing sales it could otherwise have made.

To sum up: There are three elements to this lawsuit. First, the decree in the government suit. That stands undisputed as to the general practices involved. The second element is the effect, if any, of the restrictions found in the decree on the plaintiff's product. That is subject to proof on the part of both sides.

The third element is what, if any, damage the plaintiff has suffered, that is, the effect of the practice on the plaintiff's product and whether by the enforcement of that practice, it suffered any damage at all. To that element also evidence was offered by both parties.

These are the three elements of the lawsuit. The instructions given state fully the legal principles which govern the determination of these questions. . . .

The objections as to the use of the words "gross profits" were considered by the court and the jury were subsequently instructed, with the consent of Richfield, that the court had inadvertently used the word "gross" and the court deleted it and instructed the jury to disregard it. No error is here assigned.

As to the objection to the instruction involving the words *"prima facie"* and to the use to be made of the prior anti-trust decree, in addition to the objection heretofore quoted which states no ground whatsoever, the following is all that appears in the record. After the court and counsel had agreed on correcting of the words "gross profits" in the instructions, a Richfield attorney stated:

> "The only objection we would have then would be to give our No. 14[6] as to the *'prima facie'*."

The Court:

> "I think you are absolutely wrong on that, I stake my entire case on that."

Richfield counsel:

> "We will specifically except to that Your Honor." . . . "Your Honor, just one other point, if we may clear up this objection. We have excepted to the failure to give our instruction No. 14, and we, of course, except to the giving of the instruction on *prima facie* as given by Your Honor."

This certainly is not a compliance with the rule requiring that counsel state not only the matter to which he objects, but state "distinctly . . . the grounds of his objection."

It is true that in an earlier portion of the record long before the conference on instructions and the actual instruction of the jury, there was discussion of this problem,[7] and we think it is fair to say that prior to the time of the giving of the instructions, and at the time provided by statute, after the giving of instructions, for the making of objections thereto, counsel for Richfield knew the court's position and the court knew counsel's position. The court had stated:

> "The meaning of that word *'prima facie'* does not mean that the defendant in a case of this character can come in and controvert that finding in the other case . . .",

and again,

> ". . . this is a thing I have in mind, that they are *prima facie* to the practice, and that two things are necessary, one to relate the practice to you and then the proof of damage. . . .".[8]

Thus, although the court's position was well known to Richfield's counsel, when the time arrived to make objections, Rule 51 of the Rules of Civil Procedure was not complied with. The purpose of the Rule is to give the court a chance to correct an erroneous instruction on the law. Though viewed realistically, we might hazard a guess that it would have been a difficult task, even by stating distinctly the grounds

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[6] Defendant's Instruction No. 14.

The decree in the prior government case, to which I have referred, is only *prima facie* evidence with respect to certain matters. *Prima facie* evidence is such as to be sufficient to establish a fact unless it is rebutted by other evidence. If there is other evidence controverting the fact, you are required to make your own determination of that fact by weighing all of the evidence which pertains to it.

[7] No stipulation appears in the record that earlier objections and grounds stated by Richfield, might be incorporated by reference in the record at the time of making objection to the instructions given. This practice has been approved in the Ninth Circuit. See, *Las Vegas Merchant Plumbers Assn. v. United States*, (1954) [1954 TRADE CASES ¶ 67,673], 210 F. 2d 732, 744-5 and cases cited therein. The trial judge in the case at bar does not follow this practice.

[8] Other statements showing the position of the trial judge are as follows:

". . . You can put before this jury facts, that this restriction was not effective, or partly effective only, as to Karseal, but you cannot say that it was not effective as to anybody . . .". And again. The Court: "Well, I am giving you the logic by which it would be an absolutely illogical situation, where a jury would determine not whether this plaintiff was damaged by this practice, but whether the practice existed as to all . . .". "The only thing I would submit to the jury is this: That the plaintiff has to show that this practice was applied to them in this territory, and that they were damaged by it, and then you can show that it wasn't applied as to them and/or they weren't damaged, and those are the only three elements I know of in a treble damage suit. . . ."

". . . But you can't go behind the decree and say this was not practiced as to anybody else." "You can say, 'We did not practice it as to Karseal,' but to go behind the decree and offer evidence that you did not practice it as to anyone would be to nullify this act of Congress, which only says it shall be *prima facie*, but defines it by saying the extent that people would be estopped . . .". And again. The Court: "If your theory is correct, then that section is absolutely meaningless, because you are going to retry before this jury, and I would have to instruct them, that they can find despite my decree not only didn't they exercise this as to this plaintiff, but they didn't exercise it as to anybody. . . .".

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of the objection, to have caused the court to change its previously announced position. Nevertheless, to preserve the question, on appeal, not only should the objection have been made but the grounds thereof should have been distinctly stated, *Husky Refining Co. v. Barnes* (9 Cir. 1941) 119 F. 2d 715, 717, 134 ALR 1221; *Shevlin-Hixon Co. v. Smith* (9 Cir. 1947) 165 F. 2d 170, 179; *Johnson v. Chesapeake and Ohio RR Co.* (7 Cir. 1955) 227 F. 2d 858, 860-862; *Franklin v. Shelton* (10 Cir. 1957) 250 F. 2d 92, 98; see, *Palmer v. Hoffman* (1943) 318 U. S. 109, 119, Rehear. den. 318 U. S. 800.

Accordingly, Richfield's objection to the court's instructions is not available to it on this appeal. But we have nevertheless considered the question as to whether giving the instruction was error.

(b) **It was error to so instruct but the error was not prejudicial.**

Turning to the correctness of the questioned instructions, Section 5 of the Clayton Act, 15 U. S. C. A., Sec. 16, provides as follows:

"§ 16. Judgment in favor of Government as evidence; limitation of actions

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .".

When the Clayton Act was originally passed by the House of Representatives it contained language which would make the government decree "conclusive evidence against the defendant of the law and facts determined in the prior equity action." However, the Bill was amended in the Senate substituting the words, "prima facie" for the word "conclusive." As so amended the Bill passed the Senate, was agreed to by the House conferees and became law. Report of the Senate Judiciary Committee set forth in the margin[9] pointed out that considerations of public policy might favor

[9] In section 6 there are two paragraphs as it came from the House. The first paragraph provides in substance that whenever in any suit in equity hereafter instituted by the United States a final decree is rendered against a defendant for violating any of the antitrust laws said decree shall, to the full extent to which such decree would constitute in any other proceeding an estoppel as between the United States and such defendant, constitute against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law, in favor of any other party in any action brought under the provisions of any of the antitrust laws. It is proposed to amend this by making the decree in favor of the United States *prima facie* evidence against the same defendant in any suit brought by any other party under the antitrust laws as to all matters respecting which said decree would be an estoppel as between the parties thereto. The material difference between the House provision and the Senate amendment is of course whether the decree in favor of the Government shall be *prima facie* evidence against the same defendant in a subsequent suit by another party or be conclusive against such defendant. The Committee think there are considerations of public policy which favor the House provision of conclusiveness, but in the state of the decisions of the Supreme Court of the United States in kindred cases they believe the law should go no further than to make the decree *prima facie* evidence. As a type of the opinions of the Supreme Court which have been examined by the committee in analogous cases attention is invited to the following:

"Without going at length into the discussion of a subject so often considered, we think the conclusion reached by the courts generally may be stated as follows: It is competent for the legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land.

"Mr. Cooley sums up his examination of the cases on this subject in the following statement: 'That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful. The attempt is a plain violation of the great principle of Magna Charta, which has been incorporated in our bill of rights, and, if successful, would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law or of justice; it is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the possible jurisdictional facts which would make out title. But the legislature might doubtless make the deed conclusive evidence of * * * everything except the essentials.' Cooley on Taxation, 521, 5th ed., 1886. (*Marx v. Hanthorn*, 148 U. S. 183.)" (Senate Report No. 698, 63rd Cong., 2d Sess. at p. 45).

the House proposition of conclusiveness, but that serious doubts existed as to the constitutionality of such a proposition, in that it would deprive one of his property without due process of law.

The reason for the concurrence by the House with the Senate amendment was expressly to the same effect.[10]

In *Emich Motors Corporation v. General Motors Corporation,* (7 Cir. 1950) [1950-1951 TRADE CASES ¶ 62,577], 181 F. 2d 70, reversed on other grounds [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558, the Seventh Circuit quoted the following instruction given to the jury with approval:

> "Being *prima facie* evidence the judgment is not conclusive in this case. It is merely sufficient evidence of a violation by these defendants of the antitrust laws to put these defendants to their proof . . .". (p. 76).

In the same case in the Supreme Court, *Emich Motors Corporation v. General Motors Corporation* [1951] [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558, the court said, (pp. 568-569):

> ". . . By its terms, however, § 5 makes a prior final judgment or decree in favor of the United States available to a private suitor as *prima facie* evidence of 'all matters respecting which' the judgment 'would be an estoppel' between the defendants and the United States. We think that Congress intended to confer, *subject only to a defendant's enjoyment of its day in court against a new party,* as large an advantage as the estoppel doctrine would afford had the Government brought suit.
>
> "The evidentiary use which may be made under § 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel. * * * Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish *prima facie* all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." [Emphasis added]

It is this portion of the Supreme Court's decision which the trial court apparently relied upon, together with *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.* (1954) [1954 TRADE CASES ¶ 67,640], 346 U. S. 537. But we think the judge's reliance on these cases was *misplaced.* The language relied upon from the *Theatre Enterprise* case *(supra),* as shown in the record of our case during prior discussion between the court and counsel, was the following:

> ". . . These instructions, petitioner argues, were 'so superficial and so limited as to deprive petitioner of any of the benefits conferred upon it' by § 5.
>
> "We cannot agree. The trial judge instructed in effect, that the *Paramount* decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed *Paramount* conspiracy to Baltimore and to the claimed damage period. The reasons for this are clear. The *Paramount* decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres; yet such a conspiracy is the hub of plaintiff's claim. The *Paramount* case involved a conspiracy found to exist as of 1945, which was enjoined no later than June 25, 1948; but the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed, the relevancy of *Paramount* to the instant case is slight . . .". (pp. 543-4).

However, the court in the *Theatre Enterprise* case *(supra)* had earlier stated:

> ". . . Petitioner next contends that the trial judge, when instructing the jury, failed to give sufficient weight to the *Paramount* decrees. The decrees were admitted in evidence pursuant to § 5 of the Clayton Act, which provides that a final judgment or decree rendered against a defendant in an equity suit brought by the United States under the antitrust laws 'shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all

[10] Now let us pass to section 6, which refers to the "conclusiveness" or *"prima facie"* effect of judgments in Government suits against the trusts. As the House passed the section we made such judgment "conclusive". The Senate struck out the word "conclusive" and inserted *"prima facie."* Personally, I think the Senate did the best thing by making it *"prima facie."* I doubt whether the courts would have held that the "conclusive" provision was constitutional. On the other hand, I believe that the *"prima facie"* effect of the judgment is as powerful before a jury as if you had said that it was "conclusive". A great many lawyers, and some of the best ones in the Government service, think that a provision making the judgment conclusive would have rendered the bill unconstitutional, but with the *"prima facie"* provision it is constitutional and will be as effective as if we had left it "conclusive." (51 Cong. Rec., Part 16, p. 16,276.).

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matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . .' . Exercising his discretion to choose the precise manner of explaining a decree to the jury, the trial judge instructed that:

'. . . [T]hese same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary to the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff or have conspired to restrict plaintiff to clearances which are unreasonable.' . . ." (p. 542-3.)

We think the holding of the *Theatre Enterprises* case is directly contrary to the position of the trial judge.

Richfield argues, we think correctly, as follows:

". . . If Section 5 of the Clayton Act made the government decree conclusive evidence rather than merely *prima facie* evidence which the defendant could rebut, this obviously would deprive a defendant in a treble damage action of its right to a jury trial of the issue of the violation of the law."

The other reported cases confirm our view that the instruction of the trial court was erroneous. In *Harrison v. Paramount Pictures* (E. D. Pa. 1953) [1953 Trade Cases ¶ 67,568], 115 F. Supp. 312-315, affirmed by the Third Circuit on the opinion below [1954 Trade Cases ¶ 67,721], 211 F. 2d 405, the court said:

"The [*Emich*] case decided what matters the *prima facie* case covered, but there is nothing in the opinion to support the plaintiff's argument that the presumptions arising from the decree in favor of the United States are conclusive and incontrovertible. *It is hardly necessary to say that the references to estoppel in Section 5 of the Clayton Act merely define the area which the prima facie case covers.*" (p. 315). [Emphasis added]

To the same effect is *Zuckerman v. E. I. du Pont de Nemours Company* (S. D. N. Y. 1953) 1952-53 CCH Trade Cases [¶ 67,468], Sec. [page] 68,346, otherwise unreported:

"Plaintiff in his moving papers urges that the judgment in the antitrust suit brought by the United States is conclusive as against defendant and that the misuse of patents by defendant invalidates its defense of ownership. . . .

"The purpose of Section 15 was to lighten the burden of proof of a private litigant and to facilitate the presentation of the necessarily extensive proof of such a conspiracy. However, the prior judgment is not to be accepted as conclusive proof of the conspiracy found; it is merely prima facie evidence against which defendant is entitled to his day in court for the purpose of rebuttal. . . ." .

In *Eagle Lion Studios v. Loew's Inc.*, (11/24/58) [1958 Trade Cases ¶ 69,190], 358 U. S. 100, the Supreme Court had granted certiorari on the question,

"Were findings in the government's prior antitrust suit *prima facie* evidence under Section 5 of the Clayton Act of conspiracy against the plaintiffs,"

but the Supreme Court affirmed the lower court ([1957 Trade Cases ¶ 68,819], 248 F. 2d 438), *per curiam* by an evenly divided court. The Circuit had affirmed (one judge dissenting) the dismissal of the case in the trial court for failure of proof of conspiracy.

The trial court had examined the prior *Paramount* decree and its findings and conclusions, and had concluded that

"while the findings may perhaps constitute evidence . . . that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called 'independents' such as the plaintiffs in the

present case." (248 F. 2d at 443). On appeal the appellants characterized this as a "niggardly construction" of the *Paramount* judgment. (p. 443).

The Circuit court said, (p. 444):

". . . In determining, under that section, [Sec. 5, Clayton Act] the effect of a judgment in a prior anti-trust suit it is not our function to consider inferences, whether reasonable ones or not, that might be drawn from the language of the prior judgment. Under section 5 a judgment in a prior suit is *prima facie evidence* 'as to all matters respecting which said judgment * * * would be an *estoppel as between the parties thereto* * * *'." [Emphasis added in opinion]

The court quoted from its decision in *Monticello Tobacco Co. v. American Tobacco Co., (supra)* [1952 TRADE CASES ¶67,300], 197 F. 2d 629, 631-632:

"* * * whatever is crucial to the treble-damage case and is not distinctly determined in the previous government suit must be proved by direct evidence. . . .". (citing cases)

The court concluded (pp. 444-5),

". . . Applying these principles to the *Paramount* judgment we conclude that the issue here in suit was not 'distinctly determined' in the *Paramount* litigation . . . In short, we must look elsewhere if we are to find any evidence of the conspiracy that the plaintiffs here charge."

The *Eagle Lion* case, *(supra)* is the last decision by the Supreme Court touching the effect of Sec. 5 of the Clayton Act, but the *per curiam* affirmance by an evenly divided court affords little help.

[*Fallacy Illustrated*]

We have been able to find no authority supporting the instruction of the trial court on Karseal's position on this problem. We think the fallacy would be well demonstrated by the following example. Suppose that the prior anti-trust decree had not only determined generally the restraint against waxes and polishes but also had determined particularly a restraint against Karseal's "Wax Seal". Applying the trial court's logic, this would have required him to have instructed that the prior anti-trust decree was conclusive on the question of restraint against the plaintiff Karseal and its product, and the only question then left open to the jury would have been the question of Karseal's damage. Certainly this is not the law.

[*Error Not Prejudicial*]

However, we cannot say that the error was prejudicial. Immediately following the challenged instruction, the court said:

"Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence that the defendant in an unreasonable manner prevented access of the plaintiff's product to Richfield stations. This for the reason that there was no special finding in the government's suit concerning plaintiff's special product "Wax Seal." You have before you evidence of both the plaintiff and the defendant with respect to the issue, whether plaintiff's product was restrained. You should make your own determination on the basis of this evidence whether plaintiff's distributors and their salesmen were actually denied access to Richfield's stations."

Various other instructions given by the court correctly stated the law. They are quoted in the margin.[11]

In summing up the court said:

"The decree in itself does not make out a case for plaintiff. The plaintiff, Karseal, has to show that the prohibition against waxes and polishes was actually exercised as to its wax and that by reason of the exercise of that policy as to it, it was damaged by losing sales it could otherwise have made."

Thus, under the instructions given, Karseal was still required to prove that an unlawful restraint was applied by Richfield to its product "Wax Seal," that it was damaged thereby, and the extent of its damage.

It cannot be argued that the jury was prejudiced by being informed of the prior decree, for it was clearly admissible. Even had the questioned instruction not been given, the jury would have had before it the prior decree and would have known that Richfield had been found to have violated the anti-trust laws by its exclusive dealing practices in TBA items, including wax and polishes.

There was left to the jury by the court's instructions all the proper elements of a treble damage case, (1) were illegal procedures applied to plaintiff and its product,

[11] See note 5 (*supra*).

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(2) was the plaintiff damaged, (3) the extent and amount of such damage.

[*Public Injury*]

We see the problem the trial court was approaching. In a private treble damage action it is necessary to prove, (1) *public injury*, i. e. a violation of the anti-trust laws, and (2) *private injury*. In a government anti-trust case only proof of the public injury is required.

As stated in *Emich Motors Corp. v. General Motors Corp.* (7 Cir. 1950) [1950-1951 TRADE CASES ¶ 62,577], 181 F. 2d 70, 75, reversed on other grounds [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558,

> "And we think the judgment is available at least for the limited purpose of establishing that there had been a *violation of public rights in the absence of which plaintiff would have no cause of action* under the statute, and from which violation they assert their injury stemmed." [Emphasis added]

[*Injury to Single "Member" as Injury to Public*]

The trial court was of the view that the public injury was conclusively established by the prior anti-trust decree. But the trial court required Karseal to prove the impact of Richfield's actions on it and its product "Wax Seal." When this was proved, then public injury was proved since Karseal was a member of that illusive body, the "public." The purpose of the anti-trust laws is to protect the interstate market from illegal restraints. If such restraints are applied to one person in the interstate market, then free competition is hurt and damaged.[12]

When Richfield hurt and damaged Karseal it hurt and damaged free competition, the touchstone of the anti-trust laws. This was what the trial judge's instructions required Karseal to prove.

[*Conclusion*]

We therefore conclude that appellant Richfield, for failure to comply with Rule 51 of the Rules of Civil Procedure, does not have available to it on this appeal, the right to challenge the instruction as given by the court and alternately, that although the instruction complained of was erroneous, in view of other instructions by the court and the scope of the issues left to the jury, the error was not prejudicial.

[*Judgment Affirmed*]

The judgment of the district court is affirmed.

Judge Fee did not participate in this decision.

[¶ 69,487] Federal Trade Commission v. Washington Fish & Oyster Company, Inc.

In the United States Court of Appeals for the Ninth Circuit. No. 16,541. Filed October 12, 1959.

Clayton Act and Robinson-Patman Price Discrimination Act

Price Discrimination—Brokerage Commissions—Meeting Competition As a Defense.—The good faith meeting of competition defense under Section 2(b) of the Clayton Act is inapplicable to a violation of Section 2(c) of the Act, relating to brokerage commissions. Section 2(b), in part, provides that nothing shall prevent a seller from rebutting a prima-facie case by showing that his "lower price or the furnishing of services or facilities" to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. Brokerage commissions do not involve a "lower price or the furnishing of services or facilities"; therefore, the defense is inapplicable to Section 2(c) violations. The fact that the granting of a purported brokerage fee to a buyer may result in discriminatory prices is immaterial.

See Price Discrimination, Vol. 1, ¶ 3515.165, 3520, 3520.381, 3520.396.

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[12] This opinion was prepared prior to the decision in *Klor's Inc. v. Broadway-Hale Stores* [1959 TRADE CASES ¶ 69,316], 359 U. S. 209. There the court said that a combination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. . . .". (p. 213).

Federal Trade Commission Enforcement and Procedure—Enforcement of Clayton Act Orders—Power To Conduct Investigation Under FTC Act To Determine Violation of Order—Filing of Investigation Record with Court of Appeals in Enforcement Proceeding.—The Federal Trade Commission has the authority to conduct a formal investigation under Section 6 of the Federal Trade Commission Act to determine whether or not a cease and desist order issued under the Clayton Act is being violated. While the Clayton Act does not specifically direct the Commission to conduct an investigation to determine whether or not an order is being violated, the Act provides that the Commission may apply to a Court of Appeals for the enforcement of an order. Congress contemplated that the Commission determine the fact of violation before applying to the courts. While the method or procedure to be followed in determining the fact of violation is not spelled out, any reasonable and fair method or procedure not forbidden by statute would be appropriate. The Commission is given broad powers of investigation under Section 6 of the FTC Act, and the Commission, pursuant to that authority, has promulgated rules under which investigational hearings may be conducted for determining compliance with orders.

Also, the entire record of such an investigation may be filed for the consideration of a Court of Appeals in an enforcement proceeding. The statute authorizing the Commission to institute enforcement proceedings before the Courts of Appeals provides that the Commission shall file the record in the proceeding, as provided in Section 2112, Title 28, United States Code. The record in connection with the Commission's investigation of violations of a cease and desist order constitutes "pleadings, evidence, and proceedings before the agency" which may be filed with the court for consideration in the enforcement proceeding pursuant to Section 2112(b) of Title 28, United States Code.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8701, 8801.

Federal Trade Commission Enforcement and Procedure—Enforcement of Clayton Act Orders in Courts of Appeals—Motion To Adduce Additional Evidence.—In an enforcement proceeding under Section 11 of the Clayton Act, the court may not order the Federal Trade Commission to adduce additional evidence unless it is shown to the satisfaction of the court that such additional evidence is material.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8801.

For the petitioner: Alan B. Hobbes, Assistant General Counsel, FTC; and Jno. W. Carter, Jr., and Miles J. Brown, Attorneys, FTC, Washington, D. C.

For the respondent: Evans, McLaren, Lane, Powell & Beeks, by Martin P. Detels, Jr., W. Bryan Lane, and W. T. Beeks, Seattle, Wash.

Denying motions to strike and for leave to adduce additional evidence in a proceeding to enforce a cease and desist order of the Federal Trade Commission in Dkt. 5228.

Before: Bone and Hamley, Circuit Judges, and Bowen, District Judge.

On Motions to Strike Certain Parts of Application and Designation of Record and, in the Alternative, for Leave to Adduce Additional Evidence

[*Enforcement of FTC Order*]

Hamley, Circuit Judge [*In full text*]: The Federal Trade Commission has applied to this court for enforcement of a cease and desist order entered under section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. A. § 13(c). The cease and desist order, issued on March 25, 1946, directed Washington Fish & Oyster Company, Inc., to cease and desist from

> ". . . paying or granting, directly or indirectly, to any buyer anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, upon purchases made for such buyer's own account."

On June 7, 1957, the Commission undertook a formal investigation to determine whether the cease and desist order was being obeyed. As a result the Commission on February 18, 1959, filed a report in which it was found and concluded that Washington Fish & Oyster had violated the cease and desist order. On July 21, 1959, the Commission filed an application in this court for enforcement of that order. This

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was done pursuant to section 11 of the Clayton Act, 15 U. S. C. A. § 21.[1]

Paragraphs VIII and XII of this application pertain to the formal investigation which was instituted by the Commission on June 7, 1957, to determine whether the company had violated the cease and desist order. Items 6 to 11 of the Commission's designation of record in this enforcement proceeding relate to the orders and reports of the Commission or its examiner or to testimony and exhibits having to do with the investigation begun on June 7, 1957.

The company has now moved to strike these paragraphs of the application and items of the designation of record. The company has also moved, in the alternative, that in the event the motions to strike are denied, an order be entered directing the Commission to take additional evidence to be adduced by the company.

Motions to Strike

The company contends that the Commission was without statutory authority to conduct its formal investigation to determine whether the cease and desist order was being obeyed, and that all proceedings and reports issued thereunder are therefore illegal and void.

It is true, as the Commission concedes, that the Clayton Act, as amended, does not specifically direct the Commission to conduct investigations to determine whether cease and desist orders are being violated. The act provides, however, that the Commission may apply to the United States Court of Appeals for enforcement "if such person fails or neglects to obey" a cease and desist order.[2] Congress must therefore have expected the Commission to determine the fact of violation before applying to a United States court of appeals for enforcement.

The method or procedure to be followed by the Commission in determining the fact of violation is not spelled out in the statute. Hence, any reasonable and fair method or procedure not forbidden by statute would be appropriate. Under section 6 of the Federal Trade Commission Act, 15 U. S. C. A. § 46, the Commission is given broad powers of investigation. Pursuant to this authority, the Commission has promulgated rules under which investigational hearings may be conducted for the purpose of determining whether a respondent is complying with an order of the Commission.[3]

In the formal investigation as to violations of the cease and desist order of March 25, 1946, there has been compliance with all requirements of statute and rule concerning procedure. The company had full and ample opportunity to cross-examine all witnesses and examine all documents, and availed itself of that opportunity. It had full and ample opportunity to contest the issue of violation of the order by introducing evidence, but did not avail itself of that opportunity. There is no contention that the record of that investigation, as designated by the Commission, is incomplete or inaccurate in any respect.

We hold that by virtue of the statutes cited the Commission had authority to conduct the questioned formal investigation as to violations of the cease and desist order of March 25, 1946.

The company further argues, however, that if the Commission had authority to conduct such an investigation there is nevertheless a total absence of statutory authority for the filing of the report therein, or record thereof, in this enforcement proceeding.

The statute authorizing the Commission to institute enforcement proceedings before United States courts of appeals provides that the Commission "shall file the record in the proceeding, as provided in section 2112 of title 28, United States Code. . . ."[4] Paragraph (b) of the latter section, 28 U. S. C. A. § 2112(b), provides that the record to be filed in the court of appeals in such a proceeding shall consist of the

[1] As amended August 28, 1958, Pub. L. 85-791, § 4, 85th Cong., 2d Sess., 72 Stat. 943. This provision of the Clayton Act was again amended in 1959, Pub. L. 86-107, 86th Cong., 1st Sess., 73 Stat. 243, U. S. Code Congressional and Administrative News, 86th Cong., 1st Sess., 1959, pages 1950-1954. The 1959 enactment, however, has no application to any proceeding initiated before July 23, 1959—the date of enactment of the 1959 act. (Section 2 of Pub. L. 86-107). All references in this opinion to the Clayton Act refer to the form of the act prior to the 1959 amendment.

[2] Third paragraph of section 11, 15 U. S. C. A. § 21.

[3] Procedures and Rules of Practice for the Federal Trade Commission, 16 C. F. R., subpart D, § 1.34, 15 U. S. C. A. §§ 41-80, 1958 pocket part, pages 42-43.

[4] First sentence of third paragraph of section 11 of Clayton Act, as amended on August 28, 1958, 15 U. S. C. A. § 21.

agency order sought to be reviewed or enforced, the findings or report upon which it is based, "and the pleadings, evidence, and proceedings before the agency. . . ." [5]

The question presented, therefore, is whether the record in connection with the Commission's investigation of violations of the instant cease and desist order constitutes "pleadings, evidence, and proceedings before the agency" which may be filed with the court for consideration in the enforcement proceeding pursuant to section 2112(b).

As before indicated, the Commission must determine to its own satisfaction that there has been a violation of a cease and desist order before it may apply to a United States court of appeals for enforcement. Where this determination is made as a result of an *ex parte* informal investigation, there are no "pleadings, evidence, and proceedings," within the meaning of the statute. In this event the court, if it affirms the cease and desist order and if the assertion of violation is disputed, must remand the matter to the Commission for formal proceedings on the question of whether the order has been violated. Indeed, this is the usual practice.[6]

As we have held herein, however, the Commission may make this determination as to the fact of violation by means of a formal investigation preceding application to a court for enforcement. Such an investigation pertains to an issue which must be decided before an enforcement order can be effectuated. *Federal Trade Commission v. Ruberoid Co.* [1952 TRADE CASES ¶ 67,279], 343 U. S. 470, 478. An issue which must be decided before an enforcement order can be effectuated is appropriate to be considered in deciding whether such an order should be entered by the court. The record of that investigation therefore constitutes "pleadings, evidence, and proceedings before the agency," within the meaning of section 2112(b).

It follows that the entire record of that investigation may be filed for our consideration in this enforcement proceeding.[7]

Motion to Adduce Additional Evidence

The company has also moved, in the alternative, that in the event the motions to strike are denied, an order be entered directing the Commission to take additional testimony to be adduced by the company.

This court may not order the Commission to adduce additional evidence in an enforcement proceeding unless it is shown to the satisfaction of the court that such additional evidence is material. Third paragraph of section 11 of the Clayton Act, as amended, 15 U. S. C. A. § 21.

The additional testimony which the company desires to adduce would tend to establish what the company regards as a defense to a charge of violation of section 2(c) of the Clayton Act, 15 U. S. C. A. § 13(c). Specifically, the additional evidence, it is asserted, would show that any difference between the prices charged by the company with respect to sales to direct purchasers and sales to customers purchasing through brokers was the result of the economic necessity to the company of meeting the competitive prices of other packers and brokers.

The company relies upon *Henry Broch & Co. v. Federal Trade Commission*, 7 Cir. [1958 TRADE CASES ¶ 69,208], 261 F. 2d 725, as establishing that the necessity of meeting

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[5] Section 2112 was enacted in 1958 for the purpose of permitting administrative appeals to be heard on abbreviated records where feasible. Senate Report 2129, 85th Cong., 2d Sess., U. S. Code Congressional and Administrative News, 1958, page 3996.

[6] *Federal Trade Commission v. Whitney & Co.*, 9 Cir. [1950-1951 TRADE CASES ¶ 62,948], 192 F. 2d 746; *Federal Trade Commission v. Herzog*, 2 Cir. [1944-1945 TRADE CASES ¶ 57,393], 150 F. 2d 450; *Federal Trade Commission v. Baltimore Paint & Color Works, Inc.*, 4 Cir., 41 F. 2d 474.

[7] See the last sentence of 28 U. S. C. A. § 2112(b). The same result was reached in *Federal Trade Commission v. Standard Brands, Inc.*, 2 Cir. [1950-1951 TRADE CASES ¶ 62,797, 62,846], 189 F. 2d 510, but on somewhat different reasoning. The court there said (p. 512): "True, it has been customary for a court, upon affirming such an order, to appoint a master to make an inquiry as to violation, and, usually, to name the Commission as master. But there is no reason why, now that we have affirmed the order, we may not, in the exercise of our discretion, treat the Commission's findings as if the Commission had been appointed our master, since, in the Commission hearings, respondent was accorded all its procedural privileges. (If, in future cases, a respondent, believing the Commission's order invalid, wishes to avoid what it may consider the needless expense of such a hearing if the order is invalid, such a respondent can promptly test the order's validity by a petition to review the order.)"

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competition affords a defense to a charge of violation of section 2(c) of the Clayton Act.[8] If such a defense is available, the evidence tending to establish it is material, and the company should be permitted to adduce it.

The cease and desist order involved in *Broch* was not directed against a seller or buyer but against brokers representing a seller. The Commission found that the brokers had violated section 2(c) by granting and allowing a portion of their normal and customary brokerage fee to a particular buyer in connection with that buyer's purchase of food products from the seller. The court set aside this order, holding a seller's broker is not covered by section 2(c). Since our case involves a seller rather than a seller's broker, we need not decide whether we would agree with this ruling in *Broch*.[9]

In its decision in *Broch,* however, the court went on to make some general observations concerning the desirability of permitting sellers to meet competition by reducing items in the cost of distribution, including brokerage commissions.[10] It is this language which Washington Fish & Oyster relies upon as establishing that the necessity of meeting competition affords a defense to a charge under section 2(c).

These observations by the court in *Broch* indicate that it regarded that case as one in which a seller reduced the fee to be paid to his broker for bona fide brokerage services in order to quote a competitive over-all price to a buyer. Whether this was really the case, and if so whether the seller could so proceed without violating section 2(c), we need not decide.[11] Our case involves no such circumstance, the purported brokerage fee here having been paid to the buyer.

Subsections (c), (d), and (e) of section 2 of the Clayton Act, as amended, unqualifiedly make unlawful certain business practices other than price discriminations. The only escape Congress has provided for violations under these subsections is that which is sanctioned in subsection (b) of that section. *Federal Trade Commission v. Simplicity Pattern Co., Inc.* [1959 TRADE CASES ¶ 69,361], 360 U. S. 55.

Subsection (b) provides that nothing contained in section 2 and other specified sections "shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Washington Fish & Oyster was not charged with any violation connected with the furnishing of services or facilities (subsection (d) and (e) of section 2). Nor was it charged with quoting and collecting a discriminatory price contrary to subsection (a). What it was charged with was the paying of a brokerage fee to a buyer, no brokerage services being rendered.

The defense based on competition, set out in subsection (b), is inapplicable to section 2(c) violations, since such violations are not primarily concerned with prices, services, or facilities. The fact that the granting of a purported brokerage fee to a buyer may in a particular case result in discriminatory prices is immaterial. The gist of the violation under section 2(c) is not that discriminatory prices have been charged, but that the parties have engaged in a practice designed to deceive others as to the price charged and paid, whether or not discriminatory.

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[8] *Broch* was decided after the instant Commission hearings. The company points to this circumstance as explaining why the defense now asserted was not advanced during the Commission proceedings. Prior to *Broch,* the company concedes, "the necessity of meeting competition had not been held to constitute a defense to a charge of violation of Section 2(c) of the Clayton Act . . ."

[9] Certiorari was granted in *Broch* on June 15, 1959. *Federal Trade Commission v. Henry Broch & Co.,* 360 U. S. 908.

[10] In this connection the court said:

"Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution. Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, as distinguished from comparable situations. *Standard Oil Co. v. Federal Trade Commission,* 1951, 340 U. S. 231, 248-250, 71 S. Ct. 240, 95 L. Ed. 239; 7 Cir., 1956, 233 F. 2d 649, affirmed 1958, 355 U. S. 396, 78 S. Ct. 369, 2 L. Ed. 2d 359."

[11] Nor need we concern ourselves with whether such an observation in the *Broch* decision is to be regarded as dictum in view of that court's holding that section 2(c) does not apply to a seller's broker.

Since the necessities of competition do not constitute an available defense under section 2(c), the evidence concerning competition which the company seeks to adduce is not material.

The motions to strike and the motion, in the alternative, for leave to adduce additional evidence are denied.

[¶ 69,488] Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.

In the United States Court of Appeals for the Seventh Circuit. September Term, 1959—September Session, 1959. No. 12669. Dated October 20, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. PERRY, District Judge.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Antitrust Counterclaim for Damages—Dismissal of One of Several Claims—Appealability—"No Just Reason for Delay"—Certification by Trial Judge.—A trial court which dismissed a price discrimination "count" in a three-count antitrust counterclaim and "certified" the dismissal for an appeal under Rule 54(b) of the Federal Rules of Civil Procedure abused its discretion in determining that there was "no just reason for delay" in reviewing the judgment. The question of whether or not there was a basis for that determination had to be answered "in the light of the traditional, deeply-rooted and wisely sanctioned principle against piecemeal appeals." The case, when measured by the standard that the power which Rule 54(b) confers upon a trial judge should be used only "in the infrequent harsh case," was not an appropriate one for the entering of such a special order. The appeal served to delay the trial of the principal claim and the remaining portions of the counterclaim without simplifying or facilitating the conduct of the future litigation. Further, the case presented no hardship or unfairness which would justify a discretionary departure from the normal rule as to the time of appeal.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.12.

For the plaintiff: Thomas M. Thomas and David Parson.

For the defendant: L. M. McBride and John P. Ryan, Jr.

Before HASTINGS, Chief Judge, PARKINSON and CASTLE, Circuit Judges.

[*Contract Action—Antitrust Counterclaim*]

CASTLE, Circuit Judge [*In full text*]: Columbia Broadcasting System, Inc., plaintiff-appellee (CBS) brought a diversity action against Amana Refrigeration, Inc., (Amana) for $284,545.21 alleged to be due under agreements for the production and broadcasting of a television program by CBS under Amana's sponsorship over certain broadcasting stations affiliated with the CBS television network. Amana's answer contained a counterclaim setting forth three alleged anti-trust law violations by CBS in connection with the transactions upon which the action brought by CBS was predicated. The counterclaim charged that Amana was damaged by alleged action of CBS (1) granting greater discounts to favored advertisers, competitors of Amana, in violation of 15 U. S. C. A. § 13(a), (2) requiring as a condition of the broadcasts that Amana agree to sponsor the program over a specific group of television stations designated by CBS in violation of 15 U. S. C. A. § 1 and § 14, and (3) requiring as a condition of the broadcasts that Amana agree to sponsor a program in which CBS had a financial interest in violation of 15 U. S. C. A. § 1 and § 14. Treble damages were sought.

[*Price Discrimination Charge—Dismissal and Appeal*]

CBS moved to dismiss the first of the three parts of the counterclaim on the ground that 15 U. S. C. A. § 13(a) was inapplicable. It filed a reply to the balance of the counterclaim. The District Court found for CBS on its motion to dismiss and entered an order of dismissal as to the "first cause of action of the counter-

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claim". Thereafter, Amana applied to the District Court for a certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, declaring that there is "no just reason for delay" and moving the court to direct the entry of "final judgment". The District Court granted Amana's application for certification over the objection of CBS. Amana filed its notice of appeal from the order of dismissal. CBS filed a motion to dismiss the appeal on the grounds that the order below was not a final order and that the requirement of Rule 54(b) that there be no just reason for delay is not satisfied. The motion to dismiss the appeal was taken with the case.

[*"Abuse of Discretion"*]

The District Court's determination does not preclude review by us, *Sears, Roebuck & Co. v. Mackey* [1956 TRADE CASES ¶ 68,370], 351 U. S. 427. Apart from consideration of the question of whether the part of the counterclaim dismissed constituted a "claim for relief" within the meaning of Rule 54 (b), it is our opinion that the District Court's determination that there was no just reason for delay was an abuse of discretion.

[*Piecemeal Appeals*]

The question of whether there was a basis for the determination by the District Court that there is no just reason for delaying review of the dismissal of the portion of the counterclaim until after final judgment had been rendered on the claim of CBS and the other parts of Amana's counterclaim must be determined in the light of the traditional, deeply-rooted and wisely sanctioned principle against piecemeal appeals. Rule 54(b) is designed to make an accommodation between that policy and the problems of the timing of review which have arisen under the liberalized joinder of claims, counterclaims, crossclaims and third party claims in one suit permitted by modern procedural rules. In this connection the following observations made in *Panichella v. Pennsylvania Railroad Company*, 3d Cir., 252 F. 2d 452 are pertinent:

> "Thus, the procedure contemplated by Rule 54(b) is usually more than a formality. Perhaps it can properly be viewed as mere formality, albeit an essential prerequisite of immediate appeal, in those cases where it is clear that the disposition of a portion of the litigation has been such as would clearly have constituted an appealable final judgment under Section 1291 of Title 28 before the adoption of the Rules of Civil Procedure. But otherwise and ordinarily an application for a 54(b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present. Indeed, the draftsmen of this Rule have made explicit their thought that it would serve only to authorize 'the exercise of a discretionary power to afford a remedy in the infrequent harsh case * * *.' 28 U. S. C. A., Federal Rules of Civil Procedure, 118-119 note. It follows that 54 (b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by statute and rule. See 6 Moore, *Federal Practice*, 1953, 264-65."

[*Not Appropriate Case for "Certification"*]

Evaluated by the above standard the instant case was clearly not an appropriate one for entering a special order under Rule 54(b). The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal.

[*Order Vacated*]

We conclude that the order entered under Rule 54(b) did not constitute a proper exercise of discretion. It should be vacated so that the order dismissing the portion of the counterclaim may be restored to an interlocutory status which would permit a later appeal if occasion should arise upon final disposition of the cause.

[*Appeal Dismissed*]

This appeal is dismissed and the cause remanded to the District Court with directions to vacate the order entered under Rule 54(b).

[Dissenting Opinion]

HASTINGS, Chief Judge, dissenting. In the action below, Amana filed an answer to the complaint of CBS by way of a counterclaim alleging therein three separate causes of action, designated, respectively, as the First, Second and Third "Cause of Action." The First Cause of Action alleges a violation of Section 2(a) of the Robinson-Patman Act, 15 U. S. C. A. § 13(a), predicated on an alleged price discrimination by CBS. The Second and Third Causes of Action allege a violation of both Section 3 of the Clayton Act and Section 1 of the Sherman Act, 15 U. S. C. A. § 14 and § 1, predicated, respectively, on two "tying" practices engaged in by CBS: (1) The "must buy" policy, whereby each sponsor, as a condition of purchasing any television time over the CBS network, must agree to purchase such time over a specified group of television stations and is thereby denied the opportunity of choosing those stations which he deems best suited to his marketing objectives; and (2) the policy of refusing to sell network time to a prospective sponsor unless such sponsor agrees to purchase a program in which CBS has a financial interest instead of an independently-owned program of the sponsor's own choice.

The district court sustained the motion of CBS to dismiss the First Cause of Action of the counterclaim on the ground that it failed to state a claim upon which relief could be granted, that is, that Section 2(a) of the Robinson-Patman Act is not applicable to the television network services rendered by CBS to Amana. Or, as the district court stated in its order of dismissal,

> "* * * the word 'commodity' as therein [15 U. S. C. A. § 13(a)] used relates only to articles of merchandise—goods, wares and merchandise—in short, anything having the attribute of tangible existence—and cannot be construed so as to include the concept of network television time."

Following dismissal of the First Cause of Action in its counterclaim, Amana elected not to amend and moved for entry of final judgment thereon. The district court found that such First Cause of Action constituted a claim for relief separate and distinct from the other two claims in the counterclaim; that its order of dismissal constituted a final decision dispositive of such claim; that "there is no just reason for delay;" and it entered final judgment dismissing the claim with prejudice, all over objection of CBS. The certification by the district court was made pursuant to and in full compliance with the provisions of Rule 54(b), Federal Rules of Civil Procedure, 28 U. S. C. A. On April 27, 1959, Amana filed a timely notice of appeal from the order of dismissal.

[*Hearing on the Merits*]

On June 9, 1959 CBS filed its motion to dismiss this appeal on the grounds: (1) that the order below is not a "final" order within the definition of 28 U. S. C. A. § 1291 and Rule 54(b) of the Federal Rules of Civil Procedure; and (2) that the requirement of Rule 54(b) that there be no just reason for delay is not satisfied. On June 19, 1959, our court entered an order that the motion of CBS to dismiss this appeal be continued and taken with the case on its merits. Thereafter, the case was fully briefed on its merits by both parties and on September 24, 1959, was heard by this court both on the motion to dismiss the appeal and on the merits.

The majority is moved to dispose of this appeal by granting the motion of dismissal on the second ground thereof, holding that "the District Court's determination that there was no just reason for delay was an abuse of discretion." The majority did not pass upon the first ground asserted for dismissal, i. e., whether the First Cause of Action of the counterclaim constituted a "claim for relief" within the meaning of 28 U. S. C. A. § 1291 and Rule 54(b).

I find myself in disagreement with the disposition made of this appeal by the majority. In my judgment the claim dismissed was clearly a "claim for relief" within the meaning of Rule 54(b); and its dismissal constituted a "final decision" on that claim pursuant to 28 U. S. C. A. § 1291, under the recent holdings of the Supreme Court of the United States in *Sears, Roebuck & Co. v. Mackey* [1956 TRADE CASES ¶ 68,370], 351 U. S. 427 (1956) and *Cold Metal Process Co. v. United Co.*, 351 U. S. 445 (1956).

This leads us then to a consideration of whether the district court was guilty of an abuse of discretion. Mr. Justice Burton, in *Sears, Roebuck*, at page 437, said:

> "* * * But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon

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one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals."

I agree that in considering this problem we cannot lose sight "of the traditional, deeply-rooted and wisely sanctioned principle against piecemeal appeals." Applying the standard announced in *Panichella v. Pennsylvania Railroad Company*, 3 Cir., 252 F. 2d 452 (1958), the "infrequent harsh case" rule, the majority then concludes:

"* * * The prosecution of an appeal from the order dismissing the portion of the counterclaim serves to delay the trial of the principal claim and remaining portions of the counterclaim without in any way either simplifying or facilitating the conduct of the future litigation. The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal."

[*Delay*]

It is with this conclusion that I disagree. This case is now remanded to the district court for trial on the issues drawn on the plaintiff's principal claim for damages and defendant's remaining two claims under its counterclaim. On appeal from the result of that trial Amana may again challenge the merits of the dismissal of its first claim, as it attempted to do in the case at bar. If it is successful in that effort, a reversal will send the case back again for a second trial with its attendant pre-trial proceedings and resulting additional delay and cost to Amana. The *possibility* of this occurrence can be avoided by the simple expedient of determining this appeal on its merits *now*.

It does not appear that real harm will result in the delay occasioned by the *disposition* of this appeal on its merits at this time. CBS admits that Amana paid $252,430.94 on its claim of $284,545.21 at the time of filing its answer, leaving the remaining disputed balance of $32,114.27 for trial on the complaint. It is shown that CBS has deferred taking depositions and requiring Amana to answer interrogatories until the conclusion of the motion to dismiss Amana's first claim.

Without in any sense indicating the disposition I would make of it, it is my judgment that a determination of this appeal on its merits at this time would serve to simplify and facilitate the conduct of the future litigation in this case, and that to fail to do so will result in hardship and unfairness to *both* parties. The case has been fully briefed and argued before us on the merits, and we will never be in better position to decide the important principal issue before us than we are at this time. To do so is to give effect to the plain import of the holding in *Sears, Roebuck & Co. v. Mackey, supra.*

[*Would Determine Appeal on the Merits*]

I would hold that the district court did not abuse its discretion in entering its order under Rule 54(b) and would deny the motion to dismiss this appeal and then proceed to determine the appeal on its merits at this time.

[¶ 69,489] Minnesota Mining & Manufacturing Company v. Technical Tape Corp., Paul Cohen, Paul Shalita, Frederick C. Beyer, and Vernon Chemical & Manufacturing Corp.

In the New York Supreme Court, Westchester County, Special Term, Part II. Index No. 5765-1953. Dated September 11, 1959. Amended November 30, 1959.

New York and Sherman Antitrust Acts

Combinations and Conspiracies—Contracts Not to Compete—Employee's Agreement Not to Work for Employer's Competitors for One Year—Legality.—In an action by a manufacturer of pressure-sensitive adhesive tape for injunctive relief and damages from a competitor and a former employee, an antitrust issue, based on an agreement not to enter the employment of a competitor within one year, was eliminated on stipulation and agreement between the parties. The court then ordered eliminated portions of its original findings and conclusions with respect to the monopoly allegations.

See Combinations and Conspiracies, Vol. 1, ¶ 2407.34.

For the plaintiff: Townley, Updike, Carter & Rodgers, New York, N. Y. (J. Howard Carter, John R. Schoemer, Jr., Bronson B. T. Eden, and Charles T. Bates, New York, N. Y., and Harold J. Kinney and Robert I. Coulter, St. Paul, Minn., of counsel).

For all defendants except Beyer: Gallop, Climenko & Gould, New York, N. Y., and Paul L. Bleakley, Yonkers, N. Y. (Paul L. Bleakley and Arthur S. Friedman, of counsel).

[*Misappropriation of Trade Secrets—Antitrust Violations as Defense*]

BRENNAN, Justice [*In full text except for omissions indicated by asterisks*]: This action was instituted by the plaintiff for injunctive relief and damages upon the ground that the defendants allegedly misappropriated and utilized processing methods of the plaintiff. The plaintiff contends that the defendants, Shalita and Cohen, acting on behalf of themselves as well as the defendant corporations, inveigled the defendant, Beyer, a former employee of the plaintiff, to breach his contract with the plaintiff and to disclose its trade secrets.

[*Industry Involved—Parties*]

The plaintiff, hereinafter also referred to as "3M", is a Delaware corporation licensed to do business in the State of New York, and for the past 30 years has conducted a substantial and profitable business of manufacturing and selling, among other things, pressure-sensitive adhesive tape under the trade-mark, "Scotch". Insofar as this action is concerned, there are two types of tape involved—one known as the crepe paper-backed pressure-sensitive masking tape which will hereinafter be referred to as "masking tape", and the other is a transparent cellophane-backed pressure-sensitive adhesive tape, hereinafter referred to as "cellophane tape".

The defendant, Technical Tape Corp., hereinafter referred to as "Technical Tape", is a New York corporation and since 1948 has been manufacturing and selling a masking tape; since the fall of 1951, it also has been manufacturing and selling a cellophane tape. Both tapes have been sold under the trade-name of "Tuck". The defendant, Vernon Chemical & Manufacturing Corp., hereinafter referred to as "Vernon", is a New York corporation engaged since 1951 solely in the business of selling masking tape and cellophane tape manufactured by Technical Tape, and which tapes it has sold under the trade-name, "Black Wizzard". The fair inference to be drawn from the testimony is that "Vernon" was dominated by the defendant, Cohen. Said defendant, Cohen, founded Technical Tape in 1947 and since that time he has been the principal stockholder, a director, and the chief executive thereof. The defendant, Shalita, was the first employee of Technical Tape and since 1951 he has been and still is a vice-president of that company. From approximately 1943 through 1947, he was associated, as technical director, with a firm known as the Cofax Company which manufactured and sold pressure-sensitive adhesive cellophane tape.

The defendant, Beyer, was employed by the plaintiff from June 25th, 1945 to May 25th, 1951, first at the manufacturing plant of the plaintiff in St. Paul, Minnesota, and thereafter at its plant in Bristol, Pennsylvania. In 1930 this defendant was graduated from the University of Minnesota with the degree of Bachelor of Science in chemical engineering and two years later he received his Master's Degree. Thereafter he was employed, as a chemist, by the Minnesota & Ontario Paper Company and by the Insulite Company, until the spring of 1945 when he entered the employ of the plaintiff. At both of the plaintiff's aforesaid plants Beyer's duties included research in and development of particular kinds of pressure-sensitive adhesive tape (including especially masking tape) as well as quality control of the production of cellophane tape and masking tape.

As the result of the work of one Richard Gurley Drew, who entered the employ of the plaintiff in 1921, the basic masking tape patent (U. S. Pat. No. 1,760,820) was issued to the plaintiff on Drew's application on May 27th, 1930 and the basic cellophane tape patent (U. S. Pat. No. 2,177,627) was issued to the plaintiff on Drew's application on October 31st, 1939. Since the beginning of the plaintiff's operations in the pressure-sensitive tape field, it has expended large sums in research and development for the purposes of enhancing the quality, life and performance characteristics of its tapes; and in the years from 1934 to 1945 the plaintiff expended for such purposes approximately $3,500,000, most of which was for the improvement of cellophane and masking tape.

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[*Agreement Not to Compete—Antitrust Legality*]

From the beginning of the plaintiff's operations in the pressure-sensitive tape field, to and including May 25th, 1951, the plaintiff developed certain manufacturing standards, formulations, techniques and processes, and special machinery and equipment used in connection therewith (with respect to masking tape and cellophane tape) which, during said period, were not disclosed to the public by plaintiff in patents or otherwise, and which were of value to the plaintiff. Every reasonable precaution was taken by plaintiff to insure that the said manufacturing standards, formulations, techniques, processes, and the special machinery and equipment used in connection therewith, would not be disclosed or described to any person who, by virtue of the nature of his employment with the plaintiff, was not entitled to have knowledge thereof; and one of said precautionary means was to require all technical employees whose duties would require them to have knowledge of some or all of plaintiff's processes to execute a form of agreement, hereinafter referred to as the "Technical Agreement," which, among other things, bound said employees not to disclose or divulge any of plaintiff's processes to anyone without plaintiff's prior written consent. This "Technical Agreement" also provided that any such employee, upon leaving the employ of the plaintiff, would not enter the employment of any competitor for a period of one year. The defendant, Beyer, signed such an agreement. The plaintiff maintained its secret processes in so-called "Standards Books", the distribution and use of which was limited to employees whose duties required them to have knowledge of plaintiff's processes; said books were so constructed and written (by the use of code symbols and otherwise) as not to be intelligible and comprehensible, in particular portions thereof, to a person not having access to an entire set of the standards, and it was plaintiff's general policy and practice not to disclose its manufacturing processes and formulations or its technological "know-how" to other persons or companies, even companies holding licenses under plaintiff's tape patents.

[*Access to "Trade Secrets"*]

The defendant, Beyer, who was a trained and qualified chemist while working at plaintiff's tape laboratory in St. Paul, had access to a complete set of manufacturing standards of the plaintiff as well as to those production areas in plaintiff's factory where the manufacture of masking tape and cellophane tape was carried out. Said defendant's duties, while working in the tape laboratory in St. Paul, included experiments on, among other things, various types of saturants used on masking tape as well as the so-called "alkabize backsize process" for masking tape. Prior to his transfer to the plaintiff's plant in Bristol, Pennsylvania, said defendant was well instructed in the plaintiff's quality control procedures with respect to the manufacture of both masking tape and cellophane tape. In early 1949, the plaintiff promoted the defendant, Beyer, to the position of Assistant Supervisor of Quality Control at the plaintiff's Bristol plant wherein masking tape and cellophane tape were being manufactured and it was his responsibility as well as the responsibility of other supervisors to insure against the improper disclosure of any of the manufacturing information set forth in plaintiff's standards books. Beyer's duties required him to have a familiarity with all of plaintiff's manufacturing standards and each phase of the manufacturing operation pertaining to the aforesaid tapes. Said defendant learned and became fully familiar with or was in a position to become fully familiar with the details of the plaintiff's alleged trade secrets as described in plaintiff's proposed supplemental findings of fact.

* * *

[*Divulging Confidential Information*]

This Court finds that Technical Tape's employment of Beyer was arranged for the specific purpose of having him divulge confidential information which he possessed or could readily ascertain by reference to the plaintiff's standards books with respect to the manufacture of masking tape and cellophane tape and which information he acquired or could acquire in the course of his employment by the plaintiff. From the record before this Court, it is clear that the action of Technical Tape and those who aided it was wrongful. Cohen and Shalita both knew that Beyer was under a written obligation not to divulge the confidential information and trade secrets which he acquired in the course of his employment with the plaintiff or could acquire in the course

of such employment. It is apparent that Beyer was willing to be and was knowingly placed by Technical Tape in a position of performing services wherein, by resorting to and disclosing the use of that which he had learned or could learn while in the plaintiff's confidence and employ, he could make such a major contribution to the pressure-sensitive tape products of the aforesaid defendant so as to enable said products to compete favorably with those of the plaintiff.

* * *

Amending Opinion, November 30, 1959

[*Antitrust Comment Eliminated*]

BRENNAN, Justice [*In full text*]: The defendants, other than the defendant Beyer, move to set aside the decision of this court, herein, and for a new trial, pursuant to the provisions of section 549 of the Civil Practice Act. Upon the argument of this application it was stipulated and agreed by and between counsel for the respective parties that the so-called monopoly allegations of the amended answers (such as are contained in paragraphs 26 to 29 inclusive of the amended answer of the defendant Technical Tape Corporation) be withdrawn *nunc pro tunc* as of the date of the service of said amended answers and that, with this court's approval, the aforesaid decision of this court (dated September 11, 1959) filed September 15, 1959, be modified by eliminating therefrom any and all findings of fact and conclusions of law with respect thereto with the same force and effect as if the said allegations and the said findings and conclusions had never been made. Thereupon this court approved the aforesaid stipulation and agreement. The remaining contentions of the movants have been considered and found to be without merit. Accordingly, this application is denied. Settle order on notice. The judgment to be entered on the decision of this court will be settled at chambers at 2 P.M. on December 4, 1959. Counsel are requested to be present.

[¶ 69,490] Julius Schmid, Inc. v. Gelber.

In the New York Supreme Court, New York County, Special Term, Part 1. 142 N. Y. L. J., No. 72, page 14. Dated October 9, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt.—A motion to punish a defendant for contempt for allegedly selling a commodity below fair trade prices in violation of an injunction was held in abeyance pending the taking of evidence on the issue by an official referee.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Contempt Action*]

GREENBERG, Justice [*In full text*]: This is a motion to punish the defendant for contempt for violating the injunctive provision in a judgment dated March 2, 1956, which prohibited defendant from selling plaintiff's commodities below fair trade prices. The sole violation now complained of against defendant is an alleged isolated sale of one specific item, by an unnamed sales person at defendant's retail store on July 21, 1959. The defendant denies that any sale of this nature took place or that any products of plaintiff were sold at less than fair trade price. This court, under the circumstances, cannot resolve the matter on the papers submitted. Testimony must be taken concerning the disputed issue. Accordingly, the matter is respectfully referred to Hon. Jacob Marks, official referee, to take proof on the issue raised and to report to the court with his recommendations. Pending the coming in of the report, the final disposition of this motion will be held in abeyance.

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[¶ 69,491] Gillette Co. v. Lindemann Pharmacy, Inc.

In the New York Supreme Court, New York County, Special Term, Part 1. 142 N. Y. L. J., No. 73, page 14. Dated October 13, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Violation of Injunction—Contempt.—A pharmacy, adjudged in contempt for selling products on four occasions at less than fair trade prices in violation of an injunction, was fined $500, plus $100 costs and expenses. The pharmacy could not excuse continued contempts by claims that its president had no knowledge of such sales or by hearsay denials of them. The contention that the purchasers' affidavits were unworthy of belief because they were employed to check on the pharmacy's compliance with the fair trade prices was untenable.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Contempt*]

McGIVERN, Justice [*In full text*]: This is the second motion to punish defendant for four contempts of court in selling plaintiff's products on four occasions at less than the minimum retail fair trade prices in disobedience to the permanent injunction of this court entered on June 17, 1959. Defendant cannot excuse its continued contempts by a claim that its president has no knowledge of the sales and by hearsay denials of any contemptuous sales (*General Electric Co. v. Golden Rule Appliance Co., Inc.* [1957 TRADE CASES ¶ 68,698], 3 App. Div. 2d 436). Moreover, the contention of defendant that the purchasers' affidavits are unworthy of belief because they were employed to check on defendant's compliance with plaintiff's fair trade price is entirely untenable. (*Olin Mathieson Chemical Corp'n v. Lindemann Pharmacy, Inc.* [1959 TRADE CASES ¶ 69,425], 8 App. Div. 802). Finally, defendant's attempt to place notice in issue does not raise a genuine defense to this motion. Accordingly, the motion is granted and defendant is adjudged in contempt and fined $500, plus $100 costs and expenses. Settle order.

[¶ 69,492] United Whelan Corporation v. Lind.

In the New York Supreme Court, New York County, Special Term, Part 1. 142 N. Y. L. J., No. 72, page 14. Dated October 9, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Fair Trade Enforcement Action—Temporary Injunction—Notice of Fair Trade Prices.—A retailer was denied a temporary fair trade injunction against another retailer where there was no factual support of the allegation that the defendant was on due and sufficient notice of the fair trade contract.

See Fair Trade, Vol. 1, ¶ 3268.34.

[*Temporary Injunction*]

GREENBERG, Justice [*In full text*]: Plaintiff moves for a temporary injunction in enforcement of the Feld-Crawford Act. The action is by retailer against retailer. The offending sales are claimed to have been made on September 14, 1959. The defendant, it appears, claims to have opened the place of business as a corporate enterprise on September 2, 1959. It is alleged in the complaint that defendant has had due and sufficient notice of all of the matters set forth in the complaint relating to the existence of fair trade contracts between the manufacturers and retailers. The allegation is conclusory and the moving affidavit fails to produce any factual support of claimed notice. The motion is denied.

[¶ 69,493] Beck Drug Co., Inc. v. Falk Surgical Corp.

In the New York Supreme Court, New York County, Special Term, Part 1. 142 N. Y. L. J., No. 72, page 14. Dated October 9, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Fair Trade Enforcement Action—Temporary Injunction—Defense—Unclean Hands.—A retailer was granted a temporary fair trade injunction against another retailer where the defense of "unclean hands" was held not to be available under the facts and circumstances of the case.

See Fair Trade, Vol. 1, ¶ 3420.

[*"Unclean Hands" Defense*]

GREENBERG, Justice [*In full text*]: Application for temporary injunction is granted. The underlying suit involves a retailer against retailer in which the plaintiff moves for an injunction in enforcement of the Feld-Crawford Act. The defendant has cross-moved under section 307 of the Civil Practice Act for the appointment of a referee before whom two proposed witnesses are to appear to give testimony in aid of defendant's opposition to plaintiff's motion for temporary injunction, those witnesses having refused to make an affidavit. A study of the proffered testimony indicates that it is immaterial and unnecessary. The defense of "unclean hands" is not available under the facts and circumstances revealed on the present application. The plaintiff having otherwise established grounds for the relief sought, the cross-motion is denied and the motion for a temporary injunction is granted. Settle order.

[¶ 69,494] Cameron Iron Works, Inc. v. Edward Valves, Inc., et al.

In the United States District Court for the Southern District of Texas, Houston Division. Civil Action No. 10,701. Filed July 30, 1959.

Sherman Antitrust Act

Monopolies—Practices as Evidence of Monopolization or Attempts to Monopolize—Institution of Patent Infringement Suit.—A valve manufacturer did not misuse its patent or violate the Sherman Act by instituting and maintaining a patent infringement suit. Such action was taken in good faith and with the sole motive of enforcing its patent against what it considered an infringement and not for the purpose of monopolizing or attempting to monopolize any substantial portion of interstate commerce. The manufacturer had good cause to file the suit since the claimed infringing product closely resembled its product. Also, the manufacturer's patent had been adjudged valid by a U. S. Court of Appeals. The act of bringing and maintaining an infringement suit cannot, standing alone, be a violation of the Sherman Act. A contrary ruling would discourage patentees from resorting to the courts to have their controversies determined. Among other things, it was found that the past popularity of the patented product for certain uses had been due to the excellence of the product, the protection afforded by a patent, and proper sales efforts, and not from any illegal or unfair practices. The evidence showed healthy competition in the segment of the valve industry involved.

See Monopolies, Vol. 1, ¶ 2610.525.

Monopolies—Relevant Market—Valves.—In a counterclaim charging a patentee with monopolizing or attempting to monopolize the market for "mudline valves with resilient sealing surfaces," the court ruled that there was no market for such valves separate and apart from the general market for valves of the proper pressure ratings capable of controlling the flow of abrasive laden fluids. The resilient seated valves in issue competed with metal-to-metal seated valves, which were produced by several of the large manufacturers of valves.

See Monopolies, Vol. 1, ¶ 2540.

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Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Proof of Damage to Counterclaimants.—Even if a valve manufacturer's acts had constituted a violation of the antitrust laws, the complaining parties would not be entitled to any relief since they failed to produce any evidence showing legal damage to either of them in their business or property resulting proximately from the alleged unlawful acts.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275.

For the plaintiff: Brown, Simms, Hyer & Eickenroht, by James B. Simms, Houston, Tex.

For the defendants: Baker, Botts, Andrews & Shepherd, by Garrett R. Tucker, Jr., and Frank B. Pugsley, Houston, Tex.; and Strauch, Nolan & Neale, by William A. Strauch, John R. Bronaugh, and John D. Nies, Washington, D. C.

[*Patent Infringement Suit*]

INGRAHAM, District Judge [*In full text except for omissions indicated by asterisks*]: This is a suit for patent infringement, injunction and accounting for profits and damages, brought by Cameron Iron Works, Inc., as plaintiff, against Edward Valves, Inc. and Rockwell Manufacturing Company, defendants. Other defendants were originally named in the Complaint but were dropped as parties by stipulation of counsel. Defendant Edward Valves, Inc. is a subsidiary of defendant Rockwell Manufacturing Company. Mr. Crawford, President of Edward Valves, Inc., is also Vice President of Rockwell Manufacturing Company and serves as Director upon the board of each company.

The patent in suit is patent No. 2,606,740 issued to plaintiff on August 12, 1952, upon an application of Herbert Allen filed April 5, 1945. The Allen patent is for a "Valve" and relates to an improvement in valves for controlling the flow of abrasive-laden fluids under pressures of as high as several thousand pounds per square inch in various oil and gas well drilling operations. The invention is directed to the form of the sealing means adapted to seal against the closure member of the valve and the valve body when the valve is closed. The principal object of the invention was to provide a valve having a fluid pressure actuated sealing means which will not tend to tear off or be blown past the valve closure member while the gate is being opened or closed.

The Complaint alleges that the defendants have infringed and will continue to infringe the Allen patent by its manufacture, use and sale of valves known as "Mudwonder" valves. The particular claims alleged to be infringed are not specified in the Complaint, but at the trial plaintiff urged only claims 1, 2, 4 and 5. However, defendants attacked the validity of claim 3 as well as claims 1, 2, 4 and 5.

The Allen patent drawings illustrate two gate valves and a plug valve. However, inasmuch as the accused "Mudwonder" valve is a gate valve, most of the evidence and this discussion are limited to gate valves. The gate valve embodies the following elements: A conventional housing having a flow passage therethrough which connects the pipes leading to and from the valve; a chamber intersecting the flow passage in which is located the movable valve closure member called a gate; the gate which is mounted to move up and down in the chamber to shut off the flow when the gate is across the flow passage; and a sealing element to prevent leakage flow around the gate when it is in closed position. In operation when the gate is across the flow passage, the valve is closed and to open the valve the gate is raised to a position not obstructing the flow passage.

The claims recite a novel combination of elements which includes sealing elements having a lip to seal against the gate to stop leakage. The arrangement specified in the claims is such that the lips are adapted when they are on the downstream side of the closure member to be forced by upstream pressure into sealing engagement with the closure member. The lips have surfaces which are exposed to the upstream pressure in the chamber so as to effect this pressure actuation.

Although the valve is capable of use with either end as the inlet, the seal is always effected against the valve closure member *only* around the valve outlet; that is, on the downstream side of the valve. This is due to the fact that the lip seal is so disposed that the upstream pressure is permitted to pass into the valve chamber and the down-

stream lip serves to seal the pressure fluid against flowing out of the valve chamber.

From the plaintiff's evidence it appears that this invention was made in an effort to provide a valve that would be easier to open and close than plaintiff's highly successful "Flex-Seal" valve, made under its patent 2,194,262 which is not in suit but is urged as prior art by defendants. Another point of improvement was to provide a valve that did not depend for its sealing action upon how hard the handwheel was turned to close the valve. In other words, a valve that has seals which are actuated by the pressure sealed against.

Mr. Allen testified, when called by the defendants, that the experimental valves made by plaintiff, although they proved the seal principles, did not offer enough practical advantage over the "Flex-Seal" to warrant its adoption over the "Flex-Seal" as a commercial valve. Plaintiff offered evidence showing the construction and successful testing of three plug valves and one gate valve. There is, however, no evidence that the valve was ever made and sold as a commercial item by plaintiff.

The development of the "Mudwonder" valve by defendants and the events leading up to its sale as a commercial valve are shown by a number of the technical reports taken from defendants' own files. These show that as early as 1949 defendants were weighing arguments in favor of copying the Cameron "Flex-Seal" valve against arguments against this procedure. Defendants tested the Cameron "Flex-Seal" valve and compared it to other valves on the market and proceeded to design and construct an experimental valve having a rubber seat in a one-piece body and a gate with a shoulder which would squeeze against the rubber seat and cause an upstream seal much on the principle of the Cameron "Flex-Seal" valve. However, this was abandoned in favor of the "Mudwonder" construction charged as an infringement here.

The "Mudwonder" valve has fluid pressure actuated sealing means which do not tend to tear off or be blown past the valve closure member while the gate is being opened or closed. It is a gate valve that embodies the following elements: A conventional housing having a flow passage therethrough which connects the pipes leading to and from the valve; a chamber intersecting the flow passage in which the movable valve closure member or gate is located; the gate which is mounted to move up and down in the chamber to shut off the flow when the gate is across the flow passage; and a sealing element that prevents leakage flow around the gate when it is in closed position. In operation when the gate is across the flow passage, the valve is closed and to open the valve the gate is raised to a position not obstructing the flow passage.

Plaintiff's evidence shows that defendants' employees in their conversation, in their technical reports, and even in preparing their application for patent, when referring to the "Mudwonder" called the sealing elements of the valve "lips". The lips included the ridge portion of the seal rings that engage the gate and the ridge portion which seal against the body. The seal is provided by the lips on the downstream side of the closure member, which are forced by the upstream pressure in the chamber into sealing engagement with the closure member. The seal is always about the outlet and the upstream pressure leaks by the lips on the upstream side of the gate to pass into the valve chamber.

The lips that confront the gate engage it. At their lower ends these latter lips are joined by a crescent shaped bridge that makes it easier to install the seal ring insert and provides a seal against the very bottom of the gate. The bridge does not change the function of the lips that seal three fourths of the way around the passage.

The evidence shows that defendants received a copy of the Allen patent on August 27, 1952; that in November of 1952 the Allen patent was tested by defendants; and in March of 1953 defendants were advised by their attorneys that Cameron was almost certain to bring this infringement suit. Defendants elected to go ahead with the project and to rely upon prior art, so that the infringement was both bold and deliberate.

[*Defenses*]

Defendants pleaded defenses of anticipation by the prior art, lack of invention over the prior art, non-infringement, file wrapper estopple, patent and claims are indefinite, misuse of patent and fraudulent misrepresentations to the Patent Office. The evidence does not sustain any of these defenses. The Allen patent was adjudged valid in *Cameron Iron Works, Inc. v. Stekoll,* 242 Fed. (2d) 17.

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I am of the opinion that the Allen patent is valid and infringed and find for the plaintiff on all issues.

[*Antitrust Counterclaim*]

Defendants filed a Counterclaim against plaintiff under Section 4 of the Clayton Act (15 U. S. C., Section 15) for thrice defendants' damages resulting from certain alleged acts of plaintiff which defendants charge violated 15 U. S. C. Section 2, commonly known as the Sherman Act.

Plaintiff moved for judgment dismissing the Counterclaim on the ground that upon the facts and the law the defendants have shown no right to relief. This motion was made by plaintiff under Rule 41(b) F. R. C. P. after the defendants had completed the presentation of their evidence in support of the Counterclaim.

The Counterclaim charges that plaintiff is attempting to monopolize the market in valves "sized especially for mudline service and having resilient sealing surfaces which render them capable of effectively controlling the flow of abrasive-laden fluids" circulated in the mud supply system of drilling oil wells. The offense charged in the Counterclaim was the filing and maintaining of this civil action without justification.

[*Evidence*]

The evidence failed to show that any separate market exists in valves with resilient sealing surfaces for mudline service. Rather the evidence shows that such valves in fact compete with valves having metal-to-metal seals used in this and other services. The metal-to-metal valves are sold by numerous manufacturers of valves. The evidence was inconclusive as to any particular portion of the market enjoyed by plaintiff. The evidence doesn't show any alleged illegal act on the part of Cameron other than the filing and maintaining of this civil action on the Allen patent which had already been held valid in *Cameron Iron Works, Inc. v. Stekoll,* (C. A. 5, 1957), 242 Fed. (2d) 17.

All of the evidence points toward the good faith of plaintiff in filing and maintaining this suit. There is no evidence that plaintiff had any motive in filing this suit other than a proper motive to enforce its patent against what it considered was an infringement.

[*Institution of Suit Not Unlawful*]

The act of bringing and maintaining a suit for infringement of a patent cannot, standing alone, be a violation of the Sherman Act. A contrary holding would make a serious inroad on the integrity of the patent system as it would discourage patentees from resorting to the courts to have their controversies determined. This is even the case where the patent has not been previously adjudicated. *Jacquard Knitting Machine Co. v. Ordnance Gauge Co.* (C. A. 3, 1954) [1954 Trade Cases ¶ 68,871], 213 Fed. (2d) 503; *Cole v. Hughes Tool Company* (C. A. 10, 1954) [1954 Trade Cases ¶ 67,857], 215 Fed. (2d) 924 at 935; and Walker On Patents, Deller's Edition, Volume 2, Section 408.

[*Legal Damage*]

Defendants have not produced any evidence showing legal damage to either of them in their business or property, resulting proximately from the alleged unlawful acts. This is a statutory prerequisite to the right of action under 15 U. S. C. 15; *Triangle Conduit and Cable Co. v. National Electric Products Corporation* (C. A. 3, 1945) [1944-1945 Trade Cases ¶ 57,422], 152 Fed. (2d) 398; and *Twentieth Century-Fox Film Corp. v. Brookside Theater Corp.* (C. A. 8, 1952) [1952 Trade Cases ¶ 67,218], 194 Fed. (2d) 846.

[*Judgment for Plaintiff*]

The evidence presents healthy competition in this segment of the valve industry in the true spirit of American free enterprise. Plaintiff's motion will be sustained and a judgment will be entered for plaintiff dismissing the Counterclaim.

Following are findings of fact and conclusions of law, separately, (1) upon the issues of validity and infringement of the Allen patent, and (2) upon defendants' Counterclaim under the Clayton and Sherman Acts.

Findings of Fact and Conclusions of Law Upon the Issues of Validity and Infringement

Findings of Fact

* * *

Plaintiff Has Not Misused the Allen Patent

57. As indicated in the foregoing findings relating to infringement, the Mudwonder

valve so closely resembles the Allen patent disclosure that it fully meets the terms of claims 1, 2, 4 and 5 thereof from the standpoint of both structure and function. Therefore, plaintiff had good cause to file and maintain this civil action to submit the question of infringement to the courts.

58. There is no evidence showing an overt act of plaintiff to monopolize or attempt to monopolize any portion of the valve industry and defendants' only allegation of such act is the filing and maintaining of the suit to enforce its patent.

59. Healthy competition exists in the market supplying valves to the oil and gas well drilling industry for service in mud lines, well cementing, formation fracturing and other services in which plaintiff's Flex-Seal valve and defendants' Mudwonder valve are used. Each of these valves competes with valves manufactured and offered for sale in use in these services by numerous valve manufacturers.

60. Plaintiff's Flex-Seal valve was protected by United States patent 2,194,262 until its expiration on March 19, 1957. Its past popularity for certain uses has been due to the excellence of the product, the protection once afforded by the now expired patent, and proper sales efforts, and not from any illegal or unfair practices.

61. The Flex-Seal and the competing valves have been sold for the most part by a large number of supply stores operated in the old fields. The supply stores are owned by supply companies that are unrelated to plaintiff and operate independently of plaintiff. Plaintiff has no power to control these supply stores and there is no evidence that it has attempted to do so.

62. The resilient seated Flex-Seal and Mudwonder valves compete with metal-to-metal seated valves, both lubricated and non-lubricated. The competing metal seated valves are manufactured by several of the large manufacturers of valves.

63. Resilient seated valves compete with metal seated valves except where temperatures higher than about 300° F. or the chemical composition of the fluids prevent their use. There is no market of "mudline valves with resilient sealing surfaces" separate and apart from the general market of valves of the proper pressure ratings capable of controlling flow of abrasive laden fluids.

64. The magnitude of annual sales of "mudline valves with resilient sealing surfaces" was not establish in the evidence with any reasonable certainty. Also, plaintiff's particular share of the sale of such resilient seated valves has not been established with any reasonable certainty.

65. Neither defendant has proved it has suffered any legal damages to its business or property by reason of any acts of plaintiff alleged in the Counterclaim to be unlawful.

Conclusions of Law

* * *

14. Plaintiff, in filing and maintaining this civil action and in the conduct of its business, acted in good faith and not for the purpose of monopolizing or attempting to monopolize any substantial portion of commerce controllable by Congress in violation of the antitrust laws of the United States and has not misused the patent.

15. Plaintiff has not misused the Allen patent.

* * *

Findings of Fact and Conclusions of Law in Support of Judgment Dismissing Defendants' Counterclaim

Findings of Fact

1. Plaintiff is a corporation incorporated under the laws of the State of Texas, and has a legal, regular, and established place of business in the City of Houston, Texas, Southern District of Texas.

2. The defendant Edward Valves, Inc. is a corporation organized and existing under the laws of the State of Delaware, and maintains a regular and established place of business at 1606 Maury Street, in Houston, Harris County, Texas. Defendant Rockwell Manufacturing Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania; it has a permit to do business in Texas, and maintains regular and established places of business at 1102 Delano Street and 1606 Maury Street, both in Houston, Harris County, Texas.

3. The parties have stipulated that the court has jurisdiction over the parties and the subject matter of the Counterclaim.

4. Plaintiff brought this civil action in good faith to submit to the court for deter-

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mination plaintiff's charge that defendants infringed United States patent 2,606,740 by manufacturing and selling their "Mudwonder" valve. Plaintiff's purpose in filing and maintaining this civil action was to enforce its patent which had been previously declared valid by the United States Court of Appeals for the Fifth Circuit in *Cameron Iron Works, Inc. v. Stekoll,* 242 Fed. (2d) 17.

5. There is no evidence showing an overt act of plaintiff to monopolize or attempt to monopolize any portion of the valve industry and defendants' only allegation of such act is the filing of and maintaining of this civil action to enforce its patent.

6. Healthy competition exists in the market supplying valves to the oil and gas well drilling industry for service in mud lines, well cementing, formation fracturing and other services in which plaintiff's Flex-Seal valve and defendants' Mudwonder valve are used. Each of these valves competes with valves manufactured and offered for sale in use in these services by numerous valve manufacturers.

7. Plaintiff's Flex-Seal valve was protected by United States patent 2,194,262 until its expiration on March 19, 1957. Its past popularity for certain uses has been due to the excellence of the product, the protection once afforded by the now expired patent, and proper sales efforts, and not from any illegal or unfair practices.

8. The Flex-Seal and the competing valves have been sold for the most part by a large number of supply stores operated in the oil fields. The supply stores are owned by supply companies that are unrelated to plaintiff and operate independently of plaintiff. Plaintiff has no power to control these supply stores and there is no evidence that it has attempted to do so.

9. The resilient seated Flex-Seal and Mudwonder valves compete with metal-to-metal seated valves, both lubricated and non-lubricated. The competing metal seated valves are manufactured by several of the large manufacturers of valves.

10. Resilient seated valves compete with metal seated valves except where temperatures higher than about 300° F. or the chemical composition of the fluids prevent their use. There is no market of "mud line valves with resilient sealing surfaces" separate and apart from the general market of valves of the proper pressure ratings capable of controlling flow of abrasive laden fluids.

11. The magnitude of annual sales of "mud line valves with resilient sealing surfaces" was not established in the evidence with any reasonable certainty. Also, plaintiff's particular share of the sale of such resilient seated valves has not been established with any reasonable certainty.

12. Neither defendant has proved it has suffered any legal damages to its business or property by reason of any acts of plaintiff alleged in the Counterclaim to be unlawful.

Conclusions of Law

1. This court has jurisdiction of the parties and the subject matter of the Counterclaim.

2. Plaintiff had good cause to file and maintain the civil action brought on its Complaint filed herein for infringement of United States Letters Patent 2,606,740, and such action was filed and maintained by plaintiff in good faith without any illegal intent to monopolize or to attempt to monopolize any portion of the valve industry.

3. There is no market for "mud line valves with the resilient sealing surfaces" separate and apart from the general market of valves of the proper pressure ratings capable of controlling flow of abrasive laden fluids because of competition offered by the metal-to-metal seated valves of this general market.

4. Defendants have not been severally or jointly injured or damaged in their business or property by reason of plaintiff's acts which defendants have alleged violate the antitrust laws of the United States and thus would not be entitled to relief even though plaintiff's acts did constitute a violation of the antitrust laws.

5. Plaintiff has not violated the antitrust laws of the United States.

6. The Counterclaim should be dismissed.

Filed with the clerk herewith are separate judgments (1) for plaintiff upon its suit for validity and infringement of the Allen patent, and (2) dismissing defendants' Counterclaim.

Copies hereof will be forwarded by the clerk to the attorneys of record.

[¶ 69,495] Gulf Oil Corporation v. Claude E. Mays, individually and trading as Mays Gulf Service.

In the Pennsylvania Court of Common Pleas of Berks County. No. 2813, Equity Docket, 1959. Dated October 8, 1959.

Pennsylvania Fair Trade Act

Fair Trade—Enforcement Action—Defenses—Lack of Enforcement Activity—Fair Trader's Failure to Stop Other Retailers from Giving Trading Stamps—Legality of Practice.—A gasoline producer which allegedly "sanctioned" its dealers' practice of giving "trading stamps" in connection with the retail sale of its product was not precluded from enforcing its fair trade prices against a retailer who did not follow that practice. Rejecting the contention that the circumstances gave rise to an equitable defense, the court noted that the producer had not prohibited the retailer from adopting the practice. Further, the more important answer to that contention was that "the giving of trading stamps is not a reduction of price of the article whose purchase entitles the buyer to stamps." It is not a price cutting device, but a means of inducing a customer to return and make additional purchases. In a sense, the stamps have no value in themselves; they acquire value only if the stipulated amount of other purchases is made. Thus, the giving of trading stamps cannot be regarded as cutting prices any more than free delivery service or free parking, practices which obviously save money for customers, could be so regarded.

See Fair Trade, Vol. 1, ¶ 3294.40, 3440.40.

Fair Trade—Fair Trade Prices Established After "Nonsigner's" Execution of Long-term Sales Agreement—Validity—"Unilateral Modification" of Existing Contract.—A gasoline producer with a 1955 sales agreement binding a retailer to purchase 90,000 gallons per year for 15 years was not required to obtain the consent of that retailer in order to enforce against him, a "nonsigner," the producer's 1959 fair trade agreements with others. Rejecting the contention that enforcement of those fair trade agreements against the nonsigner would constitute a "unilateral modification" of an existing contract, the court noted that (1) the parties contracted in view of, and subject to, the law of Pennsylvania, (2) the Pennsylvania Fair Trade Act was in existence at the time the parties entered into the sales agreement, (3) neither party could object to the invocation of any applicable law of Pennsylvania, and (4) the dealer could not successfully maintain that he or the producer was "impliedly contracted out of the statute."

See Fair Trade, Vol. 1, ¶ 3130, 3258.40, 3420.

Fair Trade—Defenses to Enforcement Action—Lack of "Option" to Accept or Reject Fair Trade Goods—Contractual Obligation to Make Minimum Yearly Purchases.—The fact that a gasoline retailer was contractually obligated to purchase from a producer at least 90,000 gallons of gasoline per year for 15 years did not relieve him from complying with the producer's fair trade prices. The retailer contended that, in every case which had arisen from the Pennsylvania Fair Trade Act, the retailer had had an option to buy the fair trade goods or not to buy them, but that he had no such choice by reason of his contractual obligations with the producer. He thus argued that it would be against "conscience and good equity" to forbid him to sell at such a price as he found necessary "to move it in the channel of distribution to the consumers." However, it did not appear that the retailer had labored under any difficulty in disposing of 90,000 gallons per year. During 1958, a fairly representative year, he had sold over 220,000 gallons. He testified that raising his price by one cent to meet the fair trade price would cause him to suffer a great reduction in his business, but it could not be concluded that his loss of business would be so great as to "embarrass and financially jeopardize him in taking the 90,000 gallons." In short, he had not shown that by adopting the fair trade price he could not market gasoline. Therefore, it was not necessary to rule upon the general validity of the contention that the nature and extent of his total contracts with the producer might, under some circumstances, relieve him from compliance with the fair trade prices.

See Fair Trade, Vol. 1, ¶ 3420.

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For the plaintiff: Stevens & Lee, by Charles H. Weidner and Richard A. Bausher.

For the defendant: Snyder, Balmer & Kershner, by George B. Balmer.

Sur Application for Injunction

PLEADINGS AND ISSUES

SHANAMAN, President Judge [*In full text*]: The pleadings are: (1) Plaintiff's complaint, (2) defendant's answer, (3) plaintiff's reply. The issue is whether or not defendant shall be ordered to comply with fair-trading prices for plaintiff's products, when offered for sale by defendant.

FINDINGS OF FACT

[*Parties*]

1. At all times material hereto Gulf has been and now is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at Seventh Avenue and Grant Street, Pittsburgh, Pennsylvania (N. T. 6).

2. At all times material hereto defendant has been and now is an individual doing business under the name of Mays Gulf Service at 39th Street and Philadelphia Pike, Reiffton, Berks County, Pennsylvania, where he is engaged, inter alia, in the sale at retail of Good Gulf, Gulf Super No-nox, and Gulf Crest gasoline, herein sometimes referred to separately and collectively as "Gulf Brand Gasoline" (N. T. 6).

3. For many years and at all times herein mentioned, Gulf has been and now is a refiner and vendor of branded regular and premium grades of gasolines, which gasolines are sold throughout the Commonwealth of Pennsylvania (N. T. 6).

[*Trademarked Commodity*]

4. Gulf Brand Gasoline is sold at retail from dispensing or vending machines which bear the trade-marks, brands or names of plaintiff (N. T. 6-7).

5. Gulf Brand Gasoline is in fair and open competition in the Commonwealth of Pennsylvania with commodities of the same general class produced or manufactured by others (N. T. 6-7).

6. Gulf has expended millions of dollars in promoting and advertising Gulf Brand Gasoline, both nationally and in the Commonwealth of Pennsylvania, and has established valuable public acceptance and good will for such gasolines and for the name, brand and trade-mark under which they are produced and sold (N. T. 13-14).

[*Fair Trade Contracts*]

7. Gulf, pursuant to the Pennsylvania Fair Trade Act, has entered into certain Fair Trade Agreements with retailers of Gulf Brand Gasoline in the Commonwealth of Pennsylvania and particularly in Berks County, under which Gulf has a right to and did stipulate minimum retail prices for Gulf Brand Gasoline (N. T. 11-13, 25).

8. Of 1,846 retailers of Gulf Brand Gasoline in the Commonwealth of Pennsylvania, 1,539 have executed Gulf Fair Trade Agreements; of the 63 Gulf dealers in the Reading tank wagon area, 56 have executed Gulf Fair Trade Agreements; and of the 51 Gulf dealers in Berks County, Pennsylvania, 47 or 48 have executed Gulf Fair Trade Agreements (N. T. 11, 25).

9. On January 12, 1959, Gulf commenced the Fair Trading of Gulf Brand Gasoline in Pennsylvania and gave notice thereof to its retailers including the defendant (N. T. 7-8, 12-13, 20).

10. On January 13, 1959, and again on February 20, 1959, Gulf duly notified defendant of the existence of its Fair Trade Agreements and of the minimum retail prices stipulated by Gulf under said Agreements for the sale of Gulf Brand Gasoline (N. T. 7-8, 9-10).

[*Violation by Nonsigner*]

11. Defendant, at various times since January 13, 1959, advertised, offered for sale and sold at retail Gulf Brand Gasolines, to wit, Good Gulf, Gulf Super No-nox, and Gulf Crest, from dispensing or vending machines and equipment bearing Gulf's name, brand and trade-mark at 26.9, 29.9, and 32.9 cents per gallon respectively (including taxes), although he had notice of the fact that Gulf's stipulated minimum retail prices therefor were 27.9, 30.9 and 33.9 cents per gallon respectively (including taxes) (N. T. 8-10).

12. The foregoing sales of Gulf Brand Gasoline by defendant were not made for the purpose of closing out defendant's stock of Gulf Brand Gasoline for the purpose of discontinuing delivery thereof; were not

sales of Gulf Brand Gasoline defective or deteriorated in quality or removed from Gulf's Fair Trade price schedule; were not sales by an officer acting under the order of any court; and were not sales in execution of any writ or distress (N. T. 10-11).

13. The aforesaid sales of Gulf Brand Gasoline below the legally stipulated minimum retail prices therefor were made wilfully and knowingly.

14. The aforesaid sales by defendant have caused irreparable damage to Gulf and have tended to impair and destroy the good will and value of the brands and trade-marks pertaining to Gulf Brand Gasoline.

[*Other Agreements*]

15. On September 15, 1955, the parties hereto entered into a sales agreement under which, for a period of fifteen years, from October 7, 1955 to October 6, 1970, the defendant was obligated to purchase from the plaintiff, at least 90,000 gallons of motor fuel per year (Exhibit 4).

16. Under an agreement dated September 15, 1955 between the parties hereto, the defendant agreed that in the event the defendant should for any reason cease to operate himself the gasoline station on Perkiomen Avenue in Reiffton, the plaintiff has an option to lease from the defendant said premises for the sum of $200.00 per month until December 31, 1970.

17. Under an agreement dated September 15, 1955 between the parties hereto, the defendant agreed that in the event the defendant breached any condition of a sales agreement between the parties hereto dated September 15, 1955, the plaintiff had an option to lease from the defendant said premises for the sum of $200.00 per month until December 31, 1970.

18. Under an agreement dated September 15, 1955 between the parties hereto, the defendant agreed that in the event that a sales agreement between the parties hereto dated September 15, 1955 was terminated by operation of law or by mutual consent or by other cause not attributable to the action of the plaintiff, plaintiff had an option to lease from the defendant said premises for the sum of $200.00 per month until December 31, 1970 (Appendix, N. T. filed April 8, 1959).

19. The defendant and his wife, Olive D. Mays, have operated the gas station on Perkiomen Avenue in Reiffton since October 7, 1955, and have purchased more than 90,000 gallons of motor fuel from the plaintiff during each year.

[*Trading Stamps*]

20. Competitors of the defendant selling the gasoline distributed by the plaintiff have given to customers purchasing motor fuel trading stamps.

21. The plaintiff has taken no steps to prevent competitors of the defendant selling the plaintiff's product from giving trading stamps to the customers of said competitors.

DISCUSSION

[*Defenses—Lack of Enforcement Activity*]

The validity of the Pennsylvania Fair Trade Act of June 5, 1935, P. L. 266, as amended, 73 P. S. 7, et seq., has been more than once upheld.

> "The Act of 1935 is violated when the vendor either (1) cuts directly the prices of commodities within the protection of the act, or (2) accomplishes the same result in respect to the commodities by a device which is a palpable subterfuge resorted to for the purpose of circumventing the law." *Bristol-Myers Company v. Lit Brothers, Inc.* [1932-1939 TRADE CASES ¶ 55,227], 336 Pa. 81, Syll. 3; *Lentheric, Inc. v. F. W. Woolworth Co.* [1940-1943 TRADE CASES ¶ 56,033], 338 Pa. 523; *Olin Mathieson Chemical Corp. v. L. & H. Stores, Inc.* [1958 TRADE CASES ¶ 68,981], 392 Pa. 225, accord.

[*Giving Trading Stamps—Legality*]

Defendant argues that some dealers in plaintiff's products give trading stamps to purchasers, and that plaintiff has made no substantial effort to stop this practice. Defendant concedes that in suits brought by maker against dealer to enforce a Fair-Trade price, the courts have not regarded the giving of trading stamps to purchasers as a violation by the dealer of the Fair Trade Act. Defendant contends, however, that where the defendant-dealer does not himself give trading stamps and defends on the ground that the plaintiff-manufacturer is sanctioning the practice of his other dealers in giving trading stamps, an equitable defense against an injunction should be held to exist. There are two answers to this contention: First, whatever practice of giving trading stamps exists among plaintiff's other dealers, or some of them, the plaintiff,

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Gulf Oil Corporation is not prohibiting and has not prohibited Claude Mays, the defendant, to adopt it. The second and more important answer to defendant's contention is that the giving of trading stamps is not a reduction of price of the article whose purchase entitles the buyer to stamps. In *Bristol-Myers Co. v. Lit Brothers, Inc.* [1932-1939 Trade Cases ¶ 55,227], 336 Pa. 81, 89, the court said:

> "There is no doubt that the giving away of these stamps by Lit Brothers, Inc.,—its practice for 30 years—is not a price-cutting device but a means of inducing a customer to return to the store to make additional purchases. . . . While it is the purpose of the Fair Trade Act to prevent 'cut-throat competition,' it is NOT the purpose of the Act to prevent ALL business competition. . . . It follows, therefore, that for a merchant to confer pecuniary benefits upon his customers, which benefits some competing merchant does not confer, does not amount to such unfair competition as the Fair Trade Law forbids. . . . It is clear to us that the practice indulged in by Lit Brothers, of issuing trading stamps with the sales of its merchandise falls within the sphere of legitimate competition and does not constitute a 'selling (of) any commodity at less than the price stipulated and that it is not unfair competition' within the meaning of the act appellant invokes."

In *Gever v. American Stores Co.* [1956 Trade Cases ¶ 68,569], 387 Pa. 206, the manufacturer was not a party. The suit was brought by one retailer against another. Both competed in selling at retail various branded drugs, medical, and cosmetic products. The defendant, but not the plaintiff, gave trading stamps. The court, in approving the doctrine of the *Bristol-Myers Company* case, hereinabove quoted, said at page 212:

> "Viewed realistically, the giving of trading stamps may be regarded as nothing more than the equivalent of a normal cash discount, which is merely a term of payment and not a price reduction. Indeed, in a sense, the stamps have no value in themselves but acquire it only if the stipulated amount of other purchases is made. They cannot be regarded as cutting prices any more than free delivery service or free parking could be so regarded although these are practices which obviously save money for the customers of stores offering such advantages. Accordingly, the use of trading stamps, pursued as a general business practice by a commercial establishment, does not violate either the letter or the spirit of the Fair Trade Act."

[*Contractual Obligation to Purchase Which Pre-dates Fair Trade Program*]

Defendant contends secondly that the original contract between him and the plaintiff involving purchase by defendant and his wife of the gas station, the giving of notes by them for about $25,000.00, payable to a bank and guaranteed by plaintiff, the execution of a bond and mortgage by Mr. and Mrs. Mays to plaintiff as security against plaintiff's liability as guarantor of defendant's notes, the sales agreement itself, executed September 15, 1955, operative for fifteen years, ending October 6, 1970, the obligatory purchase by defendant during that period of at least 90,000 gallons of Gulf motor fuels each year, a lease-option agreement, from defendant to plaintiff, covering the gas station, at a rental of $200.00 a month, optionally available to plaintiff as a further security in certain contingencies, all together had the effect of making defendant a "captive dealer". Defendant contends that in every other case that has arisen from the Fair Trade Act, the retailer has had the option to buy the fair trade goods or not to buy them, but in this case is compelled to buy them from the plaintiff to the amount of 90,000 gallons a year. The defendant would, in these circumstances, have the chancellor conclude that it would be against conscience and good equity to forbid defendant to price the product to his customers at such amount as he finds in his judgment necessary to move it in the channel of distribution to the consumers. It is not necessary for us to rule either that some or no set of facts can be presented which will prevent the chancellor from enforcing the fair trade price. The chancellor sees no special harm to defendant, if he conform to the regulated price, which generally obtains among plaintiff's dealers, F. of F. 8. True, defendant is obligated to accept at least 90,000 gallons yearly under the contract. It does not appear, however, that the defendant has labored under difficulty in disposing of this quantity. During 1958, a fairly representative year, he sold over 220,000 gallons of gasoline. In one month of 1959, he sold over 24,000 gallons, N. T. 42. True, he testifies to his expectation that if he would raise his price by one cent in order to meet the required fair trade price, he would suffer a great reduction in business, N. T.

42. This expectation might well be justified, but it does not follow, nor can we conclude that his loss of business would be so great as to embarrass and financially jeopardize him in taking the 90,000 gallons. In short, he has not shown that by adopting the fair trade price he cannot market gasoline. It is not necessary, therefore, to rule upon the general validity of the defendant's contention that the nature and extent of his total contracts with plaintiff may under some circumstances relieve him at least in equity from compliance with the fair-traded price. It is sufficient to rule that upon this record defendant has shown no equitable circumstances which ought to restrain us from issuing an injunction to enforce the legal rights of plaintiff under the statute. We should mention a collateral contention of defendant, that since the plaintiff had not fair-traded its product before or at the time when it entered into its agreement with defendant, it cannot, as to him, fair-trade its product thereafter, unless it first obtain his consent. To rule otherwise, defendant asserts, would be to sustain as lawful a unilateral modification of the terms of an existing contract. We are of opinion that the parties contracted in view of the law of the State of Pennsylvania and subject to it; that the Fair Trade Act was at the time in existence and had been for many years; and that neither party can object to the invocation of any applicable law of Pennsylvania, nor can the defendant successfully maintain that he or plaintiff were impliedly contracted out of the statute. We find nothing either in the language of the basic contract of September 15, 1955, between the parties, nor in the statutory or decisional law extant at that time and since, to relieve defendant. Such rights of defendant, if any there be, as might conceivably develop in the future under changing circumstances, may be sufficently guarded by allowing him at any future time to petition to reopen the case for modification or alteration of the decree. Since this is a business dispute, involving chiefly or solely a question of law, the solution of which is desirable in the interest of both parties, it is equitable to divide the costs.

CONCLUSIONS OF LAW

[*Injunction Granted*]

1. This court has jurisdiction of the parties and of the subject matter of the action.

2. Gulf has established a valid cause of action under the Fair Trade Act of the Commonwealth of Pennsylvania, approved June 5, 1935, P. L. 226, as amended (73 P. S. 7 et seq.).

3. The wilful and knowing offering for sale and selling of Gulf Brand Gasoline below the stipulated minimum retail price therefor constitutes unfair competition by the defendant.

4. Plaintiff has no adequate remedy at law and is entitled to a perpetual injunction restraining defendant from selling any Gulf Brand Gasoline for less than the applicable minimum retail price stipulated by plaintiff pursuant to the Pennsylvania Fair Trade Act.

5. The plaintiff and the defendant shall each pay half the costs.

6. The court will retain jurisdiction in case future alteration in the circumstances or law of the case should warrant either party in petitioning for rehearing and reconsideration.

7. The defendant, Claude E. Mays, individually and trading as May Gulf Service, his agents, employees and all persons acting under his authority and control, be and they are hereby perpetually enjoined and restrained from advertising, offering for sale or selling at retail any fair-traded Gulf Brand Gasoline from any dispensing or vending machine bearing plaintiff's trademark, brand or name for prices less than the applicable minimum retail prices now or hereafter stipulated therefor by plaintiff pursuant to a Fair Trade Agreement between plaintiff and a retailer of Gulf Fair-Traded gasoline; provided plaintiff shall have mailed notice of such prices to defendant at 39th Street and Philadelphia Pike, Reiffton, Berks County, Pennsylvania, or at such other address as defendant has specified in writing to plaintiff for such purpose, or shall have delivered such notice to defendant or any employee or agent of defendant at any such address.

And Now, To Wit, October 8, 1959 the prothonotary is directed to enter a decree *nisi* in accordance with the foregoing decision, and forthwith to give notice thereof to the parties or their counsel of record.

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[¶ 69,496] Clinton Engines Corporation v. Briggs & Stratton Corporation.

In the United States District Court for the Eastern District of Michigan, Southern Division. Civil No. 14007. Filed March 31, 1959.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—Patents—Practices—Obtaining Patents on Inventions Known to Be Unpatentable—Institution of Infringement Action—Evidence of Antitrust Violations.—An engine manufacturer was not entitled to summary judgment in a competitor's treble damage action charging that the manufacturer had (1) obtained certain patents from the United States Patent Office with full knowledge that the inventions were not patentable, (2) withheld from the Patent Office knowledge of prior art and previous public use of the so-called inventions, and (3) commenced, in bad faith, an infringement action against the competitor. In the latter action, it was held that the patents were invalid. Here, however, the manufacturer asserted that its actions in obtaining the patents and instituting the infringement action to protect the patents could not be the basis for a suit under the Sherman and Clayton Antitrust Acts. Even though a patent finally proves to be invalid, no violation of the antitrust laws results from the obtaining of a patent or from efforts to protect it by litigation. However, activities indulged in for the purpose of seeking to patent something known by the applicant to be invalid, and as a part of a scheme to create an illegal monopoly or restrain trade, would not be excluded as evidence in an action seeking to enforce the antitrust laws. Thus, if the competitor could prove that the obtaining of the patents and the infringement action were part of an "evil and illegal scheme to create and maintain a monopoly, it should not be foreclosed from relying on such proofs."

See Combinations and Conspiracies, Vol. 1, ¶ 2013.200, 2013.225; Monopolies, Vol. 1, ¶ 2610.500, 2610.525; Private Enforcement and Procedure, Vol. 2, ¶ 9012.130.

Private Enforcement and Procedure—Suit for Civil Damages—Summary Judgment—"Collateral Estoppel"—Prior Patent Infringement Action—Disallowance of Attorney's Fees and Concessions of Counsel as "Adjudication" of "Inequitable Conduct" Issue.—An engine manufacturer, in a treble damage action charging it with obtaining certain patents and instituting an infringement action against a competitor as a part of a scheme in violation of the antitrust laws, was not entitled to summary judgment on the issue of its alleged "misconduct," under the doctrine of "collateral estoppel," as a result of another court's refusal, in the infringement action, to award attorney's fees to the competitor for successfully defending that action (the patents were adjudged invalid). Generally, in patent litigation, a trial court considers the matter of equitable or inequitable conduct in exercising its discretion to grant or withhold attorney's fees. However, it could not be said with certainty that the disallowance of such fees was an adjudication that there was no fraud, bad faith, or inequitable conduct on the manufacturer's part. Further, it could not be said that there was no "genuine issue as to any material fact." While the manufacturer asserted in its brief that the record and file in the prior action *"presumably"* contained all the evidence which could be submitted on the misconduct issue, no affidavits that such was the fact were filed in support of the motion for summary judgment.

However, under the doctrine of "collateral estoppel," the competitor was foreclosed from retrying any of the facts included in a statement by its counsel, during the trial of the infringement action, that it was not true that the manufacturer's counsel had "intentionally, or even knowingly, withheld any information from the patent office." Noting that its ruling was not based upon a characterization of that statement as a judicial admission, the court held that counsel's concession was, in effect, a stipulation of fact and was tantamount to an agreement that the competitor was defeated on that issue.

See Private Enforcement and Procedure, Vol. 2, ¶ 9012, 9013.675.

For the plaintiff: Armstrong, Essery, Helm & Marshall, and Rottman, Siegel & Sugar, Detroit, Mich. (Harry F. Hittle, Lansing, Mich., and Chris M. Youngjohn, Detroit, Mich., of counsel).

For the defendant: Ira Milton Jones, Milwaukee, Wis.; Dickinson, Wright, Davis, McKean & Cudlip, Detroit, Mich.; and Olwell & Brady, Milwaukee, Wis. (James E. Haggerty, Detroit, Mich., of counsel).

Opinion on Motion for Summary Judgment

[*Patent Misuse as Basis for Antitrust Action*]

O'SULLIVAN, District Judge [*In full text*]: The matter for decision is defendant's Motion for Summary Judgment as to those matters set forth in paragraphs 15, 18(a), 19 and 21 of plaintiff's Complaint. Defendant contends that all matters contained in said paragraphs were tried, determined and fully adjudicated in a previous suit between these parties wherein the defendant here, Briggs & Stratton Corporation, was plaintiff, and Clinton Machine Company, plaintiff herein, was defendant. Defendant's motion further asserts that there remains now no issue for this Court to try as to the matters set forth and relied upon in the mentioned paragraphs of plaintiff's Complaint. Defendant partially relies upon the doctrine of collateral estoppel. Clinton Machine Company will hereafter be referred to as Clinton and Briggs & Stratton Corporation as Briggs & Stratton.

[*Acquisition of Patents with Knowledge of Unpatentability*]

Clinton, in this action, seeks damages from Briggs & Stratton for alleged violations of the Sherman and Clayton Act. In its Complaint, filed in December, 1954, it charges that Briggs & Stratton, as a part of its scheme to create a monopoly and restrain trade, in bad faith and with evil design, sought and obtained from the United States Patent Office certain patents, referred to as the Lechtenberg patents, with full knowledge that the inventions thereby sought to be patented were not, in fact, patentable. Plaintiff further charges that in seeking said patents, defendant deliberately and fraudulently withheld from the Patent Office its knowledge of prior art and previous public use of the so-called inventions which, if disclosed to the Patent Office, would have prevented issuance of the patents in question; that, after obtaining the patents in question, the defendant, Briggs & Stratton, in bad faith, on December 9, 1954, commenced an action in the United States District Court in Iowa against Clinton alleging infringement by Clinton of the patents fraudulently and illegally obtained. These charges are set forth in paragraphs 15, 18(a), 19 and 21 of the complaint as follows:

"15. In the spring of the year 1953, plaintiff publicly announced to the industry that it intended to design additional models to its line of engines, and that it would shortly be in a position to offer an engine in competition for each of the models produced by defendant. Upon learning of such plans, defendant, well knowing that it would thus be unable to pursue its practice of price reduction on competing models while retaining higher prices on non-competing models, and in order to impede, stifle and hamper interstate commerce, reduce competition and regain complete domination in the industry, deliberately and maliciously conceived a scheme to undermine the plaintiff by obtaining certain letters patent which it well knew would be wholly invalid, but which it well knew would nevertheless be useful to embarrass plaintiff in its relationships with customers and others. Accordingly, on May 11, 1953, and again on May 11, 1954, defendant assembled numerous and divers specious claims which comprised numerous and divers mechanical practices and forms previously employed chiefly by plaintiff as well as other engine manufacturers, and caused to be filed two separate applications for letters patent in the U. S. Patent Office in Washington, D. C., well knowing that any patent or patents that would or could issue pursuant to claims made thereunder would be wholly and completely invalid and were intended solely to be used to injure and destroy plaintiff and remove it from the industry.

"18(a). Exerted unseemly and undue pressure upon certain examiners of the U. S. Patent Office, as a result of which U. S. Patents numbers 2693789 and 2693791, now owned by defendant, were issued on November 9, 1954, greatly in advance of the time that action thereon would normally have been taken. These patents relate to certain features embodied in plaintiff's so-called light weight aluminum engine, which was the most popular and best seller in plaintiff's line.

"19. Defendant well knew that the aforesaid patents were not based on novelty or invention, but embodied features previously used by plaintiff, and were thus wholly and completely invalid. Nevertheless, on the 16th day of November, 1954, it notified plaintiff that it was infringing said patents and demanded that plaintiff desist from further manufacture of engines with features embodied therein. On November 24, 1954, solely in pursuance

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of its scheme unlawfully to destroy plaintiff, restrain interstate trade and commerce, and stifle competition, defendant wrote a letter to each of plaintiff's original equipment customers notifying them of the issuance of said patents and stated that two manufacturers who had copied certain features covered by said patents had been notified of infringement. A copy of said letter of November 24, 1954, is hereto attached as Exhibit 'A' and incorporated herein by express reference. Defendant well knew that because of plaintiff's large volume of sales of said type of engine, its customers, as maliciously calculated by defendant, would readily infer that plaintiff was intended as one of such manufacturers.

"21. In further pursuance of its malicious and illegal scheme to force plaintiff out of business and stifle competition, defendant, on the 9th day of December, 1954, instituted an action against plaintiff in the Northern District of Iowa, Eastern Division, for alleged infringement of the aforesaid patents, well knowing that the same were wholly and completely invalid, but intending thereby further to influence and induce plaintiff's customers to cease purchasing its engines, and as part of its plan and scheme to undermine plaintiff, defendant circulated divers rumors and false information in the small engine industry and particularly among plaintiff's customers relative to the institution of said suit and its probable outcome and result. In addition, defendant well knew that the expense of defending said suit in the courts would so weaken plaintiff financially that it might not wish to undertake such defense."

[*Prior Patent Litigation*]

Defendant's answer denies the wrongdoing so charged against it. After this cause was at issue, trial thereof was postponed to await the conclusion of the Iowa litigation.

In the Iowa case, Clinton filed an answer and counter-claim denying the validity of the so-called Lechtenberg patents, its claimed infringement thereof, and set forth as its 13th, 15th and 16th defenses, the following:

"13th Defense. That the subject matter of the U. S. Letters Patent No. 2693789 and Patent No. 2693791, set out in the Complaint and covered by the claims thereof, was in public use and on sale for more than one year prior to the filing of said applications, and that the patentee of said Letters Patents and his attorneys and agents, and the assignee of said Letters Patents, knew of such subject matter being in public use and on sale in the United States for over a year, but concealed such fact from the officials of the United States Patent Office, and as a consequence thereof, said Letters Patents were fraudulently and deceitfully obtained.

"15th Defense. That the application for Letters Patent No. 2605753, which was filed by Dorothy H. Madle, as Administratrix of the Estate of Alain Madle, deceased, as a continuation of an application previously filed by Alain Madle, and abandoned, discloses and covers subject matter which was not the invention of the said Alain Madle, and which was not embraced by or disclosed in or covered by the patent applications previously filed by said Alain Madle, and that at the time of the filing of the application on which Patent No. 2605753 issued to this Plaintiff, its agents and attorneys knew that such application contained other subject matter than the invention of the said Alain Madle, and particularly as disclosed and set forth in the applications previously filed by the said Alain Madle, and that with fraudulent intent and purpose concealed such fact from Dorothy H. Madle, Administratrix, and while so concealing such fact had the said Dorothy H. Madle sign the application and swear to the statutory oath forming a part of the application and thus perpetrating upon the officials of the United States Patent Office fraud and deceit and thereupon had said Letters Patent No. 2605753, surreptitiously issued; and that in view of such fraudulent conduct, said Letters Patent No. 2605753, and each and all of the claims thereof, is invalid, null and void.

"16th Defense. That the specifications and claims of each of said patents set out in said complaint are calculated to deceive and mislead the public because of ambiguity and needless multiplication of nebulous claims, and said patents are, therefore, null and void."

In its counterclaim for Declaratory Judgment in the Iowa action, Clinton incorporated by reference the allegations of its answer. It asked for a declaratory judgment that the Lechtenberg patents were invalid, that it was not infringing, that the plaintiff's complaint be dismissed, and

"that this defendant be allowed costs and attorneys fees, and that this defendant have such further, other, different and general relief as it may be entitled to."

In the Iowa litigation, Briggs & Stratton sought to establish the validity of three patents, a so-called Madle patent, No. 2605753,

and the so-called Lechtenberg patents, Nos. 2693789 and 2693791, respectively. The cause in Iowa was tried before Honorable Henry N. Graven, United States District Judge. At the conclusion of the proofs originally offered in the case, Judge Graven filed Findings of Fact and Conclusions of Law and entered a Judgment. In his original disposition of the case Judge Graven found that the Madle patent and Lechtenberg patent 2693791 were invalid, but that if such patents were valid, Clinton was guilty of infringement thereof; he held that Lechtenberg patent 2693789 was valid, that Clinton had infringed it, and directed that Briggs & Stratton should receive damages later to be determined by the Court. The said first Findings of Judge Graven contained the following:

"17. The defendant claims that in the prosecution of the application for the patent pertinent prior art was concealed from the Patent Office. The Court finds that no pertinent prior art was concealed from the Patent Office in connection with the patent.

"18. The defendant's engine VS100 is a striking copy and imitation of the structure disclosed by the patent. It is clear and the Court so finds, that the defendant's engine VS100 reads on and infringes the claims in question as to the patentable invention found to have been disclosed by them.

"29. The Court finds that the circumstances are such that no award of attorney fees shall be made to either the plaintiff or the defendant.

"30. The Court finds that the circumstances are such that each party should be assessed one-half of the taxable costs."

Judgment on Judge Graven's Findings was entered on March 12, 1956. Following entry of this judgment, new counsel appeared for Clinton, and on April 2, 1956, it filed a pleading designated "Motion to Relieve Defendant from Judgment and Order of March 12, 1956, and Motion for New Trial with Respect to the Matter of the Validity and Infringement of the Lechtenberg U. S. Patent No. 2693789." Various affidavits were filed in support of these motions; the affidavits related principally to claimed prior art and previous public use of the subject matter of the Lechtenberg patent which had been held valid and infringed.

[*Concession of Counsel*]

In oral argument on the last mentioned motions, the following colloquy between the Court and the then counsel for Clinton Machine Company occurred:

"By Mr. Raisch: Now, I think the defendant has been diligent in locating this Lauson prior arts, for reasons I will point out very shortly. And I think there is an excusable mistake or inadvertence with respect to some of the issues raised with respect to the issue of protecting the invention and the interchangeability of the covers. But if Your Honor finds that the defendant has not been diligent, then defendant offers to pay the expenses —reasonable expenses incurred by the plaintiff due to defendant's so-called lack of diligence, namely, the expenses incurred by the new trial, bearing on the newly found evidence.

"I want to point out to Your Honor one thing that is very significant. Plaintiff is a very old company in this field, it is located just sixty or seventy miles from New Holstein, which is a very short distance northeast of Fond du Lac, Wisconsin. Defendant is a relatively new newcomer in this field, located here in Iowa and away out in Michigan.

"As Your Honor is well aware, in the prosecution or acting upon applications in the Patent Office, they are filed chronologically in the patent office in the order in which they are received. The first application filed is acted upon first. During the course of prosecution of the Lechtenberg application, the plaintiff filed a petition to make the Lechtenberg application special, that is, urged the office to grant immediate action. Now, as a prerequisite to having a case made special the petitioner, which was Lechtenberg in this case, filed affidavit of certain prior arts and apprised the patent office of the best prior art that is available. Now, I have known the attorneys for Briggs & Stratton Company a good many years, I am very fond of them, and I don't want any inferences drawn whatsoever that they intentionally or even knowingly withheld any information from the patent office, I don't think they did.

"The Court: That charge is made in the pleadings, isn't it?

"Mr. Raisch: If it is Your Honor—

"Mr. Custin: Yes, it is.

"Mr. Raisch: If that charge is made, I don't stand upon it, neither would Mr. Balluff, and I am sure we would agree we would withdraw it. I have known

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Mr. Jones and right here I want to say that is not correct or encouraged. Ira happens to be a friend of mine. Here is a very fine old line company, they didn't know about this patent. If they didn't know it, then how could this little newcomer in the field have known of it when this transpired from 1941 to 1947. It was only through an accident that this prior arts was discovered within the last week or ten days, subsequent to this decision of March 12th."

[*Patents Held Invalid*]

Judge Graven granted the motion for supplemental hearing, and on April 9, 1956, entered an order containing, among other things, the following:

"It is hereby ordered that the judgment heretofore entered on March 12, 1956, be, and the same is, set aside in its entirety."

Evidence was taken upon a supplemental hearing. At its beginning, and on motion of Briggs & Stratton, it was ordered that the claim based upon Lechtenberg Patent No. 2693791 be dismissed. On December 31, 1956, Judge Graven filed Findings of Fact, Conclusions of Law, and Order for Judgment (reported as *Briggs & Stratton v. Clinton Machine Co., Inc.*, 147 F. Supp. 361). In this Finding and Judgment Judge Graven declared the Lechtenberg patent No. 2693789 invalid, so that all of the patents relied upon by Briggs & Stratton became adjudged invalid. It is not necessary to here repeat all of the matters reviewed and discussed in this reported opinion. However, the following have special pertinence in considering the disposition of the instant Motion for Summary Judgment.

Findings of Fact:

"14. The plaintiff, Briggs & Stratton, following extensive experiments in January, 1953, placed on sale a die cast aluminum one cylinder four cycle air cooled gasoline engine. Soon thereafter the defendant brought out its VS100 engine, which is the accused engine. The structure of the plaintiff's engine is in accord with the disclosure contained in the first Lechtenberg patent. (No. 2693789) The plaintiff's engine met, and is meeting, with marked commercial success. * * * The question for determination is whether the structure disclosed by the first Lechtenberg patent discloses patentable invention, or merely a high degree of artisanship.

"16. * * * In the light of the additional prior art patents introduced into evidence at the supplemental hearing and further development of the prior art patents introduced into evidence at the original trial and the evidence as to prior use introduced at the supplemental hearing, the Court is of the view that the finding as to patentable invention was erroneous.

"18. The engine produced by the plaintiff in accord with the disclosures of the Lechtenberg patent represents a high degree of artisanship and an excellent piece of engineering. However, the disclosures do not amount to patentable invention.

"20. Save in the matter of the cylinder liner, the defendant's accused engine is a striking and almost slavish copy of the plaintiff's engine. If the claims of Lechtenberg patent No. 2693789 do define inventive combination, the defendant's accused engine clearly infringes.

"12. If Claim 5 of the Madle patent does define inventive combination, then the defendant's Model 2500 engine infringes that claim.

"21. The Court finds that the circumstances are such that no award of attorney fees should be made to the defendant.

"22. The Court finds that the circumstances are such that each party should be assessed one-half of the taxable costs."

Judge Graven's Conclusions of Law follow the Findings of Fact and his Order for Judgment contained the following:

"1. That claim 5 of the Madle Patent No. 2605753 is invalid;

"2. That claims 1, 2, 4, 5, 6, 7, 8, 14, 15 and 16 of Lechtenberg patent No. 2693789 are invalid;

"3. That no award of attorney fees should be made to the defendant;

"4. That each party pay one-half of the taxable costs."

[*Appeal*]

Judgment was accordingly entered on December 31, 1956. Briggs & Stratton appealed. Clinton gave notice of cross-appeal and therein gave notice that it,

"appeals * * * from that portion of the decision entered December 31, 1956, in effect holding U. S. Patents 2693789 and 2605753 infringed by defendant, and from the failure of said judgment to grant defendant all of the relief asked in its counter-claim * * *."

The Court of Appeals affirmed Judge Graven's judgment of the invalidity of Briggs &

Stratton's patents. It accordingly held that the question of infringement had become moot and dismissed Clinton's cross-appeal. This decision is reported as *Briggs & Stratton v. Clinton Machine Co.*, 247 F. (2) 397.

Although Clinton's notice of cross appeal indicated its appeal from Judge Graven's failure to award it all of the relief asked in its counter claim (such relief including a request for allowance of attorney fees) its briefs on appeal did not argue nor state as one of the questions involved the propriety of Judge Graven's holding that under the circumstances of the case no award of attorney fees could be made to the defendant. This question was not discussed or passed upon by the Court of Appeals. In its brief, filed at the conclusion of the first hearing before Judge Graven, Clinton made the following arguments concerning its claim that Briggs & Stratton had, in processing the Lechtenberg patents, knowingly failed to make full disclosures of prior art and public use, which Clinton claimed was within the knowledge of Briggs & Stratton. The following are excerpts from Clinton's brief in this regard.

"In the prosecution of the patent application which resulted in Lechtenberg Patent 789, no structure embodying the features of the structure previously manufactured by Briggs & Stratton Corporation, the plaintiff, and by Clinton Machine Co., the defendant, was ever called to the attention of the examiner of the Patent Office. The examiner of the Patent Office, it is true, made a search of the prior art but this search of necessity was limited to the records of the Patent Office. No prior patents showing the structure of the previous Briggs & Stratton machine and the previous Clinton machine was found by the examiner in the search of the prior patents nor was it called to the attention of the examiner.

"In the prosecution of the application resulting in the Lechtenberg Patent 789, the attorney prosecuting the application personally interviewed the examiner. It is significant that this attorney in interviewing the examiner did not disclose these previous prior art machines previously manufactured by Briggs & Stratton and Clinton Machine Co., and by no means called them to the attention of the examiner. The examiner, therefore, was left in the dark entirely concerning the prior art structure of which Lechtenberg's attorney had knowledge while the application was being prosecuted. Lechtenberg's attorney knew, of course, that had he called to the attention of the examiner these prior art machines, the examiner would have undoubtedly ruled that there was no invention in the claimed structure of the Lechtenberg Patent 789; that there was no invention in making one of the walls of the crankcase removable instead of making the other wall removable; that there would be no invention in casting one of the walls integral instead of another wall and making the bottom wall removable instead of the side wall.

"These machines previously manufactured by Briggs & Stratton, plaintiff, and Clinton Machine Co., defendant, long prior to the filing of the Lechtenberg application, were well known to the plaintiff as indicated by the testimony of the plaintiff's Vice-President in charge of engineering, Mr. Brown. It is also shown that these machines were manufactured and sold by the defendant Clinton Machine Co. long prior to the filing of the Lechtenberg application, which resulted in Patent 789, and more than a year prior to the filing of said application, as shown by the testimony of witness Damon (T. R. 355).

"Moreover, Lechtenberg's attorney knew all of this. He knew what he was doing. He also knew that the Patent Office did not know of these prior structures because they were never cited as prior art in the applications. They were never cited because these patent elements of structure were never considered by either Clinton Machine Co., or Briggs & Stratton Corporation to be of patentable nature and were never patented.

"In spite of all of this Lechtenberg's attorney did not inform the Patent Office of the prior art even though he had a personal interview with the examiner handling the application."

Notwithstanding that its counsel, upon the argument in support of Clinton's motion for new trial had completely exonerated the attorneys for Briggs & Stratton of any fraud or concealment in processing the Lechtenberg patents, the Clinton brief on appeal in the Iowa litigation referred to Briggs & Stratton's petition to make special the processing of its patent application as follows:

"It would appear that the petition had the effect of 'pressuring' the Patent Office into allowing the claims without carefully considering them or the prior art cited in the Petition."

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The decision of the Court of Appeals did not discuss bad faith or inequitable conduct upon the part of Briggs & Stratton. In his concurring opinion, Judge Sanborn was complimentary to the work of Briggs & Stratton in producing the engine which was the subject of the Lechtenberg patent question, but concurred in holding that it did not quite reach the status of invention within the meaning of the patent laws. He said:

> "As a practical matter, Lechtenberg's contribution to the art of producing a light, cheap, efficient, air-cooled engine, suitable for furnishing power to rotary lawn mowers and like devices, and susceptible of being die cast, was a meritorious one and was both new and useful. It met with commercial success and was, of course, soon copied by competitors. It is not strange that the District Court first concluded that the Lechtenberg patent was valid and infringed. * * * However, as we have pointed out in a number of cases since the Supreme Court decided *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84, * * * the amount of originality and ingenuity, over and beyond novelty and utility which will constitute invention necessary to sustain a patent for a combination of old elements in a crowded art, has increased. The conclusion of the District Court is not out of line with our recent decisions in such cases."

[*Motion for Summary Judgment*]

With this review of the Iowa litigation, it becomes necessary now to consider Briggs & Stratton's present reliance thereon as a basis for its present motion for summary judgment. This Court believes the following to be a fair statement of the reasoning of the Briggs & Stratton motion:

First: The findings and judgment of Judge Craven that under the circumstances of the Iowa case no attorney fees should be awarded to Clinton was a determination and adjudication that there was no fraud, concealment or inequitable conduct on the part of Briggs & Stratton in obtaining the Lechtenberg patents or in maintaining its infringement suit to protect them.

Second: That all matters relating to fraud, concealment and inequitable conduct on the part of Briggs & Stratton were litigated and tried in the Iowa case, and that a review of the evidence and issues of that litigation demonstrates beyond argument that there was no such fraud, concealment or inequitable conduct; therefore, there are no issues in that regard that can be tried out here. This Court has, from the briefs filed by Briggs & Stratton, concluded that it is here contending that from a review of the pleadings, evidence and findings of the Iowa litigation (the entire record thereof being received in evidence for the purpose of this motion) this Court must hold that reasonable minds could come to no other conclusion than that Briggs & Stratton were not guilty of the misconduct charged in paragraphs 15, 18(a), 19 and 21 of the Clinton complaint in this action. Judgment for defendant as to those paragraphs is accordingly asked. This Court assumes that the defendant is relying upon subsection (c) of Rule 56 which states that:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, *show that there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law."

Third: That the actions of Briggs & Stratton in obtaining the patents and in instituting litigation to protect them cannot be the basis for a suit under the Sherman and Clayton Act. They argue that a patentee by obtaining a patent becomes the possessor of a monopoly to the extent of the patent, and, therefore, such patentee cannot be guilty of a violation of the antitrust laws by seeking to protect a monopoly that such a patent affords to such patentee. Their briefs, however, concede that the application of this doctrine does not apply if it can be shown that the applicant for the patent knew that what he sought to have patented was not patentable; that such patentee was guilty of concealment and fraud in seeking the patent and in instituting litigation to protect it, and that such actions were part of an illegal and evil scheme to create an illegal monopoly and illegally restrain trade.

The Court will discuss these contentions in the above order.

[*Estoppel by Prior Judgment*]

First, collateral estoppel: The cases which have brought into being the doctrine of collateral estoppel clearly announced its underlying principles. The problem comes in their application to the instant case.

Restatement of Judgments, Section 69, page 293, defines the rule as follows:

"(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as (exceptions not here applicable)

"(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

The United States Supreme Court has stated the principle in the case of *Partmar Corp., et al. v. Paramount Pictures Theatres Corp., et al.* [1954 TRADE CASES ¶67,674], 347 U. S. 89, as follows:

"We have often held that under the doctrine of *res judicata* a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein. But a prior judgment between the parties has been held to operate as an estoppel in a suit on a cause of action different from that forming the basis for the original suit only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. This latter aspect of *res judicata* is the doctrine of collateral estoppel by judgment, established as a procedure for carrying out the public policy of avoiding repetitious litigation."

Judge Cooley of the Michigan Supreme Court in the case of *Jacobson v. Miller,* 41 Mich. 90 (93) described the doctrine as follows:

"The general principles which must govern the case are familiar. There are two matters in respect to which an adjudication once made may be conclusive; first, the subject matter involved in the litigation; second, the point of fact or of law, or of both, which was necessarily adjudicated in determining the issue upon the subject matter in litigation."

Another tersely descriptive statement of the principle is found in the language of Judge Hamley of the 9th Circuit in the case of *E. V. Prentice Machine Co. v. Associated Plywood Mills,* 252 F. (2) 473 (476):

"It is predicated on the idea that once a party has fought out a matter in litigation with the opposing party, he cannot later renew the duel."

The limitations of the doctrine were stated in an early and leading authority on the point as follows:

"* * * the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." *Cromwell v. Sac County,* 94 U. S. 351 (353).

[*Elements of Collateral Estoppel*]

In their brief filed in support of the instant motion, counsel for Briggs & Stratton break this principle down into the components which they recognize must combine in order that a previous judgment collaterally estop an issue from being retried in later litigation. They assert:

"A matter is subject to collateral estoppel if (1) the parties are the same, (2) the matter is put into issue by the pleadings, (3) it is in some fashion determined during the course of the litigation; (4) the judgment resulting from the litigation is based upon the determination made, and (5) there is an opportunity for the losing party to appeal."

There is no question but that elements 1 and 5 are present here. The question is whether elements 2, 3 and 4 came into being as a result of the Iowa judgment. Existence of element number two depends on whether the subject matter of paragraphs 15, 18(a), 19 and 21 of the complaint in this case was put in issue by the pleadings in the Iowa litigation. To the extent that special defense No. 13 of Clinton's answer in the Iowa case covers the same subject matter as is contained in the mentioned paragraphs of the present complaint, that subject matter was put in issue by the pleadings in Iowa. The 13th defense charged that the subject matter of the Lechtenberg patents was in public use and on sale for more than a year prior to the filing of application for said patents and that patentee knew of such subject matter being in public use and on sale in the United States for over a year, but concealed such fact from officials of the U. S. Patent Office and as a consequence the patents were fraudulently and deceitfully obtained. This Court feels that it can be fairly stated that this subject matter could be considered as being included in the assertions in paragraphs 15, 18(a) and 19 of the complaint in this action. Other elements,

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however, of the mentioned paragraphs of the instant complaint were not necessarily put in issue in the Iowa litigation, unless it can be assumed that by asking for the allowance of attorney fees in its counter-claim, Clinton there put in issue all matters that might be considered as demonstrating fraud or inequitable conduct upon the part of Briggs & Stratton even though not specifically spelled out in the Clinton pleadings. This Court is of the opinion that it cannot be said that the pleadings in the Iowa litigation put in issue anything more than the distinct averments of its pleadings, because defendant's prayer for allowance of attorney fees was bottomed upon the assertion of its pleadings. Any averments of the complaint in this case that go beyond the contentions of the 13th defense in Clinton's answer in the Iowa litigation cannot be said to have been put in issue in the Iowa litigation. If, however, proofs were offered of the facts now the subject matter of the complaint in this case, and it can be said that the court considered that evidence and made a finding and an adjudication thereon, absence of allegations thereof in the peladings would not prevent the Iowa findings being conclusive. For the reasons stated hereinafter, this Court does not believe that it has to determine whether or not the subject matter of the mentioned paragraphs of instant complaint were in fact put in issue by the pleadings and proofs in the Iowa litigation.

In the argument of the instant motion, Clinton's attorneys make concession of record that they do not intend to present evidence to support or rely upon the averments of their 13th defense in the Iowa litigation to aid the cause of action asserted in this case. The elimination of that issue from this case can be determined upon a pre-trial order, and does not require the granting of a motion for summary judgment at this time.

The 15th defense in the Iowa litigation charges fraud and deceit on the part of Briggs & Stratton in connection with the Madle patent. The complaint in this case in no way relies upon such fraud and deceit. Clinton's counsel advised the court that such subject matter will not be brought into this litigation.

[*Concealment*]

Judge Graven's first findings in the Iowa litigation contained the following as his finding No. 17:

> "17. The defendant claims that in the prosecution of the application for the patent pertinent prior art was concealed from the Patent Office. The Court finds that no pertinent prior art was concealed from the Patent Office in connection with the patent."

He was referring to Lechtenberg Patent No. 2693789 which, by his first judgment, he found to be valid.

This finding was not repeated in his final Findings of Fact, nor was the subject matter thereof discussed or treated in his final findings or judgment. Inasmuch as he set aside his first findings and the judgment entered thereon, "in its entirety" the mentioned finding No. 17 ceased to be any part of the final findings or determinations of this litigation.

> "And the general rule is that where a court, in the discharge of its judicial function, vacates an order previously entered, the legal status is the same as if the order had never existed. *Mitchell v. Joseph,* 117 F. (2d) 253 (255).

One may, indeed, speculate that the reason why Judge Graven did not repeat this finding or make any finding at all upon the subject was as a consequence of statements made by Mr. Raisch at the time of arguing the motion for new trial, exonerating Briggs & Stratton's attorneys from any fraudulent withholding of information from the Patent Office. Judge Graven, however, did not say so and this Court's speculations as to what reasons may have prompted his failure to specifically reconsider the matter are not controlling here.

[*Denial of Attorney's Fees as "Adjudication" of Misconduct Issue*]

The determination of this motion upon the basis of collateral estoppel depends upon whether this Court can say with certainty that because Judge Graven did not allow attorney fees to defendant Clinton, he thereby adjudicated and determined that Briggs & Stratton were not guilty of any of the conduct charged against them in the aforesaid paragraphs 15, 18(a), 19 and 21 of the complaint in this case.

The statute which would have permitted Judge Graven to award such attorney fees is 35 USC 285:

> "The Court in exceptional cases may award reasonable attorney fees to the prevailing party."

Judge Graven also ordered that under the circumstances of the case each party should pay one-half of the taxable costs. Our rule 54(d) provides:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; * * *"

This Court must answer the question of whether or not the only reason why Judge Graven refused, or could have refused, attorney fees to Clinton and ordered costs to be divided equally was a determination and finding by him that Briggs & Stratton was not guilty of any of the charges made against it in the mentioned paragraphs of the complaint in this case.

This Court recognizes that generally in patent and infringement litigation, a trial court considers the matter of equitable or inequitable conduct in exercising his discretion to grant or withhold attorney fees.

In the case of *Turchan v. Cincinnati Milling Machine Co.,* 208 F. (2d) 228 (229), Judge Simons of the Sixth Circuit, commented that:

> "It has been held that under this section (referring to 35 USCA 285, as it then read) that such fees are not to be allowed as a matter of course for Congress did not intend recovery of attorney fees to become the usual thing in patent cases, that the section commits the matter to the discretion of the District Court, *that the criterion for its exercise is bad faith of the unsuccessful party* and the reviewing court will not interfere unless there has been an abuse of discretion amounting to caprice or an erroneous conception of law."

To the same general effect is the language of Judge Allen of the Sixth Circuit in *Swan Carburetor Co. v. Chrysler Corp.,* 149 F. (2d) 476 (478):

> "There is no evidence of bad faith. We think that the exceptional circumstances adverted to in *Sprague v. Ticonic National Bank, supra,* (307 U. S. 161) which justify exceptional allowances, not authorized by statute, are such as exist in the case of fraud, oppression, or bad faith * * *."

A much quoted statement of this principle is contained in *Park-in-theatres v. Perkins,* 190 F. (2d) 137 (142), as follows:

> "Thus, the payment of attorney's fees for the victor is not to be regarded as a penalty for failure to win a patent infringement suit. The exercise of discretion in favor of such an allowance should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party, *or some other equitable consideration of similar force,* which makes it grossly unjust that the winner of the particular law suit be left to bear the burden of his own counsel fees which prevailing litigants normally bear."

In the case of *Cutting Room Appliances Corp. v. Weatherbee Coats Inc.,* 158 Fed. Supp. 231, the District Judge in denying attorney fees held:

> "The Court further finds that the fact that plaintiff did not disclose to the Patent Examiner the prior art of the 'Regal' and 'Model A' machines is not, in itself, without further evidence, sufficient proof of fraud in the prosecution of the patent, such that would warrant the award of attorney fees to the prevailing party."

Recognizing the general rule, this Court does not feel that Judge Graven's disallowance of attorney fees must be judicially construed here as a finding and adjudication that none of the matters charged in the mentioned paragraphs of the complaint in this case were true and, therefore, a finding that there was no fraud, bad faith, or inequitable conduct of any kind in connection with the Lechtenberg patents and the institution of the infringement action. Certainly, this Court might well speculate as to whether as a matter of reality such was, in fact, the thinking of Judge Graven. However, in applying a doctrine such as collateral estoppel, this Court cannot expand the findings or judgment of Judge Graven or read into his findings and judgment adjudications or implications not expressed, unless it is crystal clear that the findings he did make had, beyond argument, a certain definite legal import.

Was there no other reason than an exoneration of Briggs & Stratton of all inequitable conduct that could have motivated Judge Graven in denying attorney fees to Clinton? Might not the failure of Clinton to put in all of its evidence at the first hearing—necessitating the vacation of Judge Graven's first judgment and the further hearing of the matter—have actuated Judge Graven in his discretion to refuse attorney fees to Clinton?

Judge Graven might also have been motivated by the fact that Clinton's attorneys

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in the motion for new trial offered to pay the expense incident thereto, including Briggs & Stratton's expenses, should the Court be of the opinion that Clinton was lacking in diligence in preparing its evidence for the first hearing. It is not, however, for this Court to speculate as to what Judge Graven's reasons were, though unexpressed. No request for a finding upon this question of good faith or equitable conduct was made by Briggs & Stratton.

This Court might also speculate that Judge Graven may have, after the re-hearing, had some feeling that there was some inequitable conduct on the part of Briggs & Stratton and that his denial of attorney fees to Clinton was an abuse of discretion. This Court, however, cannot pass upon Judge Graven's discretionary action nor speculate as to what was within his judicial contemplation when he rendered the judgment that he did.

> "Where several questions are litigated in an action, and in a subsequent action between the parties on a different cause of action one of the questions is in issue, and one of the parties relies upon the judgment as conclusive on the question, the burden of proof is upon him to show that the matter was determined by the judgment in the prior action. *If it does not appear whether the judgment was based on the determination of the question, the judgment is not conclusive in the second action. Restatement of Judgments,* Sec. 68 (1) page 306.

Even if this Court should feel that Judge Graven should have made some specific finding upon this question (and this Court does not indicate that such is its feeling) such omitted finding cannot be supplied here.

This Court, therefore, by granting Briggs & Stratton's instant motion would make a finding that was not made by the judge who tried the former case.

> "* * * we can import into it (judgment) no adjudication the court never made merely because it ought to have made it." *Jacobson v. Miller,* 41 Mich. 99.

[*Concession by Counsel*]

This Court, however, feels that legal effectiveness should, in this litigation, be given to the statements made by Clinton's counsel in the Iowa case at the time of presenting Clinton's motion to reopen the proofs and for a new trial. The colloquy that occurred in this regard is set forth above. It is apparent from this that Clinton's counsel was there asking to be excused from its own failure to have put in testimony concerning the prior art and former public use of certain inventions which it claimed destroyed the patentability of the Lechtenberg patents. Counsel was there claiming to the Court that Clinton should not be charged with lack of diligence in discovering this evidence in time to have presented it at the original hearing. Clinton's counsel's attention was called to the fact that Clinton's pleadings had charged Briggs & Stratton with withholding information of prior public use from the Patent Office. Clinton's counsel thereupon said:

> "If that charge is made, I don't stand upon it. * * * and I am sure we would agree we would withdraw it. I have known Mr. Jones and right here I want to say that is not correct or encouraged."

A full review of what was said in this connection can result in only one conclusion. The concession was intended to be a complete exculpation of any wrong doing on the part of Briggs & Stratton's attorneys in the processing of the petition to make the Lechtenberg patent special. It was made for the purpose of having the trial court act upon such concession and admission. This Court views what was said and done as, in effect, a stipulation of fact, made of record for the purpose of obtaining the trial court's grant of a further hearing of the matter.

At the time of the colloquy under discussion, the issue of concealment of prior art was in the Iowa litigation, and Clinton had, by the Court's finding 17, been defeated on it. If the case was to be reopened, it would still be an issue in the case. No amendment of the pleadings eliminating it was made at that time, nor thereafter. This Court feels that counsel's concession was tantamount to an agreement that on an issue distinctly relied upon by Clinton it was in truth defeated. If the rationale of the doctrine of collateral estoppel is to be given effect, a litigant defeated on an issue, by proof or admission, or both, should not be permitted to pinch out such issue and save it for re-trial on another day. After Clinton's admission in this regard, it was not necessary that thereafter a specific finding be made thereon. The concession of counsel was not an off-hand comment nor a statement made in the heat of argument by a zealous advocate. It was purposefully

made, and disposed of at least part of an issue that was still involved in the Iowa litigation. This Court feels that it, together with all of the circumstances, including the Court's previous findings, brought about the equivalent of an adjudication on the point involved. Clinton should not now, for the purpose of this case, be allowed to recant and here to "renew the duel". *E. V. Prentice Machine Co. v. Associated Plywood Mills, supra.*

No text or decided cases have been cited to the Court which directly support its position in this regard. Neither has this Court by its own research been able to find authorities which will completely square its conclusion with the definitions made of collateral estoppel. This, however, should not prevent its application, if a situation arises where the philosophy and spirit of the doctrine should appropriately be applied. Collateral estoppel is not a mathematical or mechanical formula. The Court is not making its ruling upon a characterization of what was done by Clinton's counsel as a judicial admission, having in mind the limitations applicable to judicial admissions (31 C. J. S. Sec. 361, page 1138. Wigmore, 3 E. D. 2593, *et seq.*).

This Court feels that the situation we are dealing with is not unlike the principle stated on page 304 *Restatement of Judgments,* Sec. 68(f):

> "If a question of fact is put in issue by the pleadings, and at the trial the fact is admitted and in consequence no proof is offered by the party having the burden of proof, the question is litigated and a judgment is conclusive between the parties as to the question."

The writers of *Restatement of Judgments* leave open a question which, perhaps, this opinion is daring to answer.

> "(h) Effect of Stipulation. If a question of fact is put in issue by the pleadings, and the parties enter into a stipulation as to the truth of the fact, it is a question of the interpretation of the stipulation whether it is binding on the parties only with reference to the particular cause of action sued upon, or whether it is binding in subsequent actions between them based upon different causes of action." *Restatement of Judgments,* Sec. 68, page 304.

This Court's interpretation of what occurred in connection with the statement by Clinton's counsel that it was not true that Briggs & Stratton's counsel had "intentionally, or even knowingly, withheld any information from the patent office" convinces him that collateral estoppel should foreclose retrial of the facts fairly included in the hereinabove quoted colloquy.

This Court feels that the case of *E. Ingraham Co. v. Germanow, et al.,* 4 F. (2d) 1002, is in point on the principle here. There a defendant sued for infringement consented to the entry of a decree holding that the plaintiff's patents were valid. Upon this concession, the plaintiff waived damages and costs. Later on, in another suit by the patentee against another claimed infringer, its patents were held invalid. Thereupon, the defendant in the first action proceeded to infringe the patents, relying upon the determination of their invalidity in the later case. Judge Learned Hand held that they were estopped by the judgment that had been entered in the case first heard. He said:

> "The decree entered upon their consent is a good estoppel, though the issues were not litigated, and while it stands they are as much bound by it as though the later suit had never been brought."

[*Issues to Be Tried—Affidavits*]

Second: The second reason assigned by Briggs & Stratton to support its motion for summary judgment is the assertion that on the testimony taken and the record made in the Iowa litigation, this Court should find that there remains no issue to be here tried upon the bad faith or misconduct charged in Clinton's present complaint in paragraphs 15, 18(a), 19 and 21. In its brief filed in this case, it asserts:

> "The records and file of that litigation (Iowa case) *presumably* contain all evidence which could possibly be submitted on that issue. That evidence is, therefore, all the evidence that might be submitted to this court in a re-trial of the issues which Clinton now attempts to inject into this litigation. The records are before this Court as to all of the matters asserted by Clinton relating to the character of Briggs & Stratton's activities with respect to the Lechtenberg patents. The records disclose no genuine issue of fact."

This Court feels that this is unwarranted assumption. We construe it to mean that, on the issue in question, there is no other evidence beyond what was offered in the Iowa litigation that could conceivably be offered in the trial of the instant case. This Court has no right to make such an as-

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sumption. There was not filed, in support of the motion for summary judgment, any affidavit to the effect that the matters put in evidence and considered in the Iowa case constituted all of the evidence which could possibly be offered on this trial upon the claims presented by the mentioned paragraphs of Clinton's complaint in this action. If such an affidavit had been filed, Clinton would have had the right to file counter affidavits traversing the assertions of the Briggs & Stratton affidavits and, if such was the case, setting forth what facts, additional to the disclosures of the Iowa case, they would present to sustain their position. Clinton was not called upon to make such a sworn showing in the absence of affidavits by Briggs & Stratton. This Court does not feel that upon the motion, as presented, it should conclude that there can be no genuine issue as to any material fact relied upon by Clinton in the mentioned paragraphs of its complaint.

Certainly, if this Court was the trier of the facts and the only evidence before him was what was offered at the trial of the Iowa litigation, this Court would probably hold that there was no inequitable conduct and no fraud or deceit by Briggs & Stratton in its processing and attempt to protect the Lechtenberg patents. So far as they go, the findings of fact of Judge Graven and the comments made by the concurring opinion in the Court of Appeals appear to negate any inference of wrong doing on the part of Briggs & Stratton of the character now claimed in the complaint in this action. The complementary observations by the trial court and by the concurring opinion in the Court of Appeals and the labeling of Clinton's own engine as a "slavish copy" of the Lechtenberg design, suggests that on the record made in the Iowa litigation, a trier of the facts might well conclude that the allegations of the mentioned paragraphs of Clinton's complaint here are without foundation. This Court, however, does not feel that it is in a position in the present posture of this litigation, to dispose of the motion for summary judgment because of impressions gained from reading the record and decisions of the Iowa litigation.

[*Patent Misuse as Evidence of Antitrust Violations*]

Third: The third position of Briggs & Stratton in its request for summary judgment is stated in the caption of the portion of its brief devoted thereto. There Briggs & Stratton assert:

> "In the absence of bad faith, the obtaining of a patent and bringing on an action for infringement by patentee does not constitute a violation of the anti-trust statutes of the United States, either alone or in combination with other activities, even though the patent may prove to be invalid."

For the purpose of disposing of the motion before this Court, it is not necessary to disagree with the above general observation. No citation of authorities is needed for the proposition that a valid patent, in itself, creates a monopoly, and no violation of the anti-trust laws results from the obtaining of a patent or efforts to protect it by litigation, even though the patent finally proves to be invalid. Such authorities, however, do not go so far as to say that activities indulged in for the purpose of seeking to patent something known by the applicant to be invalid, and as a part of a scheme to create an illegal monopoly or restrain trade would be excluded as evidence in an action seeking to enforce our anti-trust statutes. It was stated in the case of *Kellogg Co. v. National Biscuit Co.* [1932-1939 Trade Cases ¶ 55,056], 71 F. (2d) 662 (666):

> "While it doubtless would not be within the anti-trust Acts to bring a suit to assert a patent or trade mark right whatever the motive, if the claim was valid, an atempt to assert a known invalid claim would be a different matter."

If, within the limitations placed upon it by the order to be made pursuant to this opinion, Clinton is able to prove that the obtaining of the patents in question and the infringement action were part of an evil and illegal scheme to create and maintain a monopoly, it should not be foreclosed from relying on such proofs.

Conclusion

[*Summary Judgment Denied*]

It is, accordingly, the opinion of this Court, and such will be its order, that the motion for summary judgment be denied, except to the extent that upon this trial, Clinton will be foreclosed and estopped from relying upon any charge of misconduct from which it was exculpated by Clinton's counsel in the Iowa litigation; this Court is of the opinion that the concession there

made amounted to an adjudication and determination against the factual existence of such claimed misconduct.

An order in conformity with this opinion may be presented for signature.

[¶ 69,497] **Harold C. Myers v. P. L. George and National Wrestling Alliance.**

In the United States Court of Appeals for the Eighth Circuit. No. 16,188. Dated October 27, 1959.

Appeal from the United States District Court for the Southern District of Iowa.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Trial of Cause—Prejudicial Comments by Court—New Trial.—A wrestler, who alleged that he was deprived of his right to earn a living because of monopolistic activities of a wrestling association, was prevented from having a fair trial by reason of prejudicial comments of the trial court during the trial. The general effect of these comments was to ridicule and belittle the wrestler's calling and his alleged cause of action and tended to make a mockery out of the trial. A judgment for the defendant based on a jury's verdict was reversed, and the wrestler was granted a new trial.

See Private Enforcement and Procedure, Vol. 2, ¶ 9014, 9015.

Private Enforcement and Procedure—Suit for Civil Damages—Appeal and Error—Court's Comments—Necessity of Objections.—Objections to prejudicial comments by a trial court need not be made in order for the matter to be considered on appeal, where the effect of such comments could not be cured and the objections would have been futile. It would be a manifest miscarriage of justice to refuse to consider such comments on appeal.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.

For the appellant: James G. McDowell, Jr.

For the appellees: Harry N. Soffer (Burton M. Greenberg was with him on the brief) for National Wrestling Alliance.

Before Gardner and Vogel, Circuit Judges, and Mickelson, District Judge.

[*Antitrust Action*]

Per Curiam [*In full text*]: Appellant Harold C. Myers brought this action against appellees P. L. George and the National Wrestling Alliance to recover damages, alleging that appellees, through their monopoly on wrestling in the United States, deprived appellant of his right to earn a living as a wrestler or to promote wrestling with his carnival in the State of Iowa, in violation of the Anti-Trust Acts, Sections 1 and 2, Title 15, United States Code. The parties will hereinafter be referred to as they were designated in the trial court.

[*Grounds for Reversal*]

Plaintiff at all times pertinent to the issues was and now is a professional wrestler, while the defendant National Wrestling Alliance is a corporation organized for and on behalf of professional wrestling and bookers and promoters of wrestling. Plaintiff alleged that defendants were bookers and promoters of wrestling and have a monopoly on all professional wrestling. At a pretrial proceeding it was made to appear, either by consent of counsel for the respective parties or by judicial notice, that some two years before the commencement of the instant action suit had been brought against the defendant National Wrestling Alliance by the Government charging violation of the Anti-Trust Acts, and that in that suit a consent decree had been entered against defendant National Wrestling Alliance in which it in effect admitted its monopoly and agreed to refrain from doing so in the future. At the pretrial proceeding the court entered an order directing that "there will be no mention made at the trial of any consent decree entered against National Wrestlers Alliance." The action was tried

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to the court and a jury and resulted in a verdict for the defendants. From the judgment entered on the jury's verdict plaintiff prosecutes this appeal and seeks reversal on substantially the following grounds: (1) the court erred in making a farce out of the trial of the plaintiff's case by making jocular remarks from the bench, and (2) the court erred in failure to allow the plaintiff to answer an argument by defense counsel that, "if they were guilty of monopoly the Government would have done something about it."

It is earnestly contended that the trial court made a mockery of the trial by reason of certain remarks made during the course of the trial, variously referred to as unsolicited, jocular, belittling, witty, unjudicial, and prejudicial to the cause of the plaintiff.

[*Comments by Court*]

During the empaneling of the jury the trial judge referred to the professional wrestling game as, "sometimes considered by some people to be a racket anyway." While plaintiff was on the witness stand being examined by his counsel, the following occurred:

"Q. Well, are you, in the wrestling profession, acquainted with the territories that are had by the bookers?

The Court: Unless this witness has his contract here, some paper that denotes what his territory is, it would not be admissible. It would be hearsay, at best.

Mr. McDowell: Well, this is quite important, your honor.

The Court: If the witness knows where Oklahoma is, he can testify to that."

During the examination of a member of the Fair Board of Avoca, Iowa, the following occurred:

"Q. Do you recall in the '54 show or exhibition was Mr. Myers to furnish the referee?

The Court: He certainly wouldn't pay a referee anything here, Senator. They certainly would take care of themselves and not hurt each other."

During the examination of another witness the following occurred:

"Q. Whether you call it an exhibition or a match, as they are both described in this, did that ever come into the Board's mind as to whether or not the fellow that's putting on the show should wrestle the main event and pay his competitors and also pay the referee? A. In 1954 we booked the match Myers and Dusek as a grudge match. They had wrestled in '53 and the blood was drawn and the crowd got a big rouse out of it, so they come back in '54. It was the same thing. We weren't interested in the referee.

The Court: In other words, you were selling blood?

The Witness: That's right, we were selling blood.

Q. And the show was furnished and the wrestlers showed up and the money was paid and the refund was made to you folks, and so forth, isn't that right? A. Yes, right.

The Court: Was there blood?

The Witness: No blood.

Q. You didn't ask Mr. Myers to promote in '55 or '56? A. The wrestling wasn't particularly profitable as far as the Fair was concerned.

The Court: Tell me, how did your people around Avoca possibly survive without it?"

During the examination of another witness the following occurred:

"Q. And as I understand it, you rented the ring for $50 from a man that put on wrestling shows in Atlantic? A. I don't know whether he did or not. He advertised that he had a ring for rent. I don't know what his business was.

Mr. O'Malley: That's all.

Mr. Soffer: No questions, your Honor.

The Court: Hadn't it ever occurred to you that you could rent a race horse much cheaper than that?

The Witness: It does now, sir."

Counsel for the plaintiff announced that he desired to call as a witness a Mr. True, whereupon the court said:

"I can see now that Mr. True is not going to be very good. He is going to belie his name. (Shaking his head.) But he'll be like the old gray mare that I so frequently refer to, except that he's not all hell to get, but he isn't going to be worth a damn when you get him."

During the examination of a witness called by the plaintiff, the following occurred:

"Q. Where do you promote? A. Well, I have a show tonight in Moberly, Missouri. I have one Thursday night in Kansas City, Kansas.

The Court: May I intervene?

The Witness: Yes, sir.

The Court: How did you continue your promoting, your relation with wrestling, and keep your religion?

The Witness: Keep my what?

The Court: Religion.

The Witness: Well, sir, I think that people get more for their money in wrestling than anything in the world. I think we are giving them more for their money than anything in the world, so if you give people what they are paying for then you are honest.

The Court: All right."

During the testimony given by plaintiff with reference to his income from his wrestling bouts, the following occurred:

"Q. Well, how much did you make down there at Kansas City? A. Well, as I said yesterday, you take year in and year out, probably my average would be between fifty and seventy-five dollars a night that I worked. Naturally I had many, many main events there which had good payoffs.

Q. What you you mean, 'good payoffs?' A. Well——

The Court: Suckers. * * *

Q. All right. Now, you say you were taken off of television. Why is that important to a wrestler? A. Why is it important to a wrestler? It's probably one of the biggest monitors of publicity in the wrestling game today. If you are not on television at times, you don't do too well at all. In other words, television more or less puts you out in front of the people's eyes. They see who you are. If they like you or want to come see you, they will come and see you, because it's good publicity. If you just come in from out of a dark corner some place and be on a wrestling card as far as having——

The Court: You mean by that that the women in the home audiences can see the hair on your chest and come out if they want to see you, is that correct?

The Witness: No, sir.

The Court: Well, who does?

The Witness: Either you have ability or you don't have ability. If you have ability that appeals to the public, why naturally they want to come and see you. If you don't you might as well stay where you were.

The Court: Well, I will stay home. * * * We are not trying to build reputations of amateur wrestlers or anything of that kind. We are trying to build a livelihood in a so-called art, which is not an art. It's the art of acting. It gets money and all that, and of course it is wrongful to deprive a man of that pursuit if he wishes to follow it. It's a legal, lawful pursuit. But I may have my little fun about it.

Q. All right. When you were just getting—let me ask you this—were you on your way up in your field in 1954?

A. Definitely.

Mr. O'Malley: Just a moment.

The Court: Just a moment. That would —modesty forbids his saying so. That's true if—I suppose it would be true if the witness said so, providing he was matched right. He has to win his alleged matches. * * *

Q. Now let's get to '56. I hand you what the reporter has marked Exhibit Z-16, and ask you whether or not those are two representations of wrestling programs you have been on in Amarillo, Texas?

The Court: Mr. Myers, did you study the bricklaying trade or something like that in '55 and '56, along there?

The Witness: For my income?

The Court: Yes.

The Witness: No, sir, your Honor, but I will explain that after a while.

The Court: Well, I don't know whether you will or not. I sought to gain an explanation right then.

The Witness: Right then?"

There were other remarks by the court during the trial of an unorthodox character but their recital would, we think, unduly extend this opinion and serve no useful purpose.

[*Conduct of Court*]

In Bacon's essay on "Judicature", the learned author, in referring to the conduct of a trial judge, among other things said:

"Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue * * * Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. * * * The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purprise thereof ought to be preserved without scandal and corruption."

Manifestly, the conduct of the trial judge here under consideration comes far short of

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meeting the Baconian standard. The rule governing the conduct of the trial judge in the Federal courts is much more liberal than that prevailing in most of the State courts. The procedure in this regard is that prevailing at common law at the time of the adoption of the Constitution and is frequently referred to as the English system. The judge is not a mere moderator. He may summarize and discuss the evidence, provided that he does so in an impartial manner, and he may even express an opinion as to the credibility of testimony, provided always that he makes it perfectly clear that the jury is not bound by his expressed opinion but is the sole judge as to the facts and as to the credibility of all testimony. In *Starr v. United States,* 153 U. S. 614, the applicable rule is thus stated:

> "It is true that in the Federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. * * * It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word of intimation is received with deference, and may prove controlling."

In *Rudd v. United States,* 8 Cir., 173 Fed. 912, this court said:

> "We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment."

While the trial judge may, when the situation warrants, discuss the evidence he must do so impartially and abstain from advocacy for either party. *Cook v. United States,* 8 Cir., 18 F. 2d 50; *Boatright v. United States,* 8 Cir., 105 F. 2d 737; *Cline v. United States,* 8 Cir., 20 F. 2d 494; *Stokes v. United States,* 8 Cir., 264 Fed. 18; *Hurwitz v. United States,* 8 Cir., 299 Fed. 449; *Weare v. United States,* 8 Cir., 1 F. 2d 617. In reversing a judgment of conviction in *Cook v. United States, supra,* we said, inter alia:

> "The court did tell the jury that his opinion on the facts was not controlling upon them, but that did not in our judgment cure the error. Every one knows that suggestions from the court have great weight with a jury, and the argumentative language used in this instruction must have seemed to the jury an advocacy of the government's case, and impressed upon them the court's desire for a conviction. We think it was not such judicial discussion of the evidence as is permissible. Certainly the language is as argumentative as that used by the court in the case of *Cook v. United States* (C. C. A.) 14 F. (2d) 833, which this court decided necessitated a reversal of the case."

[*Prejudicial Comments-Objections*]

In the cases cited reversals were had because of statements made in the court's instructions to the jury. In the instant case the statements were made during the course of the trial. They did not even constitute rulings as to the admissibility of evidence but were voluntary and were clearly prejudicial in their character. The wrestling game was in effect referred to when the jury was being empaneled as a "racket". When plaintiff's counsel announced that he wished to call a witness by the name of True, the court, without any apparent provocation, said:

> "I can see now that Mr. True is not going to be very good. He is going to belie his name. (Shaking his head.) But he'll be like the old gray mare that I so frequently refer to, except that he's not all hell to get, but he isn't going to be worth a damn when you get him."

This certainly could not have assisted the jury in weighing the testimony, though it may have amused the jurors and the courtroom audience. Another expression indicated that wrestling contests are fixed in advance and that people who attend wrestling matches are "suckers". The general effect of these expressions was to ridicule and belittle plaintiff's calling and his alleged cause of action and tended to make a mockery out of the trial. The mere fact that the court in its instructions advised the jury that they were the sole judges as to the facts could not cure the error nor erase its effect

upon the jury. It is argued that no objections were made to these remarks, but when made we do not see how their effect could have been cured and objections made would have been futile. The statements of the trial judge here complained of were prejudicial and to refuse to consider them on this appeal would result in a manifest miscarriage of justice. The applicable rule with reference to the conduct of the trial judge in jury cases is well stated in 53 *American Jurisprudence*, Trials, Section 76, page 75, as follows:

> "In jury trials the trial judge should be cautious and circumspect in his language and conduct before the jury. He must be fair to both sides, and the extent to which he may go in comments and remarks during the trial is governed by the fundamental principle that nothing should be said or done by him which will prejudice the rights of the parties litigant. Especially should he refrain from any remarks that are calculated in any way to influence the minds of the jury or to prejudice a litigant. This includes remarks to counsel touching the management of the case and reflecting on their conduct, as well as those touching the character of the witnesses and the value of their testimony."

[*Reference to Government*]

It is urged by plaintiff that the court erred in denying plaintiff's counsel the right to reply to an argument of counsel for defendant to the effect that had defendants been guilty of monopoly as alleged by plaintiff the Government would have done something about it. It is without doubt that counsel's argument contained assertions that were not true; that it misled the jury; and that it was contrary to the pre-trial order of the trial court. Of themselves, such remarks would justify the granting of a new trial. *Chicago & N. W. Ry. Co. v. Kelly*, 8 Cir., 84 F. 2d 569; *London Guarantee & Accident Co. v. Woelfle*, 8 Cir., 83 F. 2d 325. However, the objection is not as to the argument of counsel for defendant but as to the refusal of the court to permit counsel for plaintiff to answer the argument. In view of the fact that the case mut be reversed for the reasons heretofore stated, and as it is unlikely that this question will again arise on retrial, we express no opinion as to this ruling of the court.

[*New Trial*]

We are convinced that plaintiff, by reason of the comments of the trial judge during the trial, was prevented from having a fair trial. The judgment appealed from is therefore reversed and the cause is remanded to the trial court with directions to grant plaintiff a new trial.

[¶ 69,498] Allen B. Thompson and Brona C. Thompson, v. North Carolina Theatres, Inc.; Wilby-Kincey Service Corporation and H. F. Kincey; Paramount Film Distributing Corporation; Loew's Incorporated; Twentieth Century-Fox Film Corporation; Warner Bros. Pictures Distributing Corporation; RKO Radio Pictures, Inc.; United Artists Corporation; Universal Film Exchanges, Inc.; Columbia Pictures Corporation; and Republic Pictures Corporation.

In the United States District Court for the Western District of North Carolina, Charlotte Division. Civil Action No. 916. Filed Sept. 10, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery May Be Barred—Applicable State Statute of Limitations—North Carolina One-year or Three-year Statute.—A Federal District Court sitting in North Carolina held that a North Carolina three-year statute of limitations (governing actions "upon a liability created by statute, other than a penalty or forfeiture"), rather than a North Carolina one-year statute (governing actions "under the statute, for a penalty or forfeiture"), was applicable to a treble damage action under the Federal antitrust laws. Since there was no applicable Federal statute of limitations governing such actions at the time of the filing of the action, the court had to adopt the pertinent state statute. The issue as to which of the two North Carolina statutes applied was seemingly one of first impression in the jurisdiction. However, preliminary to dealing with the applicable North Carolina statute, it was necessary to determine the nature of the right of action. Since the action arose out of the federal

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antitrust statutes, it was necessary to revert to the decisions of the Federal courts for the answer. The court concluded that, in the majority view, a private action for treble damages under the Federal antitrust laws is not an action to recover a penalty or forfeiture, but an action upon a liability created by statute and is in the nature of an action of tort.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100.

For plaintiff: George S. Ryan and W. Bradley Ryan, Boston, Mass.; and Francis H. Fairley and W. I. Ward, Jr., Charlotte, N. C.

For the defendants: Helms, Mulliss, McMillan & Johnston, Charlotte, N. C.; and Dwight, Royall, Harris, Koegel & Caskey, New York, N. Y.

Memorandum Opinion

[*Applicable State Statute of Limitations*]

Wilson Warlick, District Judge [*In full text*]: The defendants in this treble damage suit under the Anti-Trust Laws, 15 USCA, sec. 15, have moved for a partial summary judgment seeking to have dismissed all claims embraced in the complaint which accrued or became fixed prior to one year next preceding the filing of the complaint and the issuance of summons, as being barred by the one year Statute of Limitations of North Carolina.

Since there was no statute under the Federal Code that was applicable to threefold damages, at the time of the filing of this action, it is well established that the court must adopt the pertinent state statute. Rules of Decision Act, 1 Stat. 73, 92, as amended, 28 U. S. C. Sec. 1652; *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U. S. 390, 397, 27 S. Ct. 65, 51 L. Ed. 241.

Congress, however, on July 7, 1955, on observing the discrepancies that came about through the various applicable statutes of limitations, and the decisions of the courts thereon, in the several states, effecting a recovery,— for instance, the Tennessee statute of ten years, as is found in the *Chattanooga F. & P. Works v. Atlanta* case, above cited, and the two years statute in Illinois, as is set out in *Schiffman Bros. Inc. v. Texas Company* [1952 Trade Cases ¶ 67,270], 196 F. 2d page 695, and the one year statute of limitations as was the holding in *Northern Kentucky Telephone Co. v. Southern Bell Telephone and Telegraph Co.* [1932-1939 Trade Cases ¶ 55,063], 73 F. 2d 333, governing actions for conspiracy as apply to treble damage suits under the Sherman Act, and many other cases of like import and sensing the need therefor, amended Sec. 4 of the Clayton Act, 15 U. S. C. Sec. 15, and provided that in every cause of action by private parties under present Sec. 4 shall be forever barred, if not commenced within four years from the time of action accrues. 15 U. S. C. A. Sec. 15b.

[*North Carolina Statutes*]

The defendants in their motion contend that the One year statute of limitations is applicable.

The plaintiffs contend that the Three years statute applies.

The North Carolina One year statute is as follows:

> "Upon a statute, for penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation." N. C. G. S. 1-54(2).

The Three years statute reads as follows:

> "Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it." N. C. G. S. Sec. 1-52(2).

[*Issue*]

The issue, therefore, in this case is whether, under North Carolina law, an anti-trust action for treble damages and a reasonable attorney's fee is an action "under the statute, for a penalty or forfeiture," or whether it is an action "upon a liability created by statute, other than a penalty or forfeiture."

[*Case of First Impression*]

This issue seemingly is one of first impression in this jurisdiction, I assume, since no decision is presented to the court in which a federal court has ruled upon the applicable statute of limitations in a private threefold damage action under the Anti-trust laws. *Miller Motors v. Ford Motor Company* [1957 Trade Cases ¶ 68,663], 149 F. Supp. 790 [1958 Trade Cases ¶ 68,937], 252 F. 2d 441. (4th Cir.)

[*Nature of Action*]

Preliminary to dealing with the applicable North Carolina statute, one must determine the nature of the plaintiff's right of action. Since this right of action arises out of the federal antitrust statutes, it is the function of the Federal Courts to decide the point. Judge Nields in *Williamson v. Columbia Gas & Electric Corp.* (D. C. Del.), 27 F. Supp. 198, 204, aff'd (C. C. A. 3) [1932-1939 TRADE CASES ¶ 55,255], 110 F. 2d 15; cert. den. 1940, clearly states the rule:

> "An action to recover triple damages under the federal anti-trust laws is based upon a federal statute and enforceable only in a federal court. A federal court has the power to determine the nature of the action. *Glen Coal Co. v. Dickinson Fuel Co.*, 4 Cir. 72 F. 2d 885."

Hence we must revert to the decisions of other federal courts for our answer. There we find numerous decisions which decide the nature of this statutory right of action. The majority view is that a private action for treble damages under the anti-trust laws is not an action to recover a penalty or forfeiture but rather is an action upon a liability created by statute and is in the nature of an action of tort. It is remedial and compensatory. *Huntington v. Attrill*, 146 U. S. 657; *Chattanooga Foundry & Pipeworks v. City of Atlanta*, 127 F. 23; 203 U. S. 390; *Momand v. Twentieth-Century Fox Film Corp.*, 37 F. Supp. 649; *Wolf Sales Co. v. Rudolph Wurlitzer Co.* [1952 TRADE CASES ¶ 67,321], 105 F. Supp. 506; *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.* [1953 TRADE CASES ¶ 67,560], 113 F. Supp. 937; *Fulton v. Loew's Inc.* [1953 TRADE CASES ¶ 67,571], 114 F. Supp. 676; *Toulmin Anti-Trust Laws*, Vol. 2, page 99.

[*Three-year Statute Applicable*]

So there can be little doubt but that the applicable period in which the plaintiffs can recover is three years, and such the court holds.

[¶ 69,499] Youngs Rubber Corporation v. Dart Drug Corporation of Maryland.

In the United States District Court for the District of Maryland. Civil Action No. 10500. Filed July 14, 1959.

Maryland Fair Trade Act

Fair Trade—Enforcement Action in Federal Court—Jurisdictional Amount—Value of Trademark or Amount of Its Impairment as "Amount in Controversy"—Necessity for Proving "Actual Pecuniary Loss."—A Federal District Court sitting in Maryland, in an action under the Maryland Fair Trade Act to enjoin a retail druggist from selling a manufacturer's venereal prophylaxis below fair trade prices, found that the necessary jurisdictional amount ($3,000 when the complaint was filed) was "in controversy," whether the "approach" was (1) that the retailer's conduct would eventually impair the value of the right sought to be protected in an amount in excess of the jurisdictional amount, or (2) that the right to be protected was the value of the "good will" represented in part by, or associated with, the registered trademark. Here, the manufacturer's sales to Maryland wholesalers exceeded $50,000 per year. One of its witnesses testified, without objection, that its trademark was worth $10,000,000. In *Seagram Distillers Corp. v. New Cut Rate Liquors*, 1957 TRADE CASES ¶ 68,719, there was language to the effect that "actual pecuniary loss" must be proved. In view of a later case (not a fair trade action) by the same court (United States Court of Appeals for the Seventh Circuit) in which the value of the trademark was considered the amount in controversy, the *Seagram* case may be explained by the fact that the plaintiff there alleged that it could prove actual damages in excess of the jurisdictional amount, but did not do so. However, if that case is not distinguishable on that ground, the instant court would not follow it.

See Fair Trade, Vol. 1, ¶ 3410.

Fair Trade—Defenses to Enforcement Action—Failure to Diligently Enforce Fair Trade Program—Permitting Retailers to Give Trading Stamps.—A retail drug store charged with violating the Maryland Fair Trade Act failed to substantiate its defense that the fair trader, a manufacturer of venereal prophylaxis, had permitted the giving of trading stamps in connection with the sale of its products at minimum fair trade prices.

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Since that allegation was not substantiated, it was unnecessary for the court to determine whether the sale of fair trade items at "an established cash fair-trade minimum price, but with trading stamps, is a violation of the Maryland Fair Trade Act." Rejecting the retailer's contention that the manufacturer's action was barred by "unclean hands" because it had failed to diligently enforce, and had abandoned, its fair trade program, the court noted that the evidence showed the most vigorous enforcement of fair trade policy that had come before it.

See Fair Trade, Vol. 1, ¶ 3440.22.

Fair Trade—Commodities Which May Be Fair Traded—Products Which Are in Free and Open Competition with Others.—A retail drug store charged with violating the Maryland Fair Trade Act by selling a manufacturer's venereal prophylaxis below fair trade prices failed to sustain its defense that the manufacturer's products were not in "free and open competition with commodities of the same class produced and distributed by others." The court found that at least four other companies produced products which competed with the manufacturer's products and which were designed to accomplish the same result.

See Fair Trade, Vol. 1, ¶ 3154.22.

For the plaintiff: Bernard S. Melnicove (Needle and Melnicove) Baltimore, Md.

For the defendant: Harry Silbert, Baltimore, Md., and J. E. Bindeman, Washington, D. C.

[*Fair Trade Action*]

R. Dorsey Watkins, District Judge [*In full text*]: This is a typical action for an injunction to restrain alleged violations of the Maryland Fair Trade Act, Maryland Code of Public General Laws, 1957 Edition. Article 83, sections 102-110. As a result of a pretrial conference, stipulations, and uncontested testimony, there are no real issues of fact, the questions being substantially reduced to the legal effect of such facts, which are found as such by the court as hereinafter stated in this opinion.

[*Parties*]

Plaintiff is engaged in the manufacture, sale and distribution,[1] of commodities of venereal prophylaxis known as "Trojans", and is the owner of the trade-marks, names and brands associated therewith. Defendant operates a retail drug store in Silver Spring, Maryland, selling and offering for sale the usual articles of such operation, including commodities of venereal prophylaxis, and specifically such products manufactured by plaintiff and bearing plaintiff's name and trade-mark.

[*Sales Below Fair Trade Prices*]

Defendant admits that before the institution of this suit it sold plaintiff's products at prices less than the fair-trade prices if such fair-trade prices were in fact legal.

[*Trademark*]

The name "Trojans" was registered by plaintiff as a trade-mark in the United States Patent Office on April 29, 1947, and plaintiff since then at all times has been the owner thereof. Such products bearing the trade-mark have been widely distributed and sold throughout the United States.

[*Fair Trade Agreements*]

Since 1936, plaintiff has stipulated and established minimum prices for the sale at retail in the State of Maryland, pursuant to the Maryland Fair Trade Act, of its commodities. Plaintiff has in Maryland entered into written agreements covering the sale of "Trojans" by retailers to consumers pursuant to the Maryland Fair Trade Act. They include the following stipulations, which at all times in question were in full force and effect:

> "4. (a) The offering or giving of any article of value in connection with the sale by Retailer of any of the Commodities; (b) the offering or making of any concession of any kind whatsoever (whether by the giving of coupons, trading stamps or otherwise) in connection with any

[1] Plaintiff sells through wholesalers who sell only to retail drug stores dispensing through registered pharmacists. No sales of plaintiff's products are made through coin machines, or knowingly made through chain stores or other merchandising outlets or devices not under the control and supervision of a registered pharmacist.

such sale, or (c) the sale or offering for sale of any of the Commodities by Retailer in combination with any other merchandise shall constitute a breach by Retailer of Article 1 of this agreement.

"5. Manufacturer in good faith will employ all appropriate means, which in the circumstances shall be reasonable, including legal proceedings if such other means fail, to prevent, and to enforce the discontinuance of, any violation of said minimum retail price stipulations by any competitor of Retailer, whether the person violating or threatening such violation is or is not a party to a Fair Trade Contract with Manufacturer covering said Commodities."

[*Notice*]

Defendant was, before the occurrence of the alleged violations out of which this suit arose, informed of the existence of such contracts, of the specified minimum retail prices of plaintiff's commodities then in effect in Maryland.

Defendant, with such knowledge, sold and offered for sale plaintiff's products, at prices below the minimum retail prices stipulated in plaintiff's written Maryland contracts then in force.

[*Defenses*]

Defendant admitted, and there was proved, the requisite diversity of citizenship. Defendant however contested the existence of the requisite jurisdictional amount[2] in controversy; defendant also denied that plaintiff's products were in free and open competition with commodities of the same class produced and distributed by others; and defendant further contended that plaintiff was barred by "unclean hands" in that plaintiff had failed diligently to enforce its Maryland fair-trade agreements and had abandoned its fair-trade program through permitting its fair-traded items to be sold with trading stamps.

Plaintiff called as witnesses its own employees, and also independent Maryland pharmacists. Their testimony establishes to the court's satisfaction that plaintiff sells only through wholesalers who in turn sell to retail druggists, and that sales by plaintiff to Maryland wholesalers exceed $50,000 per year.[3]

Plaintiff advertises its products in all the recognized professional pharmaceutical journals, including the "Maryland Pharmacist". Such products are in competition with products of at least four other companies all of which products are designed to accomplish the same results.

One of plaintiff's witnesses testified, without objection, that plaintiff's trade-mark "Trojans" was worth $10,000,000. There was also testimony, satisfactory to the court, that plaintiff acted on the policy that price cutting was regarded by the public as indicating an inferior product, and that fair-trade violations would produce sale difficulties.

There was also competent testimony by employees of plaintiff and by independent pharmacists, which the court accepts, that purchasers of venereal prophylactics often request them by name or brand;[4] that the price of plaintiff's products is known by the customers;[5] and that if the prospective purchaser asks simply for the desideratum, without specifying the brand, a Trojan would be offered, because of drug store satisfaction with plaintiff's policies, including enforcement and sales program.

[*Enforcement Policy*]

The evidence offered showed the most vigorous enforcement of fair-trade policy that has come before this court or of which it is familiar through the decided cases or law review articles. Plaintiff's general counsel testified that it was plaintiff's policy to solicit a fair-trade contract from every drug store; that his company was the first to invoke judicial sanctions in the United States; that many years ago he had received a complaint of a fair-trade violation in Westminster, Maryland, which after investigation and conferences was terminated; that the present complaint was the only

[2] $3,000 at the time of the filing of the complaint.

[3] This figure relates to Maryland wholesalers; in addition, sales to Maryland retailers are made in Maryland by wholesalers in adjoining states and the District of Columbia.

[4] One independent pharmacist testified that most—70 to 80%—asked by brand name, usually Trojans; another, a member of the Maryland Board of Pharmacists, testified that a majority asked for a particular brand, and of those who did, 60% requested Trojans.

[5] The price is shown on most of the containers of plaintiff's products, although it is not stated as the fair-trade price. One of the independent pharmacists stated on cross-examination that it was "amazing", but most customers knew the price of plaintiff's articles, and usually would have the correct change ready.

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known violation in Maryland prior to the filing of this suit; and that after the filing of the complaint herein, when a shopping indicted another violation, he sent a notice demanding the cessation of violations, and they stopped. He further testified to a general routine under which every complaint is investigated; the violator is sought to be "sold" on the merits of fair-trade; if this is unsuccessful, a formal notice of violation is sent; and if the notice is not heeded, a suit is filed.

Plaintiff's District Sales Manager for five states, including Maryland, testified that except for defendant, he had found no violations in Maryland of plaintiff's fair-trade contracts in the past five years. He regularly shopped in Maryland about ten times a year, shopping five to ten stores a day in the area he covered with his salesmen.[6] On cross-examination he was confronted with affidavits by employees of defendant that a co-operative in the general area of defendant gave coupons[7] with the sale of plaintiff's products. He replied that he had learned of such alleged violation only on the Thursday preceding trial, through defendant's attorney; that the next morning he went to see the co-operative's comptroller who stated that the co-operative showed no profit thus far in 1959; but that nevertheless he (plaintiff's sales manager) had advised the co-operative's comptroller that Trojans had to be taken off the co-operative arrangement, or they could not be sold.

[*Trading Stamps*]

Defendant's defense that plaintiff had permitted its products to be sold at the minimum fair-trade prices with trading stamps[8] was not substantiated.

[*Free and Open Competition*]

The court also finds that plaintiff's goods were in free and open competition with commodities of the same class produced and distributed by others. *Eastman Kodak Company v. Home Utilities Company,* D. Md. 1956 [1956 Trade Cases ¶ 68,294], 138 F. Supp. 670, 674-677; affirmed on this point, 4 Cir. 1956 [1956 Trade Cases ¶ 68,382], 234 F. 2d 766, 770-771, cert. granted 1956, 352 U. S. 821, 77 S. Ct. 62, 1 L. Ed. 2d 46, dismissed 1957, 352 U. S. 956, 77 S. Ct. 349, 1 L. Ed. 2d 363.

The primary aim of the Maryland Fair Trade Act is

> "to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself." *Schill v. Remington Putman Co.,* 1941 [1940-1943 Trade Cases ¶ 56,095 and 56,117], 179 Md. 83, 89, 17 A. 2d 175, 22 A. 2d 128, quoting from *Old Dearborn Distributing Co. v. Seagram Distillers Corp.,* 1936 [1932-1939 Trade Cases ¶ 55,141], 299 U. S. 183, 193, 57 S. Ct. 139, 81 L. Ed. 109.

[*Jurisdictional Amount*]

Whether the approach be that defendant's conduct unless enjoined, would directly and through its effect on others, in the indefinite future eventually impair the value of the right sought to be protected in an amount in excess of the jurisdictional amount, *Lee-Wilson, Inc. v. General Electric Company,* 1 Cir. 1955 [1955 Trade Cases ¶ 68,053], 222 F. 2d 850, 852;[9] or that the right to be protected is the value of the good will, represented in part by, or associated with the registered trade-mark, *Calvert Distilling Co. v. Brandon,* D. C. S. C. 1938, 24 F. Supp. 857; *James Heddon's Sons v. Callender,* D. C. Minn. 1939, 28 F. Supp. 643, 644, 645; *Miles Laboratories v. Seignious,* D. C. S. C. 1939, 30 F. Supp. 549, 554; *Caron Corp. v. Wolf Drug Co.,* D. C. N. J. 1941, 40 F. Supp. 103, 104; *Calvert Distillers Corp. v. Rosen,* D. C. Ill. 1953 [1953 Trade Cases ¶ 67,547], 115 F. Supp. 146, 147; *Sunbeam Corp. v. Richardson,* D. C. Ky. 1956 [1956 Trade Cases ¶ 68,407], 144 F. Supp. 583, 587 reversed on other grounds, 6 Cir. 1957 [1957

[6] He would ask for a prophylactic without specifying the name.

[7] These purport to entitle a purchaser to a year-end cash distribution of, and proportionate to, the *net* profit of the cooperative.

[8] Whether a sale at an established cash fair-trade minimum price, but with trading stamps, is a violation of the Maryland Fair Trade Act, therefore need not be considered.

[9] See also *National Ass'n. for Advancement of Colored People v. Patty,* D. C. Va. 1958, 159 F. Supp. 503, 519-21, judgment vacated and case remanded on other grounds, 1959, — U. S. —, 79 S. Ct. 1025, 3 L. Ed. 2d —, holding that where continuing harmful effect (in that case, of a regulatory statute) is alleged, "the jurisdiction of the court is to be tested by the value of the object to be gained. Failure to prove that a sufficient amount of damage has already been sustained will not defeat the remedy if the injury is recurrent or continuous . . ." 159 F. Supp. at 520.

TRADE CASES ¶ 68,678], 243 F. 2d 501; see also *Sunbeam Corp. v. MacMillan*, D. C. Md. 1953 [1953 TRADE CASES ¶ 67,451], 110 F. Supp. 836, 837; *Sunbeam Corp. v. Golden Rule Appliance Co.*, 2 Cir. 1958 [1958 TRADE CASES ¶ 68,946], 252 F. 2d 467, 470, the court finds that under the facts in this case the necessary jurisdictional amount exists and is in controversy.[10]

[*Injunction Granted*]

Plaintiff is entitled to the injunction as prayed.

[¶ 69,500] **Prestole Corporation v. Tinnerman Products, Inc.**

In the United States Court of Appeals for the Sixth Circuit. No. 13,636. Decided October 21, 1959.

Appeal from the United States District Court for the Northern District of Ohio. KLOEB, Judge.

Sherman Antitrust Act

Combinations and Conspiracies — Monopolies — Patents — Price Fixing — Licensee's Agreement Not To Sell at Prices More Favorable Than Licensor's Prices—Legality.—A provision of a patent licensing agreement (between two manufacturers of sheet metal fastening devices) under which the licensee agreed to refrain from selling the devices manufactured under the license at prices more favorable than the prices established by the licensor did not violate the antitrust laws. The doctrine of *U. S. v. General Electric Co.*, 272 U. S. 476, which sustains a provision whereby a licensor under a valid patent restricts the price at which its licensee may sell articles manufactured under the license, was not overruled by *U. S. v. Line Materials Co.*, 1948-1949 TRADE CASES ¶ 62,225, 333 U. S. 287. The *Line Material* case merely restricted the application of the *General Electric* case. It involved several cross licensing agreements, concerning complimentary patents, which had price fixing provisions and which forbade the licensees from granting sublicenses without similar provisions. In the instant case, there was only one price fixing agreement, and neither the licensor nor the licensee controlled any substantial part of the industry.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.750; Monopolies, Vol. 1, ¶ 2610.550.

Private Enforcement and Procedure—Antitrust Violations as Defenses—Attacking Validity of Patent by Licensee—Price Fixing.—Where there was no price fixing provision in the patent licensing agreement being sued upon, the licensee was estopped during the continuance of its use of the license from challenging the validity of the patents upon which it accepted such license. Although there was a price fixing provision in a licensing agreement between the licensor and a third party, there was not a sufficient connection between the two agreements as to make such defense available to the third party usable by the instant licensee.

See Private Enforcement and Procedure, Vol. 2, ¶ 9044.05.

For the appellant: John A. Blair, of Harness, Dickey & Pierce, Detroit, Mich. (John A. Blair and Don K. Harness, of Harness, Dickey & Pierce, and John M. Curphey, of Williams, Eversman & Black, Toledo, Ohio, on the brief).

For the appellee: Albert R. Teare, of Bates, Teare & McBean, Cleveland, Ohio (Albert R. Teare and Jerome F. Kramer, of Bates, Teare & McBean; Walter I. Krewson, Cleveland, Ohio; and Donald A. Finkbeiner, Toledo, Ohio, on the brief).

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[10] The 2-1 decision in *Seagram Distillers Corp. v. New Cut Rate Liquors*, 7 Cir. 1957 [1957 TRADE CASES ¶ 68,719], 245 F. 2d 453, 458, cert. den. 1957, 355 U. S. 837, 78 S. Ct. 61, 2 L. Ed. 2d 48, containing language to the effect that actual pecuniary loss must be proved, may be explained on the fact that plaintiff alleged it could prove an actual damage in excess of the jurisdictional amount, and started to offer evidence of such loss, but did not do so, particularly in view of *Snap-on Tools Corporation v. Winkenweder & Ladd, Inc.*, 7 Cir. 1957, 250 F. 2d 154, where the value of the trade-mark was considered to be the amount in controversy. If the *Seagram* case is not so distinguishable, this court declines to follow it.

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Before MILLER, Circuit Judge; THORNTON and O'SULLIVAN, District Judges.

[*Nature of Action*]

O'SULLIVAN, District Judge [*In full text*]: This cause, designated by plaintiff-appellee as a suit for specific performance of a patent license agreement, was brought by Tinnerman Products, Inc., against defendant-appellant, Prestole Corporation, to obtain an accounting of royalties claimed to be due to plaintiff from defendant. A second cause of action charged infringement of the licensed patents following termination of the license agreement. Defendant claimed breach of the license agreement, misuse of patents by plaintiff, and counterclaimed for damages.

[*Judgment Below*]

Trial on plaintiff's claim for royalties, and defendant's counterclaim, resulted in judgment for plaintiff on both issues. A separate trial of the infringement action was ordered, and that cause is not here involved. This opinion will refer to plaintiff-appellee as Tinnerman, and defendant-appellant as Prestole.

[*License Agreements*]

Prior to the execution of the license agreement in question, Tinnerman had sued Detroit Harvester Company for infringement of patents owned by Tinnerman. That suit was settled, and dismissed. On the day of such dismissal, August 18, 1942, Tinnerman licensed Detroit Harvester Company to use two of the patents which, in the lawsuit so settled, Tinnerman claimed had been infringed. The license agreement required Detroit Harvester Company to pay royalties equal to five per cent of the net sales price of all devices covered by the licensed patents to be sold by it during the term of the license agreement.

On the same day that Tinnerman granted the said license to Detroit Harvester, the latter concern licensed Tinnerman to use certain patents owned or applied for by it. The two contracts of that date, August 18, 1942, were, in effect, cross-licensing agreements.

Tinnerman and Detroit Harvester were manufacturers of devices for fastening by means of threaded nuts and bolts, sections of sheet metal, in mass production industries. The patents involved were used in such devices. Both Tinnerman and Detroit Harvester had acquired patents relating to these devices besides the ones immediately covered by the license agreement sued upon.

The issues in this case involve, primarily, two provisions of the agreement by which Tinnerman granted a license to Detroit Harvester. They are as follows:

(a) In paragraph 1, after granting the license, the contract reads,

> "Provided, however, that this license shall not include devices covered by said patents in which the thread-engaging portion comprises a pair of tongues, the ends of which are notched out and formed with screw thread engaging edges intended for and used to receive a screw such as shown and described in Tinnerman Patents Nos. 1,512,653; 1,928,469; 2,221,498; and 2,233,230."

(b) Paragraph 12 provides,

> "In the event that Tinnerman grants a license with more favorable royalty terms, then within thirty (30) days of the execution of such license, a copy shall be delivered to Detroit Harvester and Detroit Harvester shall then have thirty (30) days in which to determine whether it desires to adopt such royalty terms."

On July 15, 1946, while the license agreements were still in effect, Prestole, with Tinnerman's consent, was assigned Detroit Harvester Company's interest in the agreements. Thereafter, the parties continued to operate under the license agreements in suit, Prestole paying royalties to Tinnerman until a last payment was made on September 30, 1953. Thereafter, Prestole continued to manufacture and sell devices upon which they had theretofore paid royalties, but paid no more royalties, claiming for reasons hereinafter detailed that Tinnerman had breached the license agreement. Tinnerman thereupon exercised its right to cancel its license to Prestole, and the agreement was cancelled, effective April 23, 1954. The royalties sought to be recovered in this action are those claimed to have become payable by Prestole to Tinnerman between September 30, 1953, and April 23, 1954.

[*Defense and Counterclaim—Basis*]

Prestole resists Tinnerman's claim for royalties and bases its counterclaim for damages upon the charge, First, that in 1946, and without notice to Prestole, Tinnerman granted a license for use of the same patents covered by the Prestole license to a con-

cern known as Illinois Tool Works, which license agreement gave the Illinois Tool Works more favorable royalty terms than those extended to Prestole—which action, Prestole claims, breached the Tinnerman-Prestole contract; and, Second, that by reason of certain restrictions in the Tinnerman-Prestole contract and a price fixing provision in the Tinnerman-Illinois contract, Tinnerman was guilty of misuse of the licensed patents.

The following facts are the background to Prestole's defense and counterclaim. On July 23, 1946, Tinnerman requested Prestole to join in an amendment to the existing license agreement whereby Prestole would agree to refrain from selling the devices manufactured under the license at prices more favorable than prices established by Tinnerman. Prestole refused to make the suggested amendment. Following such refusal, and on August 30, 1946, Tinnerman licensed Illinois Tool Works to use a number of patents owned by Tinnerman, including two patents covered by the existing agreement between Tinnerman and Prestole. This contract with Illinois required it to pay royalties of six percent upon the first one million dollars of sales in each calendar year and five percent upon sales in excess of one million dollars. This contract contained a price fixing clause substantially the same as the one which Prestole had refused to accept. Paragraph 16 of the Tinnerman-Illinois contract provided:

> "Tinnerman will, at the request of Illinois, assist Illinois with such information as it may have, in order that production can commence as rapidly as possible and in the event such assistance shall be given by Tinnerman in the plants of Illinois, it shall be at Tinnerman's convenience and Illinois will pay the cost of compensation of such employees for time spent in going to and from and at Illinois' plants."

Tinnerman gave no notice to Prestole of the making of this license agreement with Illinois. It did not advise Prestole of what it gave to Illinois pursuant thereto. Not until the imminence of this litigation was there ever a copy of such agreement made available to Prestole.

Prestole claims that by the quoted paragraph 12 and the services and information actually furnished by Tinnerman to Illinois pursuant thereto, Tinnerman did, in fact, grant a license with more favorable royalty terms than had been granted to Prestole.

From the time that Illinois was given its license to use the Tinnerman patents in 1946 through the year 1955, Tinnerman furnished Illinois with all types of technical information required to get Illinois started producing plaintiff's products, including detailed drawings of parts, assistance on the machinery and equipment necessary to make the licensed products, and know-how which could not be put on paper; Tinnerman sent some of its technical personnel to train Illinois Tool Works in plaintiff's methods of manufacturing fastening devices covered by the license agreement with Illinois; Tinnerman sent some of its personnel to the Illinois plant to transfer technical information, and some Illinois personnel visited plaintiff's plant to obtain technical information regarding production of the licensed fasteners, and particularly with reference to the equipment on which they were made; Tinnerman transferred a great deal of technical information regarding the licensed products, including parts, prints, and drawings of all the fasteners which Illinois desired to produce under the license, and as soon as Tinnerman designed a new fastener within the scope of the Illinois license, Tinnerman furnished technical information respecting that fastener to Illinois.

As a supplement to the Tinnerman-Illinois license contract, Tinnerman, on September 9, 1946, gave Illinois the right to use Tinnerman's trade mark "Speed Nut". Prestole was not given this right. The Tinnerman-Illinois contract did not contain the restrictions against use of the licensed patents in devices containing the Tinnerman style of thread engaging portion, as was the case in the Tinnerman-Prestole contract.

The devices which were manufactured by Illinois and Prestole under the respective license agreements from Tinnerman, were identified as being so-called U and J Nuts and the U and J Nuts manufactured by Illinois pursuant to its license from Tinnerman were manufactured according to Tinnerman's engineering design and had basically the same thickness of metal, dimension, form and shape. The furnishing of such technical information to Illinois by Tinnerman continued from the time of the making of the Tinnerman-Illinois license agreement until some time in the year 1955. Illinois made no payments of any kind

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to Tinnerman for these special services other than payment of the royalties provided for in the license contract.

Prestole contends that the furnishing of such technical information and engineering service without compensation amounted to a reduction in the royalties actually payable by Illinois to Tinnerman, with the result that Tinnerman had, in effect, granted to Illinois more favorable royalty terms than were available to Prestole. Prestole further contends, and offered evidence in support of such contention, that had Tinnerman furnished Prestole like assistance in its manufacture and production of the devices covered by the patents, the amount of saving effected thereby would have equalled an estimated six percent of the selling price of the devices upon which it paid royalties to Tinnerman. It argues, therefore, that had it had the opportunity to adopt the provisions of the Tinnerman-Illinois contract, the net royalties payable by it would have been greatly reduced if not, actually, eliminated.

To support its claim in the above regard, Prestole put in evidence a computation made by its Secretary Treasurer, who qualified himself as an expert cost accountant. His computation reviewed the engineering expenses shown by the books of Prestole as attributable to the devices upon which royalties were paid to Tinnerman. He used the period from January 1, 1947, to September 30, 1953, substantially covering the time from the commencement of the Tinnerman-Illinois contract to the cessation of royalty payments by Prestole. He concluded that a total amount of $99,600.87 of the engineering expense of Prestole during that period was properly attributable to the manufacture and marketing of the devices upon which royalties were paid by Prestole to Tinnerman. He explained that the above amount was limited to engineering costs which were charged as expense upon the company's books and did not include expenditures made for final tool and die design after the preliminary engineering had been concluded and Prestole was ready to go into production. These final expenditures were capitalized, but he calculated that they amounted to at least as much as the expenditures charged to expense. The total of the two amounts, therefore, was about $200,000. This figure approximates six percent of the total sales upon which royalties were paid by Prestole to Tinnerman during the period covered. A saving in that amount would exceed the five percent royalty payable by it and be equivalent to the six percent royalty rate fixed in the Tinnerman-Illinois contract.

Prestole argues that its computation demonstrates that the Tinnerman-Illinois contract contained more favorable royalty terms —that, in fact, Tinnerman gave Illinois a royalty free license. Prestole claims that the Tinnerman-Illinois license and the conduct of Tinnerman under it was part of a design to remove Prestole as a competitor, after its refusal to join in a price fixing arrangement.

The evidence shows that a saving of six percent of the total sales of Prestole subject to royalties would, during the period of Tinnerman-Illinois operations up to September 30, 1953, amount to $199,201.74. The royalties paid by Prestole during that period totalled $166,001.46. Prestole, therefore, claims that it owes nothing for royalties and asks recovery under its counterclaim of the aforesaid sum of $166,001.46.

Defendant's claim of misuse of patents is as follows:

> First—the license agreement between Tinnerman and Prestole's assignor contained the following proviso:
>
> "* * * this license shall not include devices covered by said patents in which the thread-engaging portion comprises a pair of tongues, the ends of which are notched out and formed with screw thread engaging edges intended for and used to receive a screw such as shown and described in Tinnerman Patents Nos. 1,512,653; 1,928,469; 2,221,498; and 2,233,230."

Of these Tinnerman patents, No. 1,512,653 had already expired at the time of the license agreement of August 18, 1942, and No. 1,928,469 expired some four years later. Prestole contends that by this limitation upon its use of the license patents, Tinnerman was seeking illegally to extend the monopoly of an expired patent and one that expired during the course of the license agreement.

> Second—in the license agreement between Tinnerman and Illinois there was a price fixing provision which Prestole claims was violative of the antitrust laws. It claims it should be permitted to assert such claimed illegality of the Tinnerman-Illinois contract as a defense in this suit and should, also, because

of such claimed illegality be permitted as a part of its defense to attack the validity of the licensed patents.

We shall discuss these contentions in the order in which they are set out above.

(1) More Favorable Royalty Terms

The district judge was of the opinion that, "when the parties, in paragraph 12 of each of the license agreements, used the phrase 'more favorable royalty terms' they intended just that, and did not intend to encompass 'more favorable contract terms'." He concluded, therefore, that Tinnerman's agreement to furnish Illinois information, and its actual furnishing of engineering service, information and other things of value should not be considered as relating to royalty terms. Accordingly, he held that the value of such assistance should not be offset against the specified royalty rate in the Illinois contract in determining whether the end result was not, in fact, a reduction of the royalty payable by Illinois to Tinnerman. We disagree with this conclusion. The trial court quoted two definitions of royalty, as follows:

> "* * * A royalty is a payment proportionate to the use of a patented device. *Western Union Telegraph Co. v. American Bell Telephone Co.*, 125 F. 342, 348." *Tesra Co. v. Holland Furnace Co.*, 73 F. (2d) 553, 554.
>
> "* * * 'Royalty' when used in connection with a license under a patent, means the compensation paid by the licensee to the licensor for the use of the licensor's patented invention * * *" *Hazeltine Corp. v. Zenith Radio Corp.*, 100 F. (2d) 10, 16.

We think that adopting these definitions of royalty and considering a royalty as the cost, consideration, compensation, or price paid or incurred for a license, the specified rate should not be the sole criterion by which to determine what was in fact the price paid for the license. By furnishing at its own expense the assistance given, Tinnerman certainly was reducing the amount it was receiving, or charging, for the use of its patents, and was likewise reducing the cost, or price paid by Illinois for such use. Royalties, being the price or compensation to be paid, were, therefore, reduced and Illinois was given more favorable royalty terms than the recited six percent.

In the case of *Corn Products Refining Co. v. Federal Trade Commission* [1944-1945 Trade Cases ¶ 57,363], 324 U. S. 726, it was contended by Corn Products Co., charged with violation of the Robinson-Patman Act, that the furnishing of services and other perquisites to a particular customer did not constitute discrimination in price. The Supreme Court, at page 740 of its opinion, stated:

> "Petitioners assert that the practices prohibited by § 2(a) are discriminations in price, and not in the terms and conditions of sale other than price. They rely on the fact that in the course of the progress of the Robinson-Patman Bill through Congress, the phrase 'terms of sale' originally included in the prohibited discriminations, was stricken from the bill. But even if the contention be accepted, *we cannot ignore the fact that the present discriminations in the terms of sale operated to permit the favored customers to purchase at a lower price than other customers,* so that their only practical effect was to establish discriminations *in price,* precisely the evil at which the statute was aimed."

The obvious intent and purpose of paragraph 12 of the contract was to protect Prestole against a possible competitive disadvantage in the event of a license to a third party. It paid for such protection. Such was a reasonable and proper objective, and language employed should not be narrowly construed to frustrate that objective. We should look at the entire contract between Tinnerman and Illinois to see whether or not more favorable royalty terms were created by it.

We think the language used in the Tinnerman-Prestole contract indicates an intention that more than the mere recited percentage was to be considered. The contract provides that the licensee, Prestole, should, after being given notice and a copy of a second license agreement, have 30 days within which "to determine whether it desires to adopt such royalty terms." There would be no need for this provision if the licensee were to benefit only when the third party paid a lower percentage of royalty on its sales. In that case, the benefits could be made automatic, since there would be nothing for the licensee to "determine."

We conclude that the value of the information, services and assistance contracted to be given by Tinnerman to Illinois, and

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that which it actually gave, should be offset against the recited rate of royalty to determine what, in fact, were the royalty terms established by such contract. We further conclude that a fair review of the evidence in this case discloses that Tinnerman intended to, and did, provide more favorable royalty terms to Illinois. Tinnerman was, accordingly, bound under its contract to have given notice to Prestole of such contract and to give Prestole opportunity to adopt its terms.

It might be argued here that there was not sufficient evidence from which it could be determined that the services which Tinnerman contracted to supply Illinois were of sufficient substance to amount to a reduction in royalty terms. The language of paragraph 16 of the agreement with Illinois provides that "Tinnerman will, at the request of Illinois, assist Illinois with such information as it may have, in order that production can commence as rapidly as possible." In considering this, we keep in mind that this is a suit in which Tinnerman is seeking specific performance of its contract with Prestole. It is not in position to maintain such suit if it was, itself, continuously breaching it. Accordingly, we should consider how the above language was implemented by Tinnerman's conduct, not only at the very beginning of its licensing of Illinois, but throughout the continuance of that contract and the contemporaneous enforcement of its contract with Prestole. It is apparent that it intended to, and did, give to Illinois a competitive advantage over Prestole contrary to the intention and to the language of the original Tinnerman-Prestole contract.

Tinnerman contends that notwithstanding that it gave no notice of the making of its license agreement with Illinois, Prestole had knowledge in 1946 and 1947 of this agreement, and failed to take action when it first learned of it; that Prestole is, accordingly, now estopped from relying on lack of notice. It is not necessary here to review in detail the evidence which Tinnerman offered to support such claim. It consisted of letters, trade journal publications and minutes of meetings of Prestole directors. We are satisfied that such evidence did not establish Prestole's knowledge of the terms of the Illinois contract or the extent or character of the assistance which Tinnerman was providing to Illinois. It is sufficient here to quote the trial judge's disposition of this claim, as follows:

> "If * * * certain conditions in the agreement (referring to the Tinnerman-Illinois agreement) are to be looked upon as supplemental royalty terms, then we see no reason why defendant should be charged with knowledge of the existence of the Tinnerman-Illinois agreement and should be required affirmatively to request a copy of the agreement, as contended by plaintiff."

As a matter of fact, in December, 1953, Tinnerman refused to furnish Prestole's attorneys with a copy of any of its license agreements, and it was not until 1954, when the dispute involved in this litigation was in full discussion, that Prestole's attorneys were allowed to inspect the Tinnerman-Illinois contract; they were told nothing of any supplemental arrangements between Tinnerman and Illinois and were given no information as to the nature, quantity or value of the engineering services and assistance furnished pursuant to paragraph 16 of the Tinnerman-Illinois contract.

Tinnerman further contends that it had always interpreted paragraph 12 of the license agreement with Prestole as reserving to Tinnerman the right to decide whether more favorable terms had or had not been granted to a licensee; that only in the event that in Tinnerman's judgment such license included more favorable royalty terms, would it be required to give notice to Prestole. We disagree. If, as a matter of fact, the Tinnerman-Illinois contract did not grant more favorable royalty terms, no notice was required. If it did, notice was required, regardless of Tinnerman's own interpretation of the contract and its own conduct.

One further phase of this subject should be considered. At the time of the making of the Tinnerman-Illinois contract in 1946, Prestole was already producing devices under the Tinnerman license and, accordingly, it is claimed it did not need assistance to get into production. The Tinnerman-Illinois contract provided that Tinnerman would give Illinois, "such information as it (Tinnerman) may have, in order that production can commence as rapidly as possible." Tinnerman argues that like assistance to Prestole was not necessary. The evidence, however, discloses that Prestole had problems of getting into production on each order for the devices in question. It continuously needed,

and supplied itself with, the engineering work being contemporaneously supplied gratis to Illinois by Tinnerman. Tinnerman should not escape a charge of substantial breach of its contract by limiting consideration to the rather vague language employed in granting the license to Illinois. We must look, also, to the manner in which Tinnerman and Illinois construed and implemented that language by performance under its auspices.

Tinnerman further claims that its 1946 agreement with Illinois had in it some provisions which were less favorable to the licensee than Prestole's license. These, it argues, should overcome any advantage to Illinois as to royalties. The Illinois agreement is more restricted than Prestole's as to territory; Illinois is bound by a price fixing provision; Illinois was required to proceed in good faith to manufacture and sell fastening devices and diligently build up and extend the business of marketing such devices as rapidly and fully as possible; Illinois was restricted as to its sales of fasteners in foreign countries; Illinois was not permitted to cancel the agreement during the first five years after its execution. These provisions were not in the Prestole contract. Such provisions, however, do not add to, or take away from, the price or consideration to be paid for use of the license. Even if we assume that Prestole, having been given notice of the Tinnerman-Illinois contract, would have had to adopt the above provisions, such assumption would not detract from the fact that Tinnerman failed to give Prestole an opportunity to adopt the Illinois contract with all its terms and, therefore, breached its contract. We conclude that Tinnerman breached its contract with Prestole and, accordingly, is not in a position to be aided by a decree specifically enforcing such contract in its behalf.

(2) Misuse of patents

Defendant claims that Tinnerman misused its patents in two regards, (1) by prohibiting Prestole from using the licensed patents in any device which had a "thread engaging portion" as described in certain patents, one of which had expired, and (2) by the inclusion of a price fixing provision in its license contract with Illinois.

(a) *Extension of monopoly of expired patent.* Tinnerman and Prestole's assignor, Detroit Harvester Company, had been in the business of manufacturing sheet metal nuts, or fastening devices. Patents involved in this suit had to do with this type of device. Prior to the making of the 1942 license agreement, Tinnerman and Detroit Harvester had used different methods for the "thread engaging portion" of the devices being manufactured by them. Each apparently had patents covering such operation. The cross licensing agreements of August 18, 1942, forbade the respective licensees, Tinnerman and Detroit Harvester, from using the licensed patents in connection with devices containing thread engaging portions which had been the subject of patents owned by the respective licensors. Tinnerman's grant of license to Detroit Harvester provided that:

> "This license shall not include devices covered by said patents in which the thread-engaging portion comprises a pair of tongues, the ends of which are notched out and formed with screw thread engaging edges intended for and used to receive a screw such as shown and described in Tinnerman patents Nos. 1,512,653; 1,928,469; 2,221,498; and 2,233,230."

Of the last mentioned patents, Tinnerman patent 1,512,653 had already expired at the time the above provision was included in the license agreement, and Tinnerman patent 1,928,469 expired some four years later. It is, however, unimportant on the point involved here that some of the mentioned patents had not expired. Our decision is controlled by the fact that one of them had expired. By the above condition in the license agreement, Tinnerman was extending, so far as competition with Prestole was concerned in devices manufactured in combination with the licensed patents, a monopoly in an expired patent. We conclude that such conduct by Tinnerman constituted misuse of the licensed patents. The fact that the general public, other than Prestole, was not thereby forbidden the use of this then unpatented device and that Prestole might employ it in manufacturing equipment not containing the invention of the licensed patents does not, in our opinion, exonerate Tinnerman from a charge of attempting to extend, for its own purposes, a monopoly in an expired patent. We are of the opinion that the misuse thus attempted by Tinnerman was of the character condemned by adjudicated cases which have spoken on the subject. The following language of the Supreme Court of the United

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States in the case of *Scott Paper Co. v. Marcalus Manufacturing Co., Inc., et al.*, 326 U. S. 249 (255, 256) supports our views in this regard:

> "The aim of the patent laws is not only that members of the public shall be free to manufacture the product or employ the process disclosed by the expired patent, but also that the consuming public at large shall receive the benefits of the unrestricted exploitation, by others, of its disclosures. *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 117-120. If a manufacturer or user could restrict himself, by express contract, or by any action which would give rise to an 'estoppel' from using the invention of an expired patent, he would deprive himself and the consuming public of the advantage to be derived from his free use of the disclosures. The public has invested in such free use by the grant of a monopoly to the patentee for a limited time. *Hence any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws.*"

We have in mind that after the expiration of a patent, the invention originally protected thereby becomes, for all purposes, an unpatented device. The Courts have uniformly held that existing patents cannot, by conditions attached to license agreements, be used to create or extend a monopoly in unpatented articles.

In the case of *Mercoid Corporation v. Mid-Continent Investment Co. et al.* [1944-1945 Trade Cases ¶ 57,201], 320 U. S. 661, an accused infringer interposed as defense to a charge of infringement that the plaintiff, "should be barred from relief because it was seeking to extend the grant of the patent to unpatented devices" (p. 662).

While the facts of that case are not directly in point with the case at bar, the principles involved are sufficiently analogous that the Court's reasoning is apposite here (pp. 664, 665, 666).

> "Ever since *Henry v. A. B. Dick Co.*, 224 U. S. 1, was overruled by *Motion Picture Co. v. Universal Film Co.*, 243 U. S. 502, this Court has consistently held that the owner of a patent may not employ it to secure a limited monopoly of an unpatented material used in applying the invention. *Carbice Corp. v. American Patents Corp., supra; Leitch Mfg. Co. v. Barber Co., supra; Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488; *B. B. Chemical Co. v. Ellis*, 314 U. S. 495. In those cases both direct and contributory infringement suits were disallowed on a showing that the owner of the patent was using it 'as the effective means of restraining competition with its sale of an unpatented article'."
>
> * * *
>
> "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. *United States v. Masonite Corp., supra*, p. 277. The method by which the monopoly is sought to be extended is immaterial."

The following language of the District Judge in the case of *U. S. v. Timken Roller Bearing Co.* [1948-1949 Trade Cases ¶ 62,380], 83 F. Supp. 284, 313, was approved by the Supreme Court of the United States by its affirmance in *Timken Roller Bearing Co. v. U. S.* [1950-1951 Trade Cases ¶ 62,837], 341 U. S. 593:

> "The proposition of law has been firmly established that the patent does not empower its owner to restrain trade in processes or devices which are not embraced within the scope of his patent."

We conclude, therefore, that Tinnerman's thus described misuse of the licensed patents forecloses it from specifically enforcing the license agreement.

(b) *Price fixing agreement.* Prestole claims that the price fixing provision of the Tinnerman-Illinois contract violated the antitrust laws. It argues that, therefore, Tinnerman is forbidden here to enforce its license agreement with Prestole. Prestole relies upon the case of *U. S. v. Line Material Co.* [1948-1949 Trade Cases ¶ 62,225], 333 U. S. 287, 307, wherein the Supreme Court said:

> "In the absence of patent or other statutory authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal per se under the Sherman Act."

In that case, the Supreme Court was dealing with cross-licensing agreements between patentees whose patents complimented each other and the commercial use of either required it to be used in combination with the other. These cross-licensing agreements each had price fixing provisions, and forbade the respective licensees from granting any sub-licenses except where such sub-licenses

contained like price fixing agreements. That *Line Material* case, however, did not overrule the doctrine of *U. S. v. General Electric Co.,* 272 U. S. 476, which sustains, as against a charge of violation of the anti-trust laws, a provision whereby a licensor under a valid patent restricts the price at which its licensee may sell articles manufactured under the license. The *Line Material* case restricted the application of *General Electric* case, but did not in the controlling opinion overrule it. As indicating the extent of its continued applicability, the Court, after reviewing it, stated at page 304:

> "* * * where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed by the patentee."

In the case at bar, there was no showing that either Tinnerman or its licensee, Illinois, controlled any substantial part of the industry in the device in question. Only one license containing a price fixing agreement is involved here.

Other cases cited by Prestole dealt with situations where through multiple licensing and other devices monopolistic control was sought, obtained, or made possible. See *U. S. v. U. S. Gypsum* [1948-1949 TRADE CASES ¶ 62,226], 333 U. S. 364; *U. S. v. U. S. Gypsum* [1950-1951 TRADE CASES ¶ 62,729], 340 U. S. 76; *U. S. v. New Wrinkle, Inc.* [1952 TRADE CASES ¶ 67,214], 342 U. S. 371; and *Newburgh Moire Company v. Superior Moire Company* [1956 TRADE CASES ¶ 68,487], 237 F. (2d) 283. We do not consider these cases in point here.

The District Judge disposed of Prestole's contention in this regard as follows:

> "Such price maintenance provision is not uncommon and is violative of no law unless a party or parties to the agreement are in a monopolistic position and the effects of the agreement would have a tendency to create a monopoly and thus operate in restraint of trade. There is nothing in the record before us that indicates that plaintiff was in a monopolistic position in the market or in such a dominant position as that the inclusion of such a price maintenance clause in an agreement with the licensee would tend to perfect or maintain a position of monopoly."

We are satisfied that the trial judge, on the record before him, committed no error in making such a finding.

(3) INVALIDITY OF TINNERMAN PATENTS

Additionally, Prestole contends that because under the rule of *Katzinger Co. v. Chicago Metallic Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,524], 329 U. S. 394; *MacGregor v. Westinghouse Electric & Mfg. Co.* [1946-1947 TRADE CASES ¶ 57,525], 329 U. S. 402; and *Sola Electric Co. v. Jefferson Electric Co.* [1940-1943 TRADE CASES ¶ 56,245], 317 U. S. 173, a licensee under a license agreement containing a price fixing clause may defend a suit for royalties by challenging the validity of the licensed patents, Prestole should here be allowed to defend this action by challenging the validity of the Tinnerman patents. We disagree.

The Tinnerman-Prestole license agreement, here sued upon, does not contain any price fixing provisions. Under the rule of *U. S. v. Harvey Steel Co.,* 196 U. S. 310, and other authorities still recognized as the law, Prestole was estopped during the continuance of its use of the license from challenging the validity of the patents upon which it accepted such license. In the *Sola Electric Co. v. Jefferson Electric Co.* case, *supra,* Chief Justice Stone, in discussing this rule of estoppel, said:

> "Where no price fixing stipulation was involved in the license contract, this rule of estoppel, which was not questioned by counsel, was applied without discussion in *United States v. Harvey Steel Co.,* 196 U. S. 310; cf. *Kinsman v. Parkhurst,* 18 How. 289. We need not decide whether in such a case the rule is one of local law, * * * or whether, if it be regarded as a rule of federal law because the construction and application of the patent laws are involved, it was rightly applied in *United States v. Harvey Steel Co., supra.*"

The *Sola, Katzinger* and *MacGregor* cases did not overrule *U. S. v. Harvey Steel, supra,* which we accept as still the law. Prestole, accordingly, is estopped in this action for royalties from challenging the validity of the Tinnerman patents. Whether Illinois might make such challenge were Tinnerman seeking to enforce its contract with Illinois is not, in our opinion, here involved. We do not think there is such connection between the two contracts as to make such defense available to Illinois usable in this action by Prestole.

(4) DEFENDANT'S COUNTERCLAIM

We affirm the District Judge's disallowance of the defendant's counterclaim. We have

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accepted the calculations of the defense expert as sufficient to show that Illinois was granted more favorable royalty terms than Prestole. We hold, also, that plaintiff is barred from recovery of royalties because of its misuse of the licensed patents. In its counterclaim, however, the burden was upon Prestole to prove its damages. Its estimate of damages assumed that all of its engineering costs during the period in question would have been supplied to it had it adopted the terms of the Illinois contract. We, however, cannot assume that it would have requested from Tinnerman all of the engineering work actually done by it during the period in question. The integrity of its expert's calculations was not impaired by cross-examination and no proofs in opposition thereto were offered by the plaintiff. These calculations were sufficient, in our opinion, to demonstrate the substantiality of Tinnerman's breach of contract. We do not, however, feel that they were sufficient to permit the giving of judgment to Prestole for the amount of royalties already paid.

In a final assertion of error, Prestole, claiming misuse of patents by Tinnerman, charges that the District Court should have dismissed the plaintiff Tinnerman's action for infringement occurring subsequent to termination of the license agreement. The District Judge granted a separate trial as to this issue and we do not here concern ourselves with it.

Because we are of the opinion that Tinnerman breached its contract with Prestole in granting more favorable royalty terms to Illinois, and because of its misuse of the licensed patents in the licensing agreement, it cannot specifically enforce that contract. Accordingly, the judgment of the District Court is, to that extent, reversed, with direction to dismiss the plaintiff's action for specific performance of the agreement to pay royalties. The Court's disallowance of the defendant's counterclaim is affirmed.

[¶ 69,501] Albert E. Robinson v. Stanley Home Products, Inc., and William J. Gahm, d. b. a. Plura Plastics.

In the United States District Court for the District of Massachusetts. Civil Action No. 58-817-F. Dated March 18, 1959.

Robinson-Patman Price Discrimination Act

Price Discrimination—Brokerage Commissions Under Clayton Act, Section 2(c)—Seller's Reduction of Prices by Elimination of its Own Broker—Legality.—A complaint in which a broker charged its principal, a manufacturer of plastic cups, with terminating the broker's services and then selling directly to a buyer at reduced prices was dismissed for failure to state a cause of action under Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The broker contended that Section 2(c) had been violated since the buyer had, in effect, obtained a commission from the seller. From the facts pleaded, however, it did not appear that the seller paid anything to the buyer; it simply sold at a lower price and eliminated any payment of a commission. The reduction or elimination of a commission or brokerage fee payable by the seller to its own agent, to enable the seller to sell at a lower price, is not forbidden by Section 2(c). The evil aimed at by that section was the evasion of the price discrimination "ban" by using the seller's payment of so-called brokerage fees or commissions to the buyer as a "mask" for what was really a reduction in price. Here, where the price allegedly had been reduced, the broker tried to "reverse the argument" by contending that a price reduction should be considered the payment of an illegal commission.

See Price Discrimination, Vol. 1, ¶ 3520, 3520.375.

Price Discrimination—Clayton Act, Section 2(a)—"Agreeing" to Sell at Reduced Prices—"Quoting" Different Prices to Different Retailers—Failure to Allege Actual Sales and Effect on Competition.—A broker's allegations that his principal, a manufacturer of plastic cups, terminated his services and then "agreed" to sell to a buyer at a "substantially reduced price," and that the manufacturer further "quoted different prices to different retailers" in an area, did not constitute an adequate statement of a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act. No actual sale was

alleged. Also, there was no allegation, much less any statement of facts, indicating that such alleged discrimination had any effect on competition.

See Price Discrimination, Vol. 1, ¶ 3505.470, 3506.250.

Price Discrimination—Knowingly Inducing or Receiving Discrimination Under Clayton Act, Section 2(f)—Failure to Allege Actual Sales and Effect on Competition—Injury to Plaintiff.—A broker's allegation that a buyer of plastic cups induced or received a discriminatory price reduction from a manufacturer (the broker's principal) stated no cause of action under Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, for the same reasons that rendered the charges against the manufacturer under Section 2(a) inadequate. The court found the latter charges insufficient because the broker alleged no actual sales, alleged no adverse effects on competition, and failed to show that he was directly injured by the alleged discriminations.

See Price Discrimination, Vol. 1, ¶ 3526.220.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments—Clayton Act, Sections 2(a) and 2(f)—Injury to Plaintiff—Discrimination Between Buyers as Injury to Seller's Broker—Causation—"Direct" as Contrasted with "Remote" Injury.—A broker who charged that his services were terminated by a manufacturer of plastic cups which agreed to sell directly to a buyer at "a substantially reduced price," and quoted "different prices to different retailers" failed to show that he was a person injured thereby so as to be entitled to sue under Section 4 of the Clayton Act. The broker, claiming that he had not been paid commissions due to him, "implied" that there was an actual sale to a buyer at reduced prices after the termination of his services, and that the loss of the commission on that sale was the injury complained of. However, only a person who has been directly injured by a violation of the antitrust laws is entitled to recover damages under Section 4. Those whose only loss is from the interruption or diminution of a profitable relationship with a party "directly" affected by a violation are injured "only remotely and indirectly." Here, assuming that the seller sold to the buyer at a lower price than it charged the buyer's competitors, this price differential was not the cause of the broker's loss of his commission. The fact that the elimination of the broker's commission may have been, economically, a condition precedent to the granting of the lower price to the buyer did not make the failure to pay that commission a result of the lower price. Thus, the lower price might have been a source of injury to some competitor of the buyer, but it did not cause the broker's injury. Therefore, the complaint stated no cause of action against the seller or against the buyer which allegedly "induced or received" the claimed discriminatory price reduction.

See Private Enforcement or Procedure, Vol. 2, ¶ 9009, 9009.750.

Private Enforcement and Procedure—Suit for Civil Damages—Damages—Measure of Damages Recoverable—Price Discrimination—Brokerage Commissions Lost by Reason of "Illegal" Sale—Antitrust Violations as Defense.—A broker who alleged that his principal, a manufacturer of plastic cups, had terminated his services and then agreed to sell to a buyer at a reduced price, thereby causing the broker to lose commissions, was not, as argued by the manufacturer, trying to collect a commission on a sale which he alleged to be illegal. The broker was not trying to recover the commission as such, but was using the amount of the commission on the allegedly illegal sale as a measure of damages, that is, as evidence of the commission he would or might have earned if the same goods had been sold legally. However, the court dismissed the complaint for failure to state a cause of action.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.640, 9040.20.

Private Enforcement and Procedure—Suit for Civil Damages—Robinson-Patman Act, Section 3—Treble Damages Not Recoverable.—A broker's complaint charging its principal, a manufacturer of plastic cups, with violating Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, contained certain language (such as the characterization of a price as "unreasonably low") which read like a charge of a violation of Section 3

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of the Robinson-Patman Act. The court, noting that the broker's counsel, in argument, stated that he did not rely on any such violation, observed that, in any case, a violation of Section 3 would not be a violation of the antitrust laws on which a treble damage action under Section 4 of the Clayton Act could be predicated.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.700.

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction of Federal Courts—State and Federal Claims Joined in Single Action—Jurisdiction Over State Claim Where Federal Antitrust Claim Dismissed—"Pendent" Jurisdiction.—A Federal District Court sitting in Massachusetts dismissed a plaintiff's whole case, including claims based on Massachusetts law, where the plaintiff's other claims stated no cause of action under the Federal antitrust laws. Assuming that the state claims were so closely related to the antitrust claims that the court had "pendent jurisdiction" under the doctrine of *Hurn v. Oursler*, 289 U. S. 238, the question remained as to the proper disposition to be made of the state claims in view of the fact that the antitrust claims had been dismissed. The plaintiff contended that, regardless of what was done as to the antitrust claim, the court had jurisdiction of the "pendent" claims and should retain and try them. In an earlier case it was held that, where a Federal claim was dismissed only after the case had been tried in its entirety, the court should have disposed of the "pendent non-federal claim" on its merits as a matter of judicial economy. However, where the Federal claim is disposed of on a motion to dismiss, it is proper to dismiss the whole case.

See Private Enforcement and Procedure, Vol. 2, ¶ 9007.

For the plaintiff: Vincent E. Galvin and Earl F. Nauss, Jr., Boston, Mass.

For the defendants: George Foley, John Lawson, and Hale & Dorr, Boston, Mass.

Memorandum of Decision on Motion of Defendant, Stanley Home Products, Inc., to Dismiss

[*Price Discrimination Action*]

FORD, District Judge [*In full text*]: This is an action brought under 15 U. S. C. A. § 15 to recover damages for injuries alleged to have been suffered by plaintiff because of violations by defendants of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. A. § 13.

[*Manufacturer's Representative—Termination*]

The basic facts alleged in the amended complaint may be briefly summarized. Defendant Gahm, doing business as Plura Plastics, is a manufacturer among other products of plastic cups. Plaintiff is engaged in the business of acting as a manufacturer's representative in the New England area and had an agreement to act as exclusive agent of Plura for the sale of its products in that area and was to be paid a commission on all sales in the New England area whether or not made by him. Plaintiff obtained two orders for plastic cups from defendant Stanley. Stanley then began to negotiate directly with Plura, offering to buy large quantities of cups at a substantially reduced price. Plura thereupon terminated plaintiff's services as its representative and accepted Stanley's offer. No actual sale to Stanley is alleged.

[*Reduction in Price by Elimination of "Commissions"*]

The plaintiff alleges that the price agreed upon by defendants was unreasonably low, was discriminatory in that the price to Stanley was lower than the price offered to other retail dealers in Massachusetts, and was not justified by differences in the cost of manufacture, sale or delivery, and that the transaction amounted to a reduction in price to Stanley by elimination of plaintiff's commission and thus constituted payment of a commission or discount to Stanley, all in violation of 15 U. S. C. A. § 13.[1] Plaintiff also alleges breach of contract by Plura

[1] Certain language, such as the characterization of the price as "unreasonably low" reads like a charge of violation of 15 U. S. C. A. § 13a. However, plaintiff's counsel in argument stated he did not rely on any such violation. In any case, violation of § 13a would not be a violation of the antitrust laws on which an action under 15 U. S. C. A. § 15 could be predicated. *Nashville Milk Co. v. Carnation Company* [1958 TRADE CASES ¶ 68,915], 355 U. S. 373.

through failure to pay him commissions due, conspiracy between Plura and Stanley to deprive plaintiff of his commissions and divert them to Stanley, and inducement by Stanley to Plura to breach its contract with plaintiff. These three claims are all expressly stated to be based on Massachusetts law.

[*Price Reduction as Payment of Illegal Brokerage*]

Plaintiff contends that 15 U. S. C. A. § 13(c) has been violated in that in effect Stanley obtained a commission from Plura. This is, of course, only a conclusion of the pleader. From the facts pleaded it does not appear that Plura paid anything to Stanley. It simply sold at a lower price and eliminated any payment of commission. The evil aimed at by § 13(c) was the evasion of the ban on price discrimination by using the payment of so-called brokerage fees or commissions by the seller directly or indirectly to the buyer as a mask for what was really a reduction in price. Here where the price allegedly has been reduced, plaintiff tries to reverse the argument by contending that a price reduction should be considered the payment of an illegal commission. The reduction or elimination of a commission or brokerage fee payable by the seller to its own agent to enable the seller to sell at a lower price is not forbidden by § 13(c). *Henry Broch and Company v. Federal Trade Commission* [1958 Trade Cases ¶ 69,208], 261 F. 2d 725. The cases relied upon by plaintiff are cases in which the seller paid a commission to the buyer's agent, who in turn passed it on to the buyer. *Quality Bakers of America v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,060] 114 F. 2d 393; *Oliver Bros., Inc. v. Federal Trade Commission* [1932-1939 Trade Cases ¶ 55,212], 102 F. 2d 763.

[*No Sales at Different Prices*]

The allegations as to a violation of § 13 (a) are rather vaguely stated. Plura is charged with having agreed to sell cups to Stanley at a substantially reduced price. No actual sale is alleged. Plura is also charged with having quoted different prices to different retailers in Massachusetts. Again no sales at different prices are alleged. There is not even an allegation, much less any statement of facts, indicating that such discrimination had any effect on competition. This is not an adequate statement of a violation of § 13(a). *Lipson v. Socony-Vacuum Corporation* [1932-1939 Trade Cases ¶ 55,069], 76 F. 2d 213, 217.

[*Injury to Plaintiff*]

Assuming that such a vague and incomplete statement was sufficient to set forth a violation of § 13(a) by price discrimination, the question arises whether the complaint shows that plaintiff is a person injured thereby so as to be entitled to sue under § 15. Apart from a vague generalization that he has been injured in his business and business reputation, the only specific injury he sets forth is that he has not been paid commissions due to him. Presumably this does not refer to commissions on the two orders allegedly obtained from Stanley by plaintiff before Stanley made an effort to obtain a reduced price. Failure to pay these commissions would have no conceivable connection with any subsequent violation of the antitrust laws. The best that can be made of this statement of injury is that plaintiff implies that there was an actual sale to Stanley at a reduced price after Plura had terminated plaintiff's services as its representative, and that the loss of the commission on this sale is the injury complained of.[2]

[*Injury "Remote," Not "Direct"*]

Only one who has been directly injured by a violation of the antitrust laws is entitled to recover damages under § 15. Persons whose only loss is from the interruption or diminution of a profitable relationship with the party directly affected by the violation have been held to have been injured only remotely and indirectly. Thus recovery has been denied to the landlord of an injured competitor, *Melrose Realty Co., Inc. v. Loew's Incorporated* [1956 Trade Cases ¶ 68,358 and 68,423], 234 F. 2d 518, to a patent licensor whose royalties from an injured licensee were affected, *Productive Inventions, Inc. v. Trico Products Corporation*, 224 F. 2d 678 [1955 Trade Cases ¶ 68,104], to employees of a corporation directly in-

[2] Defendant argues that plaintiff is in the position of trying to collect a commission on a sale which he alleges to be illegal. However, under the antitrust portion of the complaint, plaintiff is not seeking to recover the commission as such. At most he would be using the amount of the commission on the allegedly illegal sale as a measure of damages, as evidence of the commission he would or might have earned if the same goods had been sold legally.

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jured, *Corey v. Boston Ice Co.*, 207 Fed. 465, or to a corporation supplying materials to another closely related corporation which was directly injured, *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.* [1957 TRADE CASES ¶ 68,602], 147 F. Supp. 907.

It is difficult to see how in this case the claimed injury could be considered the direct result of the alleged violation. Assuming that Plura sold cups to Stanley at a lower price than it charged competitors of Stanley, this price differential was not the cause of plaintiff's loss of his commission. Of course, if Plura under whatever agreement it had with plaintiff was free to terminate his services, or to deal directly with a customer without paying plaintiff any commission on such direct sales, plaintiff has suffered no legal injury, even though he may not have earned a hoped for commission. If under his agreement with Plura plaintiff was entitled to the exclusive right to sell to Stanley or was entitled to commissions on all sales to Stanley even though he played no part in them, then his injury was caused by Plura's breach of contract, or possibly by wrongful interference by Stanley with his contractual relationship with Plura. The lower price allowed to Stanley by Plura may have been a source of injury to some competitor of Stanley. It did not cause plaintiff's injury. The fact that elimination of plaintiff's commissions may have been economically a condition precedent to the granting of a lower price by Plura does not make the failure to pay that commission a result of the lower price.

Plaintiff relies on cases such as *Roseland v. Phister Mfg. Co.* [1940-1943 TRADE CASES ¶ 56,187], 125 F. 2d 417, and *McWhirter v. Monroe Calculating Mach. Co.* [1948-1949 TRADE CASES ¶ 62,227], 76 F. Supp. 456, to show that a manufacturer's representative may be a person directly injured by a violation of the antitrust laws. In these cases the effect of the antitrust violation was to eliminate competition and thus directly deprive plaintiff of his opportunity to make sales in a competitive market. Such an injury was, of course, a direct consequence of the alleged antitrust violation.

[*Inducing Discrimination*]

Plaintiff's claim under § 13(f) is based on the allegation that Stanley induced or received the discriminatory price reduction which is charged in his claim under § 13(a) and what has been said as to the § 13(a) claim applies with equal force to the § 13(f) claim. The conclusion must be that the complaint fails to state any claim entitling plaintiff to relief under § 15.

[*Claims Under State Law—Jurisdiction*]

In the light of the allegations of the complaint that plaintiff is a citizen of Massachusetts and defendant Stanley a Massachusetts corporation and the absence of any allegation as to the requisite amount in controversy, it is clear that this court has no independent jurisdiction of the claims under Massachusetts law. Assuming, however, that these claims are so closely related to the claims under the antitrust laws with which they are joined that this court would have pendent jurisdiction under the doctrine of *Hurn v. Oursler*, 289 U. S. 238, the question remains as to the proper disposition to be made of such claims in the present position of this case. Plaintiff contends that regardless of what is done as to the antitrust claims, the court has jurisdiction of the pendent claims and should retain them and try them. *Strachman v. Palmer*, 177 F. 2d 427, relied upon by plaintiff, does not support his contention since in that case the federal claim was dismissed only after the case had been tried in its entirety, and it was held that as a matter of judicial economy and convenience the court should have disposed of the pendent non-federal claim on its merits. But where the federal claim is disposed of on a motion to dismiss, then it is proper to dismiss the whole case. *Dixon v. Martin*, 260 F. 2d 809; *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 87 F. Supp. 822, affirmed 183 F. 2d 497.

[*Complaint Dismissed*]

Defendant Stanley's motion to dismiss the complaint is allowed.

[¶ 69,502] Independent Productions Corporation and IPC Distributors, Inc. v. Loew's Incorporated.

In the United States District Court for the Southern District of New York. Civil No. 110-304. Dated October 27, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Corporations' Failure to Appear for Taking of Deposition Through a "Managing Agent"—Court's "Inherent Power" to Dismiss Complaint.—A Federal District Court, dismissing two corporations' treble damage action for their "wilful failure" and refusal to appear for the taking of their deposition, through their "managing agent," upon notice and order of the court, noted that it had "the inherent power in vindication of its authority to summarily impose sanctions upon a party who deliberately flouted its lawful mandate." In a prior ruling, the court had found that the individual to be examined was, in fact, the plaintiffs' "managing agent" and had ordered the taking of the deposition to proceed. However, when he appeared, that individual denied that he was the plaintiffs' "managing agent" and refused to answer questions which were "vital to the defendants' case" and which were relevant to the issues. In dismissing the complaint, the court noted that the defendants could not obtain from any other source the information and evidence which they sought from that individual, and that, in the words of the plaintiffs' own counsel, that individual "has probably . . . more information on the merits of this controversy than any other person."

See Private Enforcement and Procedure, Vol. 2, ¶ 9012.440, 9013.775.

For the plaintiffs: Rosston, Hort & Brussel (George Brussel, Jr., of counsel), New York, N. Y., for Independent Productions Corp.

For the defendants: Schwartz & Frohlich (Myles J. Lane, of counsel), New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1959 Trade Cases ¶ 69,375, 1958 Trade Cases ¶ 69,056 and 68,980, and 1957 Trade Cases ¶ 68,843 and 68,615.

Findings of Fact and Conclusions of Law

[*Conspiracy Charged—Motion Picture Industry*]

FINDINGS OF FACT[1]

SUGARMAN, District Judge [*In full text*]: 1. Plaintiffs, Independent Productions Corporation and IPC Distributors, Inc., are the producer and distributor, respectively, of a motion picture film entitled "Salt of the Earth".

2. On June 21, 1956, the complaint herein was filed charging defendants with participation in a conspiracy directed against the plaintiffs' production and distribution of the above-named film. Substantial damages under the Clayton and Sherman Acts are sought.

[*Depositions—"Managing Agents"*]

3. Plaintiffs moved for an order

"pursuant to § 30(b) of the Federal Rules of Civil Procedure debarring defendants from taking the depositions of the plaintiffs by Herbert Biberman and Paul Jarrico and vacating all notices of depositions heretofore served upon the attorneys for the plaintiffs by the defendants or any of them to the extent that such notices seek the depositions of the plaintiffs by and through Herbert Biberman and Paul Jarrico as officers, directors or managing agents of the plantiffs".

4. In an opinion dated May 20, 1959,[2] the court found that Messrs. Biberman and Jarrico were in fact managing agents of the plaintiffs. The said motion was therefore denied.

[1] Perhaps findings of fact and conclusions of law are not required in this matter. 5 Moore's *Fed Prac.* 52.08, p. 2673, but see *Vonder Heydt v. Rogers,* 251 F. 2d 17 (C. A. D. C. 1958). In any event, they may be helpful to the appellate courts. *Curley v. Wilson,* 239 F. 2d 957 (C. A. D. C. 1956).

[2] [1959 TRADE CASES ¶ 69,375], 2 F. R. Serv. 2d, 26a.33, Case 1; 24 F. R. D. 19 (S. D. N. Y. 1959).

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5. By order dated June 11, 1959, the court *inter alia* ordered

> "that the examination by defendants of plaintiffs by Herbert Biberman as managing agent shall proceed on June 17, 1959 at 10:30 A. M. in Room 601 of United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York . . ."

6. On September 25, 1959, the plaintiffs and certain defendants appeared before the court to argue a motion for an order

> "pursuant to Rule 37 of the Federal Rules of Civil Procedure compelling plaintiffs by Herbert Biberman to answer the questions propounded on examination before trial . . ."

7. At the hearing of the said defendants' motion it was disclosed to the court that when, on June 17, 1959, Herbert Biberman had appeared at the United States District Court at Foley Square, New York, he was not there in the capacity of a managing agent of the plaintiffs.

8. The motion papers handed up on September 25, 1959, show that during the examination of June 17, 1959, plaintiffs' counsel stated among other things:

> "The position of my clients is that under the circumstances it has done everything it possibly could to comply with Judge Sugarman's order even though it disclaims its validity and legal effect and intends, in due course, to review it on appeal. I desire to make it clear that my clients are not tendering Mr. Biberman in any capacity and do not recognize him as a managing agent of either corporation. To the contrary, we adhere to our position that he has no connection with the plaintiff corporations other than that of having a beneficial interest in a very small percentage of the shares of plaintiff Independent Productions Corporation and a participation in an equally small percentage of the profits derived from the production of SALT OF THE EARTH."
>
> * * *
>
> "As to Mr. Biberman, I will say only this, I will add to my statement only this: Mr. Biberman is not a managing agent of either corporation, with all deference to Judge Sugarman's opinion, and he cannot be made that which he is not."

At that taking of plaintiffs' deposition, in response to the inquiry:

> "Do you represent the officers and managing agents of the plaintiffs' corporation?"

plaintiffs' attorney stated:

> "There are no managing agents."

9. Mr. Biberman at the taking of plaintiffs' deposition upon oral examination on June 17, 1959 refused to answer questions which are vital to the defendants' case and which had been held by Judge Herlands to be relevant to the issues of this litigation.

10. In the words of plaintiffs' counsel, Mr. Biberman

> "has probably more than any other witness in this case, more information on the merits of this controversy than any other person". (S. M. 138, deposition of Herbert Biberman, June 17, 1959)

11. At the hearing of defendants' motion on September 25, 1959 the court entertained a motion to dismiss the complaint as to all defendants for failure of the plaintiffs to comply with the notice and order and granted it.

Conclusions of Law

[*Complaint Dismissed*]

I. The plaintiffs have wilfully failed and refused to appear for the taking of their deposition upon oral examination upon notice *and order* of the court.

II. The defendants cannot obtain from any other source the information and evidence which they seek to obtain from plaintiffs through the latters' managing agent, Herbert Biberman.

III. The complaint is dismissed.[3]

Enter judgment accordingly on the order signed simultaneously herewith.

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[3] The power to dismiss the complaint herein, in vindication of the court's authority, is inherent. While *Societe Internationale v. Rogers*, 357 U. S. 197, at first blush might appear to hold the contrary, on closer analysis it is distinguishable from the instant case.

In the *Societe Internationale* case, the Court was confronted with the propriety of a dismissal of a complaint for failure to comply with an order that the plaintiff, pursuant to F. R. Civ. P. 34, discover and produce certain documents for inspection, etc. As was pointed out (p. 202), the district court in that case dismissed the complaint for failure to comply with the order under Rule 34 by virtue of its "power under Rule 37(b)(2), as well as inherent power, . . ." whereas the Court of Appeals in affirming the district court "found it unnecessary to decide whether Rule 37 authorized dismissal under these circumstances since

[¶ 69,503] **United States v. St. Regis Paper Company.**

In the United States District Court for the Southern District of New York. Civil No. 150-271. Filed October 15, 1959.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Enforcement of Commission Orders Requiring the Filing of Special Reports—Recovery of Forfeitures—Motion to Strike.—In an action to enforce Federal Trade Commission orders requiring a paper company to file special reports and to recover forfeitures for failure to comply with these orders, a motion to strike the count relating to the recovery of forfeitures was denied. The count was not redundant, immaterial, impertinent, or scandalous. Treating the motion as one for summary judgment, it could not be granted because a trial of the fact issues raised by the count involving the enforcement of the orders was necessary. The contention of the company was that the enforcement of the forfeiture provisions of the third paragraph of Section 10 of the Federal Trade Commission Act during the pendency of the count for the enforcement of the orders constituted a deprivation of its property without due process, contrary to the Fifth Amendment of the United States Constitution. However, the company described the property of which it would be deprived without due process as the items of confidential business information which would have to be disclosed and not as the amount of the forfeitures. This goes to the issues raised by the enforcement count which must be tried first. If the company prevails on the enforcement count, then the forfeiture count would fall.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8741, 8745.

For the plaintiff: S. Hazard Gillespie, Jr., United States Attorney (William F. Suglia, Assistant United States Attorney, of counsel), New York, N. Y.

For the defendant: LeBoeuf, Lamb & Leiby, New York, N. Y.

Denying a motion to strike in a proceeding to enforce Federal Trade Commission orders requiring the filing of special reports in Dkt. 6476.

Memorandum

SIDNEY SUGARMAN, District Judge [*In full text*]: The United States of America commenced an action against St. Regis Paper Company upon the request of the Federal Trade Commission under 15 U. S. C. 49 and 15 U. S. C. 50:

"(1) for the enforcement against defendant of the several orders of the Commission described herein, and attached as exhibits hereto, which orders require defendant and certain other corporations to file special reports with the Commission, and (2) for the recovery of forfeitures because of defendant's failure to comply with the two orders requiring it to file special reports."

The complaint was filed on September 15, 1959.

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it ruled that the district court was empowered to dismiss both by Rule 41(b) of the Federal Rules of Civil Procedure, and under its own 'inherent power' ", The Court (p. 207) then stated:

"In our opinion, whether a court has power to dismiss a complaint because of non-compliance with a *production order* depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ . . ." [Italics supplied]

Thus, the Court held that Rule 37 set forth specifically the consequences flowing from a failure to comply with an order under Rule 34.

The situation presented by the instant case, i.e., the wilful failure of a corporate party to appear for examination by the deposition of its managing agent, appears to be governed by Rule 37(d). That rule provides that such failure "after being served with a proper *notice*" may be met by a motion on notice to strike the pleading of the defaulter. In the instant case, as the findings of fact point out, after the service of the notice the plaintiffs moved to quash it. That motion was denied and there resulted an *order* of this court that the plaintiffs be examined by those held to be their managing agents. This they refused to do. Rule 37 appears to be silent as to the power of a court in the situation here presented. Accordingly, this court believes it has the inherent power in vindication of its authority to summarily impose sanctions upon a party who deliberately flouted its lawful mandate.

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[*Motion to Strike*]

Before answer, the defendant now moves for an order

"striking from the complaint herein all of the paragraphs of the complaint under the heading 'COUNT TWO' and designated numbers '12' to '17', inclusive, and the paragraph of the demand for relief designated '2' in their entirety, on the ground that in said portions of the complaint the plaintiff is claiming the right to enforce during the pendency of this action, the provisions of the third (unnumbered) paragraph of Section 10 of the Federal Trade Commission Act (15 U. S. C. § 50) against this defendant to recover money forfeitures at the rate of $200 per day for alleged defaults in complying with the Commission's orders requiring defendant to file special reports with the Commission, for which a mandatory injunction is demanded herein against this defendant in the FIRST COUNT of the complaint, which provisions, as applied by plaintiff, constitute a deprivation of defendant's property without due process, contrary to the Fifth Amendment of the Constitution of the United States . . ."

Motions to strike are authorized by F. R. Civ. P. 12(f). That rule reads:

"f. MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

Plaintiff's 12-17 are not redundant, immaterial, impertinent or scandalous. The motion as one to strike Count Two is denied.

[*Motion for Summary Judgment*]

Movant seems to seek, at this early stage, an adjudication of "Count Two" of the complaint, on the merits.

Such a motion might properly be presented by a motion to dismiss "for failure to state a claim upon which relief can be granted"[1] which, when supported by matters outside the pleading may be treated as one for summary judgment.

Deeming the instant motion to be such as above described, and considering all the matters presented, it is denied.

[*Contention*]

Defendant's position is stated in its brief to be:

"The property of which the defendant claims it will be deprived without due process is not the amount of the forfeitures . . .

"The property . . . is the extensive amount of items of business information which relates to matters which are plainly confidential, such as reports to the Census of Manufactures, names and addresses of large customers, suppliers and similar kinds of information and business secrets, all of which are of great value to defendant and other corporations whose stocks or assets have been acquired by this defendant, and the disclosure of which could be harmful to defendant and the relations with its customers and suppliers, adversely affect its sales and generally reduce its business. In the circumstances, the constitutional principle . . . is applicable."

[*Ruling*]

This can only mean that the motion, when deemed one for summary judgment on Count Two, should be granted because defendant will prevail ultimately on Count One. But defendant must await a trial of the fact issues raised by Count One. It must also await a trial on the merits of Count Two.

For, if defendant is correct in its contention that it will prevail on Count One, then Count Two will fall with Count One. If plaintiff recovers the judgment it seeks in Count One, it will be entitled to the penalties sought in Count Two.

It is so ordered. No further order is necessary.

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[1] F. R. Civ. P. 12(b)(6).

[¶ 69,504] James F. McManus v. J. R. D. Tato, as President of International Air Transport Association, et al.

In the United States District Court for the Southern District of New York. Civil Action No. 148-370. Filed October 26, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction over Parties—Extraterritorial Service of Process under the Clayton Act—Voluntary Associations.—Service of process on a voluntary association in an antitrust suit was held improper since it was made beyond the territorial limits of the state in which the court was held. Rule 4(f) of the Federal Rules of Civil Procedure permits such service of process only when a federal statute so provides. While Section 12 of the Clayton Act authorizes such service in antitrust suits, it applies only to corporations. Persons, as defined in the Clayton Act, are deemed to include corporations and associations, yet Section 12 of the same act, which authorizes extraterritorial service, specifies only corporations. This specificity necessarily excludes individuals and voluntary associations from those amenable to extraterritorial service. However, the association was not entitled to a dismissal of the action. "If, in fact, as the plaintiff contends, the moving defendant is engaged in such activities within this district so that it 'may be found or transacts business' here [citing Clayton Act, Section 12], the venue as to it is proper. In any event, even assuming proper venue in this district, service of process must be made upon the association as required by Rule 4(d) of the Federal Rules of Civil Procedure."

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.

For the plaintiff: Peter M. J. Reilly, New York, N. Y.

For the defendants: Simpson, Thacher & Bartlett; Condon & Forsyth; Hale, Stimson, Russell & Nickerson; Foley, James & Conran; A. Edward Masters; Debevoise, Plimpton & McLean; Chadbourne, Parke, Whiteside & Wolff; Herman I. Meitzer; Hordin, Hess & Eder; Bleakley, Pratt, Walker, Hart & Fruth; and Bernard B. Smith; all of New York, N. Y.

Memorandum

[*Service of Process*]

Edward Weinfeld, District Judge [*In full text*]: There appears to be no dispute that the moving defendant is a voluntary association with its headquarters in Washington, D. C., where the summons in this action was served upon its President. Rule 4(f) of the Federal Rules of Civil Procedure permits, when a federal statute so provides, service of process beyond the territorial limits of a state in which a District Court is held. While section 12 of the Clayton Act[1] authorizes such service in antitrust suits, it applies only to corporations.[2] This authorization of extraterritorial service of process may not be extended to apply to voluntary associations or individuals. Such appears to have been Congressional purpose.

"Persons", as defined in the Clayton Act, are "deemed to include corporations and associations";[3] yet section 12 of the same act, which authorizes extraterritorial service specifies only "corporation".[4] This specificity necessarily excludes individuals and voluntary associations from those amenable to extraterritorial service.[5]

The motion to quash service of process is granted.

[*Venue*]

However, the defendant is not entitled to a dismissal of the action. If, in fact, as the plaintiff contends, the moving defendant is engaged in such activities within this district so that it "may be found or transacts business" here,[6] the venue as to it is proper.[7] In any event, even assuming proper venue in this district, service of process must be made upon the association as required by Rule 4(d) of the Federal Rules of Civil Procedure.

Settle order on notice.

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[1] 15 U. S. C. § 22.

[2] *Cf. Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 3d Cir. [1940-1943 TRADE CASES ¶ 56,300], 139 F. 2d 871, 875 (1944).

[3] 15 U. S. C. § 12.

[4] 15 U. S. C. § 22.

[5] *Cf. Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 3d Cir. [1940-1943 TRADE CASES ¶ 56,300], 139 F. 2d 871, 875 (1944); *Rohlfing v. Cats Paw Rubber Co.*, N. D. Ill. [1950-1951 TRADE CASES ¶ 62,872], 99 F. Supp. 886, 892-93 (1951).

[6] 15 U. S. C. § 22.

[7] Cf. *Anderson-Friberg, Inc. v. Justin R. Clary & Son, Inc.*, S. D. N. Y., 98 F. Supp. 75 (1951).

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[¶ 69,505] United States v. The Commercial Electric Company; Frank Rogers Furniture City, Inc.; S & K Appliances, Inc.; The Gross Electric Fixture Company; Woodville Appliances, Inc.; Lusk Furniture and Appliances, Inc.; Phillips Appliance and Air Conditioning; Superior Refrigeration Sales & Service; Edgar L. Bauerfeld, and Alban C. Clark.

In the United States District Court for the Northern District of Ohio, Western Division. Civil No. 8107. Dated October 23, 1959.

Case No. 1420 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Prohibited—Price Fixing—Appliances.—A wholesale distributor of a manufacturer's major appliances and several retailers were prohibited by a consent decree from entering into any contract or program having the purpose or effect of (a) fixing or stabilizing prices, profit margins, pricing systems, markups, discounts, or other terms and conditions of sale for the sale of such appliances or (b) collecting or disseminating prices or price lists among themselves for such appliances.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2011.218.

Combinations and Conspiracies—Consent Decree—Practices Prohibited—Boycotts.—A wholesale distributor of a manufacturer's major appliances and several retailers were prohibited by a consent decree from entering into any contract or program having the purpose or effect of (a) boycotting or refusing to deal with any dealer or other person in connection with the sale or distribution of such appliances or (b) hindering or preventing any dealer or other person from purchasing or selling such appliances.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533.

Resale Price Fixing—Consent Decree—Practices Prohibited—Permissive Provisions—Fair Trade—Selection of Customers.—Although a consent decree permitted a wholesale distributor of a manufacturer's major appliances to exercise its right to choose and select its dealers and to offer suggested resale prices for such appliances, regardless of whether such prices were determined by the manufacturer or the distributor, and to terminate the franchises of such dealers, it prohibited the distributor from terminating the franchise of any dealer or refusing to deal with any dealer who did not observe or agree to observe the prices suggested by the distributor or any other person and from exercising any form of coercion on any of its franchised dealers through the threat of loss of franchise for failure to adhere to the distributor's suggested prices. The decree did not prevent the distributor or defendant retailers from exercising any rights they may have under the Miller-Tydings Act or the McGuire Act, or from unilaterally exercising their rights to select distributors, dealers, consumers, or other persons with whom they will deal.

See Resale Price Fixing, Vol. 1, ¶ 3015.70; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8321, 8321.38, 8321.39, 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General; Russell E. Ake, U. S. Attorney; Richard M. Colasurd, Assistant U. S. Attorney; and Baddia J. Rashid, W. D. Kilgore, Jr., Max Freeman, Robert B. Hummel, Frank B. Moore, and Dwight B. Moore, Attorneys, Department of Justice.

For the defendants: Gerald P. Openlander for Commercial Electric Co. and Phillips Appliance and Air Conditioning; Smith, Klein & Blumberg, by William P. Klein, for Gross Electric Fixture Co.; Theodore Markwood for Lusk Furniture and Appliance, Inc.; C. F. Wasserman for Frank Roger Furniture City, Inc.; Jas. Slater Gibson and William M. Thomas for Superior Refrigeration Sales & Service; Marshall, Melhorn, Bloch & Belt, by John B. Spitzer, for S & K Appliances, Inc.; John W. Potter for Woodville Appliances, Inc.; Joseph A. Siegal for Edgar L. Bauerfeld; and Winchester & Winchester, by Bruce Winchester, for Alban C. Clark.

Final Judgment

FRANK L. KLOEB, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on October 20, 1958, and the defendants having appeared and filed their respective answers to such complaint denying the substantive allegations thereof, and all parties hereto by their attorneys herein having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue;

Now, Therefore, before any testimony has been taken and without adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby:

Ordered, Adjudged and Decreed, as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and the parties hereto, and the complaint states a claim upon which relief may be granted against the defendants and each of them under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Person" shall mean an individual, partnership, corporation or other legal entity;

(B) "GE major appliances" shall mean refrigerators, freezers, ranges and ovens, water heaters, dishwashers, disposalls, washers, dryers, combination washer-dryers, air conditioners, and television receivers manufactured by the General Electric Company (herein referred to as GE);

(C) "Commercial" shall mean the defendant The Commercial Electric Company.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, officers, agents, directors, servants, employees, successors and assigns, and to those persons in active concert or participation with any defendant who shall receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Price Fixing—Boycotts*]

Defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining or furthering, or claiming any rights under, any contract, combination, conspiracy, agreement, understanding, plan or program with any other person having the purpose or effect of:

(A) Fixing, determining, establishing, maintaining or stabilizing prices, profit margins, pricing systems, markups, discounts or other terms and conditions of sale for the sale of GE major appliances to any third person;

(B) Collecting, preparing, publishing, distributing or disseminating prices or price lists among themselves for GE major appliances;

(C) Boycotting or threatening to boycott, or otherwise refusing or threatening to refuse to deal with any dealer or other person in connection with the sale or distribution of GE major appliances;

(D) Hindering, restricting, limiting or preventing any dealer or other person from purchasing or selling GE major appliances.

V

[*Permissive Provisions—Selection of Customers*]

(A) Subject to the provisions of Section IV, Commercial may exercise its right to choose and select its dealers and to offer suggested resale prices for GE major appliances to its dealers, regardless of whether such prices are originally determined by General Electric or Commercial, and to terminate the franchise of such dealers, and such choosing, selecting, or termination, standing alone, shall not be considered a violation of Section IV. Provided, however, that Commercial is enjoined and restrained from terminating the franchise of any dealer or refusing to sell GE major appliances to any dealer or other person who does not observe or agree to observe or adhere to or who has failed to adhere to prices suggested by Commercial or by any other person for the sale of GE major appliances, and Commercial is further enjoined and restrained from exercising any form of coercion of any of its franchise dealers through the

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threat, expressed or implied, of loss of franchise for failure to adhere to or abide by prices suggested by Commercial.

(B) Nothing in this Final Judgment shall be construed:

(1) To prevent any defendant from exercising any rights it may have pursuant to the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or the Act of Congress of July 14, 1952, commonly called the McGuire Act;

(2) To prevent any defendant dealer from unilaterally exercising his or its right to select distributors, dealers, consumers, or other persons with whom he or it will deal.

VI

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice, shall, on written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant, made to its principal office, be permitted, subject to any legally recognized privilege, (A) reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, minutes, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this Final Judgment, and (B), subject to the reasonable convenience of such defendant, and without restraint or interference from it, to interview officers and employees of such defendant, who may have counsel present, regarding any such matters. Upon such written request the defendant shall submit such reports in writing with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means provided in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except, in the course of legal proceedings in which the United States is a party, for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VII

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

[¶ 69,506] Riss & Company, Inc. v. Association of American Railroads, et al.

In the United States District Court for the District of Columbia. Civil Action No. 4056-54. Dated June 4, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief —Where Suit May Be Brought—Proper Judicial District—Corporation "Transacting Business" in District.—It was properly held that a railroad was "transacting business" in the District of Columbia within the meaning of Section 12 of the Clayton Act where, in addition to the solicitation of business and the attendance of various meetings by the defendant's representatives, there was, on two occasions, a joint operation of the defendant and other railroads into the District. Those joint operations were sporadic and, standing alone, they might not have been sufficient. However, all of the elements taken together, in the aggregate, constituted the transaction of business. The United States Supreme Court has held that the phrase "transacting business," as used in the Clayton Act, is a broader and looser concept than the phrase "doing business" in some of the other statutes.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210

For the plaintiff: A. Alvis Layne, Jr., Lester Bridgeman, and Robert L. Wright, Washington, D. C.

For the defendants: Covington & Burling, Hugh B. Cox, and James H. McGlothlin, Washington, D. C.

For a prior opinion of the U. S. Court of Appeals, District of Columbia Circuit see 1958 Trade Cases ¶ 69,122; for prior opinions of the U. S. District Court, District of Columbia, see 1959 Trade Cases ¶ 69,340 and 69,244, and 1958 Trade Cases ¶ 68,959.

Memorandum

[*Venue—"Transacting Business"*]

JOHN J. SIRICA, District Judge [*In full text*]: On December 9, 1954, Judge Alexander Holtzoff heard oral argument in connection with a motion filed by the defendant Reading Company to dismiss the action on the ground of improper venue. This motion was heard by him on the facts as presented by Reading Company's affidavits and by its answers to plaintiff's interrogatories, and after full oral argument he denied the motion in an oral opinion from the Bench, which is found on pages 21 and 22 of the transcript of proceedings for that day. Said opinion reads as follows:

"The Court: It seems to the Court that the case of this defendant is to be differentiated from the cases of the other defendants whose motions have so far been granted. Here, in addition to solicitation of business, and in addition to visits of representatives of the defendant to attend meetings of trade associations and similar organizations on two occasions in 1954 there was a joint operation of the defendant and other railroads into the District of Columbia. The Court appreciates that those two joint operations were sporadic and standing alone they might not be sufficient to constitute transaction of business in the District of Columbia. But all of the elements taken together, in the aggregate, in the opinion of this Court, constitute the transaction of business in the District of Columbia, bearing in mind the fact that the Supreme Court has held that the words 'transacting business', as used in the Clayton Act, are a broader and looser concept than the phrase 'doing business' in some of the other statutes.

"This motion will be denied."

[*Separate Trial on Issue of Venue*]

Thereafter, on October 19, 1956, Judge Henry Schweinhaut filed in this cause the following order:

"The defendant, Reading Company (No. 68), having moved, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, for a separate trial on the issue of venue, and the Court having considered fully the points and authorities filed by the plaintiff and by the Reading Company, and it appearing to the Court that the granting of said motion would further the convenience of the Court, as well as other parties to this proceeding, and also would avoid prejudicing the Reading Company, it is this 18th day of October, 1956,

"Ordered: That the Reading Company be, and it hereby is, granted a separate trial on the issue of whether venue is properly laid in the District of Columbia with respect to said defendant."

[*Defense Stricken*]

Rule 12(f) of the Federal Rules of Civil Procedure, provided as follows:

"*Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

The Court has carefully considered the oral argument presented by respective parties before Judge Holtzoff on December 9, 1954 and his opinion in connection therewith, and the memoranda of points and authorities submitted by the parties in connection with this motion, and all other matters of record in this case. The Court is of the opinion that Judge Holtzoff ruled properly in this case and, therefore, the order heretofore referred to entered by Judge Schweinhaut is set aside. By virtue of Rule 12(f), Federal Rules of Civil Procedure, the Court order that the Twelfth Defense of the answer of defendant Reading Company filed on February 14, 1955 be stricken.

[*Prior Opinion*]

See opinion of this Court in the case of *Riss & Co. v. Association of Western Railroads* [1958 TRADE CASES ¶ 68,959], 159 F. Supp. 288.

[*Order*]

Counsel for plaintiff will present an appropriate order.

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[¶ 69,507] **Winchester Theatre Company v. Paramount Film Distributing Corporation, et al.**

In the United States District Court for the District of Massachusetts. Civil Action No. 58-78-S. Dated April 2, 1958.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Striking Irrelevant or Prejudicial Matters—Prior Government Case.—Allegations of a treble damage action complaint referring to a nationwide conspiracy and describing a Government antitrust case, which was terminated by the entry of a consent decree, were stricken. The instant case involved nothing more than an alleged local conspiracy and the Government case could have no possible relevance, while reference to it could be prejudicial to the defendants.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.595.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion for More Definite Statement—"Co-conspirators."—Where a complaint purported to define the expression "co-conspirators" and listed the names of ten corporations engaged in the exhibition of motion pictures, the defendants were entitled to know the relationship of these corporations to the defendants, the theatres operated by the corporations, and where the theatres were operated.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.170.

For the plaintiff: Peabody, Kaufman & Brewer, by Phil David Fine and John M. Kahn, Boston, Mass.

For the defendants: Nutter, McClennen & Fish, by Robert W. Meserve and John R. Hally, Boston, Mass.

Memorandum

SWEENEY, Chief Judge [*In full text*]: This is a treble damage action under the antitrust laws. The defendants move to strike certain paragraphs of the complaint and for a more definite statement.

The plaintiff owns and operates the Winchester Theatre near Boston and the defendants are distributors of motion pictures.

[*Motion to Strike*]

Paragraph 9 of the complaint refers to a nationwide conspiracy and describes the *Paramount* case, *U. S. v. Paramount Pictures, Inc., et al.*, which was terminated by the entry of a consent decree. The instant case clearly involves nothing more than an alleged local conspiracy and the *Paramount* case can have no possible relevance, while reference to it may be very prejudicial to the defendants. The motion to strike Paragraph 9 is, therefore, allowed.

The defendants move also to strike all references to "subsidiaries, affiliates, and successors" in paragraphs 4-7. This expression is entirely too general and ambiguous, *Reade's Theatres v. Loew's, Inc.*, S. D. N. Y. [1957 TRADE CASES ¶ 68,776], 20 F. R. D. 579, and the motion to strike it is allowed with leave to the plaintiff to amend the complaint at any time by naming the "subsidiaries, affiliates, and successors."

[*Motion for More Definite Statement*]

The defendants' motion for a more definite statement is directed to three paragraphs of the complaint.

Paragraph 5 alleges that the distributor defendants Warner's, Loew's and Universal are "defendant exhibitors" and that they operated theaters in several towns near Boston. The defendants argue that they are unable to frame an intelligent answer to these allegations since they are not true. If that be so, however, the defendants are in a motion [position] to answer by denying these allegations. The motion for a more definite statement is denied insofar as it is directed to paragraph 5.

Paragraph 6 purports to define the expression "co-conspirators" and lists the names of ten corporations engaged in the exhibition of motion pictures. The defendant is entitled to know their relationship to the

defendants and which theatres the corporations operate and where. The motion for a more definite statement is allowed.

Paragraph 10 sets out the offenses complained of and I find that the allegations of paragraph 10 are sufficiently specific to permit the defendants to frame an answer thereto.

[*Rulings*]

In summary, the motion to strike is allowed in toto. The motion for a more definite statement is allowed with respect to paragraph 6 of the complaint. Insofar as it is directed to paragraphs 5 and 10, it is denied.

[¶ 69,508] **Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corporation; Loew's Incorporated; RKO Radio Pictures, Inc.; Twentieth Century-Fox Film Corporation; Universal Film Exchanges, Inc.; and United Artist Corporation.**

In the United States District Court for the Western District of Pennsylvania. Civil Action No. 12711. Dated October 13, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Injunctive Relief—Intervention After Judgment—Timeliness of Motion to Intervene.—A petition for intervention in a motion picture exhibitor's action against certain distributors was denied on the ground that the application for intervention was not "timely." The petition, which was filed after a decree had been entered in favor of the plaintiff, and after an appeal had been dismissed pursuant to an "amicable settlement," alleged that "the action of the defendants subsequent to the Court's decree was hurting them and prejudicial to their rights." Intervention after judgment is unusual and not often granted. Here, the court considered not only the time element, but also the circumstances contributing to the delay. Several years had elapsed after the commencement of the suit, the suit was well known to all of the interveners, and the court saw no reason why they could not have sought intervention much earlier. Thus, the applicants for intervention had, in effect, "slept on their rights." The court also noted that it had already taken steps, by its decree, to eliminate the unlawful situation that it found; that no property was being distributed in which the interveners were interested; and that the interveners were not, despite their protestations, "bound by any judgment of this Court."

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.535.

For the plaintiff: Ceisler and Rodgers, Washington, Pa.; and Seymour F. Simon, Chicago, Ill.

For the defendants: Reed, Smith, Shaw & McClay, Pittsburgh, Pa.

For a prior opinion of the U. S. District Court, Western District of Pennsylvania, see 1958 Trade Cases ¶ 69,210.

Opinion

[*Conspiracy Action—Intervention*]

John W. McIlvaine, District Judge [*In full text*]: In this case the plaintiff, Basle Theatres, Inc., filed its complaint and prosecuted its action against the defendants in which it claimed that they had engaged in a conspiracy in restraint of trade. This Court found that all the defendants except one here engaged in the conspiracy, and it entered what it deemed an appropriate decree. The defendants appealed to the United States Court of Appeals, but while the appeal was pending the plaintiff and the defendants reached an amicable settlement and dismissed the appeal. Thereafter the interveners filed their petition to intervene alleging that the action of the defendants subsequent to the Court's decree was hurting them and prejudicial to their rights. It is significant to note at this point that the principal law suit was well-known to all of the interveners. The case was well publicized in the trade, and the trial lasted over a considerable length of time during which many interested people were present, many of course merely as spectators, but there is no doubt in the Court's mind that those who seek to intervene knew of the pendency of the suit.

[*Timeliness of Application*]

Before intervention may be had either as a right or permissively, there must be

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timely application; therefore, the first question that we must determine is whether there was timely application for intervention. Timeliness, of course, does not depend solely on the amount of time that has elapsed since the institution of the action, and in this case it was several years. While intervention has been allowed several years after commencement of a suit, it is in those cases allowed when substantial litigation has not taken place. Where there is substantial litigation, tardy intervention will usually be denied. Intervention after judgment is unusual and not often granted. See Vol. 4, Moore's *Federal Practice,* § 24.13.

[*Decree—Interveners Not Bound*]

The interveners here are not despite their protestations bound by any judgment of this Court. The effect of the Court's decree was to order the defendants to cease from their conspiracy and to make their decisions on clearances independently within the broad area set out by the Court's decree.

[*Discretion of Court*]

Rule 24 of the Federal Rules of Civil Procedure is silent as to what constitutes timely application, and the question must be answered in each case by the exercise of sound discretion by the trial court. See Vol. 7, *Cyclopedia of Federal Practice,* § 24.31.

[*No Absolute Right of Intervention*]

Under the circumstances involved here, we do not think that the application for intervention is timely. In exercising our discretion in this matter, we have considered not only the time element itself, but also the circumstances contributing to the delay. In that regard we might say we do not see any reason why these interveners could not have sought intervention much earlier. The Court should also consider the state of the cause. That is, as we have pointed out, the case has been concluded; a decree entered; and the parties have reached an amicable settlement and dismissed their appeal. The applicants for intervention here have in effect slept on their rights, and now they want this Court in effect to administer the motion picture industry in the distribution of motion pictures in Western Pennsylvania. We do not feel that this is a function of a district court. There is no absolute right of intervention in this case. First, because the application is not timely; and, of course, there is no statute of the United States confirming an unconditional right to intervene. Those seeking to intervene are not parties who have anyone inadequately representing an interest of theirs, and there is no property being distributed by the Court in which they are interested.

[*Permissive Intervention*]

As to whether there should be permissive intervention, here again we do not feel their application is timely. There is no statute conferring a right upon them to intervene and, of course, the case has been tried to its conclusion; a decree entered; and the original parties to the case have reached an amicable settlement of their differences; and the Court by its decree has taken steps to eliminate the unlawful situation that it found.

If these interveners feel that there is still an unlawful conspiracy being engaged in by these defendants, they being represented by competent counsel surely know how to proceed against any one engaging in an unlawful conspiracy.

[*Intervention Denied*]

Therefore, their motion to intervene should be and hereby is denied.

[¶ 69,509] Jeanne Koster v. Lingan A. Warren, et al.

In the United States District Court for the Northern District of California, Southern Division. No. 37,682. Filed September 11, 1959.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sentences—Corporate Officer's Antitrust Fine Paid by Corporation—Stockholder's Derivative Action Against Officer.—A corporate stockholder, in a derivative action seeking to recover from the corporation's former president an antitrust fine of $75,000 which the corporation had

paid on behalf of that officer, was required to post security under a statute providing for such posting where there is "no reasonable probability that the prosecution of the cause of action . . . will benefit the corporation or its security holders." In its ruling, the court noted that "the explanation presented by the defendants with respect to the payment of the * * * fine—following his change of plea from not guilty to *nolo contendere*—place the action within the doctrine enunciated in *McQuillen v. National Cash Register Co.*, 112 F. 2d 877; cf. *Simon v. Socony Vacuum Oil Co.*, 179 Misc. 202, 38 NYS 2d 270." The court also noted that the corporation received consideration from the officer in return for its payment of his fine.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.700.

For the plaintiff: Garry, Dreyfus, McTernan & Keller, San Francisco, Cal. (Sidney L. Garwin, New York, N. Y., of counsel).

For the defendants: Pillsbury, Madison & Sutro, Turner H. McBaine, and Donald G. McNeil, San Francisco, Cal., for Safeway Stores, Inc., and Robert A. Magowan; McCutchen, Doyle, Brown & Enersen, Morris M. Doyle, Burnham Enersen, and Bryant K. Zimmerman, San Francisco, Cal., for Dwight M. Cochran; W. Burleigh Pattee, Robert W. Tallman, and Chickering & Gregory, San Francisco, Cal., for Chester N. Sanders; Ackerman, Johnston, Johnston & Mathews, George H. Johnston, and Willard P. Norberg, San Francisco, Cal., for Lingan A. Warren; and William T. Selby, Ventura, Cal., for Milton L. Selby.

Memorandum Opinion and Order Granting Motions for Security

[*Derivative Action*]

George B. Harris, District Judge [*In full text except for omissions indicated by asterisks*]: In this derivative action under Rule 23b FRCP[1] brought by a stockholder on behalf of Safeway Stores, Inc. against certain directors and former officers of the corporation, defendants have moved to require plaintiff to post security pursuant to Section 834 of the California Corporations Code, in the amount of $240,000. In order to prevail on their motions, defendants must prove that there is

> "no reasonable probability that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its security holders."
> * * *

[*Payment of Officer's Antitrust Fine*]

The second cause seeks to recover $75,000 paid by Safeway on behalf of Warren, its former president, who was fined this sum in a criminal anti-trust action at Fort Worth.
* * *

[*Nolo Contendere Plea—"Consideration"*]

The explanation presented by defendants with respect to the payment of the Warren fine—following his change of plea from not guilty to *nolo contendere*—place the action within the doctrine enunciated in *McQuillen v. National Cash Register Co.*, 112 F. 2d 877; cf. *Simon v. Socony Vacuum Oil Co.*, 179 Misc. 202, 38 NYS 2d 270. Safeway received consideration from Warren in return for its payment of his fine.
* * *

[*Motions Granted*]

Accordingly, It Is Ordered that defendants' motions requiring plaintiff to post security be, and the same hereby are granted, in the amount of $100,000.

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[1] "In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath . . . ."

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[¶ 69,510] New Sanitary Towel Supply, Inc., et al. v. Consolidated Laundries Corporation, et al.

In the United States District Court for the Southern District of New York. Civil No. 137-376. Filed September 3, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Production of Evidence—Depositions—Cross-examination of Witness in Prior Government Action as "Substitute" for Taking of Deposition.—A laundry corporation, in a private action charging it with antitrust violations, was denied a motion to take the deposition of the plaintiff through an individual who was "the prosecution's chief witness" in a prior Government antitrust action against the same defendants. The court, noting the incorrectness of defense counsel's statement that the court's holding was "that cross-examination of a witness in a prior action, either criminal or civil, is an adequate substitute for the broad examination permitted under Rule 26 of the Federal Rules of Civil Procedure," observed that the exercise of its discretion in denying the motion was based upon the fact that, with respect to the antitrust charges against the defendants, the plaintiff's position had been clearly exposed through the prior examination of that witness. The fact that counsel now representing the defendants did not participate in the criminal trial, and the suggestion that, if they had, a different and perhaps more extensive cross-examination of that witness would have been conducted, was not persuasive.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.775.

Private Enforcement and Procedure—Suit for Civil Damages—Discovery—Documents in Possession of Government—Inquiry As to Existence or Nonexistence of Documents—Identity or Location of Persons With Knowledge of Facts.—In a private antitrust action, the court's order for discovery and inspection included documents and records in the possession of the plaintiffs or their agents, and documents and records in the possession of the United States Attorney or any other governmental agency or official. Also, the order could contain provisions specifically permitting inquiry as to the existence or nonexistence of certain documents and records, and inquiry as to the identity or location of any person having knowledge of relevant facts.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.825.

For the plaintiffs: Burton B. Turkus, New York, N. Y.

For the defendants: Rosenman, Goldmark, Colin & Kaye; Paul, Weiss, Rifkind, Wharton & Garrison; Simpson, Thacher & Bartlett; Cahill, Gordon, Reindel & Ohl; and Mervin C. Pollak, all of New York, N. Y.

Memorandum

[*Discovery*]

Edward Weinfeld, District Judge [*In full text*]: All documents and records referred to in the affidavit of Justin Colin which he asserts plaintiffs "still' have not produced, whether in the possession of the plaintiffs, their attorneys, accountants, agents or representatives, or the United States Attorney or any other governmental agency or official, are encompassed within the Court's direction for discovery and inspection. In view of the issue which has been raised as to the existence or whereabouts of certain documents or records, the order to be entered herein may contain a specific and appropriate provision permitting inquiry with regard to their existence or nonexistence. The order may also contain a specific provision permitting inquiry as to the identity or location of any person having knowledge of relevant facts. Nothing in the Court's decision warrants a conclusion to the contrary.

[*Cross-examination in Prior Trial as "Substitute" for Deposition*]

As to other contentions made upon this application for reargument, the fact that counsel now representing the defendants did not participate in the criminal trial, and the suggestion that if they had, a different and perhaps more extensive and thorough cross-examination of Paul Ullman, the prosecution's chief witness, would have been conducted, is not persuasive. The engage-

ment of new counsel by defendants to represent them in this civil action does not change the basis of the Court's disposition of the original motion. The fact is that all defendants herein were defendants in the criminal action, and were there represented by counsel of their own choice who not only conducted a vigorous but, as the record shows, an extensive cross-examination of the chief government witness.

The Court's decision and the exercise of its discretion were based upon the examination of that witness and the clear exposure through him of plaintiffs' position with respect to the antitrust charges against the defendants. It was not intended to foreclose an examination of the plaintiffs by any other officer, director or managing agent or any other person who was not examined as a witness in the criminal prosecution—and the order to be entered may so provide.

In passing, the Court notes that defense counsel's statement that the Court's holding is "that cross-examination of a witness in a prior action, either criminal or civil, is an adequate substitute for the broad examination permitted under Rule 26 of the Federal Rules of Civil Procedure" is not correct and misinterprets the Court's decision.

[*Reargument Granted in Part*]

The motion for reargument is granted only to the extent indicated herein and otherwise denied in all respects.

[¶ 69,511] Dale Hilton, Inc. v. Triangle Publications, Inc., et al.

In the United States District Court for the Southern District of New York. Civil No. 125-17. Filed October 21, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Security for Costs.—In an antitrust action for an injunction and for treble damages in the amount of $18,000,000, the plaintiff was stayed from proceeding further against one of the defendants until it filed a bond for costs in the sum of $500. The rules of the court specified that a non-resident plaintiff, on demand, shall post a $250 bond for costs, unless the court dispenses with the bond or fixes a different amount. In fixing the amount of the bond, the court considered, among other things, the financial condition of the plaintiff and the nature of the claim against this defendant.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.

For a prior ruling of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,868.

Memorandum

[*Security for Costs*]

Dimock, District Judge [*In full text*]: Defendant Gimbel Brothers, Inc., has moved, pursuant to Rule 2 of the Civil Rules of this court, for an order requiring plaintiff to give $5,000 security for costs. Plaintiff, a non-resident of New York, brought an action under the anti-trust laws for an injunction and treble damages in the amount of $18,000,000 from Gimbel Brothers, Inc. and eight other defendants.

Since the inception of the suit five of the defendants have made motions for security. Three were awarded $500 each and the other two, who were represented by the same attorney, were awarded $500 jointly. Security in these amounts apparently has been deposited by plaintiff. Plaintiff states that because of defendants' illegal activities which are the subject matter of this suit it is without funds to advance the security requested by Gimbel Brothers, Inc. Plaintiff claims that "even the sum of $500.00, if allowed to each of the defendants individually, would be beyond plaintiff's present financial ability" and would force plaintiff to drop its suit against some of the de-

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fendants. Defendant does not deny that it is aware from the prior motions for security that plaintiff is without financial resources to give the $5,000 security. It contends that it is nevertheless entitled to be protected to the extent of the requested security from a harassing $18,000,000 law suit which was brought by a non-resident and which will cost a considerable amount to defend. Its charge that plaintiff's claim is without merit and is being pursued to harass Gimbel Brothers, Inc. is based largely on the uncontradicted affidavit of one of its attorneys that the "almost 2,000 pages of depositions" so far taken in the case contain "not one word of proof linking defendant Gimbel Brothers with the alleged, and apparently nonexistent, conspiracy."

Rule 2(a) makes non-residence of the plaintiff a specific ground for the awarding of security for costs by the following language:

"(a) *By non-resident.* A plaintiff, who is not a resident of the State of New York, shall file within twenty days after service upon him of a demand therefor, a bond for costs in the sum of $250.00, unless the court, on motion and for cause shown, dispenses with the bond or fixes a different amount. * * *"

On this record plaintiff has certainly not made out a case for departing from the norm and dispensing with security. On the other hand, defendant Gimbel Brothers, Inc. raises a thus far unrebutted inference that the claim against it is based upon the hope that something yet unknown will turn up in the course of the litigation. A defendant in that position is entitled to something more than the norm. A requirement of security in the amount of $500 takes adequate account of plaintiff's plea of poverty.

Plaintiff is, therefore, stayed from proceeding further against Gimbel Brothers, Inc. until such time as it shall have filed a bond for costs in the sum of $500.

So ordered.

[¶ 69,512] Opinion of Attorney General of Nevada.

Opinion of Roger D. Foley, Attorney General, by Ve Noy Christoffersen, Special Deputy Attorney General for the Nevada State Dairy Commission. Opinion No. 104, October 12, 1959. Requested by Clarence Cassady, Secretary of Nevada State Dairy Commission.

Sherman Antitrust Act

Combinations and Conspiracies—Practices—Boycotts—State Regulation Requiring Milk Distributors to Withhold Credit from Certain Wholesalers—Legality of Regulation Under Federal Law.—A regulation promulgated by the Nevada State Dairy Commission which provided that the commission, when notified that any wholesaler has failed to pay for a "delivery" within 15 days, will direct all distributors in a certain market area to "place the said wholesale customer on a cash basis," did not amount to a secondary boycott in contravention of certain Federal statutes. A boycott, which is a form of conspiracy, requires, as an essential element, an "intent to injure." Here, there was no such conspiracy because the distributors, in concertedly withholding credit from a wholesaler, would be acting in concert "in order to conform to a State law or regulation."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533.

STATEMENT OF FACTS

[*Price Discrimination—Dairy Industry*]

There is at present, listed under the Unfair Trade Practices Section of the Stabilization and Marketing Plan of the Nevada State Dairy Commission, two regulations upon which you have asked that the question of their legality be given an opinion by this office. The two regulations are listed as sub-sections c. and d. and are worded as follows:

(c) "Within the boundaries of the Southern Nevada marketing area the granting of an extension or receiving of credit beyond the period of fiifteen (15) days from the date of delivery of any milk, cream, or dairy by-product. Such period of credit extension for any delivery shall be computed from the first date of delivery not previously paid. The giving of any promissory note does not constitute payment within the meaning of this section."

(d) "Within the boundaries of the Southern Nevada marketing area a distributor shall immediately place upon a cash basis any wholesale customer who has failed to pay for any delivery within fifteen (15) days after delivery, or is in default for fifteen (15) days in any other obligation to such distributor, and shall immediately notify the dairy Commission, in writing, of the name of said wholesale customer whereupon the Dairy Commission will notify all other distributors to place the said wholesale customer on a cash basis."

QUESTION

[*"Boycotts" Under Federal Law*]

The question of the legality of these two regulations raises four questions:

* * *

4. Do the regulations amount to a secondary boycott and therefore are in contravention of certain Federal statutes?

CONCLUSION

[*Concerted Action in Compliance with State Law*]

* * *

4. The regulations above listed are not in contravention of Federal statutes prohibiting secondary boycott in that a secondary boycott is a form of conspiracy which is absent in the case where the distributors are acting in concert on application of credit in order to conform to a State law or regulation.

ANALYSIS

[*Absence of "Intent to Injure"*]

* * *

4. The question arising as to whether these rules amount to a secondary boycott and therefore are in contravention of certain Federal statutes, has been given serious consideration and investigation. The opinion insofar as a violation of any certain Federal Statute is concerned, is that these rules do not constitute a secondary boycott. A boycott is a form of conspiracy and the following opinions aptly cover the situation here:

In *Bedford Cut Stone Co., v. Journeymen S. C. Assn.*, 274 U. S. 37, the Supreme Court approves the following:

> "An act which lawfully might be done by one may when done by many acting in concert take on the form of a conspiracy and become a public wrong and may be prohibited if the result is hurtful to the public or to individuals against whom such concerted action is directed."

And again we find the following holding applicable to this situation,

> "An essential element of a boycott is intent to injure." *Oxley Stove Co. v. Coopers International Union*, 72 Fed. 695.
>
> "It must appear that the means used are threatening and intended to overcome the will of others, and to compel them to do or refrain from doing that which they would not otherwise do." *Meier v. Speer* (Ark.), 132 S. W. 988.

[*No Conspiracy*]

It is therefore apparent under the above holdings and definitions that these rules do not and cannot be construed as a boycott or conspiracy in any form.

[¶ 69,513] **Reeves 57th St. Pharmacy, Inc. v. Forward Mdse., Inc.**

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 90, page 13. Dated November 6, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Suit for Injunctive Relief—Burden of Proof.—A fair trade injunction was denied where there was no adequate showing that the prices the defendant allegedly charged violated the provisions of valid fair trade agreements entered into by the manufacturers of the products and in effect at the time of the alleged violation.

See Fair Trade, Vol. 1, ¶ 3358.

[*Fair Trade Action*]

CONLON, Justice [*In full text*]: There is no adequate showing that the prices claimed to have been charged by defendant violated the provisions of valid fair trade agreements by the manufacturers of the products sold,

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in effect at the time of the alleged sales. The motion is accordingly denied, but without prejudice to a renewal on papers making a proper showing that defendant violated valid fair trade agreements.

[¶ 69,514] Loyal Chemists v. Jarvis Drug Co.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 85, page 12. Dated October 29, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement—Contempt—Plaintiff's Delay in Bringing Case to Trial as Bar to Contempt.—A plaintiff which had not moved in any way to proceed with the trial of a fair trade case for more than a year after the entry of a temporary injunction is denied a motion to punish the defendant for contempt for alleged sales below fair trade prices. The matter should be tried and disposed of after evidence has been heard and the defendant afforded the right of cross-examination.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Contempt—Delay in Bringing Case to Trial*]

CONLON, Justice [*In full text*]: Motion to punish the defendant for contempt for violation of a temporary injunction in a fair trade case is denied. It appears that the injunction was granted in October of 1958 and the order signed on November 12, 1958. It does not appear that plaintiff has moved in any way to proceed with the trial of the case. In fact it did not even file the bond required until October 5 of this year. In these circumstances, the court believes that the defendant should not be punished for contempt for alleged sales made to shoppers. The matter should be tried and disposed of finally after evidence has been heard and the defendant afforded the right of cross-examination. Settle order providing for an early trial.

[¶ 69,515] Empire Rayon Yarn Co., Inc. v. American Viscose Corporation, Fred Malina, Arthur Malina, Edythe M. Charnas and Fred H. Diamond, co-partners doing business as Malina Company, Gutner Brothers Corporation and Shawmut, Inc.

In the United States District Court for the Southern District of New York. Civil No. 115-269. Filed October 5, 1959.

Robinson-Patman Price Discrimination Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Proceedings—Discovery—Sales Information and Names of Customers.—Defendants, in pretrial proceedings, were not entitled to learn the names of the plaintiff's customers; however, they were entitled to basic information relative to sales by the plaintiff in the original package. The plaintiff could use code names for original package customers. The court also ruled that the plaintiff should be entitled to get a fairly good sampling of the defendants' customers, since the defenses raised made their identity and the business that they do quite relevant.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.825.

For the plaintiff: Sweet, Reinitz, Peskin & Sweet, New York, N. Y.

For the defendant: Herbert S. Greenberg; Jackson, Nash, Brophy, Barringer & Brooks; Silver & Berstein; and E. Compton Timberlake, all of New York, N. Y.

For a prior ruling by the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 69,015.

Memorandum
[Motions to Compel Answers and for Discovery]

MURPHY, District Judge [*In full text*]: These are motions by defendants to compel Edward Roberts, Treasurer of the plaintiff to answer certain questions propounded during his deposition and, for discovery and inspection. By agreement between the parties, the only issues left for resolution by the court relate to questions numbered 10, 17 and 18 on the deposition and items 6 and 9 on the motion for discovery.

Question numbered 10 reads "Q. Do you know what the cost was of the building?" How the cost of a building owned and constructed by another corporation unrelated to plaintiff and in which the plaintiff is a tenant is relevant to the subject matter of the action, escapes us, and the objection is sustained.

Question numbered 17 reads "Q. Do you sell any textile mills? What textile mills do you sell?" This relates to item #6 sought to be discovered and will be treated hereafter in the discussion of that item.

Question numbered 18 reads "I wish you would state for me, please, all the reasons that you know why you believe that Empire should be entitled to a jobber's status?" Plaintiff, on oral argument and in its affidavit and its brief, has now abandoned its first cause of action under Sec. 2(a) of the Robinson-Patman Act (15 U. S. C. 13(a)). While it is true that neither the affidavit nor the brief unequivocally withdraw that cause of action, we will treat it as effectively withdrawn, requiring only that plaintiff's counsel reduce such withdrawal to the form of a letter to opposing counsel.

With the first cause of action no longer in suit, question 18 becomes irrelevant.

[Right to Sales Information—Customers' Names]

Item 6 and question 17 are bottomed on the premise that defendants have a right in pre-trial to learn the names of plaintiff's customers, particularly its customers of unprocessed yarn sold in the original containers. Defendants rely on three cases for support: *Idle Wild Farm, Inc. v. W. R. Grace & Company* [1958 TRADE CASES ¶ 69,053], 22 F. R. D. 334 (S. D. N. Y. 1958); *Avon Linen Service, Inc. v. Gratenstein,* 16 F. R. D. 469 (D. Conn. 1953); *Shawmut, Inc. v. American Viscose Corp.* [1950-1951 TRADE CASES ¶ 62,844], 11 F. R. D. 562 (S. D. N. Y. 1951).

These cases are not apposite to our case in its present posture. We are of the opinion that defendants are not now entitled to such names although the basic information relative to sales by plaintiff in the original package is discoverable. In other words, with the exception of using code names for the customers, item 6 should in all other respects be granted. Plaintiff's brief indicates no objection to this method of disclosure.

Item 9 relates to plaintiff's purchases of rayon yarn, and that item should properly be granted.

On the argument, plaintiff orally moved for discovery of defendants' customers. We are not clear whether it presses such oral motion in the light of our present disposition or whether it was contingent upon defendants' success with respect to item 6 and question 17. It would appear, however, that plaintiff should be entitled to get a fairly good sampling of the defendants' customers, since the defenses that are raised make their identity and the business that they do quite relevant. Cf. *Shawmut, Inc. v. American Viscose Corp., supra.*

Accordingly, the defendants' motion to compel answers to questions 10, 17 and 18 is denied, and their motion for discovery and inspection is granted as to item 6, the plaintiff being free to codify the customers' names and addresses. Their motion for discovery and inspection of item 9 is granted. Plaintiff's cross-motion to amend is granted without opposition, with the proviso that the cut-off date of October 1, 1959 be the outside date for supplemental damages.

This is an order, no settlement is necessary.

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[¶ 69,516] **United States v. The Watchmakers of Switzerland Information Center, Inc., et al.**

In the United States District Court for the Southern District of New York. Civil No. 96-170. Dated October 26, 1959.

Case No. 1207 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suits for Injunctive Relief—Discovery and Production of Evidence—Admissions—Authenticity of Documents.—A Government motion requesting that the authenticity of certain documents be deemed admitted by two of the defendants was denied. On the basis of present information, it was found that all documents, whose authenticity was reasonably susceptible of knowledge by such defendants, had been admitted. The court held, however, that if it is shown at a subsequent time that there were no good reasons for the defendants' denial of the authenticity of the documents and that the use of the documents was of substantial importance, the defendants could be required to pay the Government the reasonable expenses incurred in making proof of the authenticity, including reasonable attorneys' fees.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.200.

For the plaintiff: U. S. Attorney, New York, N. Y.

For the defendants: Weisman, Allan, Spett & Sheinberg; Fowler, Leva, Hawes & Symington, c/o Alphonse A. Laporte of Laporte & Meyers; David Baumgarten; Robert Perret; Taft, Stettinius & Hollister, c/o Manning, Harnich, Hollinger & Shea; William H. Fox; Royall, Koegel, Harris & Caskey; Emanuel H. Reichart; Lipper, Shiem & Keeley; Milton W. Levy; Nestor S. Foley; Laporte & Meyers; Manning, Hollinger & Shea; Albert Lee Singer; Guggenheimer & Untermyer; Murray Sprung; C. Robert Mathis; and J. Lee Murphy, New York, N. Y.

For prior opinions of the U. S. District Court, Southern District of New York, see 1959 Trade Cases ¶ 69,314 and 1955 Trade Cases ¶ 68,096 and 68,145.

[*Authenticity of Documents—Admissions*]

JOHN M. CASHIN, District Judge [*In full text*]: I will first dispose of the Government's motion which was argued on October 19, 1959, which sought an order, pursuant to Rules 36 and 37 of the Federal Rules of Civil Procedure, that—

(1) the authenticity of all documents, which were the subject matter of the Government's request for admissions dated September 11, 1959, be deemed admitted; or

(2) that the defendants Longines and Wittnauer give further answers to said request, unequivocally admitting or denying the authenticity of the documents; or

(3) that the defendants Longines and Wittnauer be assessed at this time with the prospective costs of proving the authenticity of the documents not admitted.

I find myself constrained to deny the motion of the Government in its entirety. While it is true that there is some authority for ordering further answers to requests for admissions of genuineness of documents, I do not believe that this is the proper case for the exercise of such authority, even if it does exist. On the basis of information presently before the court, except for certain oversights which defendants Longines and Wittnauer have agreed to correct, all documents, whose authenticity is reasonably susceptible of knowledge on the part of Longines and Wittnauer, have been admitted.

Thus, the Government must prepare for trial by the ordinary methods, and must prove the authenticity of the documents it intends to rely upon under the usual rules of evidence. Of course, it may be shown at a subsequent time, most probably at or after the trial of the action, that there were no good reasons for the denial by Longines and Wittnauer of the authenticity of the documents, and that the use of the documents was of substantial importance. In that event, of course, the sanction provided for in Rule 37(c) would be invoked, that is, Longines and Wittnauer would be required to pay to the Government the reasonable expenses incurred in making proof of the authenticity, including reasonable attorneys' fees. Be that as it may, there is no course presently open to me but to deny the Government's motion except insofar as it refers to the documents whose authenticity has been denied by the affected defendants through oversight.

The parties may settle an order in accordance with this ruling.

[¶ 69,517] James Ingrassia v. Raymond C. Bailey.

In the California District Court of Appeal for the Second District, Division Two. Civil No. 23770. Dated July 17, 1959.

Appeal from an order of the Superior Court of Los Angeles County granting a preliminary injunction. JOHN J. FORD, Judge. Affirmed.

California Contracts in Restraint of Trade Law

Combinations and Conspiracies—State Laws—Contract Not To Solicit Customers of Lessor—Confidential Information.—A lease of an industrial catering route, which forbade the lessee from soliciting customers on the route for a year after the termination of the lease, was not a contract in restraint of trade under Section 16600 of the California Business and Professions Code. There was no promise or agreement by the lessee that, after the termination of the lease, he would not engage in any profession, trade, or business. The lease merely provided that he would not solicit those customers made known to him in confidence.

See Combinations and Conspiracies, Vol. 1, ¶ 2319.05.

For the appellant: Maurice Rose.

For the respondent: Sweeney, Irwin & Foye, and William R. Sweeney.

[*Alleged Restrictive Agreement*]

FOX, Presiding Justice [*In full text except for omissions indicated by asterisks*]: Plaintiff, proprietor of a catering route in the industrial area of Los Angeles, leased the same, together with a truck with which to operate it, to defendant. Upon plaintiff's terminating defendant's lease the latter procured other equipment and immediately resumed serving the employees of the plants where he had previously stopped. Plaintiff sought to enjoin defendant's activities. A preliminary injunction was granted. Defendant has appealed.

Plaintiff is engaged in the industrial catering business, which is carried on by vending food and drinks from trucks to the employees of industrial plants as they go in to work, at coffee breaks and at lunch time. Stops are scheduled at various plants to coincide with these periods.

Plaintiff acquired the initial stops on the route in question by purchase from George W. McAttee, Jr., for $1,475. Plaintiff added other stops by hiring a route supervisor who solicited, secured and serviced such new locations.

On July 15, 1957, plaintiff leased the route and truck for its operation to defendant. In accordance with the terms of the agreement defendant received from plaintiff a route list showing the names and addresses of certain industrial concerns that he was to service, the place at which he was to park in order to serve the employees of the particular plant, the time he was due to arrive at each place, the time allocated for each stop, his departure time and the number of employees of each company. These stops were arranged in sequence in point of time. Two or three were added subsequent to July 15, 1957. The agreement between the parties provided, inter alia, that concurrently with the execution thereof and delivery of the route list, the lessor-plaintiff, was "disclosing to lessee [defendant] all pertinent confidential information concerning the type, nature, and amount of food and sundries purchased by customers at each stop"; and "that said Lunch Route and identity of customer stops is conclusively regarded by lessor and lessee to be and is, as between them, a trade secret." The agreement further provided that upon termination of the agreement lessee would not solicit any of the customers on the route for a period of one year. The lease was on a month to month basis but might be terminated by either party at any time for cause.

* * *

[*Legality*]

Defendant's argument that his contract with plaintiff violated section 16600, Business and Professions Code, is without merit. Under this section, "a contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." In the instant case there is no promise or agreement by the defendant that, after the termination of the contract, he would not engage in any

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profession, trade, or business. The contract merely provided that defendant would not solicit those customers made known to him in confidence. Such an agreement is not rendered invalid by section 16600. The following language in *Gordon v. Wasserman* [1957 TRADE CASES ¶ 68,814], 153 Cal. App. 2d 328, 330, is apposite: "It clearly appears by the terms of the contract that it does not prevent defendant from carrying on a weekly credit, or any other business. He covenants not to use plaintiffs' confidential lists to solicit customers for himself. Similar covenants have been held valid and enforceable. . . ." This principle was reaffirmed in *Gordon v. Landau,* 49 Cal. 2d 690, 694.

* * *

The order is affirmed.

ASHBURN, J., and HERNDON, J., concurred.

[¶ 69,518] S. A. Wentling v. Popular Science Publishing Company, Inc.; National Rifle Association of America; Henry Holt and Company, Inc.; Lyman Gun Sight Corporation; and John Unertl, trading as John Unertl Optical Co.

In the United States District Court for the Middle District of Pennsylvania. Civil Action No. 6300. Dated September 11, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Venue—Foreign Corporation—Transacting Business—Volume of Business as Test—Advertising—"Good Will" Tours.—A Connecticut corporation which had not been "domesticated" in Pennsylvania, and did not solicit orders through salesmen there, was nevertheless "transacting business" there within the meaning of Section 12 of the Clayton Act. The volume of business done in a state has frequently been the controlling factor in determining venue, but it is not the sole test. Here, the corporation's 1957 sales in the District amounted to $12,018, or 1.90 per cent of its total sales. For the first five months in 1958, its sales in the District amounted to $2,335, or 1.37 per cent of its total sales. In addition, it circularized the trade generally by mailing catalogues, mail circulars, and letters into the District, and advertised in magazines having a circulation there. Further, two "good will" tours in the District by one of its officers and other employees could have had only one purpose, namely, to increase sales. Thus, from the average businessman's point of view, the activities of the corporation constituted the transaction of business in the District.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210.

Private Enforcement and Procedure—Suit for Civil Damages—Proper Judicial District—Test for Venue—Transacting Business—Non-Profit Corporation (Rifle Association)—Publication of Magazine—Advertisements.—In a treble damage action commenced in a Federal District Court sitting in Pennsylvania, venue was improper as to a non-profit rifle association incorporated in New York with offices in Washington, D. C. The test for venue, under Section 12 of the Clayton Act, is the "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.'" Here, the organization was non-business in character; its purposes, among others, was to promote the national defense and proficiency in the handling of small arms. It had no offices, employees, or agents in Pennsylvania and was not certified to do business in that or any other state. The organization's official journal, a magazine published in Washington, D. C., was sent to members in Pennsylvania, and was sold to Pennsylvania sporting goods dealers on written orders received in Washington, D. C. However, the magazine was provided as an incident to membership in the organization, and its publication was not the organization's chief business. Further, the fact that persons from Pennsylvania placed classified advertising in the magazine did not alter the picture. Probably the strongest argument against the claim that the magazine was commercial in nature was the fact two Congressional Acts had accorded "recognition" to the organization.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.210.

Private Enforcement and Procedure—Suit for Civil Damages—Service of Process—"Registered" Foreign Corporation—Failure to Report Change of Address—Service on Warehouse Supervisor.—A New York corporation qualified to do business in Pennsylvania

was properly served with process where the Deputy Marshal, finding the corporation's offices were no longer at its registered address, served a "supervisor" in charge of its warehouse at another address. In registering, the corporation had appointed the Secretary of the Commonwealth of Pennsylvania as its statutory agent for the service of process, and service on that officer would have been the simplest, best, and most proper method. However, it was not the exclusive method. The corporation, having changed its registered office address without noting that change in the Office of the Secretary of the Commonwealth, was in direct violation of the Pennsylvania Corporation Law and could not profit by its own dereliction. Further, the corporation's president, in an affidavit asserting that the individual served was not its "managing agent," stated that the individual supervised the operation of the corporation's warehouse. Therefore, it followed that the corporation had a place of business in Pennsylvania, and that the individual in question was in charge of it.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.350.

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit—Capacity to Sue—Partnership's Failure to Register "Fictitious Name" Prior to Institution of Suit—Federal Claim as Contrasted with Diversity Case.—A partnership, by reason of its failure to register its "fictitious name" and pay a $25 license fee or fine to the Secretary of the Commonwealth of Pennsylvania, as required by a local statute, was not lacking in capacity to bring a treble damage antitrust action in a Federal District Court. The case was not a "diversity" action, but was founded exclusively on a Federal statute, namely, the Sherman and Clayton Antitrust Acts. Therefore, the court was not sitting as a state court. In such a situation, the limitations upon the courts of a state do not control a Federal court sitting in that state.

See Private Enforcement and Procedure, Vol. 2, ¶ 9005, 9005.40.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion to Dismiss—Commingled Causes of Action—Two Claims Stated in Single Count.—A complaint charging, in a single count, that a publishing company and others violated Sections 1 and 2 of the Sherman Act by conspiring to exclude a partnership and other "off-list" dealers from handling gun "scopes," binoculars, and gun accessories, for the purpose of maintaining the price of scopes, did not improperly commingle causes of action. It was contended that the complaint stated two separate and distinct causes of action in a single count in disregard of Rule 10(b) of the Federal Rules of Civil Procedure. In summarily disposing of the motion to dismiss, the court noted that "the gist of this action is a single conspiracy."

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.375.

For the plaintiff: McNees, Wallace & Nurick, Harrisburg, Pa.

For the defendants: Nauman, Smith, Shissler & Hall, Harrisburg, Pa., for Popular Science Publishing Co., Inc.; Whiteford, Hart, Carmody & Wilson, Washington, D. C., and Carl F. Chronister, Harrisburg, Pa., for National Rifle Assn. of America; and Stock and Leader, York, Pa., for Lyman Gun Sight Corp.

[*Treble Damage Action*]

FREDERICK V. FOLLMER, District Judge [*In full text*]: This is a private antitrust action for treble damages under Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2) and Section 12 of the Clayton Act (15 U. S. C. § 22).

[*Parties*]

It appears from the complaint that the plaintiff, S. A. Wentling, is a partnership composed of Stanley A. Wentling and F. Robert Kreider, with its principal place of business at Palmyra, Lebanon County, in the Middle Judicial District of Pennsylvania; that the defendants herein involved are

(a) Popular Science Publishing Company, Inc. (hereinafter referred to as "Popular Science"), a New York corporation with its principal place of business in New York City, also qualified to do business in Pennsylvania, with its principal registered office in Pennsylvania located at 400 Wyoming Avenue, Scranton.

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(b) National Rifle Association of America (hereinafter referred to as "National"), a New York corporation with its principal office in Washington, D. C.

(c) Lyman Gun Sight Corporation (hereinafter referred to as "Lyman"), a Connecticut corporation with its principal office and place of business at Middlefield, Connecticut.

Action against John Unertl, trading as John Unertl Optical Co., was dismissed by Order of Court on Stipulation of Counsel.

Counsel for plaintiff and Henry Holt and Company, Inc., stipulated that Holt would not be required to answer or further plead until the motions hereinafter referred to were disposed of.

[*Motions*]

The matter is presently before the Court on

(a) Motion of National to dismiss the action as to it because of improper venue.

(b) Motion of Lyman to dismiss complaint as to it because of improper venue.

(c) Motion of Popular Science to quash the summons and dismiss the complaint as to it because

(1) Improper Service

(2) Because of plaintiff's failure to register under Pennsylvania Fictitious Name Act, plaintiff has no capacity to maintain this action.

(3) Complaint fails to state a cause of action upon which relief may be granted.

(4) Complaint states two separate and distinct causes of action in a single count in disregard of Federal Rules of Civil Procedure No. 10(b).

(5) Complaint fails to state sufficient facts to establish defendant's involvement in any conspiracy as to plaintiff, that plaintiff was injured by defendant, or that any of alleged injuries or damages were caused by defendant.

In the alternative, Popular Science moves for more specific statement.

In the further alternative, Popular Science moves to strike certain alleged scandalous and impertinent statements.

[*Conspiracy Charged*]

The unverified complaint alleges, *inter alia,* that plaintiff is a partnership, engaged as a dealer, jobber and distributor of gun scopes, binoculars, guns and various gun accessories, such business being substantially a mail order distribution of such products from its principal place of business located at Palmyra, Lebanon County, Pennsylvania; that beginning about 1950 and continuing through 1956 defendants and others named therein as coconspirators knowingly have entered into and engaged in an unlawful combination and conspiracy, carried out in part within this district, to eliminate and exclude plaintiff and other off-list dealers from engaging in the purchase and sale of scopes, binoculars, and gun accessories for the purpose of stabilizing and maintaining prices of scopes, which combination and conspiracy was in restraint of the therein described trade and commerce among the several states in violation of the Sherman and Clayton Acts.

[*Venue*]

The applicable venue section of the Clayton Act (15 U. S. C. § 22) provides in pertinent part as follows:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

As to National Rifle Association of America

[*Non-profit Organization*]

Attached to National's motion to dismiss was the affidavit of Frank C. Daniel, its Secretary, to which is attached copy of charter and amendment thereto.

National was incorporated in 1871 in the State of New York, pursuant to Act of April 11, 1865, entitled "An Act for the Incorporation of Societies or Clubs, for certain Social and recreative purposes." It is a nonprofit, nonbusiness, nonstock organization supported by membership dues. Its original objects or purposes are the "improvement of its members in markmanship, and to promote the introduction of the system of aiming drill and rifle practice as part of the military drill of the National Guard of this and other states, and for those purposes, to provide a suitable range or ranges in the vicinity of the City of New York." The charter was amended in 1956 in order

to add the following purposes to those stated originally:

"And to promote social welfare and public safety, law and order, and the national defense; to educate and train citizens of good repute in the safe and efficient handling of small arms, and in the technique of design, production and group instruction; to increase the knowledge of small arms and promote efficiency in the use of such arms on the part of members of law enforcement agencies, of the armed forces, and of citizens who would be subject to service in the event of war; and generally to encourage the lawful membership and use of small arms by citizens of good repute."

Defendant's offices are located in Washington, D. C. It has no offices, employees or agents in Pennsylvania, nor has it ever applied for or been required to apply for a Certificate of Authority to do business in Pennsylvania, or any other state, territory or district.

As of December 31, 1957, defendant had some 313,967 individual and 7,644 organization members. Each member of defendant, as a privilege of membership, is entitled to receive the official monthly journal of defendant, "The American Rifleman," which is published and printed in the District of Columbia and is mailed monthly to each member from Washington, D. C. For the month ending December 31, 1957, defendant mailed some 23,035 copies of its journal to addresses in Pennsylvania, of this amount 21,246 copies were mailed to members, 119 copies were mailed to nonmembers (consisting mainly of persons who have sent in the full dues but who have not completed all of the requirements for active membership, a few libraries, and several military units), and some 1,670 copies were mailed to approximately 165 sporting goods dealers for an average of approximately ten copies each. The copies mailed to sporting goods dealers are purchased by them at Washington, D. C., on the basis of written orders received in and accepted in Washington, D. C. These dealers pay defendant twenty-five cents per copy and are free to dispose of the copies as they see fit. The purpose of these sales is to encourage interest in the defendant on the part of the dealers and their customers.

Plaintiff then filed an affidavit, the sole purpose of which was to place in the record a copy of defendant's magazine for October 1958, which it claims is the primary source of the present controversy.

Defendant filed a reply affidavit setting forth, *inter alia,* that the copy of the magazine attached to plaintiff's affidavit is a representative copy of the October 1958 issue of the magazine with one exception. The "bind-in-reply card" which appears therein was only inserted in the few issues sent to sporting goods dealers as set forth in original affidavit. The reply card is enclosed in these copies as an application for a "subscription" because the Post Office Department has taken the position that Section 132.481 of the Postal Regulations permits such an enclosure but does not permit enclosure of an application for membership. The "subscription rates" on the card are identical to the membership dues of annual members. On the receipt of reply card sender is advised he can become a full member at no further cost on fulfilling the necessary requirements. A detailed analysis of the mailing list of magazines sent into the Middle District of Pennsylvania per month showed

5,214 copies mailed to Annual Members
499 copies mailed to Life Members
58 copies mailed to Affiliated rifle and/or pistol clubs
126 copies mailed to nonconfirmed members as described in original affidavit
282 copies mailed to 37 sporting goods dealers
31 copies go to persons or organizations therein listed, including libraries, military units, State Game Commission, etc.

An analysis of the advertisements disclosed that in the October 1958 issue of the magazine eight classified advertisements (one of which was sent in by plaintiff) and six larger advertisements (one of which was sent in by plaintiff) are from persons in the Middle District of Pennsylvania. The gross revenue from these fourteen advertisements was $865.55 of which $246.30 came from plaintiff.

At the argument on the motion plaintiff stated that for the purposes of the motion it relied upon the facts set forth by defendant in the said affidavits.

[*Transacting Business—Test*]

The sole issue here is whether plaintiff has established that defendant is transacting business in this district. After proper chal-

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lenge, as here, the burden of proving proper venue pursuant to Section 12 is upon the plaintiff. *Austad v. United States Steel Corp.*, N. D. Cal., 1956, 141 F. Supp. 437. The test for determining whether a corporation is transacting business within a particular district is stated by the Supreme Court in *Eastman Kodak Company of New York v. Southern Photo Materials Company*, 1927, 273 U. S. 359, 373,

> "* * * a corporation is engaged in transacting business in a district, * * * if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character. * * *"

This test was reaffirmed in *United States v. Scophony Corporation of America, et al.*, 1948 [1948-1949 Trade Cases ¶ 62,238], 333 U. S. 795, 807. The Court added,

> "* * * The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue."

[*Publication of Magazine*]

Attached to affidavit filed by defendant is a booklet entitled "Your NRA," which, in considerable detail, outlines the aims and purposes of the organization and what it has to offer its members. Its magazine, The American Rifleman, is merely an incident to membership. Certainly the publication of the magazine is not the chief business of the organization. Probably the strongest argument against the claim that the magazine is commercial in nature is the Congressional recognition accorded the organization. By the Act of Congress of August 10, 1956, c. 1041, 70A Stat. 236 and 237, 10 U. S. C. §§ 4308 and 4312, respectively, Congress specifically authorized the sale of Government rifles and associated supplies to defendant's members at cost, and also recognized the basic patriotic nature of the organization by providing that competitions for which tropies and medals are provided by the National Rifle Association of America (this defendant) shall be held in connection with an annual competition called the "National Matches" and consisting of rifle and pistol matches for a national trophy, medals, and other prizes, which competition or matches shall be held as prescribed by the Secretary of the Army.

[*Carrying of Advertisements*]

The fact that the magazine carries advertisements does not, in my mind, alter the picture; so do the official organs of such service organizations as Rotary, Kiwanis, Lions and indeed The American Bar Association. It could not be seriously contended that the chief purpose of any of those or similar organizations was the publication of its official magazine.

[*Venue Improper*]

In the light of the foregoing, the motion of defendant National Rifle Association of America to dismiss it from this action on the ground that venue is improper over it in this district will be granted.

As to Lyman Gun Sight Corporation

Attached to Lyman's motion to dismiss, dated June 16, 1958 and filed June 17, 1958, is the affidavit of Henry B. Leader, its attorney. Under date of April 2, 1959, Lyman filed affidavit of its President, Charles Lyman, 3rd, dated April 1, 1959. The Lyman affidavit confirmed and enlarged upon the Leader affidavit and set forth, *inter alia*, as follows, to wit:

Lyman is a corporation organized and existing under the laws of Connecticut, has not been domesticated in Pennsylvania, has no agent in Pennsylvania to receive process and has no subsidiary in Pennsylvania.[1] It does not solicit orders through salesmen in the district, has no resident agent or representatives, nor resident employees of any nature in the district. The Lyman product coming into the district is purchased by independent merchants based on orders received in Connecticut, and accepted or rejected by Lyman in Connecticut; no prices are established in Pennsylvania; no sales made in Pennsylvania, and no payments are received in Pennsylvania. Lyman neither maintains nor owns any office, factory, warehouse or other real estate or installation in this district, and pays no rents in this district. Lyman has no tangible personal property, no telephone listing and pays no business taxes in this district. Lyman has no corporate records or books of account, no bank accounts or stock transfer agent, and does no financing through institutions in the district. None

[1] While there is nothing in the pleadings to so indicate, it may be assumed that Lyman's principal place of business is in Connecticut.

of Lyman's shareholders or directors live in this district and no meetings of either group are held in this district. Lyman's magazine advertising is directed to a national audience and it does no local magazine, newspaper, radio or television advertising in the district.

Plaintiff propounded certain interrogatories to Lyman concerning Lyman's business activities in the Middle District of Pennsylvania. It was later stipulated by plaintiff and Lyman that the scope of the said interrogatories should be limited to the period between January 1, 1957 and May 20, 1958. The answers of Charles Lyman, aforesaid, to the interrogatories thus limited disclosed the following:

Lyman's total dollar volume of sales for the year 1957 was $640,581.00, and for the year 1958 to May 20, was $169,318.00. Lyman's sales in the Middle District of Pennsylvania for the year 1957 amounted to 1.90 per cent of its total sales and to 1.37 per cent of its total sales for 1958 to May 20. During the period in question Lyman did some advertising in the Middle District of Pennsylvania, generally by catalogue, mail circular, letter, and magazine. During the period in question Lyman made no sales or deliveries in the Middle District of Pennsylvania through an agent, employee or distributor for the company. It did make sales at its home office in Connecticut to merchants who were independent contractors. Lyman listed seven merchants with places of business in the Middle District of Pennsylvania, six of whom bought Lyman's product in 1957 to the extent of $12,018.00, and six of whom in 1958 bought to the extent of $2,335.00. During the period January 1, 1957 to May 20, 1958, no employees, agents or independent representatives of Lyman came into the Middle District of Pennsylvania to effect the aforesaid sales. However, in April of 1957, Henry H. Lyman, Jr., Secretary of the company, and in March of 1958 Frank Jury, an employee, J. A. Widner, Jr., an employee, and Henry H. Lyman, Jr., Secretary as aforesaid, made good will tours which extended into this district.

In seeking to determine the question of venue with relation to Lyman, we have again to apply the test of "business of a substantial character" as above indicated originally propounded in *Eastman, supra,* and reaffirmed in *Scophony, supra.* The court in *Scophony, supra,* after noting that refinements such as previously were made under the "mere solicitation" and "solicitation plus" criteria were no longer determinative, and pointing out that in *Eastman, supra,* under the broader room given by Section 12 venue was held to have been established where under the earlier tests of Section 7 of the Sherman Act the company was not "present" either for the purpose of venue or as being amenable to service of process, then went on to say:

> "Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found'—'present'—'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."

The unmistakable trend both by legislation and by court decisions has been to expand the concept of what constitutes doing business in a state by a foreign corporation. While the volume of business done in the state has frequently been the controlling factor in arriving at this determination,[2] certainly it is not the sole test. In 1931 in *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation,* 1 Cir., 46 F. 2d 623, the court stated, "The sale of goods is not essential to constitute transacting business." See also *Abrams et al. v. Bendix Home Appliances, Inc.,* D. C. S. D. N. Y. [1950-1951 TRADE CASES ¶ 62,792], 96 F. Supp. 3. "It is the totality of acts and conduct rather than isolated and fragmented items thereof which must govern." *Abrams v. Bendix Home Appliances, supra.*

The problem here is well stated in *Echeverry v. Kellogg Switchboard & Supply Co.,* 2 Cir., 175 F. 2d 900, 902-903, as follows:

> "The published decisions on what constitutes 'doing business' in a State by a foreign corporation are literally legion. Yet, in spite of this vast array of judicial

[2] See *Sunbury Wire Rope Manufacturing Company v. United States Steel Corporation, et al.,* D. C. E. D. Pa., (1955) [1955 TRADE CASES ¶ 68,015], 129 F. Supp. 425.

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authority, border-line cases still have to be decided each on its own peculiar set of facts, which too often cannot be fitted into a stereotyped pattern. In this field, realism, not formalism, should be dominant; the problem must be solved in the light of commercial actuality, not in the aura of juristic semantics. In *United States v. Scophony Corporation*, 333 U. S. 795, 810, 68 S. Ct. 855, 863, 92 L. Ed. 1091, Mr. Justice Rutledge spoke of 'the practical, nontechnical, business standard.'"

In 1957 defendant had gross sales of $640,581.00 of which 1.90% or $12,018.00 represented sales in the Middle District of Pennsylvania. For the period January 1 to May 20, 1958, defendant's total sales amounted to $169,318.00 of which 1.37% or $2,335.00 represented sales in the Middle District of Pennsylvania. During the period in question defendant engaged in a vigorous advertising and sales promotion campaign. It circularized the trade generally by mailing its catalogues, mail circulars and letters into this district and also advertised in various magazines which have circulation in this district. In addition, during April 1957 defendant caused its secretary to make "good will calls" in this district, and again in March 1958 it caused its secretary and two other employees to make similar "good will tours" in this district.

[*Money-making Organization*]

This defendant is not a philanthropic organization. It is in business to make money. In order to promote sales in this district it caused its catalogues and various advertising material to be circularized through the district, it made extensive use of magazine advertising media. Certainly, the good will calls or tours could have but one purpose, namely, to increase sales.

[*Activities Constitute Transaction of Business*]

It is my opinion that from the average business man's point of view the activities of this defendant constitute the transaction of business in the Middle District of Pennsylvania.

[*Dismissal Refused*]

The motion of Lyman Gun Sight Corporation to dismiss it from this action will be refused.

As to Popular Science Publishing Co., Inc.

[*Motion to Quash Summons*]

As above indicated, Popular Science has moved to quash the summons and dismiss the complaint for reasons stated, in the alternative for more specific statement and to strike certain alleged scandalous and impertinent statements. Defendant has withdrawn its objections to certain paragraphs of the complaint.

Considering the reasons given in support of the motion, *seriatim,*

[*Service of Summons*]

(a) Improper service. The Marshal's return reads as follows:

"I hereby certify and return that on the 22nd day of May 1958, I received the summons and served it together with the complaint herein as follows: On the 23rd day of May, 1958, executed the within Summons by serving James Scott, Manager of the Popular Science Publishing Co., Inc., by making known to him the contents thereof and leaving with him a true attested copy of summons together with copy of complaint. Service was made at their office, 1136 Moosic St., Scranton, Pa."

Plaintiff filed of record affidavit of William E. Lavin, the Deputy Marshal who made the service and return. This affidavit sets forth the following:

"* * * WILLIAM E. LAVIN, who being duly sworn according to law, deposes and says that he is a Deputy United States Marshal for the Middle District of Pennsylvania, and that in the course of his duties on May 23, 1958, he attempted to serve a Complaint in the case of *S. A. Wentling v. Popular Science Publishing Co., Inc.*, Civil Action No. 6300 a defendant in said action, at the registered office of said corporation as listed in the Complaint, namely, 400 Wyoming Avenue, Scranton, Lackawanna County, Pennsylvania; that upon arriving at said address it was apparent that there were no offices there at the time as the building was being remodeled and the window sign formerly indicating Popular Science Publishing Co. had been removed and the said defendant had no office at that address; that he then looked in the City Directory for the City of Scranton, Pennsylvania, and determined that there was set forth therein an address for said company at 1136 Moosic St., Scranton, Lackawanna County, Pennsylvania; and that he then served the said Complaint on May 23, 1958, upon

one James Scott, at the office of said defendant at 1136 Moosic St., Scranton, Pennsylvania; and that the said James Scott was or held himself out to be the manager or person in charge of said place of business."

Attached to defendant's motion to quash summons and dismiss complaint was affidavit of Ralph H. Flynn, President of defendant. This affidavit set forth that James Scott is an employee of defendant whose sole duty consisted of supervising the operation of defendant's warehouse at 1136 Moosic Street, Scranton, Pennsylvania; that he is not an officer, director or managing agent of defendant; that his duties consist of being responsible for the inventory in the warehouse; that he has no discretionary power and receives orders from defendant's New York office; that he has no authority to enter into any contracts on defendant's behalf or to make business commitments of any kind on defendant's behalf.

[*"Registered" Foreign Corporation*]

Popular Science is a foreign corporation and it appears to be agreed was duly registered in accordance with the Business Corporation Law of the Commonwealth of Pennsylvania, Act of May 5, 1933, P. L. 364, art. X, § 1011, 15 P. S. § 2852-1011, in the Office of the Secretary of the Commonwealth of Pennsylvania, appointing the said Secretary as its statutory agent for the service of process and giving its registered office as 400 Wyoming Avenue, Scranton, Pennsylvania.

[*Failure to Report Change of Address*]

While it is difficult to understand why the plaintiff did not take the obviously simple, best and most proper method of making service on the Secretary of the Commonwealth, it is not the exclusive method. Furthermore, the defendant having changed its registered office address and having failed to note the change in the Office of the Secretary of the Commonwealth, is in direct violation of the Act and should not be permitted to profit by its own dereliction.

Goodrich-Amram, *Standard Pennsylvania Practice,* § 2180(a)-9, states, *inter alia*:

"* * * The statutes permitting the registration of foreign corporations and similar entities to do business in the Commonwealth likewise require the designation of such an office. Therefore, in all cases except those where the corporation or similar entity is violating the statute or is exempt from registration, there will be on file, with a state official, an officially designated office of the corporation or similar entity. Most of the statutes permit this 'office' to be changed on application to an appropriate State officer, but the change may be effected only upon the simultaneous designation of a new office within the Commonwealth. For these reasons, it would not lie in the mouth of the corporation or similar entity to deny the validity of the existence of the office at the place specified in the registration papers. Service at such an 'office' could not be attacked by the corporation or similar entity as being a service made at a place which was not in fact the 'office.'"

Significantly, the affidavit of Ralph H. Flynn attached to defendant's motion states that Scott, the person upon whom service was made, supervises the operation of defendant's warehouse in Scranton, Pennsylvania, that other employees of defendant who work at the same location are the assistants of Scott. It therefore would obviously follow that defendant had a place of business in the Commonwealth and that Scott was in charge of it. It further appears that Scott was, or held himself out to be, the manager or person in charge of the said place of business.

[*Service Proper*]

I think the service was proper.

[*Capacity to Sue—Filing of Fictitious Name"*]

(b) As to plaintiff's failure to register its fictitious name prior to the institution of this action.

The complaint was filed May 20, 1958, the fictitious name was filed in the Office of the Prothonotary of Lebanon County, Pennsylvania, on May 22, 1958, and in the Office of the Secretary of the Commonwealth on May 21, 1958.

The Act in question, Act of May 24, 1945, P. L. 967, § 4, 54 P. S. § 28.4, provides, *inter alia,* that:

"* * *, Before any such person or persons may institute any action in any of the courts of this Commonwealth or before any justice of the peace or magistrate thereof, on any cause of action arising prior to the filing of the application provided for in this section, such person

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or persons shall pay to the Secretary of the Commonwealth for the use of the Commonwealth a license fee or fine of twenty-five dollars ($25.00). * * *."

In neither instance was the fine provided by the statute paid.

[*Not Diversity Case*]

This is not a diversity case. It is founded exclusively on a Federal statute. Accordingly, in this case this Court is not sitting as a State court.

Dealing with a similar situation, the court in *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.*, 1942, 7 Cir., 193 F. 2d 348, 352, held as follows:

"* * * But it is different where the action, as in the instant case, is predicated upon a Federal right. As stated in *Angel v. Bullington*, 330 U. S. at page 192, 67 S. Ct. at page 662, 91 L. Ed. 832: 'Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State.'"

[*No Lack of Capacity to Sue*]

Popular Science's motion to dismiss complaint on ground of lack of capacity to sue because of failure to file a fictitious name registered prior to the institution of this action is without merit and will be denied.

[*Allegations Sufficient*]

Defendant's (Popular Science) reasons (3), (4), and (5) above set forth, together with its alternative motion, can be summarily disposed of. The gist of this action is a single conspiracy. Defendant is fully advised. Whether plaintiff will succeed in establishing a conspiracy as charged is a horse of another color.

[*Dismissal Denied*]

Defendant's (Popular Science) several motions will be denied.

[¶ 69,519] Syracuse Broadcasting Corporation v. Samuel I. Newhouse, The Herald Company, The Post-Standard Company, and Central New York Broadcasting Corporation.

In the United States Court of Appeals for the Second Circuit. No. 51—October Term, 1958. Docket No. 25074. Argued December 4-5, 1958. Decided November 5, 1959.

Appeal from an order and judgment of the United States District Court for the Northern District of New York. BRENNAN, Chief Judge.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Power of Court to Dismiss Where It "Appears" Plaintiff Will Be Unable to Prove Allegations.—A trial court, in dismissing a treble damage action after the plaintiff had failed to satisfactorily comply with a pretrial order to furnish certain factual information, erroneously relied on Rule 16 of the Federal Rules of Civil Procedure. That Rule, which authorizes the court to direct the parties to appear for a pretrial consideration of certain matters, was apparently invoked by the trial court on the theory that dismissal at the pretrial stage is proper "where it clearly appears that plaintiff will be unable to prove the allegations of its complaint." Rule 16 confers no special power of dismissal not otherwise contained in the rules. Rule 41(b), which the trial court also relied upon in dismissing the complaint, authorizes dismissal for noncompliance with a pretrial order, but here the trial court did not regard the plaintiff's response to the order for further information as sufficiently contumacious, in and of itself, to justify dismissal. Thus, there appeared to be no reason to believe the dismissal motion would have been granted except for the trial court's erroneous reliance on Rule 16. Rule 56, which provides for summary judgment, played no part in the trial court's decision to dismiss. However, when matters outside the pleadings are considered in disposing of a motion to dismiss for failure to state a cognizable claim, or for judgment on the pleadings, Rules 12(b) and 12(c) make it *mandatory* that the motion be disposed of as a motion for summary judgment.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440, 9013.675.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedure—Pretrial Order to Furnish Facts Supporting Charges—Non-compliance as Basis for "Precluding" Evidence.—A trial court, having entered a pretrial order directing a radio station to produce facts to support its charges that two newspapers (1) circulated false statements among the station's advertisers, (2) refused to publish news items favorable to the station, (3) gave "discriminatory advantages" to another radio station, and (4) discriminated in advertising prices in favor of that other radio station, correctly entered another pretrial order "excluding" certain items of evidence which allegedly supported those charges. Other such items, however, were improperly excluded by the trial court. Where the station should have, but did not, comply with the court's order to produce facts, the "preclusion" order was proper. However, where the station's compliance was sufficient under the circumstances, the "preclusion" order was improper. The case was a "big" one (approximately 6300 pages of record had been produced and the case had not yet gotten to trial), and the trial court was correct in taking "vigorous measures" to see that the issues were clearly defined so that the case might be kept within manageable proportions. However, a "preclusion" order is a drastic remedy, and should be exercised only to the extent necessary to achieve a just disposition of the case in a speedy and efficient manner.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments—Interstate Commerce—Whether Plaintiff Engages in Interstate Commerce—Volume of Interstate Commerce Involved—Relevance.—In order to establish jurisdiction under Section 4 of the Clayton Act (providing for the recovery of treble damages for violations of the antitrust laws), it is only necessary to allege acts in restraint of interstate commerce and injury to the plaintiff resulting therefrom. Once this is done, the volume of interstate commerce which might be affected is irrelevant, as is the question of whether or not the plaintiff himself engages in interstate commerce.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275, 9009.600.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Motion to Compel Admission of Facts—Motion Applicable Only to Undisputed and Peripheral Issues of Fact.—A trial court properly denied a plaintiff's motion to compel the defendants, under Rule 36 of the Federal Rules of Civil Procedure, to admit as true the alleged statements of fact contained in a document which enumerated a series of more than thirty acts, each of which the plaintiff claimed was a violation of the antitrust laws. Rule 36, which was designed to eliminate the necessity of proving essentially undisputed and peripheral issues of fact, had no bearing on the instant situation.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.

For the appellant: Joseph W. Burns, New York, N. Y., and Smith and Sovik, Syracuse, N. Y. (Arthur C. Kyle, Monticello, N. Y., of counsel).

For the appellees: Bond, Schoeneck & King, Syracuse, N. Y. (Charles Goldman of Goldman, Evans & Goldman, New York, N. Y., and Tracy H. Ferguson of Bond, Schoeneck & King, of counsel).

For a prior opinion of the U. S. Court of Appeals, Second Circuit, see 1956 Trade Cases ¶ 68,468; for prior opinions of the U. S. District Court, Northern District of New York, see 1955 Trade Cases ¶ 68,127 and 1953 Trade Cases ¶ 67,539.

Before: SWAN, MEDINA and WATERMAN, Circuit Judges.

After our former remand [1956 TRADE CASES ¶ 68,468], 236 F. 2d 522, and subsequent proceedings below, plaintiff now appeals from an order and judgment dismissing its complaint for treble damages under 15 U. S. C. §§ 1, 13, 13a and 15, United States District Court for the Northern District of New York, Brennan, Chief Judge. Opinion below not reported. Plaintiff also appeals from earlier orders precluding evidence and setting side appellant's demand that defendants admit facts. The judgment dismissing the complaint is reversed, the preclusion order is ordered modified, the order setting aside appellant's motion to admit facts is affirmed, the cause is remanded.

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[*Newspaper Advertising—Conspiracy and Price Discrimination*]

WATERMAN, Circuit Judge [*In full text*]: In November of 1952 plaintiff, the Syracuse Broadcasting Corporation, filed suit in the Northern District of New York against Samuel I. Newhouse, the Herald Company, the Post-Standard Company, and the Central New York Broadcasting Corporation, alleging violations of the Sherman and Clayton Acts. Plaintiff (WNDR) and the Central New York Broadcasting Corporation (WSYR and WSYR-TV) are broadcasting corporations located in Syracuse, New York. The other two corporate defendants are the sole daily and Sunday newspapers in that city. The Post-Standard Company is wholly owned by the Herald Company. Herald Company and Central New York Broadcasting Corporation in turn are in the control of the individual defendant Samuel I. Newhouse. The district court granted summary judgment for the defendants on one of plaintiff's claims and dismissed the others for failure to state claims upon which relief could be granted. On appeal, *Syracuse Broadcasting Corporation v. Newhouse* [1956 TRADE CASES ¶ 68,468], 236 F. 2d 522 (2 Cir. 1956), we agreed with the district court that plaintiff was not entitled to go to trial on its monopoly charge under Section 2 of the Sherman Act, 15 U. S. C. 2, its complaint of mergers and interlocking directorates in violation of the Clayton Act, 15 U. S. C. §§ 18 and 19, and its allegation that defendant newspapers refused to accept advertising unless WSYR was also patronized. However, we reversed the judgment below in part and remanded the cause to the district court for further proceedings below. We held that the "interests of justice" required a trial of the remaining issues—i.e., the charge of discrimination in violation of Section 2 of the Clayton Act, 15 U. S. C. § 13; and the charge under Section 1 of the Sherman Act, 15 U. S. C. § 1, that a conspiracy existed to restrain trade to plaintiff's damage by the use of a unit rate for advertising in the two newspapers, by the circulation of false rumors about plaintiff, by the refusal to publish in the newspapers items favorable to the plaintiff, and by the giving of discriminatory advantages to WSYR.

[*Pretrial Order to Furnish Facts—Dismissal*]

After the remand pre-trial hearings were held; and, on February 12, 1957, on motion of the defendants, the district court, so as to particularize the issues involved, directed plaintiff to furnish defendants with the factual information upon which it based its claims. Extensions of time were granted and early in April plaintiff submitted a lengthy compliance document together with a demand that defendants admit all the facts contained therein. Conferences and argument were had with respect to plaintiff's compliance with the court's direction, and, after the submission of a further compliance document by plaintiff on June 20, the district court entered orders, dated July 27, 1957. These orders struck out plaintiff's demand that the defendants admit facts and also precluded plaintiff from presenting evidence with respect to those areas of alleged wrongdoing where the court believed that plaintiff had not properly complied with the pretrial order to furnish factual information. Plaintiff did nothing until October when it moved that the preclusion order against it be modified in certain particulars and that the order striking its demand that defendants admit facts be vacated. After lengthy argument these motions of plaintiff were denied without prejudice to subsequent compliance. On November 14 the defendants moved to dismiss the complaint in its entirety on the grounds that plaintiff had failed to comply with an order of the court and that there was complete legal insufficiency in plaintiff's proof. At the same time plaintiff moved once more to have the preclusion order of July 27 modified, and also moved to have vacated the order striking its demand that the defendants admit facts. In a memorandum decision, dated January 10, 1958, the district court denied all plaintiff's requests; and, in granting defendants' motion, dismissed the complaint.

On this appeal plaintiff contests the order dismissing its complaint, the order precluding the admission of evidence, and the order setting aside its demand that the defendants admit facts. We shall deal with these contentions in that order.

I

DISMISSAL OF ACTION

[*Power to Dismiss at Pretrial Stage*]

In dismissing the action the district court relied upon Rules 16 and 41(b). Rule 16 appears to have been invoked on the theory that dismissal at the pretrial stage is proper where it clearly appears that plaintiff will

be unable to prove the allegations of its complaint. We hold, however, that Rule 16 confers no special power of dismissal not otherwise contained in the rules. Rule 12(b) and Rule 12(c) provide that summary judgment, under Rule 56, is mandatory when matters outside the pleadings are considered in disposing of a motion to dismiss for failure to state a cognizable claim, or for judgment on the pleadings. Disposition under Rule 56 would appear to be no less mandatory when analogous motions are considered at the pre-trial stage. Rule 56 played no part in the court's decision to dismiss. This is clear inferentially from the fact that the court did not rule upon defendants' motion for summary judgment which accompanied the motion to dismiss. Moreover, the court expressly stated that a reason for dismissal was plaintiff's failure to bring the action to the stage where the factual issues became clear.

[*Non-compliance with Pretrial Order*]

While we do not question that Rule 41(b) authorizes a court in a proper case to dismiss a complaint for non-compliance with a pre-trial order,[1] we observe that here the district court did not regard plaintiff's response to the order for further information as sufficiently contumacious in and of itself to justify dismissal. Absent the court's erroneous reliance on Rule 16, there appears to be no reason to believe that the dismissal motion would have been granted. Dismissal with prejudice is a drastic sanction to be applied only in extreme situations, *Gill v. Stolow,* 240 F. 2d 669 (2 Cir. 1957); *Producers Releasing Corp. de Cuba v. PRC Pictures,* 176 F. 2d 93 (2 Cir. 1949), and here the preclusion order seems an ample penalty for any lack of cooperation on plaintiff's part.

[*Dismissal Improper*]

We hold that dismissal was improper.

II

PRECLUSION ORDER

[*Size of Case*]

Interested persons have long been aware that the "big" case, such as is often encountered in antitrust and patent litigation, requires special administrative treatment. See The Report on Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States, 13 F. R. D. 62; Seminars on Protracted Cases for United States Circuit and District Judges, 21 F. R. D. 395, 23 F. R. D. 319. Especially is this true with respect to the situation that confronted the district court here—the formulization of the issues to be tried.

> "It is not practical to proceed in these cases as in a lawsuit of ordinary complexity and bulk; that is, to let the parties exhaust the cross fire of pleading, to conduct open court pre-trial hearings, or to let counsel try the case as they please. The potential range of issues, evidence and argument is so great, and the necessities of adversary representation so compelling, that the activities of counsel will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed * * *
>
> "Whatever may be the objections and difficulties to the specification of issues in ordinary actions, the necessity for such specification in the case with which this report is concerned is so great as to require that it be done no matter what the objection or difficulty. Unless it is done, the hearing cannot be confined to its proper limits, counsel are at a loss as to their positions, and the judge is unable to relate the evidence to issues which are in dispute or to limit it to that which is relevant." Report of Judicial Conference, *supra,* pp. 66-67.

That this is a "big" case is apparent, both from the comments in our prior opinion

[1] It has been suggested that language in *Societe International, etc. v. Rogers,* 357 U. S. 197, 207 (1958) restricts Rule 41(b) to orders made during trial. In the context wherein this language occurred the Court merely indicated that Rule 41(b) was inapplicable to the disobedience of discovery orders because Rule 37(b)(2) was there expressly applicable and Rule 41(b) conferred no greater power than the power contained in Rule 37(b)(2). To hold that Rule 41(b) only applies to orders made at trial would not only overrule a long standing interpretation to the contrary, *First Iowa Hydro Electric Corp. v. Iowa-Illinois Gas & E. Co.,* [1957 TRADE CASES ¶ 68,726], 245 F. 2d 613, 628 (8 Cir. 1957), cert. denied, 355 U. S. 871; *Blake v. DeVilbiss,* 118 F. 2d 346 (6 Cir. 1941); *Wisdom v. Texas Co.,* 27 F. Supp. 992 (N. D. Ala., 1939), but would ignore the fact that in the same sentence permitting dismissal for disobedience of an order, Rule 41(b) permits similar disposition when plaintiff fails to prosecute his action. This latter provision could hardly be construed as applying only after the commencement of trial.

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[1956 Trade Cases ¶ 68,468], 236 F. 2d 522, 526, and the approximately 6300 pages of record which have been produced before this case has even gone to trial. Consequently, the district court was correct in taking vigorous measures to see that the issues were clearly defined so that the whole case might be kept within manageable proportions.

[*Discretion of Court*]

At the same time, however, it must be remembered that a preclusion order is a drastic remedy, *Mathany v. Porter,* 158 F. 2d 478 (10 Cir. 1946), and while the district court clearly has the power to issue such an order, *Walker v. West Coast Fast Freight, Inc.,* 233 F. 2d 939 (9 Cir. 1956), 3 Moore's *Federal Practice* 1130 (2d edition 1948), that power should be exercised only to the extent necessary to achieve the desired purpose—that is, an entirely just disposition of the case in a speedy and efficient manner. Of course, in view of its intimate knowledge of the facts, discretion must be accorded the district court in its resolution of these administrative problems. This of necessity must be so, but when we are convinced that the court below has exceeded a proper discretion in that the order imposed was too strict or was unnecessary under the circumstances, we would be remiss in our duties if we did not set that order aside.

[*Specific Objections*]

With these considerations in mind we examine each of plaintiff's objections to the preclusion order of July 27, 1957.

By the court order of February 12, 1957 plaintiff was required to produce further factual information. The information to be furnished was set forth in numbered itemized paragraphs of that order. This numbering system was preserved in the preclusion order of July 27, 1957. On appeal plaintiff objects to the court's treatment of plaintiff's offered compliance with the demands set forth in paragraphs I(e), I(g), III(a), IV(b), V(b), V(d), V(e) and VI(a). Items I(e) and I(g) deal with the extent of interstate commerce involved in the case. Item III(a) relates to rumors and false statements allegedly circulated by defendants. Item IV(b) concerns defendants' alleged refusal to publish news items favorable to plaintiff. Items V(b), V(d) and V(e) require specification of plaintiff's charge that defendant newspapers gave discriminatory advantages to defendant radio station WSYR. Item VI(a) involves allegations of price discrimination.

1. *Volume of interstate commerce.* Plaintiff objects to Items I(e) and I(g) of the order requiring it to produce further information. Item I(e) seems to call for a statement of the total volume of interstate commerce that involved those products concerning which plaintiff alleged a restraint within the geographic area the court had previously established as applicable. Item I(g) calls for a statement of the extent of plaintiff's participation in this commerce. We have grave doubts as to the relevance of each of these items. We understand that to establish jurisdiction under 15 U. S. C. A. § 15 it is only necessary to allege acts in restraint of interstate commerce and injury to plaintiff resulting therefrom. Having done this, the volume of interstate commerce which might be affected is irrelevant, *Times-Picayune Pub. Co. v. United States,* [1953 Trade Cases ¶ 67,494], 345 U. S. 594, 611 (1953), as is also the question of whether plaintiff himself engages in interstate commerce, *Ring v. Spina,* 148 F. 2d 647, 651 (2 Cir. 1945), *cert. denied,* 335 U. S. 813.

Possible irrelevance, however, does not destroy the validity of a preclusion order. If in fact the items are irrelevant no prejudice can result from preclusion of evidence as to them. The possibility that the objecting party may be incorrect in his claim of irrelevance suggests that the prudent course would be for it to comply with the order for further information while at the same time stating clearly its objection that the information required is irrelevant.

Item I(g) relates to matters peculiarly within plaintiff's knowledge. Plaintiff failed to comply with the order to produce this information, and the preclusion order with respect to this item is justified. Item I(e), however, relates to a larger and less definite subject. Plaintiff stated that it had no special knowledge of the total amount of interstate commerce in the fields of newspaper publishing and radio broadcasting in the established geographic area. Moreover, the court below seems to have regarded this information it sought from plaintiff as relevant, not to plaintiff's case, but to an issue which is essentially a matter of defense. We conclude that it was error at this stage of pre-trial examination to preclude

plaintiff, even though it failed to comply with this portion of the order for further information, from at any time introducing whatever evidence might become available to it on this point.

2. *Circulation of false statements among plaintiff's advertisers.* Item III(a) of the order for further information requires the plaintiff to substantiate its accusation that defendants have circulated false statements in an effort to drive plaintiff out of business. Information was ordered produced relating to the nature of such statements, the time and place each such statement was made, the name of defendants' representative who initiated it, and the person to whom each statement was communicated. Item III(a) relates to two types of alleged false statements or rumors: articles appearing in defendant newspapers casting doubt upon plaintiff's ability to remain in business, and similar oral statements originated and circulated by defendants' agents. In attempted compliance with this order plaintiff, in Exhibit M, listed eighteen instances where its negotiations with advertisers had been broken off after the advertiser had read allegedly false and malicious articles in defendant newspapers concerning plaintiff's financial condition and its ability to remain in business. Plaintiff also listed several instances of alleged oral statements claimed to have been circulated by defendants' agents. We hold that evidence as to statements set forth in newspaper articles should not be precluded, and we affirm Judge Brennan's disposition of the allegations concerning oral rumors.

3. *Refusal to publish news items favorable to plaintiff.* Plaintiff alleged that the defendant newspapers consistently refused to publish news items favorable to plaintiff. Item IV(b) of the order for further information called for plaintiff to specify the news items submitted and the date and manner of their rejection. The court held that plaintiff's compliance, found principally in Exhibit N, was insufficient, and therefore evidence on this point was ordered precluded. From a reading of Item IV(b) of the preclusion order, the court appears to have objected to Exhibit N because copies of the rejected news items were not submitted and the manner of each rejection was not stated with sufficient precision. Since Exhibit N alleges that most of the news items were submitted orally to defendant newspapers, and orally rejected, greater specificity as to those items in Exhibit N would appear to be impossible. Therefore Item IV(b) of the preclusion order must be set aside to that extent. However, the court was correct in precluding evidence of items contained in another exhibit, Exhibit R, since there is no suggestion that these items were submitted for publication. As to still other exhibits, Exhibits I and K, the basic compliance document alleges sufficient incidents of submission and rejection. Therefore evidence as to these items should not be precluded.

4. *Discriminatory advantages given WSYR.* Item V(b) of the order for further information requires plaintiff to enumerate the general methods by which defendant newspapers gave discriminatory advantages to defendant radio station WSYR. The court held that plaintiff's compliance was such as to preclude all evidence of alleged discriminatory practices save as to the issues of free advertising,[2] specifically treated in V(c); preferred page position, specifically treated in V(d); and secret rebates, specifically treated in V(e). The court acted properly in ordering that evidence of any other alleged discriminatory practices be precluded.

Item V(d) of the preclusion order deals with the issue of preferred page position. Notwithstanding Item V(b), discussed in the preceding paragraph, Item V(d) seems to preclude all evidence tending to support this allegation. Even so broadly construed, however, the preclusion order is correct. Plaintiff's exhibits do not indicate the dates on which the alleged discriminatory acts occurred, nor do they allege that plaintiff was denied page locations which it sought.

Item V(e) relates to secret rebates. We find no error in the way this point was disposed of by the district court.

[2] See discussion *infra* under "Price Discrimination."

"Free advertising" is not spelled out by court or counsel, but we would think the plaintiff's evidence on this point should not be restricted. Plaintiff's allegations relative to free advertising are two-fold—free advertising given to WSYR and free advertising given to WSYR's advertisers. We understand the preclusion order does not prevent evidence as to each. We further understand that the term "advertising" is sufficiently elastic so as to encompass such avenues of communication as entertainment columns, general news articles, and the like.

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5. *Price discrimination.* The only alleged method of price discrimination now in the case relates to the free advertising alleged to have been given WSYR by the two defendant newspapers. Item V(c) of the preclusion order clearly states that plaintiff's right to introduce evidence on this issue has been in no way curtailed. Hence plaintiff may not object to Item VI(a) which precludes evidence as to other methods of price discrimination.

MOTION TO COMPEL ADMISSION OF FACTS

[*"Violations" Need Not Be Admitted*]

In response to the order for further information plaintiff submitted a "compliance document" with appended exhibits. This document enumerates a series of more than thirty acts and plaintiff claims each one constitutes a violation of the anti-trust laws. The document is comprehensive and represents a summary of plaintiff's cause of action. Upon submission of this document plaintiff moved that under Rule 36 defendants be compelled to admit as true the statements of fact contained therein. The motion was denied. In so doing the court was clearly correct. Rule 36 was designed to eliminate the necessity of proving essentially undisputed and peripheral issues of fact. It has no bearing on the present situation. See 4 Moore, *Federal Practice* § 36.04 (1950 Ed.).

[*Reversed and Remanded*]

The decision below is reversed and the case remanded for further proceedings not inconsistent with this opinion.

[¶ 69,520] Remington Arms Company, Inc. v. L. Juston Skaggs and Mary Skaggs, his wife, doing business under the firm name and style of Pay Less Drug Store, and J. W. O'Larey.

In the Supreme Court of the State of Washington. En Banc. No. 34720. Filed November 5, 1959.

Appeal from the Superior Court, Spokane County. RAYMOND F. KELLY, Judge. Reversed.

Washington Fair Trade Act

Fair Trade—Constitutionality of Washington Fair Trade Act—Nonsigner Provision—Washington Constitution.—The nonsigner provision of the Washington Fair Trade Act was held invalid under the Washington Constitution as an improper exercise of the police power. The case of *Sears v. Western Thrift Stores of Olympia, Inc.*, 1940-1943 TRADE CASES ¶ 56,152, was expressly overruled insofar as it validated the nonsigner provision. A theory of the *Sears* case "was that the manufacturer of a trade-marked product retains a proprietary interest in that product by reason of the fact that he owns the trademark and the good will associated therewith, when he sells that product to a retailer, even though the retention of such an interest is not made a part of the contract of sale. If the manufacturer does have an interest in the portion of good will which goes with the trade-marked product, then he is entitled to sue and recover that portion of the resale price which is attributable to such good will, and we do not think it can be seriously contended that he has such a right. In selling the product to the retailer, the manufacturer exacts a price for the use of his trademark and the benefit of the good will associated with it, as well as for the physical components of the product, and unless he also exacts an agreement that the retailer will not resell the product at less than a stipulated price, we can see no equity which should entitle him to the special protection of the law." The court noted that there was no showing that the hardship to manufacturers and retailers resulting from the overruling of the *Sears* case would be great enough to warrant the perpetuation of an erroneous decision.

See Fair Trade, Vol. 1, ¶ 3085.51, 3258.51.

For the appellants: Keith, Winston & Repsold, by Robert J. McNichols, Spokane, Wash.

Amicus Curiae: Lycette, Diamond & Sylvester, by Josef Diamond, Seattle, Wash.

For the respondent: Riddell, Riddell & Williams, Seattle, Wash., and Hamblen, Gilbert & Brooke, Spokane, Wash.

[*Fair Trade Act—Constitutionality*]

ROSSELLINI, Judge [*In full text*]: This action was brought to enjoin the defendants from selling certain products below the price set by the plaintiff, pursuant to the Washington fair trade act. There is no dispute in regard to the facts. The defendants willfully and knowingly advertised, offered for sale, and sold at retail, firearms and ammunition which were manufactured by and bore the trademark, brand, or name of the plaintiff as the producer of the products. The prices at which the defendants advertised, offered for sale, and sold these products were less than the retail prices established by the plaintiff in its contract with other retailers, of which the defendants had knowledge. At the time of trial, the plaintiff had in effect approximately five hundred seventy fair trade agreeements with retailers in the state of Washington. All of the contracts are identical and give the plaintiff the sole right to determine and modify the resale price of all products covered by the contracts.

None of the defendants at any time entered into fair trade contracts of any nature with the plaintiff or with any other person. The parties to the action have stipulated that the damage suffered by either party in the event of success in this action, shall be the sum of one dollar. The plaintiff contends that the defendants are bound to sell at the price fixed for its products by virtue of the "nonsigner" provision of the fair trade act, Laws of 1937, chapter 176, § 3, p. 685 (RCW 19.89.030), which provides:

> "Wilfully and knowingly advertising, offering for sale or reselling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, *whether the person* so advertising, offering for sale or selling *is or is not a party to such contract,* is unfair competition and is actionable at the suit of any person damaged thereby." (Italics ours.)

The trial court enjoined the actions of the defendants and granted the plaintiff one dollar in damages. The defendants appeal. We are asked to re-examine *Sears v. Western Thrift Stores of Olympia, Inc.* [1940-1943 TRADE CASES ¶ 56,152], 10 Wn. (2d) 372, 116 P. (2d) 756 (1941), upholding the constitutionality of this provision.

To obtain the proper perspective for this appeal, we must first look to the act itself. In general, it provides that a producer or owner of a commodity which bears the trademark, brand, or name of the producer or owner of such commodity, and which is in free and open competition with commodities of the general class produced by others, may fix and enter into price maintenance contracts. The "nonsigner" provision, *supra,* which provides that willfully and knowingly advertising, or reselling such commodity at less than the price stipulated in a contract of this sort constitutes unfair competition whether such seller is or is not a party to the contract. The act also provides that it shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

In *Sears v. Western Thrift Stores of Olympia, Inc., supra,* this court held in accord with the weight of authority, that the act, providing as it did for "vertical" price fixing rather than "horizontal" price fixing, did not contravene Art. XII, § 22, of our state constitution, prohibiting monopolies.

The court further held, without discussing the relation of the act to the public welfare, that the nonsigner provision was valid as an exercise of the police power.

[*Nonsigner Provision—Police Power*]

Several constitutional objections are raised on this appeal; however, we rest our decision on a re-examination of the latter holding of the *Sears* case, pertaining to the validity of the provision as an exercise of the police power.

This case is not concerned with the unfair practices act (RCW chapter 19.90) which deals with the unjust discrimination involved in loss leader sales and sales below cost, and prescribes a method of computing cost. See *State v. Sears* [1940-1943 TRADE CASES ¶ 56,043], 4 Wn. (2d) 200, 103 P. (2d) 337 (1940). Neither is it concerned with the right of a manufacturer to fix the retail price of its product by contract with the retailer, as was *Fisher Flouring Mills Co. v. Swanson,* 76 Wash. 649, 137 Pac. 144 (1913).

The United States Supreme Court, in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* [1932-1939 TRADE CASES ¶ 55,141],

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299 U. S. 183, 81 L. Ed. 109, 57 S. Ct. 139 (1936), sustained the constitutionality of the fair trade act of Illinois, including the nonsigner clause; however, the court recognized that such price fixing was still illegal in interstate commerce, being contrary to the provisions of the Sherman Anti-Trust Act, 26 Stat. 209.

To validate vertical price-fixing agreements, Congress passed the Miller-Tydings Act, of 1937, 50 Stat. 693, amending the Sherman Anti-Trust Act; however, in *Schwegmann Bros. v. Calvert Distillers Corp.* [1950-1951 Trade Cases ¶ 62,823], 341 U. S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 (1951), the nonsigner provision was held invalid under the act. The court used the following language:

". . . If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if the state law permits. Their contract, combination, or conspiracy—heretofore illegal—is made lawful. They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. This is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion. . . .

"Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing."

The McGuire Act, of 1952, 66 Stat. 632, approved the subjection of nonsigners to price-fixing agreements in interstate commerce, where such restrictions are imposed by state law. This act was upheld in *Schwegmann Bros. Giant Super Market v. Eli Lilly & Co.* [1953 Trade Cases ¶ 67,516], 205 F. (2d) 788 (C. A. 5th, 1953), certiorari denied 346 U. S. 905, 98 L. Ed. 369, 74 S. Ct. 71.

The United States Supreme Court has not decided whether the fact that some states have laws of this type while others do not, tends to create an undue burden on interstate commerce, although it might well be argued that this is the case.

This court held, three judges dissenting, in *Sears v. Western Thrift Stores of Olympia, Inc., supra,* that the nonsigner clause of the fair trade act was a valid exercise of police power. But, as stated before in this opinion, the court did not point out how the health, safety, morals, or welfare of the public was affected by the legislation.

[*Health, Safety, Morals, Welfare*]

In 16 C. J. S., Constitutional Law, 939-945, § 195, it is stated:

". . . The limit of a state's exercise of the [police] power is reached when the regulation transcends public necessity. . . .

"In order that a statute may be sustained as an exercise of the police power, . . . the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised. . . . The legislature may not exercise the police power for private purposes, or for the exclusive benefit of particular individuals or classes. . . . A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted with a legislative declaration of a purpose which would be a proper object for the exercise of that power. . . ."

Thus, it is seen that to justify any law upon the theory that it constitutes a reasonable and proper exercise of police power, it must be reasonably necessary in the interest of the health, safety, morals, or welfare of the people. This exercise of police power must pass the judicial test of reasonableness.

After *Schwegmann Bros. v. Calvert Distillers Corp., supra,* legal scholars re-examined the reasonableness and validity of the fair trade acts in the light of the actual operation of these acts. See 49 Yale L. Jour. 607, 21 Chicago L. Rev. 175, 46 Ill. L. Rev. 349, 60 Yale L. Jour. 929.

In respect to this phase of the problem, the supreme court of Oregon in *General Elec. Co. v. Wahle* [1956 Trade Cases ¶ 68,333], 207 Ore. 302, 296 P. (2d) 635 (1956) stated:

"In 49 Yale LJ 607 and in 21 Chicago L. Rev. 175, are to be found exhaustive and well-written articles concerning the

Fair Trade statutes by two eminent scholars, viz., Harry Shulman, Sterling Prof. of law, Yale Law School, and Carl H. Fulda, Prof. of Law, Rutgers University, respectively. From the facts and statistics given, the accuracy of which seem beyond question, it is plainly apparent that the consumer is not benefited, but on the contrary is harmed by the operation of the Fair Trade Act. The consumer is the public. He is compelled to pay a higher price for a given commodity in order that the retailer may be guaranteed a higher fixed, and often unreasonable, profit. If Professors Shulman and Fulda are correct in their observations, and we have no reason to believe otherwise, it is obvious that the whole scheme of the Fair Trade Acts is one for private, rather than public, gain, a scheme fathered by highly organized groups of distributors and retailers, interested not in the public weal, but only in their own selfish ends. Manifestly, such a scheme bears no relation whatever to the public morals, health, safety, or general welfare."

Since May, 1951, sixteen state supreme courts have declared acts of this kind unconstitutional. Generally, the acts were found unconstitutional on the grounds that legislative power had been unlawfully delegated and that they constituted improper use of the police power in that they bore no reasonable relation to the health, safety, morals, or general welfare of the public.

The supreme court of New Mexico said in the case of *Skaggs Drug Center v. General Elec. Co.* [1957 TRADE CASES ¶ 68,823], 63 N. M. 215, 315 P. (2d) 967 (1957):

". . . In substance, therefore, what is the real purpose of the Fair Trade Act? No matter what high-sounding terms are used, such as 'free and open competition,' 'unfair competition,' and 'protection of good will,' it is a matter of common knowledge that it is a price-fixing statute, designed primarily to destroy competition at the retail level. The high-sounding phrases used with respect to the trade-mark owners are simply excuses and not a reason for the law."

Then in declaring the nonsigner clause of the New Mexico fair trade act unconstitutional, the court said:

"In view of the above, it will be determined that § 2, Chapter 44 of the Laws of 1937, . . . [identical with § 3, chapter 176, Wash. Laws of 1937] is unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety or general welfare insofar as it concerns persons who are not parties to contracts provided for in [the fair trade act]."

In *Rogers-Kent, Inc. v. General Elec. Co.* [1957 TRADE CASES ¶ 68,810], 231 S. C. 636, 99 S. E. (2d) 665 (1957), the South Carolina court declared the nonsigner clause of the fair trade act to be unconstitutional and stated:

"The right of an owner of property to fix the price at which he will sell [his property] is an inherent attribute of the property itself.

"This legislation can be justified only upon the theory that it constitutes a reasonable and proper exercise of the inherent police power of the State. We have held that such power can only be exercised where it is reasonably necessary in the interests of the public order, health, safety, morals or general welfare."

The court in holding that the fair trade act had no reasonable relation to the public order, health, safety, morals or general welfare, stated:

"It is difficult to find any justification for this legislation based upon considerations of the public health, safety, morals and general welfare. It applies to every product bearing the trade-mark, brand or name of the producer. No distinction is made between commodities affected with a public interest and those which are not. Under the terms of the act, a non-signer has no voice whatsoever in fixing the price at which he will sell his property. By entering into a contract with a single retailer, the trade-mark owner may fix the price for all retailers, without regard to their interests or welfare. The manufacturer is not required to take into consideration the cost of his article. He may change the retail price at will or even terminate the contract and remove any article from the operation of the statute. It is solely up to him to say whether or not there shall be a law controlling the price at which his trade-marked article shall be sold."

In *Shakespeare Co. v. Lippman's Tool Shop & Sporting Goods Co.* [1952 TRADE CASES ¶ 67,303], 334 Mich. 109, 54 N. W. (2d) 268 (1952), the Michigan court initiated the trend of the courts to declare the nonsigner clause of the fair trade act unconstitutional. That court held the act unconstitutional as an unlawful exercise of the state's police power for the reason that it bore no reason-

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able relation to the public health, safety, morals or general welfare.

The supreme court of Arkansas in *Union Carbide & Carbon Corp. v. White River Distributors, Inc.* [1955 Trade Cases ¶ 67,953], 224 Ark. 558, 275 S. W. (2d) 455 (1955), ruled that the nonsigner clause of the fair trade act was unconstitutional as it was not protective of the public welfare and was in violation of the due process clause of the state constitution. The Arkansas court stated that it was its specific task to determine whether or not it could be reasonably said that the provisions of the nonsigner clause in any way promoted the general welfare of the people of the state. The court stated:

> "It is a generalization, but not an overstatement, to say that the effort to 'fix prices' is made by groups who desire to sell something for more than the sponsoring group believes that the purchasing public would pay for that 'something' without an enforced fixed price. It would seem apparent that the principal objective of minimum price maintenance is the protection of profit margins for retailers and distributors unable or unwilling to meet the pressure of competition."

The Arkansas court analyzed the effect of the act and made the following observation:

> *"What the act does.* Considering the Act in relation to this particular case, it virtually gives appellant the absolute right to fix the price at which Prestone must be sold to the consuming public in Arkansas without regard to the cost of manufacture or distribution. We are not forgetting that it must first contract with one retailer in the state and appellee must have knowledge of contract and the fixed price, but these provisions consist more of form than substance and merely indicate a desperate attempt to hedge against the charge of unconstitutionality. Nobody doubts the feasibility of appellant acquiring one contract dealer out of the hundreds of retail dealers in the state, or the feasibility of bringing this information to all other dealers. If securing a contract with one dealer binds all others, then the corollary would be that, absent such contract, the others are not bound. It is frightful to think a device so easily concocted could destroy the constitutional bulwark protecting our personal liberties and the public welfare."

In *Olin Mathieson Chemical Corp. v. Francis* [1956 Trade Cases ¶ 68,463], 134 Colo. 160, 301 P. (2d) 139 (1956), the Colorado court sitting *en banc* declared the act unconstitutional on several grounds. With respect to the subject under discussion, the exercise of the police power, the court made the following comment:

> "The right to contract is a property right, protected by the due-process clause of the constitution, and cannot be abridged by enactment. The police power of the state exercisable by the General Assembly, while very broad, is exercisable only within the limits of the constitution. To sustain the price fixing power attempted by the General Assembly in the statute involved, under a claimed exercise of the police power, would be to place the power of the legislature above the constitution."

In concluding its decision which, as indicated, was based on several constitutional grounds, the Colorado court made the following comment, which is similar to comments found in the other decisions:

> "During a recent decade numerous attempts were made to regiment the general public and in each instance they were struck down as violative of the constitutional rights of a free people. We have not yet arrived at the place in America where the many must yield to the few, so that the latter may make ever increasing profits at the expense of those who still believe in the principle of free and competitive trade and commerce, untrammeled by legislative fiats."

In the case of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.* [1958 Trade Cases ¶ 68,920], 167 Ohio St. 182, 147 N. E. (2d) 481 (1958), the Ohio supreme court ruled that the nonsigner clause of the fair trade law was not within the police power of the legislature.

> ". . . a part of the . . . Act represents an unauthorized exercise of the police power in a matter unrelated to the public safety, morals or general welfare."

[*Manufacturer's Interest After Sale*]

A theory of the *Sears* case, *supra,* adopted from the opinion of the United States supreme court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra,* was that the manufacturer of a trade-marked product retains a proprietary interest in that product by reason of the fact that he owns the trademark and the good will associated therewith, when he sells that product to a retailer, even though the retention of such an interest is not made a part of the con-

tract of sale. If the manufacturer does have an interest in the portion of good will which goes with the trade-marked product, then he is entitled to sue and recover that portion of the resale price which is attributable to such good will, and we do not think it can be seriously contended that he has such a right. In selling the product to the retailer, the manufacturer exacts a price for the use of his trademark and the benefit of the good will associated with it, as well as for the physical components of the product, and unless he also exacts an agreement that the retailer will not resell the product at less than a stipulated price, we can see no equity which should entitle him to the special protection of the law.

It is urged that the court should not overrule *Sears v. Western Thrift Stores of Olympia, Inc., supra,* because it has been the law for eighteen years and a substantial number of contracts have been made in reliance upon the *Sears* decision. By this, it is undoubtedly meant that many manufacturers have neglected to obtain contractual undertakings from their retailers to adhere to the prices set by the manufacturer. If so, it should be a simple matter to correct this practice in the future, and the amount of the agreed damages in this action indicates that the loss sustained by the manufacturer is not severe. At any rate, there is no showing that the hardship to manufacturers and retailers resulting from the overruling of the *Sears* case would be great enough to warrant the perpetuation of an erroneous decision.

The language of Mr. Chief Justice Fuller, in the case of *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, is quoted with approval in *State ex rel. Bloedel-Donovan Lbr. Mills v. Savidge,* 144 Wash. 302, 258 Pac. 1 (1927):

> "'Manifestly, as this court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.'"

[*Nonsigner Provision Invalid*]

The nonsigner clause of the fair trade act, Laws of 1937, chapter 176, § 3 (RCW 19.89.030) is declared invalid as an improper exercise of the police power, and the case of *Sears v. Western Thrift Stores of Olympia, Inc., supra,* is expressly overruled insofar as it validates the nonsigner clause.

The judgment is reversed.

We concur: WEAVER, C. J., MALLERY, J., HILL, J., and FOSTER, J.

[Dissenting Opinions]

HUNTER, J. (Dissenting)—The appellants contend that the fair trade act in question should be held unconstitutional; that the case of *Sears v. Western Thrift Stores of Olympia, Inc.* [1940-1943 TRADE CASES ¶ 56,152], 10 Wn. (2d) 372, 116 P. (2d) 756 (1941), should be overruled, and if it is not overruled, the act should be held unconstitutional on other grounds not considered in the *Sears* case. Being in disagreement with the views of the majority that the *Sears* case should be overruled, all of the contentions raised by the appellants will be considered in this dissent.

[*Delegation of Legislative Authority*]

The *appellants first contend* the act is in violation of Art. II, § 1, as amended by the seventh amendment of the constitution of the state of Washington, in that it delegates legislative authority to private persons without requiring the conformance to any standards prescribed by the legislature.

In the early case of *C. W. & Z. R. R. Co. v. Commissioners of Clinton County,* 1 Ohio State 77 (1852), that court made this distinction in regard to a delegation of powers as opposed to a mere grant of rights under a completed law:

> ". . . The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

We have in essence followed the same reasoning in this state in regard to an unlawful delegation of legislative power. In the case of *State v. Storey,* 51 Wash. 630, 99 Pac. 878 (1909), we made the following statement in regard to a contention of unlawful delegation, which was also approved in *Rover v. Public Utility Dist.,* 186 Wash. 142, 56 P. (2d) 1302 (1936), and *Port of Tacoma v. Parosa,* 52 Wn. (2d) 181, 324 P. (2d) 438 (1958):

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". . . The mere fact that the act does not take effect until the contingency arises, does not indicate a delegation of legislative power, even where the contingency depends upon the action of certain persons. . . . In such cases it cannot be said that legislative authority is delegated. The local judgment merely accepts or rejects the operation of the legislative act. . . ."

In the instant case the legislature enacted a complete law; the mere fact that it does not become binding on others until it is invoked by a producer, does not constitute making a law as a result of the producer's act. The producer has only the option to take advantage of the fair trade law enacted by the legislature, if his commodity is in free and open competition with commodities of the same general class produced by others.

In jurisdictions outside of this state there is a sharp division of authority as to fair trade acts similar to ours constituting an unlawful delegation of legislative power to private individuals. The line of authorities followed by the California court in its recent opinion of *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores* [1955 TRADE CASES ¶ 68,234], 45 Cal. (2d) 881, 291 P. (2d) 936 (1955), is in conformity with the thinking of this court as expressed in *State v. Storey, supra,* which I believe to be the better rule. In the California case, the same contention of unlawful delegation was made upon the fair trade act of that state which is similar to our act. That court stated:

". . . Here the acts of private parties in entering into contracts for the sale of commodities constitute the facts in contemplation of which the Legislature acted, and upon the existence of which the provisions of the enactment were to be applicable. The private contracts are no more legislative in character than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute. The consequence that the statute has become applicable, and conduct in violation thereof has become actionable is in no way due to the exercise of any assumed legislative power on the part of the contracting parties. . . ."

I see no unlawful delegation of legislative authority in our fair trade act in derogation of the state constitution.

[*Police Power*]

It is *appellants' second contention* that the act has the effect of depriving persons of liberty and property without due process of law and constitutes legislation beyond the scope of the police power of the state, having no relation to the public health, safety, welfare or morals, all contrary to Art. I, § 3, of the state constitution which provides:

"No person shall be deprived of life, liberty, or property, without due process of law."

In the *Sears* case, *supra,* we said:

"Does the act represent a valid exercise of the legislative power? If it does, we cannot hold it to be invalid merely because it may be an unwise law and of questionable expediency, or because it may be unable to correct the supposed evils that it is intended to remedy, or because of any other objection directed to its wisdom. This court is interested only in whether there has been a subversion of rights as guaranteed by the constitution."

We then proceeded to decide the exact issue tendered here by stating:

"That this act is a valid exercise of the police power of the state is clearly established. We held in *State v. Sears,* 4 Wn. (2d) 200, 103 P. (2d) 337, 118 A. L. R. 506, that the police power extends not only to the preservation of the public health, safety, and morals, but also to the preservation and promotion of the public welfare. Moreover, we stated that the legislature is vested with a wide discretion in determining what the public interest requires, and what measures are necessary to protect those interests. *In the case at bar, the legislature decided that trademark owners, distributors of identified commodities, and the public needed protection against injurious and uneconomic practices.* . . ." (Italics mine.)

Passing upon this same question the supreme court of the United States, in the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* [1932-1939 TRADE CASES ¶ 55,141], 299 U. S. 183, 81 L. Ed. 109, 57 S. Ct. 139 (1936), held that the Illinois fair trade act, which is virtually the same as our enactment, did not violate the due process clause of the fourteenth amendment to the Federal constitution. The court there said:

"First. In respect of the due process of law clause, it is contended that the

statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. [Citations omitted.] These cases hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them. But the decisions referred to deal only with legislative price fixing. They constitute no authority for holding that prices in respect of 'identified' goods may not be fixed under legislative leave by contract between the parties. The Illinois Fair Trade Act does not infringe the doctrine of these cases.

". . .

"Nor is § 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. . . ."

I am of the opinion that appellants' second contention cannot be sustained, and that we correctly decided the question of due process in the *Sears* case, *supra.* Appellants argue, however, that if the act when it was enacted bore any relation to the public health, safety, or general welfare, such relationship has long since disappeared.

It appears to be clear that the fair trade act was a valid and necessary exercise of the police power for the protection of the general welfare. Our fair trade act was enacted in 1935 and reenacted in 1937 (Laws of 1937, chapter 176, § 3 (RCW 19.89.030). The compelling reason for such legislation was aptly stated in 34 Mich. L. Rev. 691 (1936):

"It will be recalled that this practice [retail price cutting], which began its phenomenal growth shortly before the beginning of the present century, created what many believed to be two serious evils. Because it made the price of nationally advertised products vary from store to store and city to city, it forced the producer of such goods into virtual competition with himself, allowed others to capitalize on his extensive advertising campaigns, and eventually lowered his article in the eyes of the consumer. But worse than this, it drove to the wall many small retail merchants who, because of large overheads and small turnovers, could not compete. This latter not only seriously affected the public but deprived the trade-mark owner of available markets and tended to fetter competition in the retail trade." (Footnotes omitted.)

Assuming, *arguendo,* these dangers to the general welfare no longer exist in our economy is not a reason for concluding that the act no longer bears a reasonable relation to the general welfare; but rather is a reason for concluding it has been effective as a protection from the dangers in the past and is effective as a protection from the same dangers that may arise from our economy in the future. It is inconceivable that a statute is a valid exercise of the police power when it functions to cure an existing evil, but becomes an invalid exercise of the police power when the evil no longer exists and the statute functions only to prevent recurrence of the same evil.

If, as appellants contend, the relation of the statute to the general welfare no longer exists, this does not make it incumbent upon the court to decide that the statute is an unreasonable exercise of the police power, because the reasonableness of the statute need not be tested by the facts which do now exist but by the facts which might reasonably be conceived to exist. We stated in *Shea v. Olson,* 185 Wash. 143, 53 P. (2d) 615 (1936):

"In determining whether a law comes within the police power of the state, it is not incumbent upon the court to find that facts which would justify such legislation actually exist. If a state of facts which would justify the legislation can reasonably be conceived to exist, the court must presume that it did exist and that the law was passed for that purpose. [Citations omitted.]"

This court cannot now say that such a state of facts can no longer reasonably be conceived to exist to justify this legislation. If the appellants believe the law is of questionable expediency, their appeal should be made to the legislature and not to this court.

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[*Special Class of Persons*]

The *appellants next contend* that the nonsigner clause of the fair trade act is in violation of Art. I, § 12, of the constitution of the state of Washington, in that it grants special privileges to a class of citizens, which privileges do not equally apply to all citizens.

In *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P. (2d) 1101 (1936), we said:

> "The aim and purpose of the special privileges and immunities provision of Art. I, § 12, of the state constitution and of the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.
>
> "To comply with these constitutional provisions, legislation involving classifications must meet and satisfy two requirements: (1) The legislation must apply alike to all persons within the designated class; and (2) reasonable ground must exist for making a distinction between those who fall within the class and those who do not."

See, also, *Adams v. Hinkle,* 51 Wn. (2d) 763, 322 P. (2d) 844 (1958).

Here the act meets these requirements as above set forth, (1) it applies equally to all persons selling an identified commodity in free and open competition with other commodities of the same general class, and (2) reasonable grounds exist for the designation of the class by their investment and property right in the article and good will associated with it, as distinguished from the class of those producing an article which does not bear a trademark, brand, or name.

[*One Subject in Act*]

Appellants also contend that the fair trade act is in violation of Act. II, § 19, of the constitution of the state of Washington, in that the act embraces more than one subject and the subject embraced is not expressed in the title.

The above section of the constitution reads as follows:

> "BILL TO CONTAIN ONE SUBJECT. No bill shall embrace more than one subject, and that shall be expressed in the title."

The title to the fair trade act reads as follows:

> "An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name."

In *State ex rel. Toll Bridge Authority v. Yelle,* 32 Wn. (2d) 13, 200 P. (2d) 467 (1948), we said:

> "It is to be noted that this constitutional provision contains not merely one prohibition or direction to the legislature, but two, *viz*: (1) No bill shall embrace more than one subject; and (2) the subject of every bill shall be expressed in the title."

In the case of *Casco v. P. U. D. No. 1,* 37 Wn. (2d) 777, 226 P. (2d) 235 (1951), we quoted with approval this portion of American Jurisprudence, 50 Am. Jur. 178, Statutes, § 197:

> "'. . . To constitute plurality of subject, an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection with or relation to each other. Within the meaning of the constitutional provision, matters which apparently constitute distinct and separate subjects are not so where they are not incongruous and diverse to each other. Generally speaking, the courts are agreed that a statute may include every matter germane, referable, auxiliary, incidental, or subsidiary to, and not inconsistent with, or foreign to, the general subject or object of the act.'"

In *Randles v. State Liquor Control Board,* 33 Wn. (2d) 688, 206 P. (2d) 1209 (1949), we made this statement in holding a title sufficiently complied with the foregoing constitutional provision:

> "A title does not need to be an index to the contents of a measure. The purpose of a title is to call attention to the subject matter of the act, so that anyone reading it may know what matter is being legislated upon, and is sufficient when it is broad enough to accomplish that purpose. All incidentals germane to a title may be brought within the legislation although not specifically referred to in such title . . . ."

In applying these rules, it is my conclusion that the Washington fair trade act embraces only one subject: the prevention of injurious and uneconomic practices involving articles distinguished by a trade-

mark, brand or name; and that the subject is adequately expressed in the title.

[*State Antitrust Provision*]

The *last contention* of the appellants is that the fair trade act is violative of Art. XII, § 22, of the constitution of the state of Washington, in that it authorizes contracts for fixing the price of products and commodities.

Art. XII of our constitution is entitled "CORPORATIONS OTHER THAN MUNICIPAL" and § 22 of Art. XII provides:

> "MONOPOLIES AND TRUSTS. Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, *or in any manner whatever for the purpose of fixing the price* or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises." (Italics mine.)

The appellants rely on the following language of § 22, *supra*: ". . . or in any manner whatever for the purpose of fixing the price. . . ."

We made this statement in the *Sears* case, *supra*:

> "That the framers intended that § 22 of Article XII should deal with monopolies is clearly established by its reference to 'MONOPOLIES AND TRUSTS.' Moreover, a reading of § 22, giving to each word its ordinary meaning, indicates that *the language relating to price fixing cannot be lifted out of its natural context and considered apart from the rest of the provision.* The entire section must be read, construed, and applied as a whole. Thus the language in § 22 with reference to price fixing must relate to the essential purpose of the provision, namely, the prohibition of monopolies." (Italics mine.)

The best mode of ascertaining the meaning affixed to any word or sentence by a deliberative body is by comparing it with the words and sentences with which it stands connected, and a constitutional provision or a phrase in a constitutional provision must be read in connection with the context. *Noscitur a sociis* is a rule of construction applied to all written instruments. The obscurity of any particular word may be removed by reference to associated words. And the meaning of a term may be enlarged or restricted by referring to the object of the whole clause in which it is used. 11 Am. Jur. 663, § 53.

Language may not be lifted out of context to be considered independent of the remainder of the constitutional provision. It must be regarded as a whole, with effect and meaning given to every part subjected to construction. *Sears v. Western Thrift Stores, supra; State ex rel. Wolfe v. Parmenter,* 50 Wash. 164, 96 Pac. 1047 (1908); *Chlopeck Fish Co. v. Seattle,* 64 Wash. 315, 117 Pac. 232 (1911).

I do not believe that the framers of the constitution meant anything more than to prohibit monopolies and trusts when they enacted this provision. Price maintenance is but one facet of a monopoly, as is the limitation of production or the regulation of transportation of a product or commodity, but it does not follow that price maintenance *per se* constitutes a monopoly.

In the case of *Fisher Flouring Mills Co. v. Swanson,* 76 Wn. 649, 137 Pac. 144 (1913), we held that a manufacturer, who has given a reputation to particular goods which he creates, has the right to fix in his contract of sale to retailers a reasonable minimum price at which those goods will be sold to consumers. We said:

> ". . . *Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable* in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy. . . ." (Italics mine.)

In the case of *Group Health Cooperative of Puget Sound v. King County Medical Society* [1952 TRADE CASES ¶ 67,201], 39 Wn. (2d) 586, 237 P. (2d) 737 (1951), this court, in a unanimous *En Banc* decision, said:

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"There is a well-settled rule, however, that Article XII, § 22, does not condemn price fixing and the limitation of production per se, but only when either of these results is brought about in connection with a monopoly, with resulting unreasonable restraint upon competition. *Sears v. Western Thrift Stores, supra; Washington Cranberry Growers' Ass'n v. Moore,* 117 Wash. 430, 201 Pac. 773, 204 Pac. 811, 25 A. L. R. 1077. It is therefore necessary to determine whether respondents' combination or arrangement by which production is limited and prices are fixed with respect to prepaid medical service, amounts to a 'monopoly' in the constitutional sense." (Italics mine.)

The supreme court of South Dakota, in the case of *Miles Laboratories, Inc. v. Owl Drug Co.* [1940-1943 Trade Cases ¶ 56,078], 67 S. D. 523, 295 N. W. 292 (1940), held that their fair trade act, which is in substance the same as the Washington fair trade act, did not violate the following provision of their state constitution:

"'Monopolies and trusts shall never be allowed in this state and no incorporated company, co-partnership or association of persons in this state shall directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders, or with any co-partnership or association of persons, *or in any manner whatever to fix the prices,* limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor.

"'The legislature shall pass laws for the enforcement of this section by adequate penalties and in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises.'" (Italics mine.)

The South Dakota court said:

"A monopoly such as is meant by Section 20 of Art. 17 of our Constitution exists only where all or so nearly all of a product or commodity within a community or district is brought into the hands of one man or set of men, as to practically bring the handling or production of the commodity within such single control, to the exclusion of competition or free traffic therein [citation omitted]. To render the protection against monopoly more effective, this constitutional provision prohibits certain combinations and agreements dealing with the production, transportation and price of commodities insofar as they tend substantially to stifle competition. The 'Fair Trade Law' does not purport to give the producer the right to stifle competition in a commodity. The right to stabilize the price of a 'brand' in the manner described in the act may only be acquired or maintained if the commdoity [sic] remains in free and open competition. SDC 54.0402. An act which grants rights conditioned upon the maintenance of free competition does not purport to authorize the making of a 'contract * * * or in any manner whatever to fix the prices, * * * of any product or commodity so as to prevent competition * * * . . . .'"

In the case of *Frankfort Distillers Corporation v. Liberto* [1950-1951 Trade Cases ¶ 62,654], 190 Tenn. 478, 230 S. W. (2d) 971 (1950), the court, in citing *Sears v. Western Thrift Stores, supra,* among other decisions, held the Tennessee fair trade act did not violate the state constitutional prohibition against monopolies.

In the case of *State ex rel. Banker v. Clausen,* 142 Wash. 450, 253 Pac. 805 (1927), we quoted with approval this portion of Ruling Case Law, which is now embodied in 11 Am. Jur. 659, § 50, as follows:

"'*A cardinal rule in dealing with constitutions is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable.* In accordance with this principle, a court should not allow the facts of the particular case to influence its decision on a question of constitutional law, nor should a statute be construed as constitutional in some cases and unconstitutional in others involving like circumstances and conditions. Furthermore, constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written constitution not warranted by the intention of its founders.' 6 R. C. L. 46." (Italics mine.)

It has been the settled law in this state, by consistent and uniform interpretation, that Art. XII, § 22, of our constitution does not prohibit price maintenance *per se,* but is a prohibition against monopolies and trusts,

and I fail to see that the fair trade act constitutes a monopoly or trust, thereby violating this provision of the constitution.

I am aware that there is a division of authority in other jurisdictions where the constitutionality of enactments similar to ours has been tested on the grounds we have considered. I believe, however, that the authorities sustaining the thinking expressed in this dissent are the better reasoned cases.

The *Sears* case, *supra,* which the appellants ask us to overrule, has been the law of this state for eighteen years, and I find no reasons more compelling in this appeal than we did then for holding the fair trade act unconstitutional, or in now overruling the established law of this state.

The determination of the trial court that the challenged act is constitutional should be affirmed.

I concur, OTT, J.

[*Police Power*]

DONWORTH, J. (Dissenting)—In my opinion, this court should not be concerned with the legislative problem of whether or not the "nonsigner" provision of the fair trade act now cures an economic evil which should be curbed under the police power of the state. It is for the legislature, not the court, to declare the public policy of this state in such matters.

In 1937, the legislature determined this matter of policy, and, in 1941, this court upheld the validity of its action as being within the police power.

What we said in *State v. Sears* [1940-1943 TRADE CASES ¶ 56,043], 4 Wn. (2d) 200, 103 P. (2d) 337 (1940), with respect to the constitutionality of the unfair practices act is equally applicable to the "nonsigner" provision of the fair trade act now before us:

> "We may or may not agree with the economic philosophy of the unfair practices act, but it is no part of the duty of this court to determine whether the policy embodied in a statute is wise or unwise. It is primarily a legislative, and not a judicial, function to determine economic policy. If it be the declared legislative policy to curb unrestrained and harmful competition, by measures which are not arbitrary or discriminatory, it is not for us to say the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law to enforce it, the courts are both incompetent and unauthorized to deal."

Having held in 1941, in *Sears v. Western Thrift Stores of Olympia, Inc.* [1940-1943 TRADE CASES ¶ 56,152], 10 Wn. (2d) 372, 116 P. (2d) 756 (1941), that the "nonsigner" provision was within the police power, I think that we should not now declare that statute to be invalid simply because, upon a re-examination of our former decision, it now appears to a majority of the court that that provision is not a reasonable exercise of the police power and that it is detrimental to the best interests of the people. Although our conception of what is for the public good may differ from that of the legislature, it is not within our province to determine such matters of legislative policy.

Furthermore, the scope of police power should not change with the personnel of the court. The portion of our decision in *State ex rel. Banker v. Clausen,* 142 Wash. 450, 253 Pac. 805 (1927) (quoted near the close of Judge Hunter's dissenting opinion), relating to the need for consistency and uniformity in constitutional interpretation by the courts, is, in my opinion, applicable to the present case.

I would adhere to our decision in the *Sears* case and affirm the judgment of the trial court.

We agree with the views expressed hereinabove. FINLEY, J., and OTT, J.

[¶ 69,521] Charles Rubenstein, Inc., and Rubenstein & Kaplan, a partnership of Abraham A. Kaplan, Charles Rubenstein, Anna Rubenstein, and Charles Rubenstein and Anna Rubenstein as Trustees for Arnold Rubenstein and Sheldon Rubenstein, d/b/a Hollywood Theatre v. Columbia Pictures Corporation; Loew's Incorporated; Minnesota Amusement Company; Paramount Film Distributing Corporation; RKO Radio Pictures, Inc.; Twentieth Century-Fox Film Corporation; United Artists Corporation; Universal Film Exchanges, Inc.; and Warner Bros. Pictures Distributing Corporation.

In the United States District Court for the District of Minnesota, Fourth Division. Civil Action No. 4332. Filed January 27, 1959; March 24, 1959.

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Clayton and Sherman Antitrust Acts

Combinations and Conspiracies—Proof of Conspiracy—Legality of Motion Picture Runs and Clearances—Discrimination.—Motion picture distributors and a chain exhibitor in the Minneapolis area were found to have conspired to establish and maintain preferential circuit runs for theatres operated by the chain, to grant such a preferential run to a theatre operated by the chain, and to impose an unreasonable clearance upon an independent theatre in favor of the chain theatre. These practices had the effect of unreasonably restraining trade in that they deprived the independent theatre of the opportunity to compete with the chain theatre for a better playing position by independent negotiations in a free market. Prior government judgments and decrees, which established that these distributors had engaged in a national conspiracy which had among its objectives the granting of preferential runs to the exhibitors affiliated with the major distributors, were prima facie evidence against the defendants in the instant action. This national conspiracy was carried out on a local level by the establishment and maintenance of a clearance schedule based on admission price. This uniform schedule was well known to and followed by all of the distributors in the area and was established and existed with the approval and cooperation of these distributors. The evidence did not support the contention that the chain theatre was entitled to a preferential run. While the court recognized that distributors, acting separately, could legally determine that where two theatres are in competition, circumstances may justify the granting of a preferential run to one of them and that where several distributors place a theatre on a particular availability, others generally follow the same plan to have an even flow of pictures on the same availability, it held that the instant situation did not arise because of such circumstances. Here the discrimination existed merely because one theatre was a chain and the other was an independent. The fact that the two principal shareholders of the independent theatre were the lessors of the chain theatre did not show any consent to the preferential arrangement. Demand on one of the defendants for an equal availability was not necessary where the evidence clearly showed that such defendant was a member of the conspiracy and that any demand would have been futile. Under the circumstances of the case, the mere failure of the independent theatre to protest could not immunize the distributors from any wrong.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360, 2005.410, 2005.553.

Private Enforcement and Procedure—Suit for Civil Damages—Who May Be Liable—Parties Defendant—Subsidiaries—Effect of Prior Government Decrees.—A motion picture distributing company which did not participate in a local conspiracy to establish preferential runs and clearances was not a proper defendant in a civil damage action based on the local conspiracy. It was immaterial that this company was a wholly-owned subsidiary of a company which allegedly participated in the local conspiracy. The subsidiary would not be liable for the wrongdoing of its parent. The fact that the two corporations had a common directorate and employed some of the same workers did not destroy their distinct corporate existence. Since no contention was made that the corporations were not bona fide and since the parent was amenable to suit at the time of the institution of the suit, the subsidiary was not a proper defendant. It was also immaterial that this subsidiary distributing company was a defendant in litigation involving a similar conspiracy on a national scale. Decrees and judgments from that prior litigation could not attach liability to this company for the local conspiracy. In order for them to have that effect, the parties to the first suit must have known of and participated in the local wrong. In the instant case, the company did not participate in the local conspiracy and was not even doing business in the area during the time of the conspiracy.

See Private Enforcement and Procedure, Vol. 2, ¶ 9006, 9012.410.

Private Enforcement and Procedure—Suit for Civil Damages—When Recovery Under Antitrust Laws May Be Barred—Statute of Limitations—Tolling the Period of Limitations.—The running of a six-year statute of limitations against one defendant, a chain exhibitor of motion pictures, was not tolled during the pendency of a Government antitrust suit since this defendant was not a party to the Government suit. The fact that such exhibitor was a wholly-owned subsidiary of a defendant in the Government suit was immaterial.

Thus, the exhibitor was liable only for damages accruing within the six years prior to the bringing of the instant action. However, as to the other defendants, who were defendants in the prior Government suit, the period of limitations was tolled.

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.275.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable —Apportionment of Damages.—In an action where there were two damage periods applicable to different defendants, the contention that the court could not apportion damages among tort feasors, but must hold that all defendants are jointly and severally liable for the damages incurred, was rejected. A six-year statute of limitations was personal to one of the defendants and was not applicable to the remaining defendants. The court ruled that there was no good reason why damages could not be assessed against the various defendants in the amounts and according to the liabilities established.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.520.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable —Measure of Damages—Motion Picture Runs and Clearances.—Where it was found that a motion picture theatre was damaged as a direct and proximate result of a conspiracy, pursuant to which a theatre of a defendant was granted a preferential run and an unreasonable clearance was imposed on the plaintiff theatre, the court ruled that damages may be calculated by adding the boxoffice grosses of the two theatres for the years involved, assigning one-half of this total to the plaintiff theatre, deducting a fair allowance for film rental, and then determining the difference between the net thus arrived at and the actual net receipts of the plaintiff theatre. The court had found that a fair and reasonable basis for determining the amount of damages was to assume that the combined boxoffice grosses of the two theatres would not have been increased over the amounts actually secured by them had there been no conspiracy and had the plaintiff theatre secured a more advantageous playing position as the result of independent negotiations in a free market. It found that the plaintiff theatre's net loss was $56,123 during the damage periods.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.400.

For the plaintiff: Lee Loevinger, Louise A. Herou, and Larson, Loevinger, Lindquist, Freeman & Fraser, Minneapolis, Minn.

For the defendants: Mandt Torrison, James C. O'Neill, and Bundlie, Kelley & Maun, St. Paul, Minn., for Paramount Film Distributing Corporation and Minnesota Amusement Company; and Philip Neville and Neville, Johnson & Thompson, Minneapolis, Minn., for the remaining defendants.

For prior opinions of the U. S. District Court, District of Minnesota, Fourth Division, see 1957 Trade Cases ¶ 68,789 and 1953 Trade Cases ¶ 67,546.

Memorandum Decision

[January 27, 1959]

[*Parties*]

Gunnar H. Nordbye, Chief Judge [*In full text*]: This action was brought under the Sherman and Clayton Anti-trust Acts and came on for trial before the undersigned without a jury.

Charles Rubenstein, Inc., is the owner of the Hollywood Theatre, hereafter called Hollywood. When it commenced operations on October 26, 1935, it was a newly constructed, attractive motion picture theatre situated in a suburban area of Minneapolis with a seating capacity of 950. Charles Rubenstein was President of the corporation. The principal shareholders at the time Hollywood was built were Louis Rubenstein, father of Charles, and A. A. Kaplan. Louis Rubenstein held 208 shares; A. A. Kaplan, 260 shares; Charles Rubenstein, 50 shares; and Anna, wife of Louis, 2 shares. Louis Rubenstein and A. A. Kaplan also were in business as a partnership under the name of Rubenstein and Kaplan and owned a theatre building known as the Arion, which was situated on a busy commercial street in northeast Minneapolis about one mile from the location of the Hollywood. Rubenstein and Kaplan, at the time the Hollywood was built, had leased the Arion Theatre to the Minnesota Amusement Company, hereafter referred to as

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MAC, the largest operator of motion picture theatres in Minneapolis and throughout the State and in some of the neighboring States. It was a wholly owned subsidiary of Paramount Pictures, Inc., one of the largest distributors of motion pictures. Its theatres were commonly referred to as the circuit theatres or Publix theatres. The other defendants are the principal distributors of motion picture films in the United States. The jurisdiction of this Court is not in issue.

[*Theatres Compared*]

In 1935, before the Hollywood opened, the Arion was a 932 seat theatre charging 15 cents admission and on a playing position of 112 days after first run. Shortly before Hollywood opened, Arion advanced its admission price to 20 cents and changed its playing position to 70 days after first run. When Hollywood opened on a 25 cent admission, it obtained a 56 day playing position after first run. MAC, as the lessee of Arion in 1935, had permitted that theatre to become run down and in need of improvements. It was in poor shape to compete with the brand new and attractive Hollywood.

These two theatres were in substantial competition with each other, and it is evident that MAC recognized the inroads which Hollywood would make on the business of Arion. At first it proposed to Rubenstein and Kaplan, the lessors of Arion and the principal stockholders of Hollywood, that the two theatres should form a pool whereby the two theatres would be operated jointly and the net profits divided equally between them. This proposal was set forth and recorded in a memorandum by MAC in the following language:

> "Film is to be bought for these houses on the same basis, or approximately the same basis, as is now done for the Uptown and Granada [two theatres operated by MAC],—namely, giving the Hollywood the first choice of pictures, and playing the repeat runs on the big pictures, and also the sluff pictures, at the Arion. This would give the Hollywood every break and definitely classify the Arion as a cheaper type house."

[*Change in Playing Position*]

Rubenstein and Kaplan demurred to this plan, and suggested that the business of the Arion was being jeopardized by the failure of the lessees to keep the theatre in proper repair which MAC was required to do under the lease. When the proposed pooling arrangement was not consummated, MAC expended in September, 1936, some $16,000 on Arion for improvements. Arion then went on a 25 cent admission price and announced to the distributors that it would be on a 49 day playing position, 7 days ahead of Hollywood. The letter of August 28, 1936, from MAC to the branch manager of Metro Goldwyn Mayer illustrates the summary manner in which the changed policy of the Arion was announced. It reads:

> "Mr. W. H. Workman
> Metro Goldwyn Mayer
> Minneapolis, Minn.
>
> Dear Mr. Workman:
>
> Please be advised that the Arion Theatre, Minneapolis, will close after the last performance Sunday night, September 13, 1936. We will advise you as soon as possible the definite reopening date.
>
> For your information, the admission price at the Arion Theatre after reopening will be 25¢. We will therefore play pictures according to the 25¢ schedule of all our theatres—49 days after first run—giving this theatre seven days protection over other theatres listed in the clearance charging the same admission.
>
> Yours very truly,
> (Signed) J. A. Branton"

[*Clearance Pattern*]

At this time there was nothing startling about the rather casual manner in which this announcement of policy was made to the distributors. For some years MAC's suburban theatres charging 25 cents admission were the only theatres in Minneapolis receiving a 49 day availability after first run. Preferential runs long had been accorded to MAC theatres by the distributors, and when requested it was taken for granted that it would be fulfilled. In view of all the circumstances, to suggest that the preferential run accorded Arion was brought about by independent negotiations by MAC with each of the distributors seems highly improbable. Reference may be made to the clearance pattern in Minneapolis as noted by the manager of Metro Goldwyn Mayer to his home office in August, 1936. This is the schedule that all of the distributors followed:

"25 cent houses	49 days Publix [MAC Circuit Theatres]
25 cent houses	56 days Independents

20 cent houses 63 days Publix
20 cent houses 70 days Independents
15 cent houses 105 days Publix
15 cent houses 112 days Independents"

[*Proof of Conspiracy*]

It is not claimed that any of the distributor defendants offered or even considered a request for a better run for Hollywood during the period in controversy. All of them, though not all at the same time, followed the pattern of preference to MAC theatres. The language in the following cases is apposite here:

In *Interstate Circuit v. United States* [1932-1939 TRADE CASES ¶ 55,205], 306 U. S. 208, 226-227, the Supreme Court stated,

> "It is enough to warrant a finding of a 'combination' within the meaning of the Sherman Act, if there is evidence that the persons, with knowledge that concerted action was contemplated and invited, give adherence to and then participate in a scheme."

Also, in *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244] 334 U. S. 131, 142, will be found the following:

> "* * * It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement."

There is conflict in the testimony as to whether Hollywood made any objection to the preferential run accorded Arion in September, 1936. But there is substantial and credible evidence that protests were made by Hollywood's booking agent, Charles Rubenstein, to many of the distributors, and there is every reason to believe that vigorous objections were made. For a year Hollywood had been on a 56 day availability as a 25 cent house and, without any forewarning, Arion announced after some improvements to the theatre that it would change its policy from a 20 cent house to a 25 cent house and operate on an availability of 7 days ahead of Hollywood. Certainly, Hollywood was a theatre superior in appointments and attractiveness as compared to Arion. Arion was built in 1913. Hollywood was built in 1935, and generally was considered one of the most attractive suburban theatres at that time in Minneapolis. The only advantage that Arion had may be attributed to its location on a commercial street where residents in the area would go to shop and look for entertainment. But the evidence is wanting to support any contention that Arion was entitled to a preferential run over Hollywood. Admittedly, the unusual situation exists of the principal stockholders in Hollywood being the lessors of Arion to MAC. The Arion lease did not expire until 1943, and it is quite evident that MAC wanted to retain Arion as one of its suburban theatres in that particular locality. Louis Rubenstein died in 1939, so we do not have the benefit of his testimony. His interest, after his death, in the Rubenstein and Kaplan partnership inured to his widow, Anna Rubenstein. A. A. Kaplan was not active in the booking of films for Hollywood. Charles Rubenstein, the son of Louis, was a young man of 23 years of age in 1936, but he was in active charge as manager of Hollywood. He testified that he repeatedly protested to the branch managers of most of the distributors as to the preferential run granted Arion and requested that Hollywood be accorded the same availability as Arion. All of the circumstances would indicate that such protestations were made, at least to some of the distributors. Warner Bros. points out that the record is silent as to any specific request by Hollywood directed to it for an availability equal to that of Arion. But the failure of any demand by Hollywood to the defendant Warner Bros. to cease the illegal practice of granting a MAC circuit theatre a preferential run cannot release this defendant from liability for any unlawful acts or legalize such practices. *Congress Building Corp. v. Loew's, Inc.* [1957 TRADE CASES ¶ 68,799], 246 F. 2d 587, 595. Hollywood was placed in the same slot as other independent 25 cent houses competing with MAC theatres. Indeed, it would have been quite futile to have made any demand for a better run.

It is vigorously urged, however, that Hollywood consented to or acquiesced in the arrangement in that the two principal stockholders of Hollywood were the lessors of the Arion. Hence, it is reasoned that a successful operation of Arion by MAC was to the interest of Louis Rubenstein and Kaplan, and they were quite content to operate the Hollywood on a 56 day run. But that reasoning is not bottomed upon any affirmative evidence, nor is it persuasive. The lease returns on the Arion were in no way contingent upon the earnings of the theatre. As

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stated, the lease did not expire until 1943. MAC was a solvent lessee. It is true that the record does not disclose any written protest to the distributors or MAC by Hollywood as to its run. However, the bald facts are that Hollywood had been operating on an availability ahead of Arion for almost a year and its gross returns exceeded that of Arion, and then upon Arion's being accorded a preferential run, Arion's gross receipts began to exceed Hollywood's. Charles Rubenstein, though young, had been connected with the operation of motion picture theatres for some years. The impact of the favored run to Arion upon Hollywood's gross receipts was noticed by him immediately, and there is every reason to believe that protests were made. Not only was he aware of what was happening to Hollywood's receipts, but the distributors were aware of the situation as well. This is apparent from a letter written by the branch manager of Metro Goldwyn Mayer as early as November 17, 1936, which stated,

> "Since the Arion started to play ahead of the Hollywood, the Hollywood has been going substantially backward as could quite naturally be expected in the same manner as the new Arion last year went back when Hollywood was playing our product ahead of them."

The evidence is entirely wanting in any support of defendants' contention that Hollywood was content with the situation because of its relationship with MAC. In any event, under the circumstances here, mere silence on Hollywood's part could not immunize the defendants from any wrong which proximately resulted from their illegal actions.

[*Reasonableness of Preferential Runs*]

That there had existed in Minneapolis for some time prior to 1936 a local system of runs and clearances dominated by MAC due to its economic power is so strongly established by the evidence that any lengthy discussion of the situation seems wholly unnecessary. The various license agreements between the MAC theatres and the distributors reflect the preferential runs granted the circuit theatres. The entrenched preferential runs of MAC theatres existed with the approval and cooperation of all the defendant distributors doing business in this State at the time. It is idle to suggest that the distributors negotiated independently with MAC for the preferred run granted to Arion over Hollywood, or that Arion was granted that run because it agreed to pay the distributors a higher film rental than Hollywood. The arrangement made in 1936 with reference to Arion's run over Hollywood was a mere consummation of the standing arrangement between MAC and the distributors; that is, when there were two theatres in substantial competition operating at the same admission price, one an independent theatre and the other a circuit theatre operated by MAC, the latter upon request of the distributors received the preferential run. There can be no real question that this tacit arrangement between MAC and the distributors was in violation of the anti-trust laws of the United States. That these defendant distributors controlled the distribution of motion pictures in interstate commerce in the United States is admitted. Hollywood was denied a free market in which to deal to its detriment and to the benefit of Arion. The door was closed to it by the concerted action of the motion picture distributors and MAC, and it could not compete with Arion free from the unreasonable runs and clearances designed and followed by the distributors and MAC. The language of this Court in *Homewood Theatre v. Loew's, Inc.* [1952 Trade Cases ¶ 67,333], 110 F. Supp. 398, 407, is appropriate here:

> "An impartial consideration of the record here not only amply justifies, but requires, a finding that the defendants acted in concert in the establishment of a uniform system of runs and clearances in the licensing of motion pictures to the various motion picture houses in the City of Minneapolis, and one of the purposes of the establishment of uniformity and the acting in concert in the formation of a system of runs and clearances was to grant the local M. A. C. theatres a preferred position in runs and clearances. Such action presumably was prompted by the fact that the M. A. C. was the largest circuit exhibitor of motion pictures in this area and thus the source of a large revenue to the distributors."

Under no reasonable construction of the evidence can it be held that the clearance of the Arion over the Hollywood was reasonable. No attempt was made by the distributors to afford Hollywood an opportunity to meet Arion's percentage rental terms. And here we are not required to base the finding of a conspiracy on mere parallelism of action on the part of the distributors in

dealing with Arion. Hollywood possessed at least an equal potential for theatre patronage to insure the distributors a rental percentage-wise on boxoffice returns comparable to that of Arion's, but it was afforded no opportunity by the distributors to compete with Arion in a free market.

The Court is not unmindful that distributors, acting separately, could determine, without infraction of the anti-trust laws, that where two theatres are in substantial competition, circumstances may well justify the granting of a preferential run to one of them. Moreover, it is well recognized among distributors, as well as exhibitors, that where several distributors have placed a certain theatre on a particular availability, other distributors generally follow the same plan because the particular theatre, in order to operate successfully, should have an even flow of pictures on the same availability. But the Arion-Hollywood situation as to runs and clearances did not arise on account of such circumstances. Here, a clear discrimination as to Hollywood existed merely because Arion was a circuit theatre and Hollywood an independent theatre.

[*Effect of Lease Arrangement*]

Defendants assert that plaintiffs' subsequent conduct after 1936 lends support to their position that Hollywood became more interested in obtaining lower film rental for its theatre and a renewed lease on the Arion than in objecting to its assigned run or demanding any redress for any claimed wrong by reason of the preferential run granted to Arion. This position requires a short recital of the events which took place after 1936. As stated, Louis Rubenstein died in 1939. His widow succeeded to his interest as a lessor of Arion. Apparently Kaplan was then the dominating partner in the partnership. Charles Rubenstein went into the military service in September, 1942, and remained there until April, 1946. During that period, one Martin Lebedoff was in charge of the booking and buying of film for Hollywood. However, the partnership, Rubenstein and Kaplan, from 1943 on, operated the Hollywood. In 1942, MAC began to negotiate for a ten-year renewal of its lease on Arion, which lease expired in 1943. The partnership of Rubenstein and Kaplan also owned the Granada Theatre in Minneapolis, which theatre was likewise leased to MAC. MAC contends that it was sustaining a net loss in the operation of both the Arion and the Granada. Moreover, MAC asserts that the partnership was making a fair return from its investment on the leases of the Arion and the Granada theatres. That the partnership was making a profit on the leases of these two theatres is not denied. On the other hand, MAC apparently wanted to renew the leases on both theatres. Satisfactory rental terms were agreed upon and the Arion lease was continued for ten years at $12,000 per year. In the rental negotiations in 1942, Charles Rubenstein represented his mother and there is no contention that the lessors attempted in any way to impose any restrictions or conditions in the Arion lease upon the playing position of the Arion with respect to Hollywood. Defendants urge with great earnestness that, if the plaintiffs were dissatisfied with the Arion's preferential runs, some demand or covenant in the Arion lease would have been inserted requiring MAC to cease its illegal activities in that regard and that the lessors' failure to do so indicates that they recognized that they were the beneficiaries of the preferential run granted Arion in that Arion's prosperity benefited them. They assert, therefore, that Hollywood, by strong inference, was entirely satisfied with the situation with respect to the allotted runs accorded to these two theatres. In other words, defendants assert that plaintiffs clearly have assented to any injury which may have resulted to Hollywood by reason of Arion's preferential run.

But defendants' position in this regard cannot be sustained after a fair consideration of all the circumstances. The prior rent on the Arion had been $15,000 per annum. The renewed rent in 1943 was $12,000. MAC does not contend that anything was said or done by plaintiffs which led it to believe that Hollywood was satisfied with its run or that MAC relied on anything that took place during the negotiations for the renewal of the lease which could constitute an estoppel. MAC received no specific encouragement from the plaintiffs that Hollywood was satisfied with its run, nor was it lulled into any understanding that its past wrongdoings were forgiven. Of course, the partnership of Rubenstein and Kaplan was not the owner of Hollywood. Its operation of Hollywood under a lease after the Arion lease was renewed for ten years was brought about primarily by reason of Charles

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Rubenstein's entering into the military service. The evidence here will not permit a finding that the agreement to lease Arion to MAC, without more, constitutes an acquiescence to use that theatre in discrimination against another theatre in which the lessors as stockholders had a controlling interest. The upshot of the matter is that the futility of further protest against the economic power of MAC in the control of runs and clearances in Minneapolis was apparent to all the exhibitors during the period in question, and it was not until the national conspiracy as disclosed in the *Paramount* cases had ended by final decrees that any hope of redress for the independent exhibitors became apparent. If the only evidence of discrimination against independent theatres in Minneapolis was this isolated instance of the preferential run accorded to Arion, then one might be tempted to infer that it arose from the relationship between the lessors of Arion and the operators of Arion. However, in that Arion's run over Hollywood was merely a following of the pattern set as to preferences granted to the circuit theatres, no such inference is warranted.

[*Damages*]

That Hollywood sustained damage by reason of Arion's preferred run is unmistakably clear. However, the arrival at a fair standard of damages is fraught with many vexatious problems. At the outset, it should be stated that every informed person in the motion picture industry recognizes that, as between two theatres in substantial competition, the earlier playing position is highly desirable. *Bigelow v. RKO Radio Pictures* [1946-1947 Trade Cases ¶ 57,445], 327 U. S. 251. The following account of the gross earnings throughout the immediate years before and after Arion had the preferred run is the most persuasive testimony in that regard:

	Hollywood	Arion
1935 (after 10-26)	$11,274	$ 7,948
1936 (to 9-5)	39,396	28,632
1936 (after 9-5)	18,522	19,031
1937	48,241	59,580

And this comparable disparity of gross earnings between the two theatres continued as long as Arion had the preferred run. Plaintiffs must recognize that the situation would not justify the favoring of Hollywood with a preferential run as long as the two houses were charging the same admission price. In fact, all that Hollywood ever demanded was a day and date run with Arion; that is, equal availability. Most exhibitors, as well as distributors, consider that a day and date run for two competing theatres is not economically sound because obviously the potential drawing patronage of the two theatres simply would be divided between the two and each would suffer a depletion of earnings. On the other hand, equal availability does not necessarily mean a day and date exhibition of the same picture. Self interest of the theatres involved would prompt them to arrange their bookings so that day and date exhibition would not occur too frequently. No doubt, therefore, some plan of booking as between the two theatres as to certain pictures released would or could be arranged in order to avoid day and date exhibitions. Hollywood takes the position that if it had been accorded a 49 day availability, as well as the Arion, the latter would not have been able to compete with the former for a playing position, and Hollywood would have continuously played ahead of the Arion as it did for the first ten and one-half months of its operation. But there is no sound basis for that assertion. During the first ten and one-half months of Hollywood's operation, Arion was in a rundown condition operating as a 15 cent and then a 20 cent house on a substantially later availability than Hollywood. Moreover, Hollywood's novelty as a new theatre would attract patronage during its early operations which would not necessarily indicate a basis for the subsequent patronage of the theatre. Arion did have the advantage of being on one of the main commercial streets of the City leading into the loop, with heavy vehicular traffic and pedestrian congregation. Hollywood was a neighborhood theatre situated in a residential area.

In addition, however, plaintiffs emphasize that a group of pictures either played day and date with Arion or ahead of Arion during the period in question, and they attempt by a comparison of boxoffice grosses to establish Hollywood's greater drawing power as a theatre. But there are many factors which militate against plaintiffs' conclusion that these 30 pictures scattered in showings over a period of twelve years demonstrate the superiority of Hollywood over Arion in producing boxoffice grosses. Some of the pictures played at Hollywood

before Arion. At other times on Saturday nights Hollywood was playing double features and its receipts include the entire Saturday night receipts, while the Arion receipts are limited to the particular pictures in question and do not include the entire receipts for the particular Saturday nights in question. During some of the years (October, 1940, to January 6, 1943), Hollywood was charging a less admission price than Arion when the same pictures were played at both theatres day and date. Obviously, when two neighborhood theatres in substantial competition are playing the same pictures day and date, the theatre playing at a less admission price may garner the higher boxoffice grosses.

Plaintiffs assert that on a 49 day availability Hollywood would have grossed 125 per cent of Arion's actual grosses during the periods when Hollywood was playing behind Arion. This prediction is based largely upon the experience of the two theatres from October, 1935, to September, 1936, and in the year 1952 (a period after the impact of the conspiracy). It is apparent that the comparison of the earnings of the two theatres from October, 1935, to September, 1936, affords no basis for the computation of damages. This was the period before Arion's improvements. It was operating on a 112 and 70 day availability, and Hollywood was the newly constructed theatre on a 56 day availability. During 1952 Arion was operating on a 42 day availability for a portion of the year and Hollywood was playing on an availability of 28 days for some 6 months. Moreover, it is evident that the selection of that year for a comparison of grosses of these two theatres, some four years after the conspiracy had ended, is not a persuasive or safe guide for the determination of damages. Many changes had taken place in the Minneapolis motion picture theatre situation since 1948. The heavy competitive impact of television was present. Suburban areas were growing by leaps and bounds. Take the year 1951, for instance. Arion was operating on a 28 day availability, and Hollywood, except for a period from March 7 to July 18, 1951, when it was on a 35 day availability, was playing on a 56 day availability. Nevertheless, the difference in the boxoffice gross for that year was about $1,000 in favor of Arion. If we should use the year 1951 as a guide in assessing damages, the losses to Hollywood by reason of Arion's preferred run would appear to be very moderate.

[*Government Decrees*]

The question of damages requires a consideration of the *Paramount* decrees, the statute of limitations, the divisibility of any judgment of damages to be entered herein and which of the defendants named were a part of, and are liable for, the conspiracy which existed. The complaint in this action was filed November 6, 1952. At that time the Clayton Act contained the following provision:

> "Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof." 15 United States Code § 16.

The Court has admitted in evidence the so-called *Paramount* decrees. The positions of the courts as to the national conspiracy are to be found in 66 F. Supp. 323 [1946-1947 Trade Cases ¶ 57,470]; 70 F. Supp. 53 [1946-1947 Trade Cases ¶ 57,526]; 334 U. S. 131 [1948-1949 Trade Cases ¶ 62,244]; 85 F. Supp. 881 [1948-1949 Trade Cases ¶ 62,473]; 339 U. S. 974. The Court is of the opinion that the *Paramount* decrees are admissible and have evidentiary value herein. The so-called national conspiracy had as one of its objectives the granting of preferential runs to the exhibitors affiliated with the major distributors. This was carried out on a local level with reference to the preferential runs granted to MAC, a wholly owned subsidiary of Paramount Pictures, Inc. The government action in the *Paramount* case was instituted on July 20, 1938, and terminated in 1948, 1949 and 1950, the dates being different as to the several defendants therein. The earliest termination of the government suit as to any one of the defendants was on November 8, 1948, as to RKO.

[*Tolling the Period of Limitations*]

The preferential run was granted to Arion in September, 1936. From that date until the government suit was instituted on July 20, 1938, about one year and ten months had

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elapsed. From November 8, 1948, when the *RKO* decree was entered until the filing of the present action on November 6, 1952, approximately four years elapsed. In view, therefore, of the tolling of the statute of limitations by 15 U. S. C. § 16, it follows that plaintiffs may recover whatever damages Hollywood sustained from September 6, 1936, to the end of the conspiracy. However, this Court in *Rubenstein v. Columbia* [1957 Trade Cases ¶ 68,789], 154 F. Supp. 216, has determined that as to MAC, plaintiffs can recover damages only for the six-year period prior to November 6, 1952. This is bottomed primarily on the premise that MAC was not a party to the government suit, and hence the statute of limitations was not tolled as to it. Defendants contend that the Court cannot apportion damages among tort feasors, but must hold that all defendants are jointly and severally liable for the damages which plaintiffs have sustained. But the six-year statute of limitations is personal to MAC; it is not applicable to the remaining defendants. There is no good reason why damages may not be assessed against the various defendants in the amounts and according to the liabilities established. See Rule 20(a), Federal Rules of Civil Procedure, and *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.* [1953 Trade Cases ¶ 67,560], 113 F. Supp. 937.

[*Demand*]

Before arriving at the method of computing damages herein, certain motions made by individual defendants should be determined. First, Warner Bros. seek a dismissal because the evidence does not affirmatively establish that Hollywood ever made a demand upon it for a better run during the period in question. However, it is clear that Warner Bros., a member of the national conspiracy, also was a member of the conspiracy on the local level which had for its objective the granting to MAC theatres a preferential run over the independent theatres charging the same admission price. In view of the clarity of the evidence in that regard and the apparent futility of any demand on the part of independent theatres to terminate that concert of action, Warner Bros. cannot be immunized from its wrongdoing merely because Hollywood did not demand that it withdraw from the illegal combination.

[*Proper Party Defendant*]

The next motion, however, made by the Paramount Film Distributing Corporation (hereafter called Paramount Film) for judgment in its behalf because it is not a proper defendant, requires a somewhat extended discussion. Paramount Film was incorporated in 1939. It was the wholly owned subsidiary of Paramount Pictures, Inc. It was licensed by its parent corporation to distribute Paramount products from branch offices where Paramount Pictures, Inc., did not itself distribute its pictures. Paramount Pictures, Inc., distributed its own pictures in the State of Minnesota during the years in question and did so until it was dissolved on or about December 31, 1949, in accordance with the directive of a consent decree in *United States v. Paramount, supra.* Paramount Film distributed the pictures of Paramount Pictures in certain States other than Minnesota up to January 1, 1950. Paramount Pictures, Inc., under the directive for its dissolution, transferred all of the production and distribution assets to a newly formed New York corporation called Paramount Pictures Corporation, which became the new parent of Paramount Film. This new corporation expressly assumed the anti-trust liabilities of Paramount Pictures, Inc. Paramount Film did not assume such liabilities. It was not until January 1, 1950, that Paramount Film began to do business in Minnesota. It did receive, however, through its new parent, Paramount Pictures Corporation, the so-called production and distribution assets in this State formerly owned by Paramount Pictures, Inc.

By reason of its dissolution, Paramount Pictures, Inc., ceased doing business in Minnesota on December 31, 1949, and filed its certificate of withdrawal from this State on January 10, 1950. Under Minnesota law, Paramount Pictures, Inc., was amenable to service of process in this State for a three-year period thereafter. Consequently, Paramount Pictures, Inc., was amenable to suit at the time this proceeding was instituted on November 6, 1952. However, plaintiffs failed to avail themselves of the provision of the statute to which reference has been made and did not make Paramount Pictures, Inc., a party to this suit. Instead, they served Paramount Film, which company was not authorized to do business in this State until January 1, 1950, which date as will hereafter be indicated, was

after the conspiracy had terminated as to Hollywood.

Plaintiffs advance several grounds as to why Paramount Film should be held liable for damages herein to the same extent as the other distributor defendants. They point out that Paramount Film was named as a defendant in the national conspiracy litigation (the *Paramount* cases), and they urge that that fact alone is sufficient to render this company responsible for the local acts of its fellow conspirators. But Paramount Film had nothing to do with this local conspiracy. It was not authorized to do business in this State during that period. The *Paramount* decrees alone cannot be the basis for a recovery of every unlawful act performed on a local level as to those who may have been parties to the national conspiracy. If that doctrine were to be applied, then any exhibitor or distributor defendant named in the *Paramount* cases could, without more, be held liable for the impact of any local conspiracy throughout the Nation although they were not doing business in the particular area and in no way participated in or even knew of the wrong which was committed.

Paramount Pictures, Inc., was the parent of Paramount Film. No contention is made that these corporations were not bona fide. The common directorate of the two corporations and the fact that some of the employees worked for both corporations will not permit their district corporate existence to be disregarded. No fraud or other illegal activities were practiced so as to estop either the parent or the subsidiary from urging its separate corporate existence. Here, plaintiffs seek to make the subsidiary, Paramount Film, liable for the wrongdoing of its parent. Plaintiffs had ample opportunity to sue the parent corporation, but it neglected to do so. The advent of Paramount Film into the State of Minnesota as a distributor of films for Paramount Pictures Corporation after the conspiracy had ended will not sustain plaintiffs' contention that it is liable for the acts of its former parent in a local conspiracy. Moreover, the isolated instances when Paramount Film's license contracts, sent from the State of Wisconsin where Paramount Film was authorized to do busines, may have been used in Minnesota during the period in question when the Minneapolis office was short of license contract forms is of no particular significance. And the assignment by Paramount Pictures Corporation, the new parent of Paramount Film to the latter of certain production and distribution assets in this State formerly owned by Paramount Pictures, Inc., when it too over the Minneapolis Exchange, is likewise of no help to the plaintiffs in their attempt to hold Paramount Film liable for the acts of its parent. At least, Paramount Pictures, Inc., would be an indispensable party. There is no evidence here as to the amount or value of the local assets of Paramount Pictures, Inc., turned over to Paramount Film. That the similarity of names of the Paramount companies may have caused confusion even to those employed by the various Paramount companies may be admitted. But there is no showing that plaintiffs were in any way misled or confused by the similarity of the names. Certainly, there was no confusion over the fact that Paramount Pictures, Inc., was dissolved on December 31, 1949; that it filed its certificate of withdrawal from the State on January 10, 1950; that a three-year period existed thereafter for suits to be brought against it; that Paramount Pictures Corporation assumed the liabilities of Paramount Pictures, Inc.; and that Paramount Film was not authorized to do business in this State until January 1, 1950. There is an absence of any sound premise in the record upon which any liability for Hollywood's damages herein can be thrust upon Paramount Film.

[*Termination of Conspiracy*]

As indicated above, the showing requires a finding that the preferential run obtained by Arion over Hollywood came to an end in 1948. Certain of the distributors in that year, at least, had entered upon a new plan of runs and clearances in Minneapolis, and although the plan of runs and clearances may be said to have been in a state of flux during that year, the break of the impasse theretofore maintained by the distributors in their refusal to accord independents equal availability with circuit theatres charging the same admission had taken place. A final decree had been entered in the *Paramount* cases and the national conspiracy was restrained. The evidence of the change in runs and clearances granted by the distributors in Minneapolis began to appear in 1948. At that time one Lowell Kaplan was the booking agent for Holly-

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wood. Apparently, he made no attempt to obtain a better run for this theatre until April 6, 1949. He wrote a letter to all the defendant distributors on that date in behalf of Hollywood, as well as the Alhambra and El Lago theatres in Minneapolis, requesting a 28 day availability after the first run. On April 21, 1949, Paramount, while stating that it did not believe its best interests would be served by negotiating a 28 day availability, informed Kaplan that it would be willing to negotiate on the basis of a 42 day availability. However, on May 5, 1949, Kaplan wrote Paramount in answer to a letter of May 4, 1949, as follows:

> "In answer to your letter of the 4th regarding your release 'El Paso' for the Alhambra, El Lago and Hollywood theatres, please be advised that we will not at that date be ready for the 28 day availability."

Arion was then on a 28 day availability. On May 6, 1949, Fox offered Hollywood an opportunity to bid competitively with Arion on a certain picture, but Hollywood took no action on the offer. Metro Goldwyn Mayer offered Hollywood, some time before September 26, 1949, an opportunity to bid on 14 pictures on a competitive basis for a 26 day availability. However, no bids were received from Hollywood. Plaintiffs' response is that all the distributors had not evidenced sufficient interest in response to Kaplan's letter requesting a 28 day availability, and hence Hollywood was justified in concluding that it could not obtain an even flow of sufficient pictures to justify a change from the 56 day availability which it then had. However, the evidence is quite clear that the distributors had abandoned their concerted effort to favor the circuit theatres by the end of the year 1948. Homewood, for instance, an independent theatre, was on a 28 day run by Paramount in April, 1949. Riverside, likewise an independent theatre, was also at that time on a 28 day availability by Paramount. It is fair to find, therefore, that whatever differences there may have been in 1949 with reference to the availability granted to theatres in Minneapolis charging the same admission price, such differences were due to independent negotiations by the distributors and not by reason of any illegal combination. In any event, the Court is abundantly satisfied that, if Hollywood had attempted early in 1949 to negotiate for a better availability than 56 days after first run, it could have obtained a better run from sufficient distributors to enable it to maintain its theatre with an even flow of sufficient pictures. And the evidence is impelling that the strait jacket of runs and clearances which had been applied to Hollywood had been removed by the latter part of 1948. The unexpected freedom of market in that year may have confounded Hollywood as to its future policy. But such circumstances should not be charged against the defendants.

[*Measurement of Damages*]

Presumably, the determination of Hollywood's damages, simply stated, is the computation of the net gross box office returns that it would have obtained but for the conspiracy. But obviously that computation is laden with many difficulties. That Hollywood would have had to pay a higher film rental on a 49 day availability is evident. Moreover, that there would have been competitive bidding between the two theatres on many films is also highly probable. These occasions would tend to increase the film rental over that which Hollywood paid on a 56 day availability, and when some pictures would be played at each theatre day and date, the box office grosses of each theatre would be diminished. It is, of course, difficult to predict with any degree of certainty the various situations which would have arisen if these two theatres in substantial competition had been on an equal availability. It is entirely possible that during some years Hollywood, as a new and more attractive theatre, would have outstripped Arion in patronage. On the other hand, when Charles Rubenstein was in the military service and during the war years, Arion, on a busy commercial street, may have far out-distanced Hollywood in gross boxoffice receipts.

As an alternative method of computing damages, plaintiffs have set forth the net boxoffice returns of Hollywood and Arion during the years in question and has computed the difference as Hollywood's pecuniary loss. In this schedule plaintiffs have listed Hollywood's average film rental as 25 per cent and Arion's average film rental as 29.4 per cent. However, there are many considerations which tend to emphasize the fallaciousness of that method of computing damages. From October 1, 1940, until January 7, 1943, Hollywood voluntarily lowered its admission price from 25 cents

to 20 cents and then raised it to 22 cents, and during that period was on a 70 day availability. Moreover, during that period it was playing some 14 days behind the Columbia Heights Theatre, one of its substantial competitors. The boxoffice grosses of Hollywood indicate a substantial slump during this particular period. In 1939, Hollywood's boxoffice grosses totaled $47,864; in 1940, 1941 and 1942, $42,865, $42,905 and $42,839 respectively. In 1943, however, when it returned to the 25 cent admission, its boxoffice grosses jumped to $49,278. When Charles Rubenstein was in the military service from 1943 to 1946, other management controlled the policy of Hollywood, and with the advent of gas rationing during the war years and the advantages which accrued to theatres located in the bright-light commercial areas, the disparity between the boxoffice gross of the two theatres is striking. In 1941, Arion's boxoffice grosses exceeded those of Hollywood by less than $5,000. In 1942, the excess of Arion over Hollywood was over $11,000; in 1943, Arion's excess was over $18,000; in 1944, the excess jumped to some $23,000; and in 1945, it was approximately $20,000. And in 1946 the spread in the grosses between the two theatres reached the all-time high of some $30,000. These differences in grosses cannot be attributed solely to the differences in their availabilities for pictures after first run. That there was a substantial impact upon theatre patronage during the war years is well established. Moreover, it seems evident that, when there was a change in management of Hollywood's policy and the experience with a lower admission price resulting in a 70 day run some 14 days behind Columbia Heights, one must conclude that the difference between the grosses in the two theatres must be attributed in part to causative factors and conditions other than the preferential run granted to Arion.

Once it is recognized that the record will not justify a finding that Hollywood would have obtained a preferential run during this entire period over Arion but for the conspiracy, we are confronted with many uncertainties in attempting to arrive at a fair measure of damages. It is reasonably certain, however, that if these two theatres had been given the same availability by the distributors, there would have been just so much theatre patronage for them in the area in which they were operating. In all probability, the combined box-office grosses of the two theatres would not have been increased over that which the records now reflect. Some years Hollywood's may have exceeded Arion's, and on the other hand, during some years Arion's undoubtedly would have exceeded Hollywood's. It is to be doubted that during the twelve year period with the many changing conditions and the probable fluctuations between the two theatres as to their playing positions, there would have resulted a greater joint gross boxoffice return than that which actually was received. As stated heretofore, MAC once proposed that the net boxoffice grosses of the two theatres be pooled and divided between the theatres on an equal basis. It seems reasonable to consider that plan and utilize it as a means of determining Hollywood's loss herein. Under such an arrangement, the total gross returns of the two theatres would have to be totaled and a reasonable film rental deducted therefrom, and the balance then divided between the two theatres. The one which has not received its full share of the net boxoffice returns should be replenished as a measure of the damages sustained as a direct result of the conspiracy. A computation of damages on that basis appeals to the Court in light of all the evidence as a fair and equitable disposition of a most difficult problem. Granted that there may be other methods of arriving at the damages herein which probably could be supported by the record and which might increase or decrease the pecuniary loss arrived at by the method of pooling the earnings of the two theatres, the Court concludes, after a great deal of consideration and reflection, that the so-called pooling of gross boxoffice returns should be adopted. But the Court does not concur in defendants' contention that the actual joint gross returns should be subject to an arbitrary percentage diminution. Defendants contend that the combined grosses of the two theatres would have been diminished by at least twelve and one-half per cent if they played on an equal availability. But that percentage figure is not based upon any evidence, and defendants assume to proceed with an equally unsupported theory of damages when they assert that Hollywood sustained no pecuniary loss whatsoever by reason of being deprived of an equal run with Arion. The

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fact of damages is clearly established. The difficulty is to arrive at a sum which is realistic and sound. In any event, the Court is clear that substantial justice will be accorded Hollywood if the pecuniary loss it sustained is computed from September 6, 1936, to January 1, 1949.

This brings up the question of the formula for the film rentals which should be applied and deducted from the total grosses. Hollywood paid on an average of substantially 25 per cent of its gross as film rental, and Arion 29.4 per cent. It is reasonable to conclude that, with the granting of the 49 day availability to these two theatres in substantial competition, there would be an effort, and a successful one on their part, to bring the film rental below the average rate paid by Arion. The selection of the mean average of 27.2 per cent as film rental seems justified.

Plaintiffs challenge the accuracy of the records of MAC as to the film rental actually paid by Arion. However, there is no reason to believe that MAC was not attempting to obtain as reasonable film rental as it could from the various distributors, and there is no reason to assume that the books during the period in question do not reflect the actual film rental paid. Certainly, there is no basis for plaintiffs' assertion that MAC had some sinister purpose in entering fictitious film rentals on its books as to Arion's operations. The so-called blanket deals for films which MAC may have had with some of the distributors were relatively few and do not destroy the verity of MAC's computations on its books as to the film rental Arion paid from its gross boxoffice returns.

The following table will illustrate the Court's findings as to damages and the method employed in arriving at Hollywood's pecuniary loss. In that MAC by reason of the six-year statute of limitations has only a six year damage period, to wit, six years prior to November 6, 1952, a break is indicated in the schedule as to MAC's liability for damages beginning November 6, 1946.

	Combined Gross	One-half to Hollywood	27.2 Film Rental	Net Gross to Hollywood	Actual Hollywood Net Gross	Difference
1937	$107,821	$53,910	$14,663	$39,247	$36,816	$ 2,431
1938	109,417	54,708	14,880	39,828	38,012	1,816
1939	102,531	51,265	13,944	37,321	35,816	1,505
1940	93,540	46,770	12,721	34,049	31,247	2,802
1941	90,542	45,271	12,313	32,958	31,921	1,037
1942	97,103	48,551	13,205	35,346	31,165	4,181
1943	117,108	58,554	15,926	42,628	36,949	5,679
1944	120,266	60,133	16,356	43,777	36,406	7,371
1945	119,009	59,504	16,185	43,319	36,607	6,712
1946 to 11-5	125,425	62,712	17,057	45,655	37,374	8,281
1946 after 11-5	23,737	11,868	3,228	8,640	7,320	1,320
1947	162,549	81,274	22,106	59,168	53,817	5,351
1948	158,959	79,479	21,618	57,861	51,253	6,608
						$55,094

In considering the method of computing damages as above set forth, it may be urged that the Court has given no effect to the war years when Arion's boxoffice gross probably would have exceeded Hollywood's if these two theatres had been playing on an equal availability. That is, of course, true. But, on the other hand, the Court has given no consideration in its computation to the years when Hollywood, by reason of its attractiveness as a new theatre, probably would have exceeded Arion's boxoffice gross. The fluctuation in the grosses of the two theatres, if they had operated on an equal availability, would be fairly balanced, and the Court's computation of damages is reasonably determinative of the pecuniary losses sustained by Hollywood as a direct result of the conspiracy.

MAC has interposed a counterclaim herein. It is not necessary to discuss its nature in that no evidence was offered in support thereof. Plaintiffs, therefore, are entitled to a dismissal of the counterclaim. In view of the Court's conclusions as to plaintiffs' failure to sue Paramount Pictures,

Inc., and instead joined Paramount Film Distributing Corporation, not a party to this local conspiracy, that company cannot be held for any damages sustained by Hollywood and it follows that a dismissal should be entered in its behalf.

Findings of fact and conclusions of law consistent herewith may be presented by plaintiffs upon ten days' notice. At that time the motion of plaintiffs as to attorneys' fees to be allowed herein likewise may be noticed for hearing. Orders granting the dismissals above referred to also may be presented. Exceptions are reserved.

Findings of Fact, Conclusions of Law and Order for Judgment

[March 24, 1959]

The above entitled action having been duly tried to the Court without a jury, the trial herein having been held on various dates from September 4, 1957 to December 21, 1957, the Court having heard and considered the testimony and evidence and the arguments and briefs of the respective parties, and the Court having made and filed its Memorandum Decision herein on January 27, 1959, which Memorandum Decision is hereby made a part hereof and incorporated herein by reference, now, upon the record herein the Court does hereby make the following:

Findings of Fact

I.

[*Parties*]

Columbia Pictures Corporation is a New York corporation organized on January 10, 1924. Its name has not been changed and it has been engaged in the distribution of motion pictures, and, directly or through affiliated corporations, in the production of motion pictures at all times relevant to this controversy. It is generally referred to in the record and herein as "Columbia".

II.

Loew's Incorporated is a corporation organized in Delaware on October 18, 1919, and its name has not been changed. It has been engaged, either directly or through subsidiaries, in the production and distribution of motion pictures, and, until recent years, in the exhibition of motion pictures. Loew's has been affiliated with a subsidiary corporation known as Metro-Goldwyn-Mayer Corporation; and Loew's has been referred to in the industry also as "MGM" and as "Metro". It is variously referred to in the record under all three names, "Loew's", "MGM" and "Metro". It is referred to herein as "Loew's".

III.

Twentieth Century-Fox Film Corporation, the corporation named as a defendant herein originally, was a corporation organized in the State of New York on February 1, 1915 as "Fox Film Corporation". It changed its name to Twentieth Century-Fox Film Corporation on August 22, 1935. It was engaged in the business of producing and distributing motion pictures until 1952; and it was dissolved on December 1, 1952. Said corporation was known in the trade and was generally referred to in the record and herein as "Fox". Just prior to the dissolution of Twentieth Century-Fox Film Corporation (New York) its name was changed to TCF Film Corporation and a new corporation named Twentieth Century-Fox Film Corporation was incorporated under the laws of the State of Delaware on July 22, 1952. On or about September 27, 1952, the production and distribution assets, including the distribution assets within the State of Minnesota, of said New York corporation were transferred to said Delaware corporation, which has held them since that time, and the Delaware corporation undertook to pay the liabilities of the New York corporation. Both TCF Film Corporation and Twentieth Century-Fox Film Corporation (Delaware) have made general appearances as parties defendant herein; and said Delaware corporation has stipulated to secure payment of any judgment against said New York corporation in this action.

IV.

Universal Film Exchanges, Inc., is a corporation organized in Delaware on May 20, 1918, and has not changed its name. It has been engaged in the business of distributing motion pictures since its organization. It has been a wholly owned subsidiary of Universal Pictures Company, Inc., which latter company produced motion pictures that were distributed by Universal Film Exchanges, Inc. Said defendant is generally referred to in the record and herein as "Universal".

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V.

United Artists Corporation is a corporation organized in Delaware on April 17, 1919, and its name has not been changed. It has been engaged since the time of its organization in distributing motion pictures produced by other persons or firms, and it differs from the other motion picture distributors that are defendants in this case in having had no studios or production facilities owned by it or any affiliated corporation, and in having confined its activities to releasing and distributing facilities. It is generally referred to in the record and herein as "United Artists" or "UA".

VI.

Warner Bros. Pictures Distribution Corporation is a corporation organized under the laws of New York on April 6, 1915. It has had two changes of name. From 1919 until 1944 said defendant was known as Vitagraph, Inc., and since 1944 it has been known as Warner Bros. Pictures Distributing Corporation. It has been a wholly owned subsidiary of Warner Bros. Pictures, Inc., which was engaged in the production of motion pictures that were distributed by Warner Bros. Pictures Distributing Corporation. During the period prior to 1950 it was affiliated with corporations engaged in the exhibition of motion pictures. Warner Bros. Pictures Distributing Corporation is referred to in the record and herein both as "Warner Bros." and as "Warners".

VII.

RKO Radio Pictures, Inc., is a corporation organized in Delaware on June 7, 1921. It has had various changes of name, and on July 3, 1930 its name became RKO Radio Pictures, Inc. This remained the name of the corporation until December 30, 1955 when the name was changed to RKO Teleradio Pictures, Inc. Until February 1957 the corporation was engaged in the production and distribution of motion pictures. During some period prior to October 31, 1936, RKO pictures were also distributed through an affiliated corporation known as RKO Distributing Corporation. During the period prior to 1950 this defendant was affiliated with corporations engaged in the exhibition of motion pictures. This defendant is generally referred to in the record and herein as "RKO".

VIII.

Minnesota Amusement Company is a corporation organized in Delaware on September 19, 1932 and has not changed its corporate name. It was a wholly owned subsidiary of Paramount Pictures, Inc., from its incorporation until December 31, 1949. In 1932 Minnesota Amusement Company acquired a circuit of about 112 theatres from another corporate subsidiary of Paramount Pictures, Inc., known as Publix Northwest Theatres, Inc. By 1951 the number of theatres operated by this defendant had dropped to 73. During the period in controversy here, Minnesota Amusement Company has been the largest exhibition circuit in this area, and it has operated numerous first and subsequent run theatres in Minneapolis, Minnesota. Minnesota Amusement Company has been referred to in the industry and in the record as "Publix", as "the circuit", as "Paramount theatres" and as "MAC". It is sometimes referred to herein as "MAC".

IX.

(A) Paramount Film Distributing Corporation was incorporated in Delaware on January 26, 1939. From the time of incorporation until December 31, 1949, said defendant, herein sometimes called "Paramount Film", was a wholly owned subsidiary of Paramount Pictures, Inc.

(B) Paramount Film distributed pictures produced by Paramount Pictures, Inc., from branch offices where Paramount Pictures, Inc., did not itself distribute pictures until on or about December 31, 1949. Paramount Pictures, Inc., distributed its own pictures in the State of Minnesota until its dissolution on or about December 31, 1949, in accordance with the directive of a decree in the case of *United States v. Paramount,* referred to hereinafter.

(C) Paramount Film did not begin to do business within the State of Minnesota until January 1, 1950.

X.

Charles Rubenstein, Inc. is a corporation organized under the laws of Minnesota July 10, 1935. Charles Rubenstein has been the president and principal executive of the corporation since its organization, and has also been a shareholder in the corporation during the same period. Principal share-

holders in the corporation were Louis Rubenstein, the father of Charles Rubenstein, and A. A. Kaplan. Louis Rubenstein and A. A. Kaplan also were in business as a partnership, operating under the name of Rubenstein and Kaplan. They owned a theatre known as the Arion Theatre, and each of the partners owned a half interest in a corporation which owned the Granada Theatre in Minneapolis. At the death of Louis Rubenstein in 1939, his partnership interests devolved upon his sons, Charles, Sheldon and Arnold, and upon his widow, Anna Rubenstein. His interest in the Arion Theatre devolved upon his widow, Anna Rubenstein. All of the Rubenstein-Kaplan theatre interests were owned and operated as a two family interest with A. A. Kaplan owning one half and the members of the Rubenstein family the other one half in various percentages from time to time.

XI.

[*Plaintiff Theatre*]

The Hollywood Theatre was built by Charles Rubenstein, Inc., in the summer and early fall of 1935 on land owned by the corporation at 2815 Johnson St. Northeast, in the City of Minneapolis, Minnesota. Hollywood Theatre was operated by Charles Rubenstein, Inc., until the beginning of the year 1943, when Charles Rubenstein was called into military service. At this time the operation of the theatre was taken over by a partnership called "Rubenstein and Kaplan", and composed of Charles Rubenstein, Anna Rubenstein, Arnold Rubenstein, Sheldon Rubenstein and A. A. Kaplan. After the beginning of 1943 the Hollywood Theatre was operated by the partnership of Rubenstein and Kaplan under the lease from Charles Rubenstein, Inc.

XII.

From the fall of 1936 until Louis Rubenstein's death, the principal stockholders of Charles Rubenstein, Inc., Louis Rubenstein and A. A. Kaplan, were the owners of the Arion Theatre. This was built in 1913, located on Central Avenue between 23rd and 24th Streets in Minneapolis, Minnesota, and leased by plaintiff A. A. Kaplan and his then partner, Louis Rubenstein, to the Minnesota Amusement Company. The Arion was operated by Minnesota Amusement Company and it and the Hollywood Theatre were located about one mile apart and were in substantial competition with each other at all times relevant hereto. The lease on the Arion Theatre (as well as the Granada Theatre) expired in the early part of 1943. These leases were renewed in the early part of 1942 for an additional ten-year period.

XIII.

[*Defendants' Business*]

During the entire period relevant hereto, the defendants Columbia, Loew's Fox, Universal, United Artists, Warners and RKO were engaged in the distribution of motion pictures all of which were produced outside the State of Minnesota, and most of which were produced in the State of California. These motion pictures were shipped and transported by the respective distributor defendants named from the places of production to the State of Minnesota, and other states of the United States for exhibition. A substantial number of such motion pictures were so transported in interstate commerce in each of the years involved in the present controversy, and substantially all of such motion pictures were transported in interstate commerce to the State of Minnesota and exhibited therein.

XIV.

A substantial amount of interstate commerce was involved in the activities of said distributor defendants, and said defendants do not deny that said activities constitute and involve interstate commerce.

XV.

Pictures so distributed by said distributor defendants and by Paramount Pictures, Inc., were exhibited by MAC and by the plaintiffs in the Arion Theatre and Hollywood Theatre, respectively, and most of the motion pictures exhibited in these two theatres during the period in controversy here were motion pictures so distributed by said distributor defendants and Paramount Pictures, Inc. The product of the distributor defendants, or their predecessors then operating in this state, was necessary to the successful operation of a suburban theatre in Minneapolis during the period in controversy here.

XVI.

Motion pictures are distributed by the leasing of a print of a picture by a distributor to an exhibitor for a stipulated

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amount, known as "film rental" and which may be stated in terms of dollars, in terms of percentage of boxoffice gross, or in terms of some other formula or method of calculation. Motion pictures are exhibited in a given community on successive "runs", the first exhibition being the "first run", the second exhibition in the community being the "second run", and so forth. The time elapsing between successive runs of a picture is known as "clearance" or "protection". The "availability" is the date on which a picture will be offered to a given theatre by a distributor for exhibition. The availability of subsequent run theatres is usually expressed in terms of days after first run, so that a "56 day availability" means that a theatre will be offered pictures for exhibition 56 days after first run. The term "break" is also used to mean the same as "availability", and the playing position of a subsequent run theatre is often expressed in terms of a "run", which in this context means the same as availability. Thus a "56 day run" means an availability or playing position 56 days after first run.

XVII.

[*Runs and Clearances*]

The Hollywood Theatre commenced operations on October 26, 1935. It was then a newly constructed, attractive motion picture theatre situated in a suburban area of Minneapolis and with a seating capacity of 950. It was generally considered one of the most attractive suburban theatres at that time in Minneapolis.

XVIII.

In 1935, before the Hollywood opened, the Arion was a 932 seat theatre charging 15 cents admission and on a playing position of 112 days after first run. Shortly before Hollywood opened, Arion advanced its admission price to 20 cents and changed its playing position to 70 days after first run. MAC, as the lessee of Arion in 1935, had permitted that theatre to become run down and in need of improvements; and it was in poor shape to compete with the brand new and attractive Hollywood.

When the Hollywood Theatre commenced operations its playing position was 56 days after first run and it charged 25 cents admission. Shortly after this, MAC proposed to shareholders of Charles Rubenstein, Inc., that the Arion and Hollywood operations should be pooled, the two theatres be operated jointly, the Hollywood should play the better pictures, and the net profits of the operations should be divided equally between the two theatres. This proposal was rejected.

XX.

In 1936 MAC expended about $16,000 on renovating the Arion, with the consent of the lessors, Louis Rubenstein and A. A. Kaplan. The Arion then went on a 25 cent admission price and announced to the distributors that it would play on a 49 day playing position, 7 days ahead of the Hollywood.

XXI.

The clearance schedule followed by all of the motion picture distributors in Minneapolis at this time, was, as stated in a memorandum of one of the distributors:

25 cent houses	49 days Publix (MAC Circuit Theatres)
25 cent houses	56 days Independents
20 cent houses	63 days Publix
20 cent houses	70 days Independents
15 cent houses	105 days Publix
15 cent houses	112 days Independents

XXII.

This clearance schedule or plan was well known to and followed by all of the distributors in Minneapolis for some time prior to 1936. This clearance schedule involved establishing the playing position of a theatre by the admission price charged and involved giving a preferential run to MAC theatres whereby the circuit theatres upon request were permitted to play 7 days earlier than independent theatres charging the same admission price. The preferential runs of MAC theatres were established and existed with the approval and cooperation of all the defendant distributors doing business in Minnesota at this time.

XXIII.

As a result of the clearance schedule established and adhered to by action of all the defendant distributors then doing business in this State and of the preferential runs accorded the MAC theatres pursuant to this clearance schedule, the Arion Theatre was given a playing position 7 days earlier than the Hollywood Theatre.

XXIV.

After the Arion Theatre was given a preferential playing position ahead of Hollywood Theatre, Charles Rubenstein, as the manager in active charge of the Hollywood, repeatedly protested in the years 1936 and 1937 to the branch managers of most of the distributors against the preferential run of the Arion and requested that the Hollywood be accorded the same availability as the Arion. There is no evidence of protests to Warners. Such protests as were made were rejected and the requests refused.

XXV.

None of the plaintiffs at any time consented to or acquiesced in the grant to the Arion of a preferential playing position ahead of the Hollywood.

XXVI.

[*Government Suit—Conspiracy*]

A suit or proceeding in equity was brought by or on behalf of the United States to prevent or restrain violation of the antitrust laws in the United States District Court for the Southern District of New York in the case of *United States v. Paramount Pictures, Inc.*, et al., Equity No. 87-273, on July 20, 1938. Defendants in said action included Columbia, Loew's, Fox (the New York corporation), Universal, United Artists, Warners, RKO, Paramount Film, and Paramount Pictures, Inc. Various and protracted proceedings were had in this action. The proceedings are reported in *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323 [1946-1947 TRADE CASES ¶ 57,470]; 70 F. Supp. 53 [1946-1947 TRADE CASES ¶ 57,526]; 334 U. S. 131, [1948-1949 TRADE CASES ¶ 62,244]; 85 F. Supp. 881 [1948-1949 TRADE CASES ¶ 62,473]; and 339 U. S. 974. Final decrees were entered against Columbia, Loew's, Fox (the New York corporation), Universal, United Artists, and Warners on February 8, 1950, against RKO on November 8, 1948, and against Paramount Film and Paramount Pictures, Inc., on March 3, 1949, all to the effect that said defendants had violated the antitrust laws of the United States.

XXVII.

Columbia, Loew's, Fox (New York), Universal, United Artists, Warners, RKO, Paramount Film, Paramount Pictures, Inc., and other corporations not involved in this case, are shown by the aforesaid proceeding to have been engaged in a national conspiracy which had among its objectives the granting of preferential runs to the exhibitors affiliated with the major distributors.

XXVIII.

The national conspiracy referred to in Finding XXVII above was carried out on a local level by the establishment and maintenance in Minneapolis, Minnesota of the clearance schedule set forth in Finding XXI above. Defendants Columbia, Loew's, Fox (New York), Universal, United Artists, Warners, RKO and MAC combined and conspired among themselves and with Paramount Pictures, Inc., to carry out in Minneapolis the national conspiracy and to establish and maintain the local schedule of clearances referred to herein.

XXIX.

The granting of preferential circuit runs to MAC theatres in Minneapolis, Minnesota, during the period specified herein, and the granting of a preferential run to the Arion Theatre by which it played ahead of the Hollywood Theatre were parts of, purposes of and results of both the national and local conspiracies as set out in the foregoing findings among the parties respectively named therein.

XXX.

The clearance granted to the Arion Theatre over the Hollywood Theatre was unreasonable, and was also collusive and discriminatory.

XXXI.

The unreasonable, collusive and discriminatory clearance of the Arion Theatre over the Hollywood Theatre established and maintained by MAC and the distributor defendants then doing business in Minnesota began in September 1936 and ended about the end of the year 1948. The evidence indicates that the Hollywood could have obtained a better playing position by independent negotiations with the distributors some time early in 1949.

XXXII.

Had it not been for the conspiracy above described, the establishment and maintenance of the uniform clearance schedule in

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Minneapolis and the granting of the preferential circuit run and clearance to the Arion Theatre as set forth above, the Hollywood Theatre would have had an earlier and more advantageous playing position and would not have been forced to play pictures after its competitor the Arion Theatre had first exhibited them, during the period September 6, 1936 to January 1, 1949.

XXXIII.

[*Damages*]

The expenses of operation of the Hollywood Theatre, other than film rental, would not have been increased had it played on an earlier or more advantageous playing position during the period involved herein.

XXXIV.

In general, the earlier the playing position a motion picture theatre enjoys the more favorable it is, since it is preferable to exhibit pictures before they have been shown to the public in other theatres in the competitive area. For subsequent run theatres, during the period involved here, an earlier playing position generally involved higher admission prices and larger box office gross receipts, as well as larger net receipts and profits.

XXXV.

The Hollywood Theatre was certainly and clearly damaged as a direct and proximate result of the conspiracy among the defendants referred to above, the preferential run granted to the Arion and the clearance of the Arion over the Hollywood.

XXXVI.

There are many problems in attempting to arrive at a measure of the amount of damages to the Hollywood. However, the Court concludes and finds that a fair and reasonable basis for determining the amount of such damages is to assume that the combined box office grosses of the Arion and the Hollywood would not have been increased over the amounts actually secured by those theatres had there been no conspiracy and had the Hollywood secured a more advantageous playing position as the result of independent negotiations in a free market. Upon such an assumption, damages may be calculated by adding the box office grosses of the two theatres for the years involved, assigning one-half of this total to the Hollywood, deducting a fair allowance for film rental, and then determining the difference between the net thus arrived at and the actual net receipts of the Hollywood during the period from September 6, 1936, to January 1, 1949.

XXXVII.

During the said damage period the average film rental of the Hollywood was 24.74% of its box office gross and the average film rental of the Arion was 29.37% of its box office gross. It is reasonable to conclude that with the granting of equal availability to these two theatres in substantial competition the film rental would have been a mean average of these amounts or 27.055% of box office gross.

XXXIII.

The following table sets forth the Court's findings as to damages and the method employed in computing Hollywood's pecuniary loss, which is the amounts set forth in the final column headed "Difference", which amounts the Court finds to be the amounts of net loss to the plaintiffs during the respective periods indicated caused by the conspiracy and acts of the defendants set forth in the preceding findings:

	Combined Gross	One-Half to Hollywood	27.055% Film Rental	Net Gross to Hollywood	Actual Hollywood Net Gross	Difference
1937	$107,821	$53,910	$14,585	$39,325	$36,816	$ 2,509
1938	109,417	54,708	14,801	39,907	38,012	1,895
1939	102,531	51,265	13,870	37,395	35,816	1,579
1940	93,540	46,770	12,654	34,116	31,247	2,869
1941	90,542	45,271	12,248	33,023	31,921	1,102
1942	97,103	48,551	13,135	35,416	31,165	4,251
1943	117,108	58,554	15,842	42,712	36,949	5,763
1944	120,266	60,133	16,269	43,864	36,406	7,458
						¶ 69,521

	Combined Gross	One-Half to Hollywood	27.055% Film Rental	Net Gross to Hollywood	Actual Hollywood Net Gross	Difference
1945	$119,009	$59,504	$16,099	$43,405	$36,607	$ 6,798
1946 to 11/5	125,425	62,712	16,967	45,745	37,374	8,371
1946 after 11/5	23,737	11,868	3,211	8,657	7,320	1,337
1947	162,549	81,274	21,989	59,285	53,817	5,468
1948	158,959	79,479	21,503	57,976	51,253	6,723
Total, 1937 to 11/5/46, incl.						$42,595
Total, 11/6/46 to 1948, incl.						13,528
Total, 1937 to 1948, incl.						$56,123

XXXIX.

The combination and conspiracy of the defendants found to have conspired and the acts of said defendants in granting a preferential circuit run to the Arion Theatre and imposing an unreasonable clearance upon the Hollywood Theatre, as set forth above, have unreasonably restrained trade and commerce among the several states in motion pictures and the distribution of motion pictures, and have injured the plaintiffs in their business and their property in the amount of $42,595 during the period January 1, 1937, to November 5, 1946, inclusive, and in the amount of $13,528 during the period from November 6, 1946, to December 31, 1948, inclusive.

XL.

[*Subsidiary Corporation—Liability*]

Paramount Film Distributing Corporation was not engaged in business in the state of Minnesota prior to 1950. It did not participate in the local conspiracy in Minneapolis, Minnesota, or in the establishment or maintenance of uniform Minneapolis clearance schedules or the preferential circuit run granted to the Arion Theatre or to the clearance of the Arion Theatre over the Hollywood Theatre. *Paramount* decrees alone cannot be the basis for recovery for the unlawful acts performed on the local level as to those who may have been parties to the national conspiracy but did not participate in the local conspiracy. The fact that Paramount Pictures, Inc., which did participate in the local conspiracy, was a parent of Paramount Film does not permit the distinct corporate existence of the two to be disregarded nor permit holding the subsidiary, Paramount Film, liable for the wrong-doing of its parent.

XLI.

[*Counterclaim*]

No evidence whatever has been offered herein that plaintiffs, or any of them, have conspired against MAC or engaged in any other illegal conduct with respect to it, or in support of any of the allegations of the counter-claim of MAC herein.

XLII.

[*Attorneys' Fees*]

A motion has been made by plaintiffs for the allowance of attorneys' fees, and affidavits and arguments have been presented to the Court in connection with that motion. The Court has taken this matter under advisement and will make a separate order embodying appropriate findings and an allowance for attorneys' fees. The order of the Court allowing attorneys' fees, when duly made and filed, shall be considered a part of the Findings of Fact, Conclusions of Law and Order for Judgment herein.

XLIII.

The Court has heretofore made and filed a Memorandum Decision herein on January 27, 1959. Said Memorandum Decision is hereby incorporated in and made a part of these Findings of Fact and Conclusions of Law for all purposes.

Conclusions of Law

1. The distribution and exhibition of motion pictures by defendants as described above constitute trade and commerce among and between the several states of the United States within the meaning of the Sherman Act and the Clayton Act and laws amendatory thereof.

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2. This Court has jurisdiction of this cause under the provisions of the Clayton Act and the Judicial Code.

3. This Court has jurisdiction of each of the defendants named above.

4. The several final judgments and decrees rendered and entered in the proceeding by the United States against the several respective defendants in the United States District Court for the Southern District of New York referred to above are prima facie evidence against the defendants herein who are also named as defendants in that proceeding, except Paramount Film, to the effect that said defendants have combined and conspired to establish and maintain preferential playing positions for theatres affiliated with national distributors, including those in Minneapolis, Minnesota, in violation of the antitrust laws of the United States.

5. The running of the applicable statute of limitations in respect of plaintiffs' cause of action herein was suspended as to the defendants in said government action during the period of pendency of said proceeding against them in the United States District Court for the Southern District of New York, and the period of such suspension was from the filing of said action on July 20, 1938, until February 8, 1948, as to RKO, and until February 8, 1950, as to Columbia, Loew's Fox (New York), Universal, United Artists and Warners.

6. The period of time established by the statute of limitations applicable to the present case within which the plaintiffs may recover damages for injury to their business and their property is six years.

7. Pursuant to the applicable statute of limitations, plaintiffs may recover damages from MAC only for injuries suffered or damages incurred on and after November 6, 1946.

8. Pursuant to the applicable statute of limitations and the suspension thereof by the pendency of said government action, plaintiffs may recover damages from the other defendants for all injuries suffered and damages incurred at any time after September 6, 1936.

9. The Court herein is authorized to enter judgment against the various defendants in the amounts and according to the respective liabilities established.

10. The defendants, except Paramount Film and Fox (Delaware), agreed combined and conspired among and between themselves concertedly to establish and maintain preferential circuit runs for theatres operated by MAC, to grant such a preferential circuit run to the Arion Theatre, and to impose an unreasonable clearance upon the Hollywood Theatre in favor of the Arion Theatre, during the period from 1936 until the end of 1948, and thereby have agreed, combined and conspired unreasonably to restrain trade and commerce among and between the several states in violation of the Antitrust Laws of the United States.

11. Paramount Film Distributing Corporation not being a party to the local conspiracy is not liable for any damages sustained by the Hollywood and is entitled to judgment of dismissal.

12. As a direct and proximate result and consequence of the combination and conspiracy and the other acts of the said defendants in restraint of trade and commerce as described above, the plaintiffs have been injured in their business and property and have been damaged in the amount of $42,595 during the period from January 1, 1937, to November 5, 1946, inclusive, and in the amount of $13,528 during the period from November 6, 1946, to December 31, 1948, inclusive.

13. The plaintiffs are entitled to recover three-fold the damages sustained by them.

14. The plaintiffs are also entitled to judgment for reasonable attorneys' fees, the amount of which will be determined by the Court by a separate order, and which shall be added to the judgment herein when so determined and allowed by the Court.

15. The plaintiffs herein are entitled to judgment as follows:

(A) Against Columbia Pictures Corporation, Loew's Incorporated, RKO Radio Pictures, Inc., TCF Film Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corporation in the amount of $127,785 for damages sustained during the period January 1, 1937, to November 5, 1946, inclusive.

(B) Against Columbia Pictures Corporation, Loew's Incorporated, RKO Radio Pictures, Inc., TCF Film Corporation, Twentieth Century-Fox Film Corporation, United Artists

Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation, and Minnesota Amusement Company in the amount of $40,584, for damages sustained during the period November 6, 1946, to December 31, 1948, inclusive.

(C) That the counterclaim of Minnesota Amusement Company against plaintiffs herein be dismissed with prejudice.

(D) Against Columbia Pictures Corporation, Loew's Incorporated, RKO Radio Pictures, Inc., TCF Film Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Warner Bros. Pictures Distributing Corporation and Minnesota Amusement Company for attorneys' fees in the amount allowed by the Court, and for plaintiffs' costs and disbursements herein.

16. Paramount Film Distributing Corporation is entitled to judgment of dismissal on the merits, together with its costs and disbursements herein.

[¶ 69,522] **United States v. Standard Oil Company (New Jersey); Socony-Vacuum Oil Company, Inc.; Standard Oil Company of California; The Texas Company, and Gulf Oil Corporation.**

In the United States District Court for the Southern District of New York. Civ. 86-27. Filed November 10, 1959.

Case No. 1163 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act and Wilson Tariff Act

Department of Justice Enforcement and Procedure—Civil Suit for Injunctive Relief—Production of Documents—Area and Product Limitations—Narrowing of Issues in "Big" Case—Oppressiveness of Government's Demands—Size of Industry.—A trial court, in ordering oil companies charged with conspiring to monopolize international commerce in oil to comply with the Government's demand for the production of documents (some of which were in foreign countries), noted its awareness of the necessity for taking "vigorous measures" to keep "big" cases within manageable proportions, but held that it was unable, at the present time, to effectuate any narrowing of the issues here. Thus, the court refused to require the Government to remove the "crude oil" phase of the industry from its case, or to limit the required "file searches," even in the first instance, to certain "major consuming areas." Earlier, the court had ordered the companies to answer the Government's interrogatories, holding in abeyance the production motions in the hope that the answers to the interrogatories would help in narrowing the issues. That hope had not materialized. Hence, the court did not regard as feasible the companies' proposed plan of ordering production from the "major consuming areas" and then, after that information had been used to narrow the issues, ordering further production within the framework of those narrowed issues. As to the contention that the demands were oppressive, the court noted that the industry which the companies were charged with unlawfully controlling was one of vast size.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.280.

For the plaintiff: Victor R. Hansen, Assistant Attorney General; Richard B. O'Donnell, Chief, New York Office, Antitrust Division; and Wilbur L. Fugate, Charles L. Whittinghill, Barbara Svedberg, David Haberman, and Max Freeman, Trial Attorneys, Department of Justice.

For the defendants: Davis, Folk, Wardwell, Sunderland & Kiendl (Taggart Whipple, of counsel), and Sullivan & Cromwell (Arthur H. Dean and Roy H. Steyer, of counsel), New York, N. Y., for Standard Oil Co. (N. J.); Donovan, Leisure, Newton & Irvine (George S. Leisure and James R. Withrow, Jr., of counsel), and Dorr, Hand, Whittaker & Peet (Goldthwaite H. Dorr, of counsel), New York, N. Y., for Socony-Vacuum Oil Co., Inc.; Cahill, Gordon, Reindel & Ohl, New York, N. Y., for Standard Oil Co. of Cal. (John F. Sonnett and William Sayre, of counsel); Kissam & Halpin (Leo T. Kissam and George B. Cooke, of counsel), and Oscar John Dorwin, New York, N. Y., for Texas

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Co.; Dunnington, Bartholow & Miller, New York, N. Y. (William F. Saunders, of counsel), and Howrey & Simon, Washington, D. C. (Edward F. Howrey, of counsel), for Gulf Oil Corp.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1958 Trade Cases ¶ 69,206.

Opinion

[*Production of Evidence*]

CASHIN, District Judge [*In full text*]: On December 2, 1958 I filed an opinion [1958 TRADE CASES ¶ 69,206] concerning the production motions addressed to all of the defendants and objections to interrogatories by all of the defendants, except Gulf. My opinion disposed of the objections to interrogatories and, as implemented by an order dated January 14, 1959, directed the answering of substantial portions of the interrogatories. Decisions on the motions for production were held in abeyance in the hope that the answers to the interrogatories would enable at least a preliminary narrowing of the issues and thus enable the admittedly vast amount of documents demanded in the production motions to be considerably reduced.

[*Narrowing of Issues*]

In accordance with the order of January 14, 1959 the defendants, with certain minor exceptions apparently necessitated by non-disclosure provisions of foreign law,* have fully answered the interrogatories. The hope expressed in the opinion of December 2, 1958 has not, however, proved availing. Plaintiff contends that, while the answers to the interrogatories are of considerable help to it in the preparation of its case, they are not at all useful in narrowing the issues. The argument supporting this conclusion is basically that many inferences can be drawn from the statistical data supplied in the answers to the interrogatories but that no conclusions can be drawn as to the precise nature or scope of the charged conspiracy. Thus, it contends the production previously demanded (as altered by the concessions made by the Government during pre-trial conferences held during the Summer and Fall of 1958) should be ordered.

[*Area and Product Limitations Proposed*]

The defendants, on the other hand, have adhered to their original contention, which is basically that no production whatsoever should be ordered until the Government has more precisely stated its claims, thus narrowing the issues and consequently the scope of production. The defendants, however, possessing at least as much information concerning their activities as the Government, have not suggested any substantial way in which the issues can be narrowed. True it is they have suggested that any question of crude oil be eliminated from the case and that production be limited, at least in the first instance, to certain major marketing areas, which areas consume the vast majority of the product marketed by the defendants.

[*Crude Oil*]

The argument that crude oil be no longer part of the case is attempted to be supported by statistics garnered from the answers to the interrogatories, which defendants contend is inconsistent with any conspiratorial plot. The Government, however, argues that the statistics are equally consistent with a cleverly contrived scheme. I cannot say on the evidence presented that there is no conspiracy with respect to crude oil, as charged, and, thus, I will not order the Government to remove that phase of the industry from its case. Indeed to do so would appear to be granting, unwarrantedly, a motion for partial summary judgment which has not, in form, been made.

[*"Major Consuming Areas"*]

In the course of further argument on the production motions, held on October 5 and 6, 1959, I requested that plaintiff attempt further to limit the number of countries in which file searches would be necessary. The plaintiff, in compliance with the request, has, as to four of the defendants, eliminated certain countries relatively large in number but relatively small in importance. The defendants persist in their contention that further countries be eliminated and the file searches in the first instance be limited to major consuming areas on the theory

* **The plaintiff has not as yet made any contention that any defendant has not made a good faith attempt to obtain permission from foreign authorities for waiver of the non-disclosure laws.**

that, if a conspiracy can be proved, such proof would necessarily be found in the major consuming areas. In addition, defendants contend that the fact that a small number of personnel are available who can intelligently conduct the requisite file searches, precludes the possibility of the files of all of the countries being searched simultaneously. Thus, defendants suggest production in the major consuming areas be presently ordered and the remainder of the production motions be held in abeyance in accordance with the scheme utilized in my prior decision and order. The plan, therefore, would be that production be ordered from the major consuming areas and that, based upon the information available from the documents produced, as well as from the answers to the interrogatories already on hand, the issues be narrowed and any further production be ordered only within the framework of such narrowed issues. I do not think that the defendants' proposal is feasible. The production motions are clearly ripe for decision. Therefore, the plaintiff's motion for production, as amended, is granted.

[*"Good Cause"*]

In granting the motion I, of course, find that there is "good cause" for the production of the documents. The only really substantial argument made against the existence of "good cause" is that the allegations of the complaint are much too broad. This argument has already been disposed of.

[*Oppressiveness—Size of Industry*]

The defendants, in opposing the motion, have also invoked the provisions of Rule 30(b) of the Federal Rules of Civil Procedure, asserting that the production, as demanded, is oppressive. However, the industry, which the defendants are charged with unlawfully controlling, is of a vast size. The defendants' claim of oppressiveness has already been adequately disposed of in a prior phase of this case wherein it was stated—

> "But the laws, which have helped protect the movants as they grew in size, are also designed to permit an investigation of them, if the proper authorities are of the impression circumstances so warrant it." (*In Re Investigation of World Arrangements, etc.,* (D. C. D. C. 1952) [1952 TRADE CASES ¶67,358], 13 F. R. D. 280, 287).

[*The "Big" Case*]

In ordering this considerably widespread production I am not unaware of the admonition of the Judicial Conference of the United States contained in The Report on Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States, 13 F. R. D. 62, to the effect that in the so-called "big" case a limiting of the issues is sooner or later, in any event, prior to trial necessary. This admonition has been repeated as recently as November 5, 1959 when the United States Court of Appeals for the Second Circuit stated that the District Court should take "vigorous measures to see that the issues were clearly defined so that the whole case might be kept within manageable proportions". (*Syracuse Broadcasting Corporation v. Samuel I. Newhouse, et al.,* Docket No. 25074, October Term, 1958 [1959 TRADE CASES ¶69,519], at p. 2365). However, for the reasons stated above I am unable at this time to effectuate any narrowing of the issues.

[*Foreign Law—Trade Secrets*]

Any difficulty encountered concerning the foreign law or trade secrets shall be met in the manner outlined in my prior opinion of December 2, 1958 [1958 TRADE CASES ¶69,206], I cannot, on the basis of the information presently before me, compose an order which would set forth any timetable for the production. Accordingly, counsel are directed to confer in an attempt to reach an agreement on the form of the order. If full agreement cannot be reached, the court will, upon request of any party, schedule a hearing on the form of the order. Any order submitted for signature shall incorporate therein all concessions that the plaintiff has already made.

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[¶ 69,523] Schwegmann Bros. Giant Super Markets v. McCrory, Commissioner of Agriculture and Immigration of Louisiana.

In the United States Supreme Court. No. 423. Decided November 23, 1959.

Appeal from the Louisiana Supreme Court. FOURNET, Chief Justice.

Louisiana Orderly Milk Marketing Act

Sales Below Cost—Louisiana Orderly Milk Marketing Act—Constitutionality—Appeal Dismissed—Want of a Substantial Federal Question.—An appeal from a decision of the Louisiana Supreme Court sustaining the constitutionality of the Louisiana Orderly Milk Marketing Act (prohibiting, among other practices, the sale of milk products below cost) was dismissed by the United States Supreme Court "for want of a substantial federal question." The Louisiana Supreme Court had held that the Act, by permitting the Louisiana Commissioner of Agriculture and Immigration to fix minimum prices to go into effect only if approved by two-thirds of the producers of milk products in a given marketing area, did not delegate to private persons the legislative power to fix prices in violation of the "due process" guarantees of the Louisiana and United States Constitutions.

See Price Discrimination, Vol. 1, ¶ 3903; Sales Below Cost, Vol. 2, ¶ 7111.20.

For a prior opinion of the Louisiana Supreme Court, see 1959 Trade Cases ¶ 69,477.

[*Appeal Dismissed*]

PER CURIAM [*In full text*]: The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

[¶ 69,524] Clyde E. Clapper v. Original Tractor Cab Company, Incorporated, and Stanley Williams.

In the United States District Court, Southern District of Indiana, Indianapolis Division. Civil No. 2255. Findings of Fact and Conclusions of Law filed January 13, 1958. Correcting Entry filed January 14, 1958. Memorandum Entry filed July 9, 1958. (Reversed in part and remanded with directions by the United States Court of Appeals for the Seventh Circuit, September 30, 1959, 1959 Trade Cases ¶ 69,472.)

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Patents—Combining Non-competing Patents in Single Licensing Agreement—Giving Non-exclusive Licensee Veto Power in Selection of Other Licensees—Legality.—A patent licensing agreement under which two patentees of related but non-competing patents (one covering the "basic unit," a tractor "cover" designed to deflect engine heat around the operator, and the other relating to that part of the "cover" which surrounded the operator) granted separate, non-exclusive licenses to three manufacturers, and agreed that no licenses would be granted to others without the consent of the two patentees and the three licensees, was *per se* violative of Section 1 of the Sherman Act. Patent rights give no protection from the prohibitions of the Sherman Act when they are asserted, controlled, or used in consequence of an agreement that is in restraint of trade. Here, the agreement was invalid according to Sherman Act standards because it was an agreement by a patentee which gave a non-exclusive licensee a veto power in the selection of other licensees. Also, the agreement was unlawful under Section 2 because it manifested an attempt to monopolize by combining non-competing patents in a single agreement, by competitors. Further, it gave to the parties to the agreement, both the patentees and the licensees, veto power over patent rights that were not referrable to their individual businesses, the patents, or the licenses granted. The fact that the licensees might have continued to compete with each other made no difference. They were jointly given an exclusive market and control thereover by the terms of the agreement "and not singularly as a consequence of patent privileges acquired."

Further, it was no defense that each of the patentees had the right to individually license their respective patents.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.430, 2013.600; Monopolies, Vol. 1, ¶ 2515, 2610.550.

Combinations and Conspiracies—Monopolies—Patents—Conspiracy Between Patentees and Licensees—Concerted Refusal to License Another Manufacturer—Legality.—Patentees of related but non-competing patents violated the Sherman Antitrust Act by concertedly refusing to license a manufacturer in furtherance of an agreement in which the patentees and their licensees, three manufacturers, had agreed that no licenses would be granted to others without the consent of all the parties. That agreement was illegal *per se* under the Sherman Act.

See Combinations and Conspiracies, Vol. 1, ¶ 2013; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Patents—Instituting Infringement Suit—Concert of Action—Legality.—A patent licensing agreement under which patentees of related but non-competing patents granted separate, non-exclusive licenses to three manufacturers, agreed that they and the licensees would act jointly with respect to infringements of either patent, and set up and used a "litigation fund" for that purpose constituted an unlawful use of the patent monopolies in violation of Sections 1 and 2 of the Sherman Act. Under the agreement, each party, including both the patentees and the licensees, was given a separate and collective right to bring and control infringement actions, when no such right or power legally existed in the licensees or the "opposite" patentee under the patent laws. The action of the parties in the giving of infringement notices to alleged infringers and their dealers was intended to curtail and ultimately stop the manufacture of tractor covers by the alleged infringers. The licensees were the major manufacturers in the field and held a "dominant" position therein. The monopoly granted to them gave them virtual control of the market and made it impossible for others to obtain any rights under the patents or to legitimately enter the field. It was no defense that each of the patentees had the right, under patent law, to give notices of infringements of their respective patents and institute infringement actions. A conspiracy or combination having as its object or effect a restraint of trade, whether accomplished by legal or illegal means, falls within the ambit of the Sherman Act. Here, it was the fact of combination and concert of action that spelled out the unlawful use of the patent monopolies.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.225; Monopolies, Vol. 1, ¶ 2610.525.

Private Enforcement and Procedure—Antitrust Violations as Defense to Patent Infringement Action—Use of Patent As Basis for Agreement in Restraint of Trade.—A patentee of a tractor "cover" designed to deflect engine heat around the operator was barred from recovering for an alleged infringement of his patent because that patent had been used as a basis for an agreement in restraint of trade in violation of Sections 1 and 2 of the Sherman Act. The patentee, along with a patentee of a related but non-competing patent, had granted a separate, non-exclusive license to three manufacturers and had agreed with that patentee and the licensees that no license would be granted to others without the consent of all the parties to the agreement. Such misuse of patent rights bars any recovery for patent infringement. The court also found that the patent was invalid for want of patentable invention.

See Private Enforcement and Procedure, Vol. 2, ¶ 9044.

Private Enforcement and Procedure—Suit for Civil Damages—Damages Recoverable—Defense of Conspiratorial Patent Infringement Action—Attorneys' Fees as Part of "Damages" to Be Trebled Under Antitrust Laws.—A manufacturer of tractor "covers" and one of its officers, having successfully defended a patent infringement action instituted as a part of a conspiracy in violation of the antitrust laws, and having successfully prosecuted an antitrust counterclaim against the patentee, were entitled to attorneys' fees incurred in the defense of the infringement action, but those fees were not to be trebled as an element of "damages" under the antitrust laws. Instead, they were awarded by reason of counsel's representation of the successful parties in the infringement action, and by reason of the "exceptional circumstances" involved in the case concerning the

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validity of the patent and its use by the patentee and his licensees. The defendants showed no authority to support their claim for the inclusion of such fees as an element of antitrust "damages".

In addition to an award of $28,244.31 in attorneys' fees for the defense of the infringement action, the defendants were also awarded reasonable attorneys' fees ($25,000) for the services of their attorneys in the prosecution of the antitrust counterclaim. In fixing the latter amount, the court noted that it was bound by the authorities relative to the matter of fixing attorneys' fees in such actions, and that the defendants' claim for $141,035.00 for prosecution of the antitrust counterclaim did not bear a "realistic relation" to the $28,244.31 compensatory damage award.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725.

Private Enforcement and Procedure—Suit for Civil Damages—Antitrust Violations as Defenses—Unlawful Patent Licensing Agreement—Treble Damage Counterclaim by Alleged Party to Conspiracy.—A manufacturer of tractor "covers" and one of its officers, in a treble damage counterclaim charging a patentee with conspiring to violate the antitrust laws, were not estopped from contesting the validity of the patent or claiming damages for the patentee's antitrust violations by reason of their alleged "unclean hands." The counterclaimants, having requested and been refused a license under the patent, had manufactured the tractor covers under a "working arrangement" with the patentee's licensee. However, the counterclaimants operated only as suppliers for that licensee, and did not become licensees themselves or parties to the conspiracy. Yielding to the pressure imposed by a conspiracy does not make the one who thus yields a party thereto. While the counterclaimants had met with the patentee and its co-conspirators in an effort to secure a license under the patent, they had no knowledge of the illegal conspiracy, no agreement was reached at the meeting in question, and any proposals made to the counterclaimants at that meeting were in furtherance of a conspiracy in violation of the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9041.155.

Private Enforcement and Procedure—Civil Damages for Antitrust Violations—Damages Recoverable—Measure of Damages—Loss of "Potential Sales"—Accountant's Computations—Work Stoppage—Financing and Advertising Costs.—A manufacturer of tractor "covers" and one of its officers, having successfully defended a patent infringement action and successfully prosecuted an antitrust counterclaim against the patentee, were entitled to recover for (1) a direct loss in salaries, wages, and other expenses of a "shutdown" caused by the conspiracy, (2) "financing" costs, for continued operation, which had to be dropped by reason of the shutdown, (3) "advertising" costs which were rendered valueless by the forced shutdown, and (4) a direct loss of sales to two customers (based on sales in prior years and "the actual average net profit" to the manufacturer from such sales) which was caused by infringement notices sent to those customers pursuant to the conspiracy. As to the manufacturer's further claims for alleged loss of "potential sales," the court found that the theory propounded by the manufacturer's president and its accountant was unrealistic and would have led the court into too much speculation and conjecture. The evidence was insufficient to support the conclusion that, except for the interference of the conspirators, the manufacturer could have sold the number of tractor covers indicated by its "estimate of potential sales."

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.350, 9011.400.

Private Enforcement and Procedure—Suit for Civil Damages—Antitrust Counterclaim—Costs of Suit.—A patentee who instituted an infringement action against a manufacturer in furtherance of a conspiracy in violation of the antitrust laws was not "exonerated" from the payment of a just portion of the attorneys' fees and costs by the manufacturer's "covenant not to sue" the patentee's co-conspirators and the court's dismissal, pursuant to a settlement agreement, of the manufacturer's antitrust counterclaim against those co-conspirators. On the theory that attorneys' fees were a part of "costs," the patentee had contended that the dismissal order, which provided that each party would pay its own costs, precluded the successful counterclaimant from recovering such fees and costs. The court also rejected the contention that the major portion of the costs were

attributable to a phase of the litigation in which the patentee had no interest. The counterclaimant was allowed "costs" as to fees and mileage for certain witnesses, a transcript of the evidence, the reproduction of certain documents, certain docket fees in connection with the filing of depositions, the taking of certain depositions, and certain Patent Office records. However, a portion of a counterclaimant's salary, travel expenses, and telephone charges which were allegedly chargeable to "litigation matters" was an attempt to retry the "damage" issue. Also, travel and telephone expenses of the counterclaimants' attorneys were "personal" expenses, and charges made by an accountant were a part of their preparation expenses. Also, the court disallowed a claim for witness fees for the individual counterclaimant and his attorney and the costs of taking the adverse party's deposition.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.725, 9011.800.

For the plaintiff: Thomas E. Scofield, Kansas City, Mo., and Harold R. Woodard, Indianapolis, Ind.

For the defendants: J. Preston Swecker, Washington, D. C.; Kenneth L. Earnest, Rushville, Ind.; and John F. Linder, Indianapolis, Ind.

Reversed in part and remanded with directions by the U. S. Court of Appeals, Seventh Circuit, 1959 Trade Cases ¶ 69,472.

Findings of Fact and Conclusions of Law

[*Infringement Action—Antitrust Counterclaim*]

WILLIAM E. STECKLER, District Judge [*In full text except for omissions indicated by asterisks*]: The above entitled cause came on regularly for trial, and the court having duly considered the evidence, together with the post-trial briefs of the parties, the proposed findings of fact and conclusions of law, and the oral argument had thereon, and the court being fully advised in the premises, now makes its findings of fact and conclusions of law by adopting substantially the proposed findings of fact and conclusions of law as submitted by the defendants, with the exception however, of certain amendments and deletions as made by the court in order to more accurately reflect the views of the court in regard to the issues and the evidence pertaining thereto. The court's findings of fact and conclusions of law are therefore as follows:

Findings of Fact

1. Plaintiff, Clyde E. Clapper, is a resident of near Blue Springs, Missouri.

2. Defendant, Stanley Williams, is a resident of near Arlington, in the County of Rush, State of Indiana.

3. Defendant, Original Tractor Cab Company, Incorporated, is a corporation organized and existing under the laws of the State of Indiana and having its principal place of business at Arlington, Indiana.

[*Patent Action*]

4. Plaintiff filed this action under the Patent Laws of the United States, U. S. Code, Title 35, Section 281, to enjoin the defendants from infringing patent No. 2,452,834, granted to the plaintiff on November 2, 1948.

[*Antitrust Counterclaim*]

5. The defendant, Original Tractor Cab Company, Incorporated, in answer to the complaint, included a counterclaim for damages claimed to have been caused by the plaintiff and others as a result of violation of the antitrust laws of the United States, under U. S. Code, Title 15, Section 15.

[*Amended Complaint*]

6. Thereafter, the plaintiff filed an amended complaint seeking (1) a declaratory judgment that the defendants were estopped from denying the validity and infringement of the plaintiff's patent and further that the defendants were estopped from charging a violation of the antitrust laws; (2) claiming an infringement of the plaintiff's patent and unfair competition; (3) that the defendants have, for the purpose of deceiving the public, falsely marked articles of manufacture with the patent number of the plaintiff's patent; (4) that the defendants have breached an agreement entered into with the plaintiff; and (5) that the defendants have been unjustly enriched, which latter was dismissed voluntarily by the plaintiff prior to trial.

[*Jurisdiction*]

7. The court has jurisdiction of the parties and of the causes of action presented.

[*Trial*]

8. All of the causes of action presented by the pleadings between plaintiff and de-

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fendants were presented to the court in a trial which consumed twelve full days, and all evidence presented by the parties with respect to all of such issues has been received by the court.

9. Thereafter, briefs were filed on behalf of the plaintiff and defendants, together with proposed findings of fact and conclusions of law. After the post-trial briefs and proposed findings of fact and conclusions of law were filed, the proposed findings of fact and conclusions of law were subjected to oral argument for the benefit of the court.

[*Causes Abandoned*]

10. In his briefs, the plaintiff has abandoned the causes of action for unfair competition and false patent marking, and the amended complaint will be dismissed as to these causes of action.

[*Alleged Invention—Tractor Covers*]

11. In 1945, the plaintiff and one Lee Flora, of Danville, Illinois, separately claimed to have made inventions in tractor covers for deflecting the heat from the engine of the tractor around the operator, and each filed an application for a patent thereon. In 1946, one Michael A. Halligan, of Fort Dodge, Iowa, claiming to have made a like invention, filed an application for a patent thereon.

[*"Interference" Declared*]

12. During the pendency of these three patent applications, the Patent Office, recognizing that they claimed substantially the same invention, declared an interference between all three of them, for the purpose of determining priority of invention as to said three patent applicants. It also declared a separate interference between the Flora and Halligan applications on an auxiliary feature of that tractor cover.

[*Licenses Granted*]

13. While his application for patent was pending, Clapper had granted an exclusive license to Bearing Distributors Company to manufacture and sell the tractor cover included in his patent application and the patent to be granted thereon. Later that company's corporate name was changed to Comfort Equipment Company.

14. Flora had granted an exclusive license under his patent application to the Cabette Company, of Danville, Illinois, to manufacture and sell the tractor cover included in his application and the patent to be granted thereon.

15. Halligan likewise had granted an exclusive license to the Fort Dodge Tent & Awning Company to manufacture and sell the tractor cover included in his patent application and the patent to be granted thereon. Later that company's corporate name was changed to Burch Manufacturing Company.

[*Manufacture and Sale*]

16. After licenses were granted to the above corporations, Comfort began manufacturing and selling tractor covers in 1945 and Burch and Cabette began like operations in 1946, sales being made largely through distributors located throughout substantial portions of the United States.

[*Chicago Meeting—Priority of Invention*]

17. In April, 1948, after the declaration of the aforesaid patent interferences, representatives of the above named licensees and the three named inventors and their respective attorneys met in Chicago, Illinois, in an effort to settle their differences with respect to priority of invention. At the outset of said meeting and prior to disclosure between themselves of the respective dates of invention, it was agreed by all of the parties there present, or represented by others, that each of the corporate licensees under the then pending patent applications would have a right to a license under each patent application then pending and under any letters patent that might be granted thereon, upon the same terms as granted to the others.

18. Thereafter, at said meeting some evidence of priority of invention was adduced and discussed by the parties, but the discussion was concerned more particularly with the question of royalties to be paid by the respective licensees to the respective patent applicants. At the conclusion of the meeting, although specific agreement was not reached thereon, by reason of the earlier filing date of his patent application, it was generally understood that Clapper should have priority of invention to the basic unit of a

tractor heat deflector; that Flora, who was second in point of time in filing his patent application, should have priority as to the part of the tractor cover that surrounds the operator; and that if Halligan had any priority of claim with respect to an invention, it was minimum.

[*St. Louis Meeting*]

19. The parties were unable to settle at that meeting the question of priority of invention and the amount of royalty to be paid by the respective licensees, and it was agreed that another meeting be held by the interested parties or their representatives to formulate specific agreements regarding the question of royalties to be paid by the respective licensees to the several patent applicants. Later, two such meetings were held in St. Louis, Missouri, at which the interested parties or their representatives and their attorneys attended. At these meetings in St. Louis, Missouri, various topics were discussed, such as the amount of royalties to be paid, the establishment of a litigation fund, costs of manufacture and the selling price per unit of tractor covers and other related subjects.

[*Des Moines Meeting—Agreements of August 3-4*]

20. From the conferences had in said meetings in St. Louis, Missouri, and correspondence later passing between the interested parties, a final meeting was agreed to be held at Des Moines, Iowa, when the License Agreement of August 3-4, 1948, was formally executed by or on behalf of said three aforesaid inventors and their several respective licensees.

21. At that same meeting in August 3-4, 1948, "Priority Award Agreements" were consummated by the three inventors, whereby Clapper was awarded priority of invention on the counts involved in the three-way interference, and Flora was awarded priority of invention on the counts involved in the two-way interference. Thereafter, on November 2, 1948, Clapper was granted Letters Patent No. 2,452,834; and on February 15, 1949, Flora was granted Letters Patent No. 2,461,974. No patent was granted on the Halligan application.

[*Unlawful License Agreement*]

22. By the terms of the License Agreement executed at Des Moines, Iowa, on August 3-4, 1948, the priority of Clapper and Flora to their respective inventions was recognized and agreed upon. Cabette, Fort Dodge and Bearing were each granted a separate license to manufacture and to sell heating units embodying the Flora and Clapper inventions, subject to the following conditions, among others: (1) that the licensees manufacture such heating units "at their respective addresses and in no other place or places except upon written consent" of the owner of the respective patents; (2) that the licensees pay Clapper $1.00 "as a royalty fee on each and every unit sold and shipped by them" and pay a proportionate royalty on parts, including specifically a royalty of 15¢ on "windshields when sold separately from completed unit"; (3) that the licensees pay Flora 25¢ on each and every unit sold by them, and also a "proportionate royalty" on parts, the same as Clapper; (4) that if any party to the Agreement made, or became the owner of any "improvements in said heating units," then Cabette, Fort Dodge and Bearing could manufacture and sell the improvements without paying any further royalty, except as set forth in paragraph 18 of the Agreement; (5) that Flora and Clapper would not grant any licenses under any patent that may be issued to them, respectively, "or any other patents that might fall within (the) license agreement, without first obtaining the written consent thereto of the remaining parties to (the) Agreement," and each of the licensees agreed not to grant any sub-licenses or any licenses on "any other patent that might fall within (the) License Agreement, without * * * the consent thereto of the remaining parties"; (6) Flora and Halligan agreed to "file applications for Canadian patents" on the subject matter of their respective United States patent applications, and Clapper and Flora granted licenses and the right to "manufacture and sell" heating units under their respective Canadian patent applications "then on file or to be filed"; (7) that if any patent was issued on the "Halligan application" or "any improvement made by Halligan relative to the subject matter of his application" then Bearing and Cabette would have an option "to take a license under such patent" and to pay royalty therefor on equal terms with Fort Dodge; (8) Sections 13, 14 and 15 of said license agreement read as follows:

"13. In the event any of the claims included in patents that may be issued on

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said FLORA, CLAPPER or HALLIGAN application, or any patents issued covering any improvements thereon, are infringed or in the event any party to this agreement is sued for infringement for the manufacture of heating units under said patents, then any party to this agreement having knowledge of such infringement or any party to this agreement who is sued for infringement shall send written notice thereof to the remaining parties and within a reasonable time thereafter, not to exceed twenty days, all of the parties hereto agree to discuss said infringements for the purpose of arriving at a mutually agreed upon procedure for their disposition.

"14. To prosecute infringers and defend against infringement, the parties hereto agree to set up a litigation fund of $8,000.00 in the following manner: coincident with the execution of this agreement, CLAPPER shall pay into the said fund $3,000.00 and CAB-ETTE, FORT DODGE and BEARING the sums of $1,000.00 each; that CAB-ETTE, FORT DODGE and BEARING shall pay into said fund the additional sum of 5¢ on each heating unit sold by them, respectively, from and after the 1st day of August, 1948, and said CLAPPER shall pay into said fund the sum of 5¢ for each $1.00 royalty by him received from and after the 1st day of August, 1948, until the funds amount to $8,000.00. That if at any time during the life of this agreement said fund shall be depleted to the sum of $6,000.00, then in any such event, the said parties hereto shall again contribute to said fund at the rate of 5¢ per unit as hereinabove in this paragraph provided, until said fund shall again amount to the sum of $8,000.00. The monies to be paid into said fund as above provided shall be paid to CLAPPER, who shall deposit and hold the same in trust in the Commerce Trust Company of Kansas City, Missouri, for the prosecution of infringers and the defending against infringement of any patents because of the manufacture, by CAB-ETTE, FORT DODGE, or BEARING of heating units under the above recited patent applications, or patents issuing therefor, or any future patents that may fall within the terms of this agreement. That said funds are to be used for the prosecution of infringements of any of said patents only upon the approval of a majority of the parties to this agreement. That said fund shall also be used to defray the expense that may be necessarily incurred in the investigation of claimed infringements and the necessary correspondence, negotiations and the giving of legal notice of infringement to infringers. That in the event any of the parties to this agreement shall claim an infringement materially affecting their business and shall have given notice thereof to the other parties hereto as provided in paragraph numbered 13 hereof, and a majority of the parties hereto agree that such claimed infringement should be prosecuted, then such prosecution shall be instituted within ninety days, but if a majority of the parties hereto shall fail to give their approval to the prosecution of such an infringement within a period of ninety days after the giving of such notice, then in that event, such party hereto claiming to be materially affected as aforesaid shall have the right and privilege at its own expense to prosecute such infringement without any claim to any of the monies in the said fund in this paragraph provided for, unless such prosecution shall have been finally resolved in favor of the complainant, in which event said complainant shall be entitled to be reimbursed from said fund for their expense incurred in the prosecution of such infringement. That in the event a majority of the parties agree to the prosecution of any infringement, or to undertake the defense of any claimed infringement by any of the parties hereto, that in any such event, the owner of the patent being infringed shall, and with the aid and advice of the remaining parties hereto if he so chooses, select and engage required counsel. That CLAPPER shall render unto CAB-ETTE, FORT DODGE and BEARING upon request an itemized statement of all sums, if any, withdrawn from said fund accompanied by a copy of the bank statement thereof. That the liability of FLORA, CLAPPER and HALLIGAN to prosecute infringements or to defend against infringements shall be limited to the monies in said fund in this numbered paragraph provided for. Upon the termination of this agreement by expiration of the patents issued to FLORA and CLAPPER on U. S. applications 617,049 and 583,345, respectively, or otherwise, or by the mutual consent of the parties, said fund shall be liquidated by dividing among the parties the monies in said fund in proportion to the amounts paid in by said parties as herein provided for.

"15. That in the event a patent shall be issued for improvements upon said heating units to persons other than parties to this agreement, then in such event, it is agreed that the parties hereto shall call a meeting and act as a unit in the negotiation for the use of such improvement, if desired, so as to make the same mutually available and on the same terms to all parties to this agreement, but that if the

majority of the parties to the agreement determine not to contract for such improvement, then the parties to this agreement are privileged to contract therefor individually or collectively."

(9) said agreement was "based not only on the patents to be issued on said Clapper or Flora application which (were) the "subject matter of (said) agreement, but also upon those issued upon any renewals, continuations, divisions of, or substitutes for, said applications, and also on any reissues or extensions of said patent or patents"; and (10) that unless otherwise terminated, the licenses granted were to "extend to the latest expiration date of any patent issued on said Clapper and Flora applications."

[*Volume of Business—Royalties*]

23. Under the original license that Comfort had from Clapper; Cab-ette had from Flora; and Burch had from Halligan; and the license agreement executed by plaintiff on August 3-4, 1948, the licensees, Comfort, Cab-ette and Burch, built up substantial businesses, each doing several million dollars of business, in interstate commerce, manufacturing and selling tractor heating units during the time referred to herein. Each had numerous distributors in this country and Canada. Their collective sales value of tractor covers ranged from $200,000.00 to over a million dollars a year. Royalties paid to the plaintiff have amounted to over five hundred thousand dollars.

24. Adhering to the agreement of August 3-4, 1948, the licensees and Clapper set up a "Litigation Fund" as therein provided, for the purpose of defraying the expense of investigating and prosecuting infringers and defending against infringements of the Clapper and Flora patents. Said fund continued in existence from 1948 and the parties proceeded to use and control the same jointly as provided in said license agreement until on or about May 8, 1953. On that date the "Litigation Fund" was disbursed to Clapper and Flora, proportionately and the agreement of August 3-4, 1948, was terminated by the execution of a "Termination Agreement" which mainly resulted from a civil anti-trust action instituted against the licensees and Flora and Cab-ette by the United States, in the United States District Court, Western District of Missouri, Western Division, entitled *United States of America v. Bearing Distributors Company, et al.*, Civil Action No. 6895. 11 F. R. D. 591, 18 F. R. D. 228.

25. Thereafter, separate non-exclusive licenses were granted by the patentees, Clapper and Flora, to Burch, Comfort and Cabette, under which these three corporations conducted their business operations in tractor covers, and any and all interim effects of the Agreement of August 3-4, 1948, thereafter ceased to exist on May 6, 1953.

[*Infringement Notice*]

26. On November 24, 1948, plaintiff served notice on the defendant, Original, of infringement of the aforesaid Clapper patent, No. 2,452,834. However, no action was taken immediately against the said defendant.

27. During all of the times herein mentioned, the plaintiff was represented by Mr. Fred M. Roberts, an attorney with offices in Kansas City, Missouri. After consummation of the License Agreement of August 3-4, 1948, and establishment of the litigation fund provided for therein, Roberts, under instructions from Clapper and with full knowledge and understanding of the other parties to the Agreement of August 3-4, 1948, caused the notices of infringement to be sent to the defendant, Original, and to all of the known distributors who were selling tractor covers manufactured by the defendant. Notices of those and other claimed infringements were sent to Roberts by the plaintiff and by the licensees and from various other sources. When knowledge of a claimed infringement was made known to Roberts, he caused infringement notices to be served on the alleged infringers. Copies of said notices were sent to the plaintiff and to the licensees and they were generally informed by Roberts of the giving of said notices of infringement and were consulted from time to time with respect thereto.

[*Second Notice*]

28. In August, 1949, a second notice of infringement was sent Mr. Fred M. Roberts, as attorney for the plaintiff, Clapper, to the defendant, Original, and a number of letters were sent by Roberts to the distributors for the defendant, informing said distributors that the tractor covers manufactured by the defendant, Original, were infringements of Clapper's Letters Patent, whereby the sale thereof by such distributors constituted an

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infringement, and subjected the said distributors to infringement actions by the said patentee.

[*Sales Curtailed by Infringement Notices*]

29. As a consequence of such infringement notices, the defendant, Original did cease for a time the manufacture and sale of tractor covers, and also some of the distributors thus notified of infringement also ceased selling tractor covers manufactured by the said defendant and began the sale and distribution of tractor covers manufactured by Comfort Equipment Company; whereby the sale of the tractor covers by the said defendant to the public were thereby directly curtailed and limited.

30. Clapper and Roberts were obligated under Section 13 of the Agreement of August 3-4, 1948 to give notice and to take action against claimed infringement of Clapper's Letters Patent within ninety days after notice thereof was received from the licensees or from any other source, and generally did so by serving notices of infringement. Clapper, as trustee of the litigation fund, built by himself and the licensees, expended $15,288.24 from the litigation fund with the approval of Flora and the licensees, to defray the costs incurred in the giving of infringement notices and the prosecution of infringement actions, including the one here involved instituted against the defendants.

[*License Denied to Defendant*]

31. After the giving of notice of infringement by the plaintiff to the defendant, Original, the defendants sought a license under the Clapper patent, but all such requests were denied by the plaintiff because of his obligations to Flora and the licensees, parties to the Agreement of August 3-4, 1948.

[*Meeting Between Plaintiffs and Defendants*]

32. After the notices of infringement were sent by Roberts in August, 1949, to the defendant, Original, and to its distributors as aforesaid, the defendants were invited to a meeting held in Chicago, Illinois, on September 12, 1949, with the plaintiff, together with Flora and the several licensees under said License Agreement, their representatives and attorneys, for the purpose of discussing the license requested.

[*Concerted Action—Economic Duress*]

33. At the meeting on September 12, 1949, the defendant, Williams, sought to persuade the plaintiff, together with Flora, and representatives of and attorneys for their several licensees, that a license should be granted to the defendant, Original, but such request for a license was rejected by those present acting in concert.

34. The parties to the Agreement of August 3-4, 1948, including the plaintiff, acting through Roberts and through the spokesman for the group at the meeting on September 12, 1949, concertedly acted to stop the defendants from manufacturing and selling tractor covers in infringement of the Clapper patent. The full extent of all economic duress thus imposed by the plaintiff together with Flora and the licensees, the other parties to the said Agreement, in respect to that matter through the giving of notices to the defendant and to its distributors, was that if such claimed infringement was not abated, patent infringement proceedings were imminent.

[*No Contract Between Plaintiffs and Defendants*]

35. The spokesman for the several parties to the Agreement of August 3-4, 1948, upon rejecting the application of the defendants for a license under the Clapper patent, in the meeting on September 12, 1949, informed the defendants that the defendant, Original, would be given a limited period of time within which to dispose of its stock of tractor covers then in course of manufacture and that if the defendants then ceased the manufacture of tractor covers, no action for patent infringement would be instituted. The evidence does not establish that an agreement was reached between the plaintiff and defendants in that meeting in Chicago on September 12, 1949, or subsequently. Any proposals made to the defendants in that meeting were in furtherance of a conspiracy in violation of antitrust laws, with respect to which the court will elaborate further in subsequent findings herein. Plaintiff has alleged and relies upon the theory that a contract was entered into between the defendants and the several parties to the Agreement of August 3-4, 1948, and that he, plaintiff Clapper, has been damaged as a result of the breach of said contract on the part of the defendants. There is no evidence in the record of damages to the plaintiff

flowing from the alleged breach, even if it were assumed that an agreement was reached, which the court does not find.

36. Thereafter, the defendants entered into a working arrangement with Cabette, formed for the use of the Original facilities to manufacture parts of tractor covers for Cabette, which working arrangement became effective the latter part of October, 1949. A proposed contract to formalize the working arrangement was reduced to a writing dated November 4, 1949. Before the execution thereof by both parties, disagreement arose, and the proposed contract was not executed. The working arrangement was terminated by mutual consent. A proposed settlement contract dated November 28, 1949, was prepared. Before the execution by both parties, a controversy arose, and the contract was unexecuted by both parties.

[*No Knowledge of Unlawful License Agreement*]

37. The defendants prior to the filing of this action by the plaintiff, had no knowledge of the terms and provisions of the License Agreement of August 3-4, 1948, except with respect to the place of manufacture of the tractor covers with the permission of Clapper.

[*"Working Arrangement" with Licensee*]

38. The defendants discontinued the manufacture and sale of the Original products and entered into a working arrangement with Cabette. This arrangement was made in order to afford Cabette the working facilities of Original whereby Original could manufacture parts for Cabette, and at the same time, it was a means of keeping Original in operation.

39. During the working arrangement between Cabette and the defendants, the defendants notified the plaintiff that they were discontinuing the manufacture and sale of tractor covers in accordance with the direction by the spokesman for the group at the meeting in Chicago, as aforesaid, on September 12, 1949, which notice was retracted, however, after the discontinuance of the working arrangement with Cabette in November, 1949.

[*Defendants Not Parties to Conspiracy*]

40. During the working arrangement with Cabette, the defendants operated only as suppliers for Cabette by direction of the latter and did not thereby become licensees under the Clapper patent nor parties to the conspiracy; whereby the defendants are not estopped from contesting the validity of the Clapper patent nor from claiming damages for violation of the antitrust laws, according to the first cause of action of the amended complaint.

[*Action Instituted*]

41. Thereafter, upon the insistence of the licensee, Comfort, a meeting of the parties to the License Agreement of August 3-4, 1948, was held early in the year 1950, to determine what course of action should be followed with respect to the claimed infringement by the defendants; and subsequently, in accordance with an understanding reached by the parties to the Agreement of August 3-4, 1948, at that meeting, this action was instituted in April, 1950, claiming infringement of the Clapper and Flora patents. Thereafter, this action was dismissed as to the Flora patent.

[*Patent Invalid*]

42. The Clapper patent application was filed March 17, 1945, on which patent No. 2,452,834 was granted on November 2, 1948.

43. This patent disclosed a conventional farm tractor, indicated generally at 10 in Fig. 1 [not reproduced herein], with a rear deflector member 44 (Fig. 1) extending over the superstructure 26 of the tractor and down along opposite sides of the operator's station at the seat 30. The rear open side of the deflector 44 is supported by a bow 36 (Fig. 7), adapted to be mounted on the rear axle housing 20 of the tractor and extending upward in front of the operator on the seat 30. A separate front deflector member 88 extends on opposite sides of the engine 22 of the tractor and down beneath the bottom of the engine as an extension of the deflector, so as to increase the supply of heat to the operator when needed. This deflector 88 is removable for the purpose described in the patent of varying the amount of heat to be supplied to the operator (see column 3, lines 55-56). The Clapper hot air deflector takes advantage of the known principle that the fan of the tractor would blow air over the engine during operation and be heated

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thereby, which heated air is then channeled back to the region of the operator.

* * *

54. The evidence shows, and the Court so finds, that the construction of a heat deflector for channeling the heat of the engine back to the operator of a tractor, and mounting it by a bow or metal frame on the tractor, would have been obvious to a person skilled in the art, at a date when Clapper claims to have made his invention.

55. The fact that almost identical devices were conceived by the several patent applicants, Clapper, Flora and Halligan, at about the same time, and apparently without knowledge of the developments of each other, is corroborative of the inescapable conclusion that this was an obvious adaptation, and that it did not amount to a patentable invention.

56. In any event, Clapper's contribution clearly lacked patentable merit as a combination. Every element was old in the prior art, the tractor, the heat deflector or cowl section of canvas, and the metal bow or frame. The manner of use of these in combination was what would have been expected in putting them together in the manner set forth in the Clapper patent. This is the type of device which is unpatentable as a combination, because the combination was not new nor the elements individually.

[*No Infringement*]

57. Since the Clapper patent is invalid, as indicated above, the question of infringement is moot. There can be no infringement of an invalid patent.

[*Antitrust Violation—Bar to Infringement Action*]

58. Moreover, this Clapper patent has been used as a basis for an agreement in restraint of trade in violation of Sections 1 and 2 of the Sherman Act. Such misuse of patent rights bars any recovery for patent infringement.

[*"Elements of Illegality"*]

59. By the Agreement of August 3-4, 1948, the patentees, Clapper and Flora, granted a non-exclusive and non-transferable license to Comfort, Cabette and Burch to manufacture and sell tractor covers. The limitations imposed on the licensees by said Agreement, that the licensees would manufacture the inventions "at their respective . . . named addresses and in no other place or places"; and that no other license would be granted "without obtaining the written consent thereto of the remaining parties to the Agreement"; that if a license so granted was terminated, as provided in Paragraph 8 thereof, Flora or Clapper, respectively, shall be at liberty to license other licensees; that the parties would "mutually agree upon procedure for the disposition" of infringement suits; and that the parties set up a "litigation fund" to be used for that purpose, all are elements of illegality when used for an illegal purpose, as they were.

[*Giving Licensee Power in Selecting Other Licensees*]

60. An agreement by a patentee which gives a non-exclusive licensee a veto power in the selection of other licensees is invalid according to Sherman Act standards, Sections 1 and 2.

[*Combining of Non-competing Patents*]

61. The Agreement is also violative of Section 2 of the Act, in that it manifests an attempt to monopolize by the combining of non-competing patents in the single agreement by competitors and gives to the parties to the agreement veto power over patent rights that are not referrable to their individual businesses, the patents or licenses granted, and this is true even though the licensees may have continued to compete with each other in the manufacture and sale of tractor covers after the execution thereof. They were jointly given an exclusive market and control thereover by the terms of said Agreement, and not singularly as a consequence of patent privileges acquired.

[*Unlawful Use of Patent Monopoly*]

62. By Section 13 of the Agreement, the parties agreed to and the evidence establishes that they did act jointly in respect to "infringements" of the letters patent in question, and "mutually agree upon procedure for their disposition." In Section 14, Clapper and the licensees set up a "Litigation Fund" to be used for the prosecution of infringements of both said letters patent, upon approval of a majority of the parties to the agreement, and the evidence is that said fund was actually used by them for that

purpose. The clear intent of the parties, gleaned from the verbiage contained in paragraphs 13 and 14, *supra*, and from the evidence herein was giving to each party thereto a separate and collective right to bring and control infringement actions, when no such right or power legally existed in the licensees, or opposite patentee, so to do under patent law; that they jointly and cooperatively intended to and did unite in the prosecution, and use of the "Litigation Fund" for that purpose. The action of the parties as revealed by the evidence is that they did, pursuant to the said agreement, join hands, through Roberts, in the giving of infringement notices to defendant and its dealers, and in so doing they intended to curtail and ultimately stop the manufacture and distribution of tractor covers by defendants, and sale thereof by defendants' distributors.

[*Dominant Position in Field*]

63. The evidence clearly establishes that the licensees were the major manufacturers of tractor covers and held a dominant position in that field of interstate trade and commerce, and that if the Agreement of August 4, 1948, was carried out by the parties, according to its terms, as it was, that the monopoly granted to said licensees gave them virtual control of that market and made it impossible for defendants to obtain any rights under the patents in issue, or legitimately enter the field of manufacturing and selling tractor covers. It is the fact of combination and concert of action by the parties to do the very things that they claim they had a right to do under said agreement, collectively and jointly, that spells out unlawful use of patent monopoly by them, in violation of Sections 1 and 2 of the Sherman Act.

[*"Separate" as Contrasted with "Concerted" Action*]

64. It is no defense of the Agreement of August 4, 1948, or for the giving of infringement notices and bringing of the infringement action as mentioned above, to say that Clapper and Flora had the right to grant separate licenses to defendants and that said patentees had the right under patent law to give notices of infringements of their respective patents, and to bring infringement actions. It is conceded that such are legal rights accruing to a patentee, or his assign or assigns. But what may be legally done by a patentee, or his assign, singularly or collectively, is no criterion for the measurement of legality of the agreement of August 4, 1948, and what was actually done by the plaintiff and his licensees in furtherance thereof as shown by the evidence. What Clapper or Flora, separately, might legally have done and what was done by them in concert of action with each other and with the licensees herein are two different matters. The fact that concert of action, violative of the Sherman Act, is accomplished by legal means, does not remove the terminal result thereof from the prohibitions of the Act.

[*Patent Rights—Sherman Antitrust Act*]

65. A conspiracy or combination having as its object, or effect, a restraint of interstate trade and commerce, whether accomplished by legal or illegal means, falls within the ambit of Sections 1 and 2 of the Sherman Act and is condemned thereby. Patent rights give no protection from the prohibition of the Sherman Act, when they are asserted, controlled, or used in consequence of an agreement that is in restraint of interstate trade or commerce. Cf. *United States v. New Wrinkle, Inc.* [1952 TRADE CASES ¶ 67,214], 342 U. S. 371. When two individual patentees combine their patent monopolies and contract between themselves and with their licensees to secure mutual benefits for themselves and their licensees that are not given to them by the patent laws, and which agreement gives to the opposite patentee and the licensees a right of control over patent rights that may be asserted, and is used in restraint of interstate trade and commerce, the purpose and result of such an arrangement and conduct is clearly in violation of Sections 1 and 2 of the Sherman Act. Cf. *United States v. United States Gypsum Company* [1948-1949 TRADE CASES ¶ 62,226], 333 U. S. 364; *United States v. Line Material Co.* [1948-1949 TRADE CASES ¶ 62,225], 333 U. S. 287; and *United States v. New Wrinkle, Inc., supra.*

[*Loss of Potential Sales—Damages*]

66. The evidence shows that the impact of this conspiracy on the defendants has been substantial, has caused a direct loss of customers, a shutdown in business, and it is inescapable as a conclusion from all of the evidence that it has caused a material

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reduction in the potential sales of the defendant, Original. However the evidence before the court upon which to estimate the loss of potential sales is such as to preclude the court from relying upon it, and only for that reason is the court not able to fix the damages suffered by the defendants for loss of potential sales in each of the years in question.

67. The evidence is that the defendant, Original, sustained damage as a direct result of the actions of the plaintiff in concert with others. The impact of that conspiracy resulted in damages to the business and property of the defendant, Original.

[*Work Stoppage*]

68. The evidence shows direct loss was suffered by the defendant, Original, in salaries, wages and other expenses of shutdown from August 22 to September 28, 1949, in the total amount of $2,561.45. Defendant, Original, also claims an average cost of $116.43 per day for eleven days' stoppage of production from November 18 to December 1, 1949, following the termination of a working agreement with Cabette. This would amount to $1,280.73. The defendant, Original, also claims the sum of $3,830.00 for the loss it sustained as a result of the unsuccessful working arrangement it had with Cabette from the latter part of September to on or about November 23, 1949.

[*"Unsuccessful Working Arrangement"*]

In regard to the working arrangement, the court finds the facts to be:

(1) that the arrangement was voluntarily brought about by the mutual desire of the officers of Cabette and Original;

(2) it was a business expedient for both parties;

(3) its termination came about through disagreement of the parties to the arrangement;

(4) there is not a preponderance of the evidence to indicate that the plaintiff Clapper and his licensees, through any conspiratorial act, caused the termination of the working arrangement.

Accordingly, defendant, Original, is not entitled to loss claimed for the eleven days' work stoppage and the claimed loss of $3,830.00 arising out of the unsuccessful working arrangement.

[*"Financing" Costs*]

69. The evidence shows that the defendant, Original, had negotiated for financing for continued operation which had to be dropped entirely by the shutdown following the notices sent by the plaintiff in concert with others, in August, 1949, the cost of which to the defendant, Original, was $317.20, which it is entitled to recover.

[*Advertising Costs*]

70. The evidence shows that the defendant, Original, had expended for advertising the sum of $4,563.70, which was rendered valueless by the forced shutdown in August, 1949, as a result of said notices of infringement sent to the defendant and to its distributors.

[*Attorneys' Fees in Defending Conspiratorial Suit—Not to Be "Trebled"*]

71. The evidence shows that the defendant, Original, has incurred in fees and expenses obligations for $28,244.31 in defense of the patent infringement action instituted by the plaintiff and Flora as a part of the conspiracy in violation of the antitrust laws. The court finds these legal fees and expenses to be reasonable for the services rendered by counsel for the defendant, Original, in the defense of the patent infringement litigation, and should be awarded to defendant's counsel for such services. Said sum, however, is not to be included as an element of damages in the antitrust action to be increased threefold, as defendants would have the court do. It is to be awarded counsel for the defendants by reason of their representing the successful parties in the patent infringement action, and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact.

[*Loss of Sales*]

72. The evidence shows that there has been a direct loss of sales by defendant, Original, to Farm Equipment Sales Co. and Stover-Winsted Co. as a consequence of the notices of infringement sent pursuant to the conspiracy created by the License Agreement of August 3-4, 1948. Defendant, Original, has vigorously contended and attempted to show that it also sustained loss of sales to Firestone Tire & Rubber Co. as a consequence of notices of infringement

sent pursuant to the aforesaid conspiracy. In respect to the latter company, the court fails to find from the record sufficient evidence to support the defendants' claim of loss of sales to Firestone Tire & Rubber Co. by reason of the notices of infringement sent pursuant to the conspiracy.

Following the time Stover-Winsted Co. and Farm Equipment Sales Co. stopped doing business with the defendant, Original, the evidence shows that during the years 1949 through the first eleven months of 1956, Farm Equipment Sales Co. purchased from Comfort Equipment Company 9,084 covers. Such purchases were as follows:

Farm Equipment Sales Co.

Year	Comfort Covers Purchased
1949	1,339
1950	1,452
1951	1,985
1952	1,494
1953	982
1954	732
1955	649
1956 (11 months)	451
	9,084

Following the time Stover-Winsted Co. stopped doing business with the defendant, Original, it made the following purchases of Comfort covers from Comfort Equipment Company:

Stover-Winsted Co.

Year	Comfort Covers Purchased
1949	1,410
1950	1,425
1951	2,361
1952 (Jan. thru May)	660
	5,856

[*Certainty of Damages*]

The evidence shows that during said years the actual average net profit to defendant, Original, on the sale of half/Cabs amounted to $1.35 per unit. Accordingly, the loss sustained by defendant, Original, in respect to the loss of sales to Farm Equipment Sales Co. amounted to $12,263.40, and the loss of sales to Stover-Winsted Company amounted to $7,905.60. Where there is certainty as to the fact of damage which is thus established, there may be uncertainty as to the amount of damages. It is reasonable to conclude that the defendant, Original, could have sold at least an equal number of tractor covers to Farm Equipment Sales Co. and Stover-Winsted Co. had said companies not ceased to do business with the defendant, Original, as a result of the notices of infringement sent to them pursuant to the conspiracy created by the License Agreement of August 3-4, 1948. Therefore the court finds that the defendant, Original, has been damaged by reason of the loss of sales to said companies in the total amount of $20,169.00.

[*Defendants' "Theory" as to "Potential" Sales*]

73. The evidence shows that an estimate was made by the defendant, Williams, president of the defendant, Original Tractor Cab Co., Inc., as to the total number of tractor covers that could have been manufactured and sold by the said defendant, Original, but for the interference with the business of the defendant, Original, by the plaintiff, together with Flora and their licensees acting in concert. A very considerable amount of time and record was devoted to the explanation of the defendants' theory upon which the asserted right to recover for loss of potential sales is predicated. Briefly and generally, the theory of the defendant, Original, as explained by its president, Williams, and its accountant, Morgan, involved the process of taking the number of dealers the defendant, Original, had prior to the summer of 1949, at which time it changed its sales methods from dealers over to distributors. Williams explained he was very careful in making his calculations in order to stay on the conservative side. In his survey of existing dealers, he found there were 901 dealers listed. But of the 901 listed dealers he could find only 684 cards showing actual sales to such dealers. Therefore in his calculations he used the figure of 684 dealer cards as the basis from which to test the average potential sales to the established dealers. Among the 684 dealers, he found that 336 had sent orders in and had purchased half/Cabs. The 336 dealers purchased 1,275 half/Cabs. By taking the number of purchases of half/Cabs and relating them to the number of dealers who had actually purchased half/Cabs, he found that the company sales amounted to three and eighty hundredths half/Cabs per dealer. By relat-

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ing the company sales of half/Cabs to all of its dealers, he found that the company's average sales of half/Cabs per dealer amounted to 1.86 half/Cabs.

After the establishment of the distributorships, Williams made a survey in order to determine the total number of dealers served by the distributors. It was found that the distributors serviced 17,450 dealers. Commencing with the year 1949, the first year defendant, Original, had distributors, and the first year of the impact of the conspiracy, the defendant, Original, estimated the sale of one unit to each dealer served by its distributors. Thus, it estimated its potential sales for the year 1949 at 17,450 units. Taking the year 1950 as the base year and applying the annual percentage growth in tractor population in the United States and applying such percentages of tractor population growth to the subsequent years to and including the year 1956, and by applying the estimated unit sales per dealer of 1.86, defendant thereby arrived at the respective total unit potential sales for the years 1950 through 1956. Page 8A of Defendants' Exhibit JJJ sets forth the computation of the number of units of potential Original half/Cab sales as estimated by Williams and the accountant Morgan. They are as follows:

Computation of Number of Units of Potential Original Half/Cab Sales

Year	Tractor Population	Per Cent of Base Year (1950)	Estimated Unit Sales per Dealer	Total Unit Potential Sales
1949	3,230,000	.....	1	17,450
1950	3,442,000	100.00	1.86	32,457
1951	3,778,000	109.76	...	35,625*
1952	3,859,000	112.12	...	36,391*
1953	3,950,000	114.75	...	37,244*
1954	4,122,000	119.75	...	38,867*
1955	4,198,000	121.96	...	39,585*
1956	4,320,000	125.50	...	40,784*
				278,353

* Increased by percentage of tractor population over base year, 1950.

By eliminating what defendant's accountant determined to be abnormal operating expenses by reason of the impact of the conspiracy and the attendant litigation, the accountant arrived at an adjusted net unit profit per half/Cab. By further applying the estimated unit potential sales as estimated by Williams according to his estimated sales per dealer as related to tractor population growth, defendant established a different and higher net unit profit through the commensurate savings in overhead costs per unit due to the greater estimated production. By applying the greater net unit profit to the respective annual estimated potential sales, the accountant arrived at the total dollar profits which defendants claim could have been realized on potential sales except for the impact of the conspiracy for the period 1949-1956, which amounted to $1,364,200.10. From this was deducted the actual profit realized from sales of half/Cabs as reflected by the accountant's proforma earnings statement adjusted to eliminate the abnormal effects of the conspiracy and litigation. The realized profits from actual sales of half/Cabs during the period amounted to $79,996.17. Subtracting the realized profits from the total estimated profits, the accountant arrived at the figure of $1,284,203.93, which the defendants claim represents the total profits that could have been realized on the estimated potential sales except for the antitrust violations by plaintiff Clapper, together with Flora and their licensees.

[*Theory "Unrealistic"*]

The court has spent numerous hours analyzing and weighing the defendants' evidence in regard to the damages sustained, and although it is convinced, even beyond a reasonable doubt, that the defendant, Original Tractor Cab Co., Inc., has been damaged as a result of the impact of the conspiracy of the plaintiff Clapper, and Flora and their

licensees, the court is firmly of the opinion that the Williams-Morgan theory of computing the estimated potential sales is unrealistic and is based upon assumptions and conclusions which would lead the court into too much speculation and conjecture if reliance were to be placed upon it. For example, in order to rely upon the theory, it must be assumed that each of the distributors and the dealers included in Williams' estimate would continuously and consistently handle and sell the Original product, and that they would do so throughout the years involved. As a matter of fact, the record discloses that Firestone Tire & Rubber Co., whose stores were included among the 17,450 dealers, completely discontinued the sale of tractor cabs either in the year 1952 or 1953. Likewise, in order to rely upon the Williams-Morgan theory, it must be assumed that all of the dealers operate in states having climatic conditions wherein tractor covers would have sales potential. Further, it must be assumed that the sales of the defendant, Original, would consistently increase annually and that there would be no peaks and valleys in its annual sales. The evidence in the case indicates that this was not true in the case of any of the defendant, Original's, competitors who were engaged in the tractor cover business in each of the years here involved. In short, the formula upon which the defendant, Original, would have the court find its loss of profits is so fraught with pitfalls as to render it completely unreliable as an aid to the court in estimating reasonably the damages defendant, Original, has sustained. The court must have before it such facts and circumstances, or comparisons, for example, as to enable it to make an estimate of damage based upon judgment and not upon conjecture or guesswork. The evidence as a whole is not sufficient from which to draw a reasonable inference to support the conclusion, that except for the interference with the business of the defendant, Original, by the plaintiff and Flora and their licensees, the defendant, Original, could have sold the number of tractor covers indicated by the estimate of potential sales with the resultant profit claimed thereon.

[*Compensatory Damages Allowed*]

74. The losses heretofore stated resulted in damage to the business and property of the defendant, Original, as a consequence of the illegal conspiracy of the plaintiff Clapper, and Flora and their licensees acting in concert. For such damage, defendant, Original, is entitled to recover the following amounts of compensatory damages:

(1) Costs resulting from forced stoppage of production, from August 22, 1949 through September 23, 1949	$ 2,561.45
(2) Expenses incurred in finance negotiations	317.20
(3) Advertising costs rendered useless by reason of forced work stoppage	4,563.70
(4) Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
(5) Loss of potential sales to Stover-Winsted Co. for the years 1949 through the first five months of 1952	7,905.60
TOTAL	$27,611.35

[*Attorneys' Fees for Defending Infringement Action*]

75. The licensees under the Agreement of August 3-4, 1948, were added to this action as cross-defendants. Thereafter, the counterclaim was dismissed as to said licensees and Flora and the defendants entered into covenants not to sue upon payment by those parties to the defendants the amount of $110,000.00. Those covenants not to sue are plainly intended by their terms not as releases but only covenants not to sue, and it is expressly set out that the amount paid was not satisfaction which would discharge the liability of the remaining tort-feasor, Clapper. However the amount paid should be considered as a *pro tanto* credit, which in this instance, exceeds the liability of the plaintiff Clapper to the defendant, Original, even after trebling the amount of compensatory damages sustained by the defendant, Original, as a result of the plaintiff and his coconspirators' antitrust violations. That is to say, by trebling the compensatory damage sustained by the defendant, Original, the figure of $82,834.05 is obtained. By crediting against this sum the amount of $110,000.00, the amount paid the defendants under the covenants not to

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sue, the liability on plaintiff Clapper for compensatory damage to defendants is completely liquidated. But even though there is no further liability on the plaintiff Clapper for compensatory or general damages, there still remains his liability for the payment of defendants' attorney's fees for services rendered in defending the patent infringement action, which the court finds to fall within the category of "exceptional cases" as evidenced by the whole of the findings herein. As heretofore found, a reasonable attorney fee and reimbursement of counsel for miscellaneous expenses in rendering legal service in the patent infringement phases of this case is the sum of $28,244.31. As a part of the judgment in this proceeding, the plaintiff Clapper will be ordered to pay such sum to defendants' counsel of record. In addition to the payment of attorney's fees in connection with the patent infringement action, the defendants are entitled to have and recover from the plaintiff Clapper, reasonable attorneys' fees for the services of their attorneys in the prosecution of defendants' counterclaim and crosscomplaint for antitrust violations on the part of plaintiff Clapper and Flora and their coconspirators. Such attorneys' fees will be fixed by the court upon petition of counsel for the defendants and after hearing thereon.

[*Costs—Defense and Counterclaim*]

In addition to the foregoing attorneys' fees, defendants are entitled to recover fully the costs of suit laid out and expended by them in their defense to each cause of action brought against them in the five paragraphs of complaint, and in the prosecution of their counterclaim and crosscomplaint for the antitrust violations.

[*Release*]

76. The general release dated November 23, 1949, between the Cabette Company and Original Tractor Cab Co., Inc. was executed and signed by Cabette but was not executed by Original or Williams.

77. The unexecuted general release was prepared as and for settlement of the controversy between the parties thereto. It did not contemplate or involve any settlement for violation of the antitrust laws and would not settle such matter. Consequently it does not release the plaintiff from liability for damages to the defendant, Original.

[*Yielding to Duress—Unclean Hands*]

78. Some evidence is in the record tending to indicate that tractor covers sold during the working arrangement between Original and Cabette in 1949 were identified as "half/Cabs" rather than "Original Cabettes", as contemplated by the parties. If this was a violation of the arrangement between Original and Cabette, it is nothing of which the plaintiff may complain and does not constitute, without more, any evidence of unclean hands with respect to the subject matter of the counterclaim for damages for violation of the antitrust laws. The evidence does not show that the defendants had knowledge of the illegal conspiracy at and subsequent to the meeting in Chicago on September 12, 1949. The acts of the defendants under the economic duress imposed by such conspiracy in yielding to the pressure imposed by the conspiracy does not make the one who thus yields a party to the conspiracy. The evidence does not show unclean hands on the part of the defendants with respect to this action for damages.

Conclusions of Law

From the foregoing facts the court concludes:

[*Jurisdiction*]

1. That this court has jurisdiction over the parties and the subject matter in this cause of action.

[*Dismissal of Causes*]

2. The first cause of action for declaratory judgment, having been withdrawn by the plaintiff, is dismissed.

3. The charge of unfair competition included in the second cause of action is dismissed.

4. The third cause of action, for false patent marking, having been withdrawn by the plaintiff, is dismissed.

[*Breach of Contract*]

5. There was no valid agreement between the plaintiff and the defendants entered into on September 12, 1949, or subsequently, with respect to discontinuance of manufacture of tractor covers, and judgment on the fourth cause of action, for breach of contract, is entered for the defendants.

[*Patent Invalid*]

6. The Clapper patent is invalid.

7. The subject matter of the Clapper patent was fully anticipated in the art, was an obvious adaptation, and an unpatentable aggregation.

[*Infringement Question Moot*]

8. Whether the Clapper patent has been infringed by the defendants is moot in view of the court's conclusion of law that the Clapper patent is invalid.

9. The plaintiff's second cause of action is dismissed.

[*Sherman Act, Section 1*]

10. The Agreement of August 3-4, 1948, is *per se* violative of Section 1 of the Sherman Act.

[*Sherman Act, Section 2*]

11. The Agreement of August 3-4, 1948, also violates Section 2 of the Sherman Act, in that it manifests an attempt to monopolize, by the combining of non-competing patents in a single agreement by competitors, and gives to the parties to the agreement veto power over patent rights that are not referrable to their individual businesses, or licenses granted, even though the licensees may have continued to compete with each other, after the execution thereof. They are jointly given an exclusive market and control thereover by the terms of the agreement, and not singularly as a consequence of patent privileges acquired.

[*Patent Rights Under Sherman Act*]

12. A conspiracy or combination having as its object or effect a restraint of interstate trade and commerce, whether accomplished by legal or illegal means, falls within the ambit of Sections 1 and 2 of the Sherman Act, and is condemned thereby. Patent rights give no protection from the prohibitions of the Sherman Act, when they are associated, controlled, or used in consequence of an agreement, that is in restraint of interstate trade or commerce.

[*Patent Control by "Opposite" Patentee*]

13. When the two individual patentees, Clapper and Flora, combined their patents, they monopolized and contracted between themselves and with their licensees, to secure mutual benefits for themselves and their licensees, that are not given to them by the patent laws, and which agreement gave to the opposite patentee and licensees, a right of control over patent rights that may be associated and used in restraint of interstate trade and commerce; the purpose and result of such an arrangement and conduct was a violation of Sections 1 and 2 of the Sherman Act.

[*Concerted Refusal to License*]

14. The patentees and their licensees had no legal right to act in concert and join hands in an agreement shown to be in violation of the Sherman Act, thereby refusing a license to another manufacturer in the field, even though the latter was carrying on some business in violation of those patents.

[*Damages*]

15. Defendants are entitled to recover damages from the plaintiff as a result of losses suffered as a result of actions of the plaintiff, together with Flora and their licensees, and resulting to the business of the defendant, Original, in the following amounts:

(1) Costs resulting from forced stoppage of production, from August 22, 1949 through September 23, 1949	$ 2,561.45
(2) Expenses incurred in finance negotiations	317.20
(3) Advertising costs rendered useless by reason of forced work stoppage	4,563.70
(4) Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
(5) Loss of potential sales to Stover-Winsted Co. for the years 1949 through the first five months of 1952	7,905.60
TOTAL	$27,611.35

[*Damages Trebled—Credits*]

16. The damages assessed against the plaintiff shall be increased threefold in accordance with the Clayton Act; however as against that threefold amount, the plain-

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tiff Clapper is entitled to credit the sum of $110,000.00 heretofore paid by Flora and the cross-defendants.

[*Covenants Not to Sue*]

17. The covenants not to sue entered into between the defendants and Flora and the cross-defendants, were not releases, and do not discharge the liability of the plaintiff for violation of the antitrust laws.

[*Estoppel*]

18. The defendants are not estopped from asserting their counterclaim for damages under the Clayton Act by the arrangement made with the Cabette Company in October, 1949.

19. The third cause of action for breach of contract is dismissed.

[*Attorneys' Fees and Costs*]

20. Judgment shall be entered for the defendants on the counterclaim, and in the judgment it shall be ordered that the defendants have and recover of the plaintiff Clapper, attorney fees and reimbursement of miscellaneous legal expense in the amount of $28,244.31 for the services of defendants' counsel in their defense to the patent infringement action in this case. It shall also be ordered that defendants are entitled to reasonable attorney fees, to be fixed by the court upon petition and hearing, covering the services of defendants' counsel in the prosecution of the counterclaim and cross-complaint for antitrust violations on the part of plaintiff Clapper, together with Flora and their co-conspirators. In addition to the payment of the attorney fees aforesaid, the defendants shall fully recover of the plaintiff their total costs of suit laid out and expended in this cause.

Let judgment be entered accordingly.

Correcting Entry for January 14, 1958

After the court entered its findings of fact and conclusions of law herein, it occurred to the court that in finding and concluding that defendants were entitled to have and recover from plaintiff Clapper, reasonable attorney fees for the services of their attorneys for prosecuting the defendants' counterclaim and cross-complaint, that the court erred in including services rendered by defendants' counsel in the prosecution of defendants' cross-complaint against the cross-defendants.

Accordingly, it is now ordered that the findings of fact and conclusions of law heretofore entered by the court in this cause be amended to exclude from consideration, attorney fees for defendants' counsel covering services rendered in the prosecution of the defendants' cross-complaint against the cross-defendants. That is to say, the attorney fees to be allowed defendants' counsel in connection with the prosecution of the antitrust phases of this action will be limited to services rendered upon the defendants' counterclaim.

Memorandum Entry

[*Attorneys' Fees—Costs*]

This cause is now before the court upon the following matters:

(1) The fixing of attorneys' fees to be awarded defendants' attorneys for prosecuting the counterclaim for antitrust violations.

(2) Motion of defendants for admission of attorneys' itemization.

(3) Motion of plaintiff for an order requiring defendants' counsel, John F. Linder, to file an itemization of his charges for services on the antitrust cause of action.

(4) Motion of defendants to amend findings of fact and conclusions of law.

(5) Plaintiff's post-hearing brief anent attorney fees, and motion to amend findings of fact and conclusions of law, etc.

(6) Plaintiff's objections to defendants' bill of costs.

* * *

[*Covenant Not to Sue and Settlement with Other Conspirators*]

The court will stand on its prior ruling whereby it has found that the plaintiff has not been released as a tort-feasor by the terms of the settlement and covenant not to sue executed by the defendants in connection with their settlement with the other alleged joint tort-feasors. Moreover, Plaintiff's proffered Exhibit 200, the waiver and release of attorneys' lien, would not give aid to the plaintiff in his contention that he is absolved from payment of attorneys' fees by reason of his claimed release based upon this construction of the covenant not to sue. The waiver and release of attorneys' lien amounted to no more than what it purported to accomplish, *i. e.*, to cause

Defendants' counsel not to look to Comfort Equipment Company, Burch Manufacturing Company, Cab-Ette Company and Lee Flora, Plaintiff's co-conspirators, for the payment of any fees whatsoever, in any of the then pending litigation in three different district courts, in consideration of the execution of the agreement of settlement. The defendants, Williams and Original, were not parties to the waiver and release of attorneys' lien. Only their attorneys had such a lien to waive and release. Surely Plaintiff cannot seriously contend that by such action on the part of Defendants' counsel, the defendants are now precluded from recovering as a part of their statutory remedy, a reasonable attorneys' fee and costs as provided by the antitrust laws. Such an argument seems frivolous beyond words when considered in the light of the entire record in this case. Suffice to say that this court believes that the defendants as parties litigant are still entitled to recover a reasonable attorney fee for the use of their attorneys against their remaining defeated adversary in this long and expensive litigation.

[*Attorneys' Fees—Antitrust Counterclaim*]

The court will next take up the matter of fixing the attorney fees to be awarded Defendants' attorneys for their services in prosecuting the counterclaim for damages sustained by Defendants as a result of Plaintiff's violation of the antitrust laws.

Defendants' counsel have submitted evidence by way of expert testimony and itemized statements tending to show that they have earned attorneys' fees for services in their antitrust cause of action totaling $141,035.00. This they are claiming in addition to the attorneys' fees in the amount of $28,244.31 heretofore fixed by the court for their services in the defense of the patent infringement action.

The court has awarded compensatory damages to the defendants in the amount of $27,611.35 which, when trebled, amount to $82,834.05. Against this sum has been credited $110,000.00 received by the defendants from Plaintiff's co-conspirators for a covenant not to sue. Thus the court now finds what remains to be done is the fixing of Defendants' attorneys' fees in the antitrust phase of the lawsuit.

[*Complexities of Case—Authorities on Fixing of Fees*]

The court has carefully considered the evidence and post-trial briefs relating to attorneys' fees in the antitrust cause of action. The court is not unmindful of the complexities of the case, nor of its far-flung reaches. The case has been in process for over eight years and has consumed hundreds of hours of the court's time. Nor is the court overlooking the fact that it is convinced that this action was brought as a furtherance of the conspiracy, which the court believes had its inception prior to the granting of the patent in issue. Notwithstanding all of this, the court is bound by the authorities relative to the matter of fixing attorney fees in this type of action, particularly the rule as followed in the Seventh Circuit. See *Milwaukee Towne Corp. v. Loew's, Inc., et al.*, (7 Cir. 1951) [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561. See also *Twentieth Century-Fox Film Corp., et al. v. Brookside Theatre Corp.*, (8 Cir. 1952) [1952 TRADE CASES ¶ 67,218], 194 F. 2d 846.

[*Relation to Damages Awarded—Fees as "Damages"*]

With the *Milwaukee Towne Corp.* case as a guide, the court concludes, and therefore finds, that the request for attorneys' fees in the amount of $141,035.00 for services of Defendants' attorneys in the antitrust cause of action, does not bear a realistic relation to the amount of compensatory damages awarded. With regard to this finding, the court is not in accord with the views of the defendants whereby they would have the court include as a part of the basis of compensatory damages, the amount of $28,244.31, the attorney fees fixed for their services in defending the patent infringement action. No convincing authority has been shown to support their position in that regard. Nor does the court agree with the defendants in respect to their position that the court ought to readjust the credit allowed on the damages awarded. Defendants would have the court deduct their expenses and claimed attorneys' fees in connection with the venue issue from the $110,000.00 paid Defendants pursuant to the covenant not to sue, using the balance as a credit against the trebled compensatory damage. Likewise, as in their claim that the attorneys' fees for defending the

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patent action should be included as a part of the compensatory damage in computing the treble damages, they have shown no authority to support their position and the court has been unable to find any.

[*Attorneys' Fees as "Costs"*]

Approaching the issue of attorneys' fees from the other side, Plaintiff would have the court disallow all fees for Defendants' attorneys prior to the entry of December 14, 1954, the order of dismissal, whereby the complaint was dismissed by Flora as against the defendants, Williams and Original, and the counterclaim and cross-complaint dismissed by Williams and Original against Flora, Comfort, Burch and Cab-Ette. This is on the theory that attorneys' fees are to be included as part of the costs and that item four of the order of dismissal provides, "That no costs be awarded to any party litigant designated in this order, the respective parties litigant bearing their own costs." This theory, as so many others proffered by Plaintiff, at first blush might seem to have some merit, and the court is not wholly ignoring it. But the plaintiff does not stop there, he goes on and asks to be completely exonerated from payment of all costs and attorneys' fees incurred during the three-year period devoted to the venue issue involving his co-conspirators and the appeal taken from the order of this court in respect thereto. He would have the court believe his hands are stainless of the part he played in the conspiracy. During that time he was as much of a litigant in the antitrust cause of action as at any other time throughout the long course of this controversy. It was he who reaped the greatest benefits from the conspiracy. The presence of the co-conspirators before the court, more than anything else, made it possible for the court to ascertain the true relationship between them and the plaintiff and thus the existence of the conspiracy. Not only that, it should be borne in mind that the District Court for the Western District of Missouri, on October 27, 1953, had enjoined and restrained the plaintiff from instituting any proceeding, judicial or administrative, for infringement of Plaintiff's patent alleged to have occurred prior to such date. It can be concluded from that injunctive decree that the Missouri District Court intended to deprive the plaintiff of the fruits of his patent during the period of the existence of the conspiracy, which this court has also found to have existed prior to the Missouri District Court action. And this court has found that by the bringing of this action in the Southern District of Indiana, the conspiracy was furthered, that this action was a part of the conspirators' scheme to effectively carry forth their conspiracy and help bring it into complete fruition. Why the Missouri District Court made no mention in its decree of the "maintenance" of any pending infringement action at the time of its decree is unexplained. But to say the least, it is not logical to believe that that court intended to exempt this action in this district merely because it had been brought prior to the date of its injunctive decree. Since there is no conclusive evidence on this point before this court, it is assumed that the Missouri District Court, out of judicial conservatism and comity, left the matter of the pendency of this action to the discretion of this court in view of the pending counterclaim and cross-complaint. The decree there was a consent decree without the benefit of findings of fact and conclusions of law. Certainly the spirit of that court's decree would dictate that this action for patent infringement especially in view of the record in this proceeding, should have abated at the time of that decree. Instead of withdrawing the complaint for patent infringement, the plaintiff and his co-conspirator, Flora, chose to pursue the action beyond the date of that decree, even though they knew it was a remnant of their earlier conspiratorial actions.

Of course the plaintiff does not agree with such a construction of that decree, and the court here being somewhat in doubt as to its full meaning, concluded that this entire litigation should be heard on the merits. Except for such doubt, this court should have dismissed the complaint here in suit.

With the foregoing in mind, the court concludes that its order of December 14, 1954, did not relieve Plaintiff from payment of a just portion of the attorneys' fees and costs during the pendency of the venue litigation. Out of fairness, however, the court should not fail to consider as a weight factor in determining a reasonable attorney fee for Defendants' attorneys in the antitrust litigation, the recovery made and the attorneys' fees received in connec-

tion with the $110,000.00 paid by Plaintiff's co-conspirators. Though the arrangement between Defendants and their counsel was a private one, not subject to the control of the court at the time of payment, nonetheless, it cannot be altogether ignored in the separate matter of assessing attorneys' fees at this time.

[*Amount Awarded*]

Therefore, considering the evidence in the light of the court's firsthand knowledge of much of the services performed by Defendants' attorneys, and the value thereof, the court finds that a reasonable fee for their combined services should be, and is hereby fixed in the amount of $25,000.00. As to the division of such amount, counsel will be left to their own discretion.

The court is well aware that this sum represents just a little less than the compensatory damage found to have been sustained by Defendants, but except for the difficulty of proof, it is ventured that the actual damage suffered as a direct result of the violation of the antitrust laws by the plaintiff and his co-conspirators would have been found to be far greater.

Motion of Defendants for Admission of Attorneys' Itemization, and Motion of Plaintiff for an Order Requiring Defendants' Counsel, John F. Linder, to File an Itemization of his Charges for Services on the Antitrust Cause of Action

[*Mootness*]

Since the court has now disposed of the matter of fixing the amount of attorneys' fees for the defendants' attorneys in prosecuting the antitrust cause of action, the motion of Defendants for admission of attorneys' itemization, and motion of Plaintiff for an order requiring Defendants' counsel, John F. Linder, to file an itemization of his charges, are considered to be moot.

Motions to Amend Court's Findings of Fact and Conclusions of Law

Next the court turns to the respective motions filed by each side for amendment of the court's findings of fact and conclusions of law. Their motions and supporting briefs have been carefully read and considered. After such consideration and further review of the pertinent parts of the record, the court concludes that it will stand on the findings of fact and conclusions of law heretofore made.

Plaintiff's Objections to Defendants' Bill of Costs

[*Bill of Costs—Objections*]

The court now turns to the plaintiff's objections to the bill of costs submitted by the defendants. Their bill of costs was filed on January 27, 1958. On February 11, 1958, the plaintiff filed objections thereto. Due to the complex issues involved, many of which were previously argued, the clerk of the court made no attempt to tax the costs. Therefore, this matter is not being considered on review of the actions of the clerk, but by the court in the first instance.

The bill of costs totals $39,257.26, and with certain minor exceptions, the plaintiff objects to the whole thereof. Following is a categorical breakdown of the items listed in the original bill of costs:

Item 1	Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	$ 1,453.76
Item 2	Fees for witnesses (28 U. S. C. 1821)	75.28
Item 3	Fees for exemplification and copies of papers necessarily obtained for use in case	207.98
Item 4	Docket fees under 28 U. S. C. 1923	72.50
Item 5	Costs incident to taking of depositions	1,077.09
Item 6	Schedule I—Services, travel and telephone expense of defendant Williams	27,189.53
Item 7	Schedule II—Travel and telephone expenses of Defendants' attorneys	3,979.17
Item 8	Schedule III—Expense for services of Defendants' accountant	4,950.00
Item 9	Schedule IV—Miscellaneous costs of certified copies of Patent Office records and notary fee	251.95
		$39,257.26

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Since filing the original bill of costs, Defendants were ordered to itemize with greater particularity Items 1, 3 and 5 of the bill. In their response to that order, which, incidentally was not a satisfactory response and therefore required an additional itemization, defendants called the court's attention to "slight differences" in the amounts of court reporter charges and deposition charges, and asked that the amounts as set forth for such items in the original bill of costs be changed to show the sum of $1,733.64 for court reporter charges, and the sum of $1,050.04 for costs incident to taking of depositions. After such correction, the total amount of the bill of costs would amount to $39,510.09, an increase of $252.83. However, it is apparent that these figures must further be amended in view of Defendants' "Further Itemization of Costs" which was filed on May 20, 1958. According to the last itemization, the charges for court reporter amount to $1,688.73, and the costs incident to the taking of depositions amount to $1,049.64. The court will therefore treat the bill of costs to be amended as requested and according to the latest itemization amounting to $39,464.78.

[*Court's Intentions as to Costs*]

Before taking up the objections to the various items in the bill of costs, it would be helpful to the parties if the court would set aright what appears to be a misgiving on the part of the defendants with respect to the meaning of certain language used in the court's findings of fact and conclusions of law dated January 13, 1958. In its findings and conclusions, the court stated,

> "In addition to the payment of attorneys' fees aforesaid, the defendants shall fully recover of the Plaintiff their total costs of suit laid out and expended in this cause."

This was not the best choice of words in view of what the court had in mind at the time. The court intended merely to have the statutory costs, including the reasonable costs incident to the taking of depositions, assessed against the plaintiff. It was not the intent of the court to go beyond what is normally and customarily included in the assessment of costs in this type of action. Therefore a great bulk of the defendants' bill of costs will be disallowed in fixing the costs to be taxed against the plaintiff.

[*Alleged "Exoneration"*]

Perhaps it would also be well at this point to dispose of certain objections which the plaintiff interposes and which flow to the question of whether the defendants should be permitted to recover any costs after the date of the settlement with the plaintiff's co-conspirators, and to the question of whether Plaintiff should be taxed with any of the costs incurred in connection with the trial and disposition of the issue of venue. These objections affect all of the items of costs and must be considered in addition to the specific objections to the respective items.

[*Dismissal of Co-conspirators*]

Plaintiff says that by reason of the terms of the agreement made in connection with the execution of the covenant not to sue and the order of the court of December 14, 1954, approving the simultaneous dismissal of the complaint on behalf of Flora as against the defendants, Williams and Original, and the counterclaim and cross-complaint on behalf of said defendants as against Flora, Comfort, Burch and Cab-Ette, he, the plaintiff, is exonerated from the payment of costs. Then, moreover, the plaintiff says he took no active part in the trial and disposition of the issue of venue. He says that during the period "from the spring of 1951 through the fall of 1954 the venue dispute occupied the stage, with the Clapper issue completely sidetracked." He claims that he did not participate in the long venue battle in any way, that during the long period of delay the battle was confined to the defendants on the one hand and the cross-defendants on the other.

The settlement agreement which was made at the time the covenant not to sue was given by the defendants to all of the co-conspirators, except the plaintiff Clapper, provided that the dismissals

> "shall be entered without an award or payment of costs . . . all parties paying their own costs."

The court's order of dismissal of December 14, 1954 specified,

> "4. That no costs be awarded to any party litigant designated in this order, the respective parties litigant bearing their own costs."

In view of the terms of the agreement and the court's order of dismissal, Plaintiff con-

cludes that the defendants are thereby bound to bear their own costs up to the date of the order, December 14, 1954. Now in addition to the foregoing, Plaintiff further contends that he is in fact released from all liability because the agreements and the covenant not to sue constitute a legal release of Plaintiff's joint tort-feasors, and by operation of law, he too is released.

A similar position was taken by the plaintiff in his opposition to the matter of awarding attorneys' fees to Defendants for the services of their attorneys in the antitrust phase of this case. What the court has said in that regard will not be fully repeated here. The court disagrees with the theory of the plaintiff, first, because throughout the pendency of this action the plaintiff has been a most active litigant in the antitrust phase of the suit. Actually that phase of the suit has overshadowed the patent infringement action, both from the activities of the plaintiff and the defendants. Had it not been for the fact that the plaintiff's co-conspirators were brought into this court, the scope and effect of the conspiracy might never have been known. Plaintiff's argument that he took no active part in the case during the venue battle does not bear weight.

[*"Apportioning" Costs Among Joint Tort-feasors*]

Plaintiff seems to take the position that since he did not participate in the venue dispute as much as the other litigants, he should only be taxed, if at all, in proportion to the extent of his participation. Bearing in mind the court has found him guilty of violation of the antitrust laws, there is no logical reason why he, as one of the joint-wrongdoers, should not be held accountable for the full amount of the court costs. It is only in rare cases where one of several joint-wrongdoers is absolved from full liability for court costs. In the case of *Vrooman v. Penhollow,* (6 Cir. 1911) 186 F. 495, a patent infringement action, one of three defendants made a motion that the costs adjudged them be distributed among them in proportion to the extent of their participation in the infringement complained of. In the trial below, the evidence was scant as to the extent of the participation of this particular defendant in the infringement. This minor issue received little attention during the trial because of the larger contest over patent infringement. In denying the motion of the complaining defendant, the court said:

> "It is apparently true that in some rare cases where there were several wrongdoers, some of whom had participated in doing the wrong only in a trivial or almost wholly unrelated manner, the court has exercised its discretion in their favor and cast the heavier burden of the costs to which all are liable upon the more guilty parties. But such cases are exceptions to the general rule upon very special circumstances. We think the position which Baker has taken and held in this matter has not been such as ought to induce the court to exercise its discretion in his favor. We have the conviction that he was the most potent factor in the infringement and that it was mainly because of his countenance and encouragement that the other defendants persevered in it."

And so it was in the case at bar. The plaintiff Clapper was the dominant figure in the conspiracy. He stood to gain the most and did gain the most from the fruits of the joint-wrongdoings. How, then, can this court exercise its discretion in his favor and shift the costs incident to the venue question over and upon the successful defendants? Certainly not merely because the plaintiff says he did not participate very much in that part of the litigation.

[*Recovery of Costs Not Precluded*]

The terms of the agreement and the order of dismissal of December 14, 1954, do not preclude at this stage of the litigation the taxing of the defendants' costs against the plaintiff. Plaintiff was not a party to the agreement nor the covenant not to sue, and he was not included in the order of dismissal. Nor did the court by entering the order of dismissal intend it to have the legal effect Plaintiff now claims. The court knows of no rule or theory of law that would preclude the defendants from agreeing with a part of the other litigants that they would bear their own costs up to the time the covenant not to sue was executed and the dismissal entered, and look forward to an ultimate recovery of such costs from their remaining defeated opponent, should they be successful. Whether the court in assessing costs under such circumstances should take into account the prior consideration paid for the covenant not to sue, seems

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to be a matter to be left to the sound discretion of the trial court.

Throughout Plaintiff's argument he fails to draw a distinction between such costs as should be awarded the successful defendants in connection with the patent infringement issue, and the costs which should be awarded in regard to the antitrust phase of the case. Keeping in mind all of the issues in this action, it is doubtful whether such a distinction can be accurately drawn. The court, therefore, must weigh and evaluate the respective items of cost and the objections made thereto, whether such items were incurred prior or subsequent to the dismissal as against the other parties, or whether in connection with the patent or antitrust issues.

The court has previously ruled that the agreement and covenant not to sue did not constitute a legal release but was only a covenant not to sue.

For these reasons the court now holds that the plaintiff has not been relieved of paying the defendants' legitimate costs of suit.

The court will now deal with the items of costs as they are listed in the bill of costs and consider them in the light of Plaintiff's objections.

[*Court Reporter's Fees*]

Item 1	Fees of court reporter for all or any part of the transcript necessarily obtained for use in the case	$ 1,688.73

Plaintiff objects generally to the allowance of this item but particularly objects to the assessment of any costs against the plaintiff for an extra copy of the transcript of the testimony taken during the trial. Plaintiff argues that such extra copy of the transcript was merely for the convenience of counsel and therefore not necessarily obtained for use in the case. By inference Plaintiff also objects to the cost of the original stenographic transcript furnished the court. This is on the premise that the court did not order a transcript of the evidence. Plaintiff, for authority in support of the first proposition, cites *Hope Basket Co. v. Product Advancement Corp.*, (Mich. 1952) 104 F. Supp. 444; *Dept. of Highways v. McWilliams Dredging Co.*, (La. 1950) 10 F. R. D. 107; *Kenyon v. Automatic Instrument Co.*, (Mich. 1950) 10 F. R. D. 248; *Stallo v. Wagner*, (2 Cir. 1917) 245 F. 636. For his second proposition, Plaintiff cites and relies upon *Firtag v. Gendleman*, (D. C. 1957) 152 F. Supp. 226; *Marshall v. Southern Pacific Co.*, (Cal. 1953) 14 F. R. D. 228, and *Cooke v. Universal Pictures Co.*, (N. Y. 1955) 135 F. Supp. 480. From a reading of these and other cases, one thing is made abundantly clear; the fixing and allowing of court costs vary in different districts and according to the judicial discretion of the various judges in view of the varying circumstances in the respective cases. Of course there are generally fixed standards which should be followed, but in each case the matter of allowing costs must be determined according to the peculiar facts and circumstances.

In this court it has been a custom of long standing, amounting to an unwritten rule, that in any case when a party orders a transcript of the evidence, the original transcript must be furnished the trial judge and the expense thereof must be borne by the party ordering the same, or, as the court otherwise directs. In the case at bar, since the court early in the proceedings made it known to counsel that in view of the complexities of the case they would be required to prepare and submit proposed findings of fact and conclusions of law, it is nothing more than reasonable that counsel and the parties should have anticipated the need of a transcript of the evidence and the cost incident thereto. Therefore the court concludes that Defendants are entitled to recover as costs in this proceeding their expenditures toward the cost of the original stenographic transcript of the evidence and minutes of the trial. Also, the cost of one copy for the use of their counsel in the conduct of the trial and in the post trial procedures which were required by the court. The court will not, however, order the plaintiff to pay the costs of reporters' fees and charges for transcripts of oral arguments which were had at various times through the pendency of this action. Such transcripts, it is felt, were principally for the convenience of counsel and should be borne by the party requesting them.

With these pronouncements as a guide, the following costs under Item 1 of the bill of costs will be taxed against the plaintiff, but in respect to all other costs thereunder the plaintiff's objections are sustained:

May 18, 1953	Walene E. Shields Transcript from trial of venue.		
	One-half of cost of original (391 pages)	$ 107.58	
	One-half cost of two copies @ 25¢ per page ($195.50)	97.75	
	Postage	1.44	
			$ 206.72
June 11, 1957	E. Clifford Powell Daily copy (carbon) of trial June 3, 4, 5, 6/57		
	869 pages @ 40¢	347.60	
	17 pages index @ 80¢	13.60	
			361.20
August 10, 1957	E. Clifford Powell Transcript of trial, 6/20-28/57		
	1,481 pages @ $1.05	1,555.05	
	26 pages index @ $2.10	54.60	
	1½ days reporter @ $25	37.50	
	One-half due by Original		823.57
Total Allowed—Item 1			$1,391.49

Item 2—Fees for Witnesses (28 U. S. C. 1821)—$75.28

[*Witness Fee and "Mileage" for Defendant*]

Plaintiff objects to the allowance of this item of costs except with respect to Ralph L. Morgan—$19.20, Ray Steffey—$8.62, and Harold B. Hood—$4.00. As to the witness fee and mileage for the defendant Williams, Plaintiff points out that he being a party to the action and a real party in interest, attended throughout the whole of every day of both sessions of the trial, and actively participated in the management thereof; that therefore he did not, in other words, attend merely as a witness. Such being the case, the claimed witness fee and mileage for him is not allowable. Plaintiff cites *Barnhart v. Jones,* 9 F. R. D. 423 (W. Va. 1949); *Picking v. Pennsylvania R. Co.,* 11 F. R. D. 71 (Pa. 1951); *Ryan v. Arabian American Oil Co.,* 18 F. R. D. 206 (N. Y. 1955), and *Tuck v. Olds,* 29 F. 883 (Mich. 1886).

[*Witness Fee for Counsel*]

Similarly, as to the witness fee for Defendants' counsel, Messrs. Swecker, Linder and Ernest, Plaintiff argues that since all of them were attorneys of record in this case and actively participated in the conduct of the trial, they should not be permitted to shift position from counsel table to witness chair and thereupon be entitled to witness fees. The court agrees with the plaintiff. Accordingly only the following costs will be allowed under Item 2 of the bill of costs:

Ralph L. Morgan	$19.20
Ray Steffey	8.62
Harold B. Hood	4.00
Total Allowed—Item 2	$81.82

Item 3—Fees for exemplification and copies of papers necessarily obtained for use in case.—$207.98

[*Lack of Itemization*]

To this item the plaintiff objects because there has been no itemization of the amount sought. Plaintiff relies upon Judge Hincks' ruling in *Perlman v. Feldman,* 116 F. Supp. 102, 112 (Conn. 1953). There, upon timely objection Judge Hincks disallowed an item of costs covering the making of copies of unidentified documents. This court would be inclined to rule similarly on the item here at hand except for the court's own knowledge of the manner in which the parties dealt with each other in providing copies of the very great number of letters and documents here involved. The court recalls the many conferences and informal agreements among counsel with respect to furnishing each other documents or copies of documents. Admittedly it would be far better for the problem now presented if the defendants had kept an itemized list identifying each letter, invoice, circular, catalog page, work sheet, etc., which they had reproduced, with a further explanation as to how it was used in the case.

Counsel for the defendants point out that this item covers photostatic and other re-

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production costs of literally hundreds of letters, invoices and many different types and kinds of papers for use in this case only. A part of the cost here involved was actually paid Mr. Scofield, counsel for Plaintiff, for copies of the Clapper letters that he furnished. Defendants say that when the plaintiff demanded and received large quantities of records taken from the defendant, Original, letters, invoices, purchase orders, shipping notices, etc., photostatic copies were made of those and the cost thereof is here included. Counsel for the defendants say it would be the work of supererogation to list all of the many documents thus copied, even if the court had the time to read such a list. In other words, it would be beyond what is required. The court agrees.

In view of the court's own knowledge of the many, many documents used in the case, and since this is a matter within the court's judicial discretion, and further in view of the oath of Defendants' counsel that the item of $207.98 is correct and necessarily incurred in this action, this item of costs will be ordered taxed.

Amount of Item 3 Allowed..... $207.98

Item 4—Docket Fees under 28 U. S. C. 1923—$72.50

[*Filing Depositions*]

Objection is made on the basis that this lump sum item is not broken down. Defendants in their brief say that they filed twenty-one depositions and are charging merely the $2.50 statutory fee per deposition. The remaining portion of the $72.50 item represents the $20.00 statutory attorneys' docket fee.

In this court no charge is ever taxed by the clerk for filing a deposition. The attorneys' docket fee will be allowed as a part of this item.

Amount of Item 4 Allowed..... $20.00

Item 5—Costs Incident to Taking of Depositions—$1,049.64

Quoting the plaintiff, his objection to this item is as follows:

"Most of the items under the heading 'Depositions' reflect disbursements made in 1951 and 1952, and these of course cannot be allowed in view of the court's order of December 14, 1954 requiring the defendants to bear their own costs as to all matters up to that date. Some of these deposition expenses would not be allowable for the further reason that they were discovery depositions not introduced into evidence in the case. Insofar as the amounts reflect disbursements for *carbon copies* of depositions obtained by plaintiff's counsel for their own convenience (the original being on file with the Clerk), no allowance for the copy would be proper."

Defendant goes on to object to the items of expense covering the depositions of the plaintiff Clapper, and the defendant Williams, and also the expense of the carbon copy of the deposition of McVicar taken at Bloomington, Illinois.

Insofar as the objection is based on the court's order of December 14, 1954, by reason of what the court has previously said in this memorandum, it follows that the objection must be overruled. As to the expense covering the extra copies of the various depositions, the court is firmly of the view that it was not merely convenient for counsel to have them, but it was imperative that they have them. This case, in the experience of the court, stands out singularly. Never before has the court witnessed such vehemence on the part of counsel and the parties. Throughout all the proceedings there has been an absence of the customary trust and professional reliance a court is accustomed to see on the part of counsel. Not infrequently, accusations of misrepresentation, falsification and fraudulence have been leveled by counsel at each other. From their conduct and lack of trust in each other, there should be little wonder as to why they wanted copies of everything, including every statement made during their oral arguments. In this setting and with such a background, the court is of the view that the extra copies of the depositions were reasonably necessary for the use of counsel in this case. This applies both with respect to the pre-trial procedures and in connection with the trial and post-trial procedures. Therefore, the court holds that Defendants are entitled to recover the costs incident to the taking of the depositions listed in the itemization of this item of the bill of costs, including one carbon copy. Moreover, the court recalls how often it was required to call upon counsel to brief and argue certain points which necessarily required reference to the various depositions.

[*Carbon Copies—Deposition of Adversary*]

The court, although with some reluctance, agrees with the plaintiff in his objections to the costs of the deposition of the plaintiff Clapper taken by the defendants and the cost of the carbon copy of the deposition of the defendant Williams. It is felt that these depositions fall largely within the rule precluding the recovery of the costs of depositions taken solely for the convenience of counsel in the preparation of their case. Consequently, these two items of expense will not be allowed as a part of Defendants' bill of costs.

Therefore, as to Item 5 of the bill of costs, the court will allow the following:

1951		
January 18		
Cost of reporting deposition taken 11/10/50 of Lee Flora and Snyder, Danville, Ill. (antitrust)		$ 71.70
January 18		
Cost of reporting depositions taken 11/28/50 in Kansas City of Robert D. McCarthy and Harry Burch (antitrust)		79.49
January 24		
Cost of reporting Heller deposition taken in Chicago on 11/8/50 (patent infringement)		
3 hours attendance @ $4	$ 12.00	
34 pages original @ 70¢	23.80	
34 pages carbon @ 30¢	10.20	
		46.00
January 24		
Cost of reporting Frein deposition taken in Chicago 12/27/50 (patent infringement)		
1 hour attendance	4.00	
8 pages original	5.60	
8 pages carbon	2.40	
		12.00
February 19		
Cost of reporting Alveson, and others, depositions at Duluth, 11/9/50, (patent infringement)		47.66
1952		
May 19		
Cost of reporting Maumee Valley Seed Co. depositions at Fort Wayne on 5/14/52 (venue)		
Reporter's bill	154.00	
Legal services—costs in obtaining subpoenaes for witnesses	25.00	
		179.00
May 27		
Cost of reporting Ruddell and Morton depositions at Indianapolis, 5/15/52 (venue)	73.50	
2 sets of photostats of correspondence produced	36.54	
		110.04
September 28		
Cost of reporting McCarthy, Dolan, Bowers and Kimsey depositions at Kansas City 6/25—36/52 (venue)		
Attendance, 8 hours @ $3	24.00	
Notarial certificates	2.50	
187 pages original @ 60¢	112.20	
187 pages carbon @ 20¢	37.40	
2 sets photostats of correspondence produced	10.45	
Postage	1.80	
		188.35

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1956

December 15

Cost of reporting McVicar deposition taken at Bloomington, Illinois on 12/13/56 (antitrust)

Attendance, 3 hours @ $5	15.00	
35 pages original	26.25	
35 pages copy	8.75	
Postage	.75	
Marshal's fees for service of subpoenaes	18.20	
		68.95
Amount of Item 5 Allowed		$803.19

Item 6—Schedule I. Services, travel and telephone expense of defendant Williams—$27,189.53

[*"Damages"*]

This item is made up of expense purportedly incurred by the defendant, Original Tractor Cab Company, Incorporated, and may be broken down into three categories:

(a) The portion of defendant Williams' salary estimated to be chargeable to what are identified as "litigation matters."

(b) Travel expenses of the defendant Williams in connection with such "litigation matters."

(c) Telephone charges for calls also pertaining to "litigation matters."

There is little doubt in the mind of the court that the defendant, Original, did in fact suffer material damage as a result of this litigation. But the defendants had their opportunity during their day in court to establish such damage. They attempted to establish the damage suffered by the corporation, but the court was not convinced by their method and theory. Now is not the time to retry this element of their case. Nor is the taxing of costs of suit the proper means of fixing such damage. For this and the reason earlier set out in this entry, all of Item 6 will be disallowed.

Amount of Item 6 Allowed..... $0.00

Item 7—Schedule II. Travel and telephone expenses of Defendants' attorneys.

[*"Personal" Expense*]

As authority for its objection to this item Plaintiff cites *Manley v. Canterbury Corp.* 17 F. R. D. 234 (Del. 1955); *Hope Basket Co. v. Product Advancement Corp.*, 104 F. Supp. 444, 451 (Mich. 1953), and *Brookside Theatre Corp. v. Twentieth Century Fox*, 11 F. R. D. 259 (Mo. 1951). Upon the authority of these cases Plaintiff says it is well settled that an attorney's travel and telephone expenses are not allowable. Stated as the general rule, the court would agree.

That this is the general rule is borne out by the weight of authorities. It is only in exceptional and compelling circumstances that courts are prone to depart from the general rule. *Gibson v. International Freight Corp.*, 8 F. R. D. 487 (Pa. 1947). Such compelling circumstances do not appear in the case at hand. Travel expense of counsel in the preparation of suit and in attending the court proceedings must generally be classified as personal expense. The same is true in respect to long distance telephone expense. Neither of these items can rightfully be classified as "costs of suit." Accordingly Item 7 of the bill of costs is disallowed.

Amount of Item 7 Allowed..... $0.00

Item 8—Schedule III. Expense for services of Defendants' accountant.

[*Preparation*]

This item represents charges for Defendants' accountant in the preparation of Defendants' statement of losses and for attending hearings, conferences and trial. Such services were a part of the defendants' detailed preparation and presentation of their counterclaim, and, as such, cannot be allowed as costs. It is true, a part of his time was spent in furnishing Plaintiff's accountants with information they needed in making an audit of the defendants' operations. However, there is no specification in the bill of costs as to how much time was so spent. The court will hazard no estimate. For these reasons Item 8 of the bill of costs is disallowed.

Amount of Item 8 Allowed..... $0.00

Item 9—Schedule IV. Miscellaneous costs of certified copies of Patent Office records and notary fee—$251.95

[*Necesary Part of Record*]

All of the charges enumerated in Schedule IV are objected to with the exception of the certified copy of the Clapper file wrapper and interference ($24.55). Plaintiff concedes that the notary fee of $3.00 may be allowable if identified and shown to be applicable to this case. He also concedes that the defendants may be entitled to a portion but not all of the costs of patent copies ($78.25).

Defendants counter by pointing out that some of the copies of patents were foreign patents and photostatic copies had to be obtained, which increased the cost. A certified translation of the Swiss patent was required. A book of patents was offered in connection with the motion for summary judgment, as well as at the trial. They go on to say that the Alverson file wrapper was made necessary "by the misrepresentation of Plaintiff's counsel with respect to it."

The court was materially aided in making its final determination as to patent validity through the earlier presentation and disposition of Defendants' motion for summary judgment. By the time of the trial the court was well acquainted with the history of the prior art in this field.

The court availed itself of the Alverson file wrapper after the dispute arose with respect to the Alverson patent application. It was a necessary part of the record.

As to the file history of the Clapper patent for use of Defendants' counsel during trial, in view of the manner in which the interference and concession of priority were handled as between the applicants, who later were found to be in conspiracy, the court is inclined to believe the extra copy of the history of the Clapper patent was necessary for Defendants' counsels' use in the trial. All of Item 9, Schedule IV, will be allowed.

Amount of Item 9 Allowed.....$251.95

Recapitulation of Costs Allowed

Item 1	Fees of court reporter for all or any part of the transcript necessarily obtained for use in the case	$1,391.49
Item 2	Fees for Witnesses	31.82
Item 3	Fees for exemplification and copies of papers necessarily obtained for use in case	207.98
Item 4	Docket fees under 28 U. S. C. 1923	20.00
Item 5	Costs incident to taking of depositions	803.19
Item 6	Services, travel and telephone expense of defendant Williams	—0—
Item 7	Travel and telephone expenses of Defendants' attorneys	—0—
Item 8	Expense for services of Defendants' accountans	—0—
Item 9	Miscellaneous costs of certified copies of Patent Office records and notary fee	251.95
	Total Costs Allowed	$2,706.43

The clerk will tax the foregoing items of costs against the plaintiff.

It is so ordered.

[¶ 69,525] United States v. International Boxing Club of New York, Inc., International Boxing Club, Madison Square Garden Corporation, James D. Norris, and Arthur M. Wirtz.

In the United States District Court for the Southern District of New York. Civil Action No. 74-81. Dated November 16, 1959.

Case No. 1122 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Modification of Injunctive Decrees—Dissolution of Boxing Clubs.—A motion by the pur-

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chaser of a boxing stadium and two boxing clubs to modify a final judgment requiring dissolution of the clubs was denied. It was contended that the dissolution would result in the loss, for tax purposes, of an "operating deficit" of $218,000. The court held that this situation did not represent a "hardship so extreme and unexpected" as to make the movant a "victim of oppression." Factors affecting the court's determination were (1) the loss accrued after the entry of judgment, and thus while the club was engaged in activities found to be violative of the antitrust laws, (2) the real parties in interest on the motion were not the defendants and normally one who is neither a party to the suit nor a beneficiary of the decree has no standing to seek a substantial modification of the final judgment, (3) the movant had notice of the provisions of the decree when he purchased the club, although he did not have notice of the loss, and (4) dissolution of the club was an integral part of the relief required by the evidence, and a vital and essential provision of the judgment. The tax loss was an unconsequential development in view of the ends sought to be accomplished by the judgment.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.325, 8233.700.

For the plaintiff: Robert A. Bicks, Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D. C. (William J. Elkins and Edward F. Corcoran, of counsel).

For the defendants: Simpson, Thacher & Bartlett, New York, N. Y. (Cyrus R. Vance, of counsel), for Madison Square Garden Corporation and International Boxing Club of New York, Inc.

For prior opinions of the U. S. Supreme Court, see 1959 Trade Cases ¶ 69,231, 1957 Trade Cases ¶ 68,849, and 1955 Trade Cases ¶ 67,941; and for prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,759 and 68,649 and 1954 Trade Cases ¶ 67,758.

[*Modification of Final Judgment*]

RYAN, District Judge [*In full text*]: The defendants Madison Square Garden Corporation and International Boxing Club of New York, Inc., have moved to amend the final judgment entered in this suit on July 2, 1957. The motion is addressed to Paragraph "21", which provides:

> "21. Defendants International Boxing Club, Inc., an Illinois corporation, and International Boxing Club of New York, Inc., a New York corporation, are hereby ordered immediately to take appropriate steps to cause their dissolution in accordance with the laws of their respective states of incorporation."

The motion as originally made sought modification of the final judgment (1) by eliminating the requirement of dissolution of International Boxing Club of New York, Inc., and by substituting a provision requiring a change of name from International Boxing Club of New York, Inc., to either Madison Square Garden Boxing Club, Inc., or Madison Square Boxing Inc., and by amending Paragraphs 15 and 22 of the judgment to conform to the modifications *; or, in the alternative (2) by eliminating the requirement of dissolution of I. B. C.-N. Y. and substituting in its place a provision requiring a change of name from I. B. C.-N. Y. to Madison Square Garden Iceland Corporation, and enjoining that corporation from ever promoting any professional boxing contest. At the hearing on the motion, the first request was withdrawn and we have before us, therefore, only an application for the alternative relief.

[*Claimed Basis for Amendment*]

A provision of the final judgment directed the defendants Norris and Wirtz to sell all their stock in the Madison Square Garden Corporation. After affirmance of the judgment by the Supreme Court [1959 TRADE CASES ¶ 69,231], (358 U. S. 242), this Court, on February 19, 1959, approved the sale of the Norris and Wirtz stock to Graham-Paige Corporation. The ground urged to justify the relief sought is that as of August 15, 1959, I. B. C.-N. Y. had an operating deficit of approximately $218,000,

* Par. 15 enjoined defendants Norris and Wirtz and Madison Square Garden Corporation from jointly promoting professional boxing contests; Par. 22 enjoined I. B. C.-N. Y. and I. B. C.-Illinois, pending their dissolution, from promoting any professional championship boxing contest.

which would be lost for federal income tax purposes if I. B. C.-N. Y. is dissolved. We have assumed, for the purposes of this motion, that this is the fact.

This tax loss, we are informed, accrued during the fiscal year ended May 31, 1959 and during the period from June 1, 1959 to August 15, 1959. The President of Graham-Paige has testified that, when he negotiated to buy the Norris and Wirtz stock, he knew there was an outstanding final anti-trust judgment requiring dissolution of I. B. C.-N. Y., and that, although he had examined some financial statements of corporations related to Madison Square Garden, he was not aware of this loss in I. B. C.-N. Y. The negotiations to purchase the Garden stock took place on January 28 and 29, 1959. He further testified that the first time Graham-Paige learned of the tax loss was two or three days after on February 19, 1959, when the transfer was approved by this Court.

The following testimony was also given by him:

"Q. Do you mean that when you discussed the financial operations of I. B. C. with Mr. Wirtz you were just interested in history, what their average had been over a course of years?

"A. As far as I. B. C. was concerned, it was a minor influence in our interest in buying the Garden."

[*Criteria for Amendment*]

The Supreme Court in *United States v. Swift & Co.* [1932-1939 Trade Cases ¶ 55,005], 286 U. S. 106, 119 (1932), has stated the criteria to be considered on an application to modify a final anti-trust decree.

"No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation . . .".

We cannot say that the situation here represents a "hardship so extreme and unexpected" as to make Graham-Paige a "victim of oppression", or that "a grievous wrong" has been the result of "new and unforeseen conditions".

[*Parties in Interest*]

It must be borne in mind that the real parties in interest on this motion are Graham-Paige and the other stockholders of Madison Square Garden Corporation. They are not the defendants in this suit and the judgment addressed itself to correct wrongs committed by the named defendants. Rarely, if ever, may it be held that one neither a party to the suit, nor a beneficiary of the decree, has standing to seek a substantial modification of the final judgment reached by the Court after trial.

Prior to the entry of the final judgment, we expressed our views concerning the two I. B. C. defendants:

"These corporations are the promotional arms of the defendants, conceived and used to enable defendants to restrain and monopolize promotion of championship boxing contests. Their assets are of but nominal value except for the goodwill attaching to their names by virtue of the conspiracy."

On appeal, the Supreme Court concurred in the conclusion to decree dissolution because "the creation of the combination is itself the violation."

[*Tax Loss*]

The tax loss accrued to I. B. C.-N. Y. after the entry of judgment and while it was continuing to operate pending appeal. The loss occurred while I. B. C.-N. Y. was continuing to engage in activities which had been found to be in violation of the anti-trust laws. This hardly appeals to the Court as a basis for amending the final judgment.

Addressing attention to the argument by defense counsel concerning the tax problems created by the proposed judgment, on the hearing as to the scope of the relief to be provided for in the final judgment, we said:

"The Court: I don't attempt to regulate the tax problems of these defendants, but offhand it would seem to me to present no great difficult problem . . . It is a problem that has arisen because of wrongful acts and I cannot concern myself too much with it, if by concerning myself with it I make the decree ineffective."

This is still our view.

The decree was carefully fashioned to deal with the specific violations found to exist. Dissolution of I. B. C.-N. Y. was not only an integral part of the relief required by the evidence, but was a vital and essential provision of the judgment. The tax

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loss, accruing after entry of the final judgment, is an inconsequential development in view of the ends sought to be accomplished and the ending of the unlawful monopolization of professional championship boxing contests.

When Graham-Paige purchased the Garden stock from Norris and Wirtz, it was aware of the outstanding final judgment and of the particular terms and provisions of the judgment requiring dissolution of I. B. C.-N. Y. By that time, the directors of the Garden had already initiated action to dissolve I. B. C.-N. Y. Graham-Paige gave little or no consideration to I. B. C.-N. Y. in deciding to purchase the Garden stock. To modify the final judgment under these circumstances would amount to granting Graham-Paige and the other stockholders of the Garden stock relief at the expense of the integrity of the Court's final judgment. This cannot be made the justification for the modification sought.

Motion denied; so ordered.

[¶ 69,526] John Blaski v. Inland Steel Company, Inland Steel Products Company, and Joseph T. Ryerson & Son, Inc.

In the United States Court of Appeals for the Seventh Circuit. No. 12658. Dated November 16, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, PHILIP L. SULLIVAN, Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Injunctive Relief and Treble Damages—Necessary Averments to State a Cause of Action—Injury to Plaintiff—Acquisitions of Stock or Assets Under Section 7 of Clayton Act.—A steel manufacturer, including two of its subsidiaries, which allegedly acquired various companies in violation of Section 7 of the Clayton Act was properly granted summary judgment where the plaintiff, a purchaser and user of steel products, failed to show any specific damages to his business or property which resulted from the acquisitions. General allegations that the defendant's control of raw materials and outlets for steel lessened the opportunity of others to enter the field of supplying steel, narrowed the sources from which the plaintiff could obtain steel, and resulted in less favorable treatment of him as a customer were not sufficient to show actual injury to his business. It was essential for him to allege specific injury differing from that sustained by him as a member of the community.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.

For the plaintiff: Joseph Keig, Sr., Chicago, Ill.

For the defendants: Herbert A. Friedlich, H. Templeton Brown, and Patrick W. O'Brien, Chicago, Ill.

Affirming a decision of the U. S. District Court for the Northern District of Illinois, Eastern Division, 1959 Trade Cases ¶ 69,327.

Before SCHNACKENBERG, KNOCH and CASTLE, Circuit Judges.

[*Treble Damage Action*]

CASTLE, Circuit Judge [*In full text*]: Plaintiff-appellant, John Blaski, hereinafter referred to as plaintiff, filed a complaint in the District Court charging defendants-appellees, Inland Steel Company, Inland Steel Products Company and Joseph T. Ryerson & Son, Inc.,[1] with violation of Section 7 of the Clayton Act (15 U. S. C. A. § 18). Treble damages under 15 U. S. C. A. § 15 and an order of divestiture under 15 U. S. C. A. § 26, were sought. The defendants took plaintiff's deposition and moved for summary judgment on the complaint and deposition. The District Court granted defendants' motion and dismissed the action, holding that the complaint and deposition failed to make any showing of damage to the plaintiff. Plaintiff appealed.

[1] Referred to as Inland, Products and Ryerson, respectively.

[*Issue*]

This appeal presents a single issue: Did the District Court err in ruling that the complaint and deposition failed to show any injury to plaintiff resulting from the acquisitions about which plaintiff complains?

[*Allegations*]

The complaint alleges that plaintiff is engaged in fabricating and selling steel building products and as such is a purchaser of steel sheets, galvanized steel sheets and steel angles. It alleges that Inland is primarily an operating company which with its subsidiaries constitute an integrated unit of the iron and steel industry; that Inland and its subsidiaries Products and Ryerson manufacture, sell and distribute steel products. The complaint describes in detail the development and expansion of Inland since its incorporation in 1917 as successor to an 1893 establishment, including Inland's 1935 acquisition of Ryerson, a steel service organization; its 1939 acquisition of Products, a manufacturer and seller of sheet metal products consisting primarily of building materials, metal buildings and building products such as roofing, siding and steel roof deck; and the acquisition over the years of three manufacturers of steel products and varying degrees of control or interest in seventeen companies engaged in mining ore, seven companies which mine coal and produce coke, two which mine limestone and fluorspar, as well as a rolling mill company, a rail rerolling mill and a steel post company. It is alleged that the effect of these acquisitions by Inland have been "substantially to lessen competition or to tend to create a monopoly" in the production, distribution and sale of steel products in the United States or in the Chicago area, in violation of the antitrust provisions of 15 U. S. C. A. § 18. Actual and potential elimination of competition is alleged and that plaintiff as a purchaser and user of steel products is damaged.

In his deposition the plaintiff testified that prior to World War II he purchased some steel from Ryerson and some angles from Inland but the bulk of his purchases was from other warehouses and mills. That for some years following World War II plaintiff's demand for steel was practically negligible. Only during the three years prior to his deposition have his operations required the use of steel in substantial quantities. This was for the purpose of making metal decking. Purchases of steel for this use were made from Sharon Steel Company, Rolled Steel Products Company, U. S. Steel Company and some from Ryerson. All orders placed with Ryerson were filled. Plaintiff's principal supplier during 1957 and 1958 was Sharon Steel Company; previously purchases were made wherever the "best proposition" could be obtained. The extent of plaintiff's contact with Inland was a general discussion aimed at the possibility of obtaining a "position on Inland's books" *i. e.,* establish a supplier—customer relationship for the purchase of steel directly from the mill. The approach to Inland was made at a time when steel was in short supply. Inland advised that it was unable to take on new customers at that time. Its position in this respect was the same as that taken by other steel companies contacted at the same time by the plaintiff.

Plaintiff testified that in order to obtain steel sheets rolled to tolerances as close as desired by him he was compelled to purchase from Sharon Steel Company and pay higher prices. That purchases from warehousemen such as Ryerson could be made only at prices higher than the price of purchases direct from the steel mills such as Inland. Plaintiff's steel decking business terminated shortly after Acme Steel Company entered the field of fabricating steel metal decking in 1956 or 1957.

[*Damages*]

When asked to state what actual damage he had sustained plaintiff was unable to do so. He pointed out that Products being a subsidiary of Inland and a competitor of plaintiff in the manufacture of steel decking, was in a position to receive favorable treatment from Inland in obtaining steel to tolerances it desired or at better prices; that Inland was in a position to favor its subsidiaries Products and Ryerson; that Inland's control of sources of raw materials and of outlets for its steel lessened the opportunity of others to enter the field in competition with Inland as a steel supplier and narrowed the sources from which steel fabricators like plaintiff could obtain the steel required for their operations. Plaintiff, however, was unable to show in what particular way he had actually been damaged or injured.

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In order for plaintiff to maintain an action under 15 U. S. C. A. § 15 it was necessary that he show injury to his business. In *Beegle v. Thompson*, 7 Cir., [1940-1943 TRADE CASES ¶ 56,291], 138 F. 2d 875, (cert. den. 322 U. S. 743) we stated:

"Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business, must be pleaded. The mere existence of a violation is not sufficient *ipso facto* to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act."

[*Holding*]

Plaintiff's complaint and deposition are insufficient to show an antitrust violation which has resulted in specific damages to the plaintiff's business or property.

The District Court's entry of summary judgment for the defendants-appellees was proper and is affirmed.

Affirmed.

[¶ 69,527] David W. Erickson, doing business as Erickson Hair and Scalp Specialists v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. No. 12635. Dated November 19, 1959.

Petition for Review of an Order of the Federal Trade Commission.

Federal Trade Commission Act

Unfair Practices—Misrepresenting Quality or Character of Product—Hair Preparations and Treatments—Sufficiency of Evidence.—A Federal Trade Commission order prohibiting a producer of hair preparations from advertising that his products and treatments could prevent or overcome baldness, cause hair to grow thicker, cause new hair to grow, cause fuzz to develop into longer and stronger hair, and permanently eliminate dandruff, itching, and irritation of the scalp was affirmed where substantial evidence showed these representations to be false. The uncontradicted medical evidence showed that neither respondent's preparations nor any others would accomplish those results. Qualified medical witnesses testified that most cases of baldness are accounted for by a condition known as "male pattern" baldness which is most common in the male adult. Its precise cause has not been proven and there is no medical evidence that it would respond to the external application of various chemical and cosmetic preparations as far as loss of hair is concerned. While certain of respondent's witnesses testified as to the efficacy of his preparations, it was not shown that any of them suffered loss of hair due to male pattern baldness. Further, the fact that respondent had satisfied customers was not a defense to Commission action for deceptive practices.

See Unfair Practices, Vol. 2, ¶ 5081.816, 5081.817.

Federal Trade Commission Enforcement and Procedure—Court Review—Substantial Evidence to Support Commission's Findings—Medical Evidence.—In affirming a Federal Trade Commission order prohibiting the false advertising of hair preparations and treatments, the court held that it was the Commission's task to appraise the credibility of witnesses, weigh the evidence, and draw inferences therefrom, and that it was the court's task to determine whether the findings were supported by substantial evidence. Here, the Commission's finding was supported by such evidence, namely, opinion evidence based on general and pharmacological knowledge. A conflict of medical opinion concerning the effectiveness of the preparation, the meaning of the representations to the public, and the

tendency or capacity of such representations to mislead were questions of fact to be determined by the Commission, and should be upheld by the court unless arbitrarily or clearly wrong.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.27, 8621.690.

Federal Trade Commission Enforcement and Procedure—Court Review—Scope of Order.—A Federal Trade Commission order prohibiting a producer of hair preparations from falsely advertising the preparations and treatments described in the findings or "any other preparation for use in the treatment of hair and scalp" was held not to be broader than the findings would permit or to be in excess of the Commission's authority. The only prohibition as to "any other preparations" related to the false representations contained in the respondent's advertising found to be deceptive. If the Commission's order was not broad enough to cover all preparations, the respondent could change the formula of his preparation and continue with the deceptive practices. If he should discover a cure for male pattern baldness, he may seek modification of the order. It was held that the Commission has a wide discretion in its choice of a remedy to cope with the unlawful practices, and its orders are intended to prevent such practices in the future. "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity".

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.91.

Federal Trade Commission Enforcement and Procedure—Prejudicial Error—Hearing Examiner—Bias.—In affirming a Federal Trade Commission order prohibiting the false advertising of hair preparations and treatments, the court found no prejudicial error in the challenged rulings of the hearing examiner. It was found that he was not prejudiced or biased, and did not improperly restrict the respondent's efforts to present evidence or his right of cross examination.

See FTC Enforcement and Procedure, Vol. 2, ¶ 8611.62.

For the petitioner: Frank E. Gettleman, Arthur Gettleman, and Franklin M. Lazarus, Chicago, Ill.

For the respondent: James E. Corkey and Alan B. Hobbes, Washington, D. C.

Affirming and enforcing a Federal Trade Commission cease and desist order in Dkt. 6499.

Before HASTINGS, Chief Judge, SCHNACKENBERG and KNOCH, Circuit Judges.

[*Prior Proceedings*]

HASTINGS, Chief Judge. [*In full text*]: This is a petition to review and set aside an order of the Federal Trade Commission requiring petitioner, David W. Erickson, doing business as Erickson Hair and Scalp Specialists, to cease and desist from falsely advertising petitioner's medicinal and cosmetic preparations in violation of the Federal Trade Commission Act, 15 U. S. C. A., § 45, *et seq.*

The Commission's complaint charged petitioner (respondent below) with disseminating, through the United States mails and by various means in interstate commerce, false advertisements concerning his preparations, all to the prejudice and injury of the public; it further charged that such conduct constituted unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act. Petitioner answered the complaint, admitted the composition of his preparations and the fact that he advertises, denied generally the other allegations, and included an averment that the acts and practices complained of were not in violation of the Federal Trade Commission Act.

Hearings were held and evidence was presented by both parties. The Hearing Examiner issued an initial decision and a proposed order to cease and desist, and petitioner appealed to the Commission. Upon consideration of briefs and oral argument, the Commission denied the appeal and adopted the Hearing Examiner's findings and proposed order. That part of the order we are

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asked to review directs petitioner forthwith to cease and desist from,

[*Order*]

"1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as 'commerce' is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:

"(a) That the use of said preparations alone or in conjunction with any method of treatment will:

(1) Permanently eliminate dandruff, itching or irritation of the scalp,

(2) Cause fuzz to be replaced with long or strong hair,

(3) Prevent or overcome excessive hair loss or baldness or cause new hair to grow, or cause hair to grow thicker or otherwise grow hair, unless such representations be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that in the great majority of cases of baldness and excessive hair loss, respondent's said preparations and treatments are of no value whatever,

"(b) That respondent, his agents, representatives or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

"2. Disseminating or causing to be disseminated by any means, any advertisement for the purpose of inducing or which is likely to induce directly or indirectly the purchase of said preparations in commerce, as 'commerce' is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in Paragraph 1 hereof."

[*Facts Established*]

From the record before us we find that the following relevant facts were well established. Petitioner's principal place of business is in Chicago, Illinois, from which he distributes through interstate commerce home treatment kits of various medicinal and cosmetic preparations designed for external use in the prevention of baldness, the growing of hair and the elimination of various scalp disorders. The total value of his business from his Chicago office is from $60,000 to $80,000 annually.

In conducting his business petitioner or his representative visits various cities throughout the United States where he conducts a so-called hair and scalp "clinic," usually in the room of a local hotel. Prior to visiting a particular city, petitioner places an advertisement in a local newspaper of that city inviting prospective customers to call on him for free consultation and advice about their hair and scalp problems. A substantial number of such newspapers are distributed in interstate commerce. Petitioner accepts for treatment 95% of the persons who respond to his advertisements and, when agreeable to the prospect, sells him a home treatment kit containing his various preparations which is mailed directly to the purchaser from petitioner's Chicago office.

In some of these newspaper advertisements petitioner refers to himself as a "trichologist." A typical advertisement purports to be a newspaperman's report of an interview with petitioner and contains a picture of petitioner attired in a type of white jacket customarily worn and associated with members of the medical profession. The picture shows petitioner pointing to what appears to be a clinical chart depicting the human scalp with relation to hair and hair follicles. In this advertisement petitioner states that he has directed some of the largest "clinics" in the United States and Canada. Two of the Commission's expert medical witnesses testified that to bear the title "trichologist" properly, a person should be a dermatologist. Petitioner has had no medical training, and his college education was limited to one semester in "marketing."

Without attempting to quote further from the several exhibits before us, we think it is fair to say that in his advertisements petitioner represents that he can, without qualification, through the use of his preparations and method of treatment prevent or overcome baldness, cause hair to grow thicker, cause new hair to grow, cause fuzz to develop into longer and stronger hair, and permanently eliminate dandruff, itching and irritation of the scalp. The uncontradicted medical evidence of record shows that neither petitioner's preparations nor any others will accomplish these results.

The Commission's qualified medical witnesses testified that most cases of baldness are accounted for by a condition known as *male pattern baldness*. It is said to be most common in the male adult, and *its precise*

cause has not been medically proven. Various conflicting theories have been advanced as to its cause but there is no medical evidence that male pattern baldness will respond to the external application of various chemical and cosmetic preparations as far as the progression of loss of hair is concerned. Admitting that certain of petitioner's consumer witnesses testified as to the efficacy of his preparations, it was not shown that any of them had suffered loss of hair due to male pattern baldness.

[*Substantial Evidence*]

Petitioner's chief contention is that there is no credible, reliable or substantial evidence to sustain the Commission's findings on which the cease and desist order is based or to support such an order against petitioner. We disagree.

It is for the Commission to appraise the credibility of witnesses, to weigh evidence and to draw inferences therefrom. On review, our task is to determine whether the findings are supported by substantial evidence. *Keller v. Federal Trade Commission,* 7 Cir., [1940-1943 TRADE CASES ¶ 56,322], 132 F. 2d 59, 60 (1942). If the findings are thus supported, *Aronberg v. Federal Trade Commission,* 7 Cir., [1940-1943 TRADE CASES ¶ 56,324], 132 F. 2d 165, 170 (1942), they are conclusive and binding on us. Opinion evidence based on general medical and pharmacological knowledge constitutes substantial evidence. *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission,* 7 Cir., [1940-1943 TRADE CASES ¶ 56,305], 111 F. 2d 889, 891 (1940). Whether there is a consensus of medical opinion is a question of fact; a conflict of medical opinion concerning the effectiveness of a preparation also presents a question of fact, *United States v. Kaadt,* 7 Cir., 171 F. 2d 600, 603 (1948), and is therefore to be resolved by the Commission.

Likewise, as Chief Judge Duffy said in *Kalwajtys v. Federal Trade Commission,* 7 Cir., [1956 TRADE CASES ¶ 68,525], 237 F. 2d 654, at page 656 (1956):

> "The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission and should be upheld by a reviewing Court unless arbitrarily or clearly wrong. *Rhodes Pharmacal Co., Inc. v. Federal Trade Commission,* 7 Cir., [1953 TRADE CASES ¶ 67,607], 208 F. 2d 382, 387; *Parker Pen Co. v. Federal Trade Commission,* 7 Cir., [1946-1947 TRADE CASES ¶ 57,519], 159 F. 2d 509, 511."

Further, it is sound to say that the fact that petitioner had satisfied customers is not a defense to Commission action for deceptive practices. *Independent Directory Corp. v. Federal Trade Commission,* 2 Cir., [1950-1951 TRADE CASES ¶ 62,817], 188 F. 2d 468, 471 (1951).

Tested by these well-established standards and on the record before us, we hold that the findings and order of Commission are supported by substantial evidence. We agree with the conclusions of the Commission that petitioner was engaged in unfair and deceptive practices in commerce.

[*Scope of Order*]

Petitioner also contends that the Commission's order is broader than the findings will support and is in excess of its statutory authority. This is predicated on the proscription in the order of advertisements "of any other preparations for use in the treatment of hair and scalp conditions." However, we think that a reading of the preamble of the order and the whole of paragraph 1 will show that the only prohibition as to "any other preparations" relates to the false representations contained in petitioner's advertising found to be deceptive. "Unless the Commission's order is broad enough to cover all preparations petitioner need only to change the formula of his present preparations and continue to engage in the same false and deceptive practices condemned by the Commission," as Government counsel aptly points out. If petitioner does discover some method of curing male pattern baldness in the future, under Commission rules, he may seek modification of the order.

It is settled beyond dispute that in formulating its order to cease and desist, the Commission is empowered to determine the appropriate remedy according to the nature and character of the unfair practice. *Keller v. Federal Trade Commission,* 7 Cir., [1940-1943 TRADE CASES ¶ 56,322], 132 F. 2d 59, 61 (1942). Orders of the Federal Trade Commission are intended to prevent illegal practices in the future. "In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the

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narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission v. Ruberoid Co.*, [1952 TRADE CASES ¶67,279], 343 U. S. 470, 473 (1952). The Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed, *Seigel Co. v. Federal Trade Commission*, 327 U. S. 608, 611 (1946), and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 613, and followed in *Ruberoid*, 343 U. S. at page 473. See also *Federal Trade Commission v. National Lead Co.* [1957 TRADE CASES ¶68,629], 352 U. S. 419, 428 (1957).

We hold that the Commission's order is valid and does not exceed its statutory authority.

[*Prejudice*]

Petitioner finally charges that "the Hearing Examiner was prejudiced, showed bias and improperly restricted petitioner's efforts to present evidence and his right of cross-examination." We have carefully considered this contention and find that it is without merit. We find no prejudicial error in the challenged rulings of the Hearing Examiner. See, *Dolcin Corp. v. Federal Trade Commission*, D. C. Cir., [1954 TRADE CASES ¶67,791], 219 F. 2d 742 (1954).

[*Holding*]

The petition to review and set aside the cease and desist order of the Commission will be denied, and enforcement of the order of the Commission is now ordered.

Enforcement Ordered.

[¶ 69,528] Mitchell S. Mohr, an individual trading and doing business as National Research Company, and Sydney Floersheim, an individual trading and doing business as S. Floersheim Sales Company v. Federal Trade Commission.

In the United States Court of Appeals for the Ninth Circuit. No. 16,328. Dated November 16, 1959; amended December 7, 1959.

On petition for review and to set aside an order of the Federal Trade Commission.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Reopening of Cases—Public Interest.—The Commission reopened a proceeding against persons engaged in selling and distributing skip-trace forms, which are used to gather information about defaulting debtors, in order to modify a cease and desist order entered against them. The case was reopened and the order modified on the ground that the public interest so required it, which is a statutory ground for reopening a proceeding where, as here, the time for reviewing such an order has expired. There were two reasons why public interest required this reopening: (1) The outstanding order had given rise to confusion and controversy as to the compliance required. While the Commission said that the purpose of the order had always been to require the discontinuance of forms "which do not make the recipients aware of the true purpose for which information is being requested", the defendants interpreted the order as merely requiring that no false purpose be stated or implied. Regardless of whether the confusing nature of the order was due to ineptness of expression or whether the Commission changed its mind as to its intention, a clarification of the meaning of the order was shown to be in the public interest. (2) The forms now being sent under the order have the tendency and capacity to mislead and deceive persons to whom they may be sent. Stipulated facts as to the actual results of those forms sent out and an examination of the forms themselves were sufficient to support this conclusion. Thus, the admission of certain other evidence pointing to the same conclusion, whether or not admissible, was not prejudicial.

See Unfair Practices, Vol. 2, ¶ 5089.15; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.55, 8611.62, 8611.74.

Federal Trade Commission Enforcement and Procedure—Reopening of Cases—Estoppel—Passage of Time—Acceptance of Compliance Report.—The Commission was not estopped to modify its original order by its asserted failure to act within a reasonable

time after accepting and approving the defendant's compliance report. While the acceptance of the report may have caused the defendants to acquiesce in the order instead of seeking review of it, they no longer acquiesced in the order as modified and were exercising their right to review it. Thus, they were not aggrieved by the fact that they were originally lulled into inaction by the acceptance. Although there was a five month delay between acceptance of the report and the institution of the show cause proceeding, the Commission began to question the defendant's compliance approximately two months after acceptance of the report. In any event, section 5(b) of the Federal Trade Commission Act authorizes the reopening of the cease and desist proceeding and the altering, modifying, or setting aside of such orders "at any time". Thus, estoppel based on passage of time could not be a defense available against the Commission.

See FTC Enforcement and Procedure. Vol. 2, ¶ 8611.74.

For the petitioners: Murray M. Chotiner, Beverly Hills, Cal.

For the respondent: Daniel J. McCauley, Jr., General Counsel; Alan B. Hobbes, Assistant General Counsel; and Miles J. Brown, and Jno. W. Carter, Jr., Attorneys, FTC, Washington, D. C.

Affirming a Federal Trade Commission order in Dkt. 6236 which reopened a proceeding and modified a cease and desist order entered therein.

Before: Orr, Barnes, and Hamley, Circuit Judges.

[*Skip-Trace Forms—Modifying Order*]

Hamley, Circuit Judge [*In full text*]: This matter is before us on the petition of Mitchell S. Mohr and Sydney Floersheim to review and set aside an order of the Federal Trade Commission. In this order the Commission reopened a proceeding involving petitioners, and modified a cease and desist order which had been entered therein.

Petitioners argue here that on the showing made the Commission was without jurisdiction or authority to reopen the proceedings. They also contend that the Commission was estopped to modify the original order; that the modified order is too broad, considering the facts of the case and the scope of the act; that certain Commission findings are insupportable; and that evidence was erroneously admitted at the Commission hearing.

Mohr and Floersheim are engaged in the business of selling and distributing in interstate commerce so-called skip-trace forms. These forms are intended to be used by creditors and collection agencies in obtaining information concerning the whereabouts of defaulting debtors. The forms are sent to the last known address of the debtors in the hope that the debtors will return them with the desired information. If this information is supplied, the creditors or collection agencies are enabled to proceed with their collections.

[*Prior Proceedings*]

In a complaint filed with the Commission on October 11, 1954, it was charged that the forms which Mohr and Floersheim were selling and distributing contained false and misleading statements and implications. It was alleged that as a result many persons were induced to give information which they otherwise would not have supplied.

Administrative proceedings were had, leading to the issuance of a decision and order sustaining the allegations of the complaint.[1] In the order Mohr and Floersheim were required to cease and desist from making certain specified representations, and to cease and desist from:

> "Using or placing in the hands of others for use, any form, questionnaire, or other material, printed or written, which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors;"

The Commission order also required Mohr and Floersheim to file within sixty days a report indicating compliance with the cease and desist order. Petitioners did not petition this court to review the June 1, 1956, order. On July 26, 1956, they submitted a report of compliance to the compliance

[1] Order of June 1, 1956, *In the Matter of Mitchell S. Mohr, et al.*, Docket No. 6236.

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division, office of the Commission's general counsel. By letter dated August 1, 1956, the general counsel advised them that on the basis of the representations made in their report they were then in compliance with the cease and desist order.

On October 2 and 12, 1956, the Commission's assistant general counsel for compliance wrote to petitioners stating that their forms continued to create misunderstanding among some recipients. It was indicated that the matter would be reviewed by the Commission. On February 13, 1957, the Commission wrote to petitioners advising that all forms submitted with the July 26, 1956, report of compliance were in violation of the cease and desist order.

On February 6, 1958, the Commission ordered Mohr and Floersheim to show cause why the public interest does not require that the Commission reopen Docket No. 6236 and alter the quoted paragraph of the cease and desist order to read as follows:

> "Using, or placing in the hands of others for use, any forms, questionnaires or other materials, printed or written, which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors." [2]

After Mohr and Floersheim had filed a response to this show cause order, a hearing was held before an examiner at which a stipulation of facts, exhibits, and oral testimony were received.[3] The exhibits included copies of forms then being sold and distributed by petitioners and certain sales materials. The oral testimony consisted of the testimony of twelve residents of the District of Columbia and the adjacent area. They were each shown copies of the forms being sold by petitioners, and testified that they could not determine therefrom why the information was being requested. None of these witnesses had actually received such a form through the mail. It was stipulated that during the first six months of 1958 approximately 700,000 forms were sold and approximately 80,000 of them were returned from the addressees.

On September 12, 1958, the hearing examiner made his report and recommendations, and certified the record to the Commission. In his report the examiner stated that it was apparent from the testimony of the twelve witnesses that none of them was aware that the purpose of these forms was solely to locate delinquent debtors. The examiner concluded that the cards then being sold and distributed by petitioners fail to reveal the true purpose thereof, and "actually mislead and deceive the recipients to the extent that they do not know why the information is being requested." The examiner therefore recommended that paragraph 1 of the cease and desist order be modified as provided in the order to show cause, quoted above.[4]

On November 14, 1958, the Commission rendered an opinion in which it adopted the findings, conclusions, and recommendations of the hearing officer. On the same day the Commission ordered Docket No. 6236 reopened, and modified the order to cease and desist in the manner indicated. It is this order which is now under review.

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[2] This order to show cause contains several recitals, including the following:

"WHEREAS, the Commission intended, and believed that it had, by said language, required respondents to discontinue use of skip-trace forms and materials which do not make the recipients aware of the true purpose for which information is being requested, thereby selecting, in the public interest, the remedy in its opinion most suitable to the correction of a deceptive act and practice charged in the complaint, and in which the respondents were found by the hearing examiner and the Commission to have engaged, namely, the obtaining of information concerning delinquent debtors by deceit, and

"WHEREAS, it now appears to the Commission that there is reasonable doubt that the language of Paragraph 1 of said order has remedied the foregoing situation and will effectuate its said intent and purpose to remedy it, in that such language appears to be susceptible to the interpretation that it merely requires respondents to refrain from affirmatively stating any purpose, thereby permitting respondents to continue the use of skip-trace forms and materials which do not make the recipients aware of the true purpose for which the information is being requested . . ."

[3] Except for their participation in the stipulation of facts, Mohr and Floersheim presented no evidence at the show cause hearing.

[4] Indicating the view that the public interest required reopening of the proceeding to make this change in the order, the examiner stated in his report:

"Since the cards currently in use by Respondents have the tendency and capacity to mislead and deceive persons to whom they may be sent, and since Paragraph 1 of the Commission's outstanding order to cease and desist has given rise to confusion and controversy as to the compliance required, the public interest demands that said paragraph be revised to insure, beyond question, that such deception shall cease."

[*Public Interest*]

Petitioners contend that on the showing made the Commission was without jurisdiction or authority to reopen the proceedings for the purpose of modifying the cease and desist order in the manner indicated.

The Commission reopened the proceeding and modified the cease and desist order on the ground that the public interest so required. This is one of the two statutory grounds for reopening such a proceeding and modifying a cease and desist order where, as here, the time had expired for reviewing that cease and desist order.[5]

[*Outstanding Order—Confusion*]

Two reasons were given why the public interest required the reopening and modification. One of these was that the outstanding cease and desist order had given rise to confusion and controversy as to the compliance required.

If supported by the record, this is sufficient to sustain the finding that public interest required the reopening and modification. The public interest requires that a cease and desist order be clear and explicit in all of its terms. Otherwise it is ineffective in correcting the abuses with which it is intended to deal, and is unfair to the parties charged with compliance.

The record, as summarized above, amply supports the Commission's assertion that the outstanding order had given rise to confusion and controversy. The Commission states that the original intention, to which it still adheres, was to require discontinuance of the use of forms "which do not make the recipients aware of the true purpose for which information is being requested." But petitioners interpreted the original order as merely requiring that no false purpose be stated or implied.

That the Commission's general counsel originally interpreted the order in this same way is indicated by his letter of August 1, 1956, referred to above. In the Commission's brief filed in this review proceeding it is conceded that the cease and desist order is reasonably subject to the interpretation petitioners have given to it. In the face of this confusion and controversy as to the meaning of the original order, a clarification thereof would be in the public interest.

[*Current Misleading Forms*]

The second reason given by the Commission for requiring the reopening and modification was that the forms in current use by petitioners have the tendency and capacity to mislead and deceive persons to whom they may be sent.

Assuming that it is substantiated by the record, this too is a sufficient reason to support the finding that public interest required the reopening and modification. If experience with the forms in current use proved that they were deceptive, the public interest required that the proceeding be reopened and that the order be modified to prevent the use of such forms. Moreover, the statute is broad enough to authorize a requirement that the true purpose of the forms be affirmatively disclosed.[6]

[*Evidence*]

The record also supports this reason for asserting that public interest required the action taken. The parties stipulated that of 700,000 forms sent out during a six-month period in 1958, 80,000 had been returned. The Commission could reasonably find, without the aid of evidence on the subject, that people do not ordinarily supply information when they know it will be used against them. See *Bennett v. Federal Trade Commission*, D. C. Cir. [1952 TRADE CASES ¶ 67,372], 200 F. 2d 362. It was proper for the Commission to conclude from the substantial response to these forms that the effect of omitting an affirmative statement of purpose therefrom was to cause recipients

[5] Under the stated circumstances, the reopening of such a proceeding is governed by the last sentence of section 5(b) of the act, 15 U. S. C. A., § 45(b), which reads in part as follows:

"After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . ."

[6] *L. Heller & Son, Inc. v. Federal Trade Commission*, 7 Cir., [1950-1951 TRADE CASES ¶ 62,931], 191 F. 2d 954; *Haskelite Manufacturing Corp. v. Federal Trade Commission*, 7 Cir. [1940-1943 TRADE CASES ¶ 56,317], 127 F. 2d 765.

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to take action they would not otherwise have taken.[7]

The Commission also had before it the forms in actual use and was entitled to find from an examination of these forms that recipients would be thrown off guard as to the true purpose of the forms. Such a finding based on examination of the forms does not require the support of oral testimony or other evidence. See *Dejay Stores v. Federal Trade Commission* [1952 TRADE CASES ¶ 67,407], 200 F. 2d 865, at page 867.

The public interest in terminating deceptive practices, even though such practices result in bringing delinquent debtors to task, is not here specifically questioned. But in any event the Commission's implied finding to this effect will not be judicially overturned.[8]

[*Reasons for Confusing Order*]

One may wonder why, if the Commission's original intention was to require an affirmative disclosure of purpose, it did not find a more forthright way to say so in its original cease and desist order. But ineptness of expression in the original order would not stand in the way of reopening the proceeding and modifying the order. It would in fact dictate that the order be clarified.

If it be assumed, on the other hand, that the Commission's original intention was not what it now says it was, this would likewise be immaterial. Experience under the cease and desist order, as revealed by the stipulated facts, showed that mere elimination of specific statements from the forms was not enough to stop the deception. The Commission was entitled to change its mind, if that is what it has done, as to the kind of a cease and desist order which was necessary to protect the public interest. The record of the entire Commission proceedings, including the original hearing, is before us, and factually supports the order here under review.

[*Estoppel*]

Petitioners contend that the Commission is estopped to modify its original order by its asserted failure to act within a reasonable time after accepting petitioners' compliance report. In this connection it is called to our attention that the compliance report is dated July 26, 1956, and was accepted by the office of the chief counsel on August 1, 1956, whereas it was not until February 6, 1958, that the show cause proceeding was instituted.

While the show cause proceeding was not instituted until the latter date, the Commission's compliance division began to question petitioners' compliance as early as October 2, 1956. In any event, however, section 5(b) of the act authorizes the Commission to reopen cease and desist proceedings and to alter, modify, or set aside such an order "at any time."[9] Hence estoppel could not be based upon passage of time, assuming that it could be, in any event, a defense available against the Commission.

The general counsel's letter of August 1, 1956, expressing satisfaction with the forms then being used by petitioners may have caused petitioners to acquiesce in the cease and desist order instead of seeking a review thereof. But they no longer acquiesce in that order as modified and are now exercising the right to review that order. Hence they are not aggrieved by the fact that they may have been originally lulled into inaction by the general counsel's letter of August 1, 1956.

Petitioners assert that the Commission's examiner erred in overruling objections to the admission of evidence. The reference here is to the twelve witnesses called by the Commission, who testified that they could not determine from an examination of the cards what purpose was intended to be served by the forms.

Whether or not this evidence was admissible, it was not prejudicial. It added nothing that could not have been determined by the Commission from an examination of the forms. The items of evidence tending to support the finding of continued deception were the forms themselves and the stipulated facts concerning the substantial response which they brought.

The order of the Federal Trade Commission entered on November 14, 1958, in its Docket No. 6236 is affirmed, and it is directed that a decree be entered enforcing in whole the said order.

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[7] Indeed, it is apparent that petitioners have drawn the same conclusion, else they would not feel aggrieved by the requirement that the true purpose be revealed.

[8] See *Dejay Stores, Inc., v. Federal Trade Commission, supra; Rothschild v. Federal Trade Commission*, 7 Cir. [1952 TRADE CASES ¶ 67,364], 200 F. 2d 39; *Silverman v. Federal Trade Commission*, 9 Cir. [1944-1945 TRADE CASES ¶ 57,300], 145 F. 2d 751.

[9] See footnote 5.

[¶ 69,529] A. C. Becken Co. v. The Gemex Corporation.

In the United States Court of Appeals for the Seventh Circuit. No. 12656. Dated November 24, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. JULIUS H. MINER, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Resale Price Fixing Under Federal Laws—Refusal to Deal—Legality.—A manufacturer of watch bands was found to have violated Section 1 of the Sherman Act by refusing to sell to a dealer solely because it would not follow resale prices established by the manufacturer. While a manufacturer has a right to stop dealing with a dealer because he thinks the dealer is acting unfairly in trying to undermine his trade, this right is neither absolute nor exempt from regulation. Distinguishing *United States v. Colgate & Co.*, 250 U. S. 300, from the instant case, the court held that here the refusal to deal was used to accomplish an illegal purpose, since it was part of a plan of operation to limit the sale of the manufacturer's products to wholesalers who would agree not to sell below the established prices. Such an agreement is illegal under Section 1 of the Sherman Act.

See Resale Price Fixing, Vol. 1, ¶ 3015.70.

Private Enforcement and Procedure—Civil Damage Action—Necessary Averments—Damage to Plaintiff.—In a civil damage action against a manufacturer of watch bands for refusing to deal with a wholesaler because it would not follow the manufacturer's resale prices, the element of damage to the plaintiff was shown where the fact of actual damage was established and the amount could be reasonably ascertained. "It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damages it has suffered." In the instant case, the wholesaler's proof of damages was not speculative. The case was remanded to the trial court for the purpose of fixing the amount of the damages.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275.

For the plaintiff: Fred W. Potter and Edward P. Morse, Chicago, Ill.

For the defendant: Edward A. Haight and William J. Marshall, Jr., Chicago, Ill.

Reversing a decision of the U. S. District Court, Northern District of Illinois, Eastern Division, 1959 Trade Cases ¶ 69,328.

Before DUFFY, SCHNACKENBERG and PARKINSON,[1] Circuit Judges.

[Treble Damage Action]

SCHNACKENBERG, Circuit Judge [*In full text*]: Plaintiff, A. C. Becken Co., an Illinois corporation, appeals from an adverse judgment entered in the district court in plaintiff's action for treble damages brought under § 1 of the Sherman Act,[2] following a trial by the court without a jury. Defendant, The Gemex Corporation, a New Jersey corporation, is a manufacturer of watch bands, distributed by it nationally through wholesalers, including plaintiff (until August 2, 1956) and the latter's two principal competitors, The Ball Company and Stein and Ellbogen Company.

[Refusal to Deal]

1. According to plaintiff's theory, defendant attempted to force plaintiff to enter into a price-fixing agreement for the establishment and maintenance between wholesalers of minimum resale prices on Gemex products and also on products competitive to the Gemex line. Plaintiff contends that defendant had already exacted such an agreement from plaintiff's competitors and threatened to drop plaintiff as a distributor unless it joined this price-fixing agreement. Plaintiff asserts that, when it refused to do so, defendant carried out its threat to "drop" plaintiff as a Gemex distributor,

[1] While Judge Parkinson participated in the hearing of oral arguments and a conference of the division judges above-named, he was not present at the time of, and did not participate in, the adoption of this opinion.

[2] 15 U. S. C. A. § 1.

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which resulted in losses to plaintiff for which it is entitled to treble damages.

§ 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal [3] * * *."

The trial was on complaint [4] and answer. The court heard the evidence of the parties, made findings of fact and conclusions of law, and entered judgment, dismissing the action with prejudice. Finding 7 is as follows:

Defendant's refusal to sell was not the result of any combination, conspiracy, or attempt to combine and conspire by defendant and anyone.

Here is defendant's contention:

> "The defendant, being a manufacturer, may announce to its distributors in advance the circumstances under which it will or will not sell to a given distributor. Such an announcement does not in any way amount to coercion and certainly, if done on a unilateral basis, does not constitute an attempt to conspire, whether in regard to fixing prices, maintaining quality, protecting trade names or trademarks, or any of the many aspects of commercial trade. A merchant or a manufacturer, absent any attempt to monopolize or restrain trade, may exercise discretion as to whom it will sell its products and may refuse to sell for reasons sufficient to itself."

The evidence clearly establishes the following facts:

Tower, defendant's representative, on August 1, 1956, visited plaintiff's office and told its vice-president Bohlander that plaintiff would be expected to sell lines competitive to defendant's lines at manufacturer-suggested prices. On the following day, Swartman, defendant's sales manager, and Tower talked to president Clark and others, of plaintiff, in the latter's office. Tower stated that "it is the philosophy of our company" that to be a Gemex distributor, plaintiff would have to sell competing lines of watch bracelets at prices suggested by manufacturers. Tower also said that he had talked to Stein & Ellbogen Company and The Ball Company, competitors of plaintiff, and, when asked "how he knew that they would uphold, or how they would stop doing this, and he said they had shook hands over it. And he said, 'That is good enough for me'." After further discussion Bohlander suggested that

> "* * * if they would not allow us to sell the line through the salesman, that they at least allow us to show the line in our catalog."

He also stated that—

> "* * * at that point Mr. Tower stood up and he said, 'Well,' he said, 'we are at an impasse. This is it.'
>
> "And Mr. Swartman said, 'Well,' * * * 'it would seem to me that there is a moral obligation of some kind here, and that we ought to take back the sample lines,' * * *."

Defendant's answer admits that it advised plaintiff on August 2, 1956 that it would no longer sell its products to plaintiff.

[*Illegal Purpose*]

The law recognizes that a manufacturer, in the battle for business, has a right to sell to whom he pleases. It follows that he has a right to stop dealing with a dealer because he thinks the dealer is acting unfairly in trying to undermine his trade. *United States v. Colgate & Co.*, 250 U. S. 300, 307. He is, however, limited to a

[3] 15 U. S. C. A. § 1.

[4] Plaintiff's complaint charged that defendant attempted to engage in a wrongful and unlawful combination and conspiracy,

(a) To prevent and restrict the sale and distribution of Gemex's products, by reason of its refusal, for the unlawful reason stated by Gemex as aforesaid, to sell its products to Becken;

(b) To prevent and restrict the sale and distribution of products manufactured and sold by Gemex's competitors;

(c) To, and did [sic], discriminate against a wholesale distributor, to-wit, Becken, who would not combine and conspire with Gemex to price competitors' lines as directed and dictated by Gemex;

(d) To force and compel Becken to enter into a contract or agreement providing for the establishment and maintenance between wholesalers of minimum resale prices on products competitive to the Gemex line; and

(e) To force and compel Becken to enter into a contract or agreement providing for the establishment and maintenance of minimum resale prices between persons, firms or corporations in competition with each other; and that such acts have unreasonably restrained, do unreasonably restrain, and will continue unreasonably to restrain trade and commerce in violation of the anti-trust laws of the United States of America above cited.

legitimate use of this weapon. The right to stop dealing is neither absolute nor exempt from regulation. *Lorain Journal Co. v. United States* [1950-1951 TRADE CASES ¶ 62,957], 342 U. S. 143, 155; *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594. In the latter case the court said, at 625:

> "* * * If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. * * *"

A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it *may not* be used to accomplish an unlawful purpose. In the case at bar, the clearly established facts show a plan of operation adopted by defendant, the essential purpose of which was to limit the sale of its products to wholesalers who would agree not to sell below prices stipulated by defendant. Such an agreement is in violation of § 1 of the Sherman Act. The established facts also show that the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according to defendant's existing illegal plan of doing business in violation of § 1. Plaintiff was not rejected as a customer by defendant because of any other reason. It follows that the facts alleged and established by the evidence state a cause of action under § 1 of that Act. Findings of fact by the district court, inconsistent with these views, are clearly erroneous, under rule 52(b).[5]

In *Federal Trade Comm. v. Beech-Nut Packing Co.*, 257 U. S. 441, there was involved a system of merchandising which the court said, at 454,

> "* * * goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* case was held to be within the legal right of the producer.
>
> "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. * * *"

From what we have said, it is obvious that the district court erred in entering its conclusion of law that no violation of the Sherman Act has been shown by plaintiff.

The district court should have found the issues in favor of plaintiff and this cause will be remanded so that such a finding may be entered, together with judgment accordingly.

[Damage]

2. Defendant relies upon the district court's finding 13, which reads:

Plaintiff was not damaged as a result of defendant's refusal to sell watch bands to plaintiff subsequent to August 2, 1956.

Defendant asserts that the damages were so speculative in nature that it was impossible for the court to conclude that plaintiff had been damaged by any action taken by defendant.

However, we find that virtually uncontradicted evidence shows the following facts:

In the fall of 1954, defendant induced plaintiff to take over the Gemex inventory of a wholesaler who was going out of business and predicted that plaintiff's Gemex annual sales would be as much as $250,000. Plaintiff took on the line and commenced active promotion and sale, putting the line in its catalog which was distributed to thousands of retailers in the United States. Complete sample lines of Gemex brands were distributed by 16 salesmen to the retail trade throughout the middle west. The Marshall Field account was assigned specifically to one salesman and, as a result, that account on August 2, 1956 was about one-third of the total volume of plaintiff's Gemex sales. When defendant withdrew its line, plaintiff's Field account dropped from $25,435.60 in the fiscal year ending January 31, 1956, to $1940.87, in the fiscal year next succeeding August 2, 1956. As a result of the cutoff, plaintiff lost its Christmas last-half business, and its profit on Gemex sales, instead of being an expected $6655 for the fiscal year ending January 31, 1957 (up from $4627.76 the year before), was only $1263.94, or a loss in

[5] 28 U. S. C. A. rule 52(b).

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the fiscal year during which the cutoff occurred of $4391.06.

In the light of 43 years' experience with promoting similar lines of merchandise, plaintiff, after promoting the Gemex watch bands during the first full fiscal year ending January 31, 1956, could reasonably expect a 50% increase in profits for the next year ending January 31, 1957, a 33% increase the following year, a 25% increase the next year and a 15% increase in each of the two succeeding years. Also sustained were losses ranging from out-of-pocket cash expended to losses in closing out the merchandise defendant had first agreed, and then later refused, to take back. These losses totaled $56,007.95. In addition, $780 was a salary outlay for promotion of defendant's line at Field's, the benefit of which was lost when the cutoff by defendant halted further sales of its merchandise there. Plaintiff concedes that about two-fifths of this item might be fairly deducted because of the sales made during the two years of this promotion activity before the date of the cutoff.

Total losses to plaintiff, thus shown, amount to $56,475.95.

We do not consider that the proof of damages offered by plaintiff was speculative in nature and that it is impossible to contend that plaintiff has been damaged by the action taken by defendant, as the latter contends. Rather, we think, that there was no speculation as to the fact of actual damage and that plaintiff's business was seriously curtailed by the cutoff by defendant. It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars the damages it has suffered. *William H. Rankin Co. v. Associated Bill Posters,* 42 F. 2d 152,[6] where, at 155, the court said:

> "* * * This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of the defendants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony. * * *"

The district court was led into error in finding as a fact and concluding as a matter of law that plaintiff was not damaged as a result of defendant's conduct. Damage was proved. Finding 13 is clearly erroneous.

While the evidence now in the record might be sufficient to justify a direction to the district court to compute therefrom plaintiff's actual damages sustained and make an assessment accordingly, we feel that the ends of justice would be better served if this cause be remanded for the purpose of considering the evidence already in the record on the subject of plaintiff's damages, as well as any proper evidence to be offered by defendant, and rebuttal evidence of plaintiff, on subject of plaintiff's damages, and fixing the proper amount of said damages. Such proceedings we now direct.

[*Holding*]

3. The judgment of the district court is therefore reversed and this cause is remanded to that court with instructions to (1) find the issues in favor of plaintiff and against defendant, (2) assess plaintiff's damages in the manner and in accordance with the views herein expressed, and (3) enter judgment that plaintiff recover threefold the said damages assessed, and costs of suit, including a reasonable attorney's fee, which the district court shall fix. 15 U. S. C. A. § 15.

Judgment Reversed and Cause Remanded with Directions.

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[6] Cert. denied, 282 U. S. 864.

[¶ 69,530] The Upjohn Company v. Lindemann Pharmacy, Inc.

In the United States District Court for the Southern District of New York. Civil Action No. 141-329. Dated November 17, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Suit for Injunctive Relief—Sufficiency of Proof.—A preliminary injunction to enjoin a druggist from violating the plaintiff's fair trade contracts with retailers was denied for insufficiency of proof. There was an admitted error in identifying the clerk in one of the three transactions involved, none of the shoppers in the three transactions could produce receipts, and there was a sworn denial of the violations by the druggist. The determination of those contested matters depended on "demeanor" evidence which was insufficient to support the motion for a preliminary injunction.

See Fair Trade, Vol. 1, ¶ 3354.34.

For the plaintiff: Rogers, Hoge & Hill, New York, N. Y.

For the defendant: Nathan Finkelstein, New York, N. Y.

Memorandum

[*Fair Trade—Preliminary Injunction*]

Edward Weinfeld, District Judge [*In full text*]: This is another case where plaintiff seeks a preliminary injunction to enjoin a druggist from violating the plaintiff's fair trade contracts with retailers in the State of New York by selling its trade-marked products at prices below those established by plaintiff. Two shoppers, who jointly participated in one of the three alleged sales upon which plaintiff moves for injunctive relief, describe the person from whom the purchase was made as a female. The defendant denied it ever had in its employ a female clerk, whereupon the two shoppers conceded that they were wrong but claimed the description was an inadvertent error. This might well be and is understandable but the defendant denies selling plaintiff's product below the stipulated price. Its President swears that each purchaser is given a sales receipt which reflects the date and amount of purchase and that none of the shoppers on the three occasions have produced these receipts. If such receipts are given to a customer this certainly would be fairly potent evidence of the purchase and the amount thereof. The shoppers deny they received any such receipts or that they were tendered to them.

[*Sufficiency of Proof*]

The admitted error in identification plus the contested issue revolving about the receipts and the sworn denial of violation preclude a finding on this record that plaintiff has presented sufficient proof to entitle it to the drastic preliminary relief it seeks. The determination of the contested matters must, in large measure, depend upon demeanor evidence. Under the circumstances, the motion is denied.

[*Reply—New Matter*]

The plaintiff has submitted reply affidavits which include new matter not presented in its original motion papers based on events after the argument of the motion. The Court has not considered these affidavits insofar as they present new matter. Plaintiff was given leave to reply to the answering affidavit and not to make a further application based upon alleged events occurring after the hearing of the motion. To permit this practice would draw out the process of reply and surreply affidavits interminably. What the practice is in the defendant's drugstore in October 1959 is not proof of what it was in July 1959, when it is alleged the events took place upon which the motion for injunctive relief was based.

Settle order on notice.

[¶ 69,531] The Upjohn Company v. Julius Polovsky, doing business under the firm names and trade styles of J & M Merchandise Co., J & M Sales Co., and Polly Drug Co.

In the United States District Court for the Southern District of New York. Civil Action No. 144-20. Dated November 17, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Suit for Injunctive Relief—Sufficiency of Proof—Delay in Enforcement as a Defense.—An injunction *pendente lite* to enjoin violations of a drug company's fair trade contracts was granted where a defendant, while professing to be a wholesaler selling

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to retailers sold single quantities at retail and below fair trade prices to persons who came in off the street. The plea that the defendant did not know these individuals were not retailers was insufficient; he could have readily ascertained whether or not they were retailers but deliberately chose not to do so. In addition, the delay from the time of discovery of the alleged violation to the seeking of injunctive relief did not defeat the motion since that delay was caused by extensive investigations to assure adequate proof. Also, the balance of hardship was in the plaintiff's favor. Constant violations by the defendant were shown, and the injunction simply required conformity to the law.

See Fair Trade, Vol. 1, ¶ 3354.34, 3440.34.

For the plaintiff: Rogers, Hoge & Hill, New York, N. Y.

For the defendant: W. Edward Woods, New York, N. Y.

Memorandum

[*Fair Trade—Injunction Pendente Lite*]

Edward Weinfeld, District Judge [*In full text*]: Plaintiff moves for an injunction *pendente lite* to enjoin the defendant from violating plaintiff's fair trade contracts with retailers in the State of New York by selling its trade-marked products at prices below those established by plaintiff.

[*Type of Sale*]

While defendant asserts it is a wholesaler, who sold to retailers, the proof submitted establishes that it sold single quantities at retail and below plaintiff's fair trade prices to persons who came in off the street. The plea that defendant did not know these individuals were not druggists must fail since defendant could readily have ascertained by appropriate inquiry whether the purchasers were retailers. It chose not to do so. It deliberately avoided information which at once would have destroyed its present claim.

[*Delay in Enforcement*]

The defendant has raised the issue of delay from the time of discovery of the alleged violation to the filing of the motion for injunctive relief. The Court requested an explanation from plaintiff's attorneys and is satisfied that the delay was unavoidable. The extensive investigation to assure adequate proof to support the charge and the even and rigid enforcement of the plaintiff's fair trade program throughout the general area where this defendant and other alleged violators operated were necessarily time-consuming. Unless there were such enforcement against other alleged violators, defendant would be in a position to urge nonenforcement as a basis upon which to defeat plaintiff's application. In this case, unlike the other decided this day, where the plaintiff herein also sought injunctive relief which was denied because of inadequacy of proof, sufficient has been submitted to warrant the granting of the application.

[*Balance of Hardship*]

In addition, the balance of hardship tips in plaintiff's favor. Plaintiff is entitled to enforce its fair trade program; defendant is required to observe the law; plaintiff's fair trade program has been enforced extensively and with vigor. The granting of the injunction would simply require the defendant to conform to the law. Sufficient has been shown to indicate constant violations by the defendant. Cf. *Hamilton Watch Co. v. Benrus Watch Co.* [1953 Trade Cases ¶ 67,517], 206 F. 2d 738, 740 (2d Cir. 1953).

[*Ruling*]

Accordingly, the motion is granted. Settle order on notice.

[¶ 69,532] United States of America v. Brown Shoe Company and G. R. Kinney Co., Inc.

In the United States District Court, Eastern District of Missouri, Eastern Division. Civil No. 10527(3). Filed November 20, 1959. Amended December 4, 1959, and December 14, 1959.

Case No. 1266 in the Antitrust Division of the Department of Justice.

Clayton Antitrust Act

Acquisitions of Stock or Assets—"Vertical" Acquisition of Stock and Assets—Merger of Nation's Largest "Family Shoe Store Chain" with Fourth Largest Shoe Manufacturer —Effect on Competition.—A proposed merger of the country's largest "family shoe store

chain" with the nation's fourth largest manufacturer of shoes would substantially lessen competition and tend to create a monopoly in the manufacturing and retailing of shoes in violation of Section 7 of the Clayton Act. The "acquired" company, in addition to its principal business of operating family style retail stores (seventh in the industry with 1.2 per cent of the national retail sales), also operated four manufacturing plants which produced 0.5 per cent of the nation's shoes (twelfth in the industry in manufacturing). The "acquiring" company, in addition to manufacturing 5 per cent of the nation's shoes (fourth in the industry in manufacturing), operated 3.8 per cent of the nation's total retail shoe stores. The court noted, however, that . was not so much concerned with percentages, as such, as with the meaning of those percentages in the light of the facts and the "economic realities" involved. It made no difference that the "acquiring" and "acquired" companies produced only 5 and 0.5 per cent of the country's shoes, respectively, when one was the fourth largest manufacturer in the nation and the other, with only 1.2 per cent of all retail shoe sales, was the largest family shoe chain retailer. The test is: what do the facts show as to the trends in the industry and the true economic impact of the particular merger.

Here, the merger would increase concentration in the shoe industry, both in manufacturing and retailing. The fourth manufacturer would become the third and the combination would be the largest operator of retail shoe stores in the nation (5.7 per cent). Other manufacturers would be adversely affected since the "acquired" chain would become a smaller market for their products. Other retailers would be adversely affected by reason of the advantages which would inure to the chain from its affinity with the manufacturer. Further, in the shoe retailing field, the chain would be eliminated as a substantial competitive factor to the "acquiring" manufacturer.

See Acquisitions of Stocks or Assets, Vol. 1, ¶ 4207.635, 4207.800.

Acquisitions of Stock or Assets—Vertical Acquisition of Stock and Assets—Merger of Nation's Largest "Family Shoe Store Chain" with Fourth Largest Shoe Manufacturer—Relevant Market (Line of Commerce).—A Federal District Court, in ruling that a proposed merger of the nation's fourth largest manufacturer of shoes and the nation's largest "family shoe store chain" would violate Section 7 of the Clayton Act, held that, for the purpose of determining the impact of the merger, the "line of commerce" was (1) men's shoes, (2) women's shoes, and (3) children's shoes, each considered separately. "Line of commerce," which refers to a product market, has been defined as any product, or group of products, that has "sufficient peculiar characteristics and uses to make it distinguishable from all other products." As to the burden of proof, there was no question but that the burden was upon the Government to establish the "line of commerce." Here, there was "interchangeability" in (1) the manufacturing process, (2) price, style, and quality, and (3) use. However, it was a noticeable fact that shoes are distinct as to the sexes (except children's) in that the male and female population wear distinctly different types of shoes. Further, shoe manufacturers making men's, women's, and children's shoes separate their production, as to each of those categories, in separate plants. Thus, while there was a close question as to whether "shoes—as such" could be treated as a "line of commerce" (as first contended by the Government), and while there was argument for a breakdown into quality, style, price and intended use (as contended by the defendants), there could be no question, either legal, logical, or evidentiary, but that men's, women's, and children's shoes, regardless of quality, style, price, and intended use, have sufficient peculiar characteristics and uses to make them "distinguishable" and a "line of commerce." That classification is recognized by the entire industry and the public. To classify shoes "as a whole" could have been unfair and unjust; to classify them further would have been "impractical, unwarranted and unrealistic."

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4207.375.

Acquisitions of Stock or Assets—Vertical Acquisition of Stock and Assets—Merger of Nation's Largest "Family Shoe Store Chain" with Fourth Largest Shoe Manufacturer—Relevant Market (Section of the Country).—A Federal District Court, in ruling that a proposed merger of the nation's fourth largest manufacturer of shoes and the nation's largest "family shoe store chain" would violate Section 7 of the Clayton Act, held that,

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for the purpose of determining the impact of the merger, the effective area of competition, and, thus, the relevant "section of the country," was the "whole of the United States" as far as manufacturing was concerned, since both parties manufactured shoes throughout the country. However, as to the retail market (both parties retailed shoes throughout the country), the court concluded that a "section of the country" was "a city of 10,000 or more population and its immediate and contiguous surrounding area" in which both of the companies had a store. The Government contended that the proper geographic market was "the nation as a whole," or, in the alternative, a city, or, a city and the immediate surrounding area. The defendants contended that the proper designation for retailing was a "standard metropolitan area," which they defined as an economic unit "which is commonly the result of consolidating political units, its borders being defined by the flow of local commerce as measured by objective economic indicators." The court found that the "acquired" company operated primarily a family-type store in cities of 10,000 or more population and usually in the corporate limits or its environs; that the "acquiring" company had stores, and leased "departments," in cities of 10,000 or more inhabitants; that there were at least 141 such cities in which both companies had a retail store; and that dealers in "downtown" metropolitan areas competed with dealers in the "outlying" areas.

See Acquisitions of Stock or Assets, Vol. 1, ¶ 4207.425.

Department of Justice Enforcement and Procedure—Civil Suit for Injunctive Relief—Unlawful Stock and Asset Acquisitions Under Clayton Act, Section 7—Injunctive Relief—Divestiture of Stock—Ruling Reserved.—A Federal District Court, in ruling that a proposed merger of the nation's fourth largest shoe manufacturer and the nation's largest family-shoe store chain would violate Section 7 of the Clayton Act, reserved for further consideration the question of the disposal of the stock. If the judgment should become final in its present form, the "acquiring" company would be confronted with the necessity of disposing of the "acquired" company's stock. Noting that the disposition could have far-reaching effects and consequences, the court concluded that, should the judgment become final, evidence would be heard concerning the effects and the manner of handling that disposition.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8233.700.

For the plaintiff: James J. Coyle, Bill G. Andrews, Lewis J. Ottaviani, Nicolaus Bruns, Jr., and Edward M. Medvene, Attorneys, Department of Justice, Washington, D. C.

For the defendants: Sullivan & Cromwell, New York, N. Y., and Bryan, Cave, McPhetters & McRoberts, St. Louis, Mo.

[*Unlawful Merger Charged*]

RANDOLPH H. WEBER, District Judge [*In full text*]: This is a suit by the government to restrain the proposed merger of the defendants Brown Shoe Company, Inc., and G. R. Kinney Co., Inc., hereinafter to be referred to as Brown and Kinney respectively. The Complaint charges a violation of Section 7 of the Clayton Act[1] and seeks injunctive relief under Section 15.[2] Brown is a New York corporation and has its principal office and transacts business in this district and therefore this Court has jurisdiction of this proceeding.[3]

[1] 15 U. S. C. A. § 18, 64 Stat. 1125. "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." (Other parts of the section are not herein involved.)

[2] 15 U. S. C. A. § 25, 38 Stat. 736. "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations * * *, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, * * *."

[3] 15 U. S. C. A. § 22, 38 Stat. 736. "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; * * *."

[*Prior Proceedings*]

The plaintiff filed its Complaint on November 28, 1955, and obtained an *ex-parte* temporary restraining order before the late Honorable Rubey M. Hulen. Upon hearing the evidence presented on plaintiff's Motion for Preliminary Injunction the Court was not convinced at that stage of the proceedings that plaintiff was entitled to a preliminary injunction pending a hearing of the cause on its merits. However, while the merger was permitted to continue, the businesses were ordered to be operated separately.

The merger was effected on May 1, 1956, and throughout the trial hereof there has been no contention made or indicated that defendants have not complied with the preliminary order. Business has been done between defendants but, as far as the record is concerned at this time, the businesses have been operated separately and the assets have been kept separately identifiable in a new corporation licensed as G. R. Kinney Corporation. G. R. Kinney Corporation entered its appearance as a party to this suit[4] and hereafter the reference to defendant Kinney shall be construed as a reference to both G. R. Kinney Co., Inc., and G. R. Kinney Corporation.

Judge Hulen died on July 7, 1956, and this matter remained upon the docket without action until August, 1957, when various pretrial conferences were begun and subsequently all discovery and preparation for trial was completed and the cause came on for trial before this Court on August 4, 1958. Full testimony was not completed until January 24, 1959, the matter was passed for filing of briefs and the cause was taken under submission on August 1, 1959.

I.

A. History of Brown

[*Manufacturer and Retailer of Shoes*]

The evidence reveals that Brown and its predecessors have been engaged in the manufacture of shoes since 1877. In its present form, Brown was incorporated in the State of New York in 1913, and since that time has been engaged in the manufacture of men's, women's and children's shoes. In 1929 Brown began to experiment in operating a few retail outlets, but by 1945 had disposed of them and until 1951 engaged principally in manufacturing and distributing its shoes to the consuming public through independent retailers, chain stores and mail order houses.

[*Franchise Arrangements*]

For a number of years Brown has had franchise arrangements with certain retailers. These franchise arrangements consist of committing the retailers not to carry competing lines of shoes of other manufacturers and in return they receive certain aids and assists from Brown by way of advertising, insurance, rubber footwear purchases, advice and help on inventories and inventory sales. Brown does not limit its sales to franchise dealers but has expanded its franchise operations since 1950.

Brown engages in extensive national advertising to develop consumer acceptance for its brand name shoes, viz., Buster Brown

[4] Judge Hulen's Memorandum Opinion on plaintiff's Motion for Preliminary Injunction, [CCH] 1956 TRADE CASES par. 68,244 (E. D. Mo. 1956), was filed and entered in this Court on January 13, 1956. It provided that if the merger was completed, then:

"(1) that title to all assets acquired from Kinney by Brown by the merger be vested in a subsidiary corporation of Brown;

"(2) that the subsidiary corporation shall have independent management under the control of a board of directors, none of which members shall be on the boards of directors of Brown or any of Brown's other subsidiaries;

"(3) that all assets acquired from Kinney, together with the net earnings of Kinney subsequent to the merger, shall be retained by Kinney, and shall be at all times identifiable as assets of the subsidiary corporation, and none such assets shall be intermingled with Brown's assets;

"(4) that all the stock in the subsidiary corporation shall be held by Brown, other than qualifying shares for the board of directors, and shall not be hypothecated or encumbered in any manner;

"(5) that any leases now held by Kinney if renewed shall be renewed in the name of the subsidiary corporation, and any new leases negotiated for the subsidiary (Kinney) outlets shall be in the name of the subsidiary corporation, and all such leases shall be and remain the property of the subsidiary corporation;

"(6) that no subsidiary (Kinney) retail outlet shall be closed for reasons of competition with any Brown controlled retail outlet;

"(7) that no factory of the subsidiary (Kinney) corporation shall be closed or any of its production taken over by Brown because of competitive reasons with Brown; and

"(8) that on formation of the subsidiary (Kinney) corporation it shall enter its appearance in this cause and make itself subject to the jurisdiction of the Court in this cause."

[Judge Hulen's Order, entered March 13, 1956, follows above Opinion except it details the mechanics of performance.]

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and Robin Hood for children's shoes; Naturalizer, Air Step and Life Stride for women's shoes; and Pedwin and Roblee for men's shoes. Brown also manufactures shoes for independent retailers under their brand names.

(Wohl)

In 1951 Brown acquired Wohl Shoe Company, hereinafter referred to as Wohl. Wohl was then a well-established corporation which operated 250 shoe departments in various department stores located throughout the United States. Most of its outlets were located in medium-sized cities and specialized in women's shoes. It operated a wholesale division which bought from various manufacturers, including Brown, and sold its own brand name shoes to some independent retailers, to its own retail outlets (leased shoe departments in various department stores) and to Wohl-plan accounts (independent retailers throughout the country who are not permitted to handle competing lines of shoes under trade names other than Brown or Wohl and who receive certain merchandising aids and assists and have credit arrangements under which they file weekly statements showing total sales and expenses and remit the weekly sales receipts, after deducting salaries and expenses, to be applied against their outstanding account). Wohl was, at the time of acquisition, the nation's largest operator of leased shoe departments. Since acquisition, Wohl operates as a separate division of Brown but there has been an interchange of corporate officers.

In 1950 (before acquisition) Wohl bought $2,884,328.00, or 12.8% of its purchases, from Brown. In 1952 (after acquisition) purchases increased to $6,018,939.00, or 21.4%; in 1955, to $10,758,518.00, or 32.6%, and in 1957, to $12,099,201.00, or 33.6%. In 1950, Wohl ranked ninth among shoe firms in net sales and Brown fourth. By 1955, including Wohl, Brown had moved into third place in net sales.

(Regal)

In 1954 Brown acquired Regal Shoe Corporation, hereinafter referred to as Regal, a Massachusetts corporation, which operated one manufacturing plant producing men's shoes and 110 retail stores. Regal manufactured shoes for sale at retail in its own retail stores and also purchased shoes from other manufacturers for sale therein. Regal operated a few shoe departments and also sold some of its manufactured products, under private brand names, to chain stores and other distributors of shoes. Regal had acquired the Curtis Shoe Company in 1954. The Regal Shoe Manufacturing Company was incorporated in 1954 as a wholly-owned subsidiary of Regal Shoe Company and certain assets of Regal Shoe Company were transferred to the new corporation. After the merger between Regal and Brown there was an interchange of corporate officers.

Before its acquisition, Regal sold no shoes to Wohl. In 1955, after the acquisition, Regal sold $2,000.00 worth of shoes to Wohl and in 1956 this increased to $265,000.00. It sold $89,000.00 to Brown in 1953, $544,000.00 in 1954, $599,000.00 in 1955 and $744,057.00 in 1956. Before Kinney's acquisition by Brown, Regal never sold shoes to Kinney. By 1956 it had sold and delivered $359,000.00 worth of shoes to Kinney.

At the time the Regal sales to Brown and its affiliates were increasing, Regal's sales to other concerns, unconnected with Brown, decreased. For example, in 1953 Regal sold 51,815 pairs to those other concerns at $278,000.00, and by 1955 this decreased to 14,864 pairs at $92,000.00.

(Wetherby-Kayser)

In 1952 Brown and the Florsheim Shoe Company had each purchased a total of approximately one-third of the capital stock of Wetherby-Kayser, which operated retail stores in the Los Angeles area. In 1953 International Shoe Company acquired Florsheim and Brown acquired Florsheim's stock in Wetherby-Kayser. Subsequently, in 1953, Brown acquired the remaining outstanding stock of Wetherby-Kayser. Since that time Brown officials serve as officers of its board.

Brown had been a small supplier of Wetherby-Kayser before acquisition. In 1952, when Brown and Florsheim began to acquire its capital stock, Brown sold Wetherby-Kayser $23,144.00 worth of shoes, or 10.4% of its total purchases. In 1953, during Brown's acquisition of all of Wetherby-Kayser's stock, this had increased to $137,958.00 or 49.2% of its total purchases. Since 1954, Wetherby-Kayser's purchasing has been assumed by Wohl, and 50% of its requirements come from Brown.

(Other Retail Acquisitions)

Brown acquired the Richardson Shoe Store, Corpus Christi, Texas, in 1952, which operated one retail store. In 1954, Brown acquired the Wohl Shoe Company of Dallas, Texas, (not connected with Wohl) which

operated leased shoe departments in Dallas. In 1954 Barnes and Company of Midland, Texas, which operated two retail shoe stores was also acquired by Brown; Barnes purchased shoes from manufacturers located outside of Texas, including Brown.

In 1955 Brown acquired the T. D. Reilly Shoe Company, hereinafter referred to as Reilly, which operated two leased retail shoe departments in Columbus, Ohio. Reilly had been purchasing its shoes for retail from various suppliers and manufacturers outside the State of Ohio, including Brown.

(Manufacturing Acquisitions)

From 1913 Brown's manufacturing facilities grew and expanded through the building and acquisition of additional plant facilities. It acquired Barton Bros. of Kansas City, Missouri, in that year. In 1946 Brown purchased the trust certificates representing the stock of the Ermtree Shoe Company and its affiliate Footkind Shoe Company. In 1948 it acquired the assets of the Milius Shoe Co., consisting of a factory at Piggott, Arkansas, and a leased plant at Festus, Missouri. In 1950 it acquired the assets of Spalsbury-Steis Shoe Company, which operated a manufacturing plant at Fredericktown, Missouri. In 1952 it acquired the capital stock of the Bourbeuse Shoe Company, which operated a factory at Union, Missouri. In 1953 it acquired the stock of Monogram Footwear, Inc., which operated a factory at Trenton, Illinois, the stock of the O'Donnell Shoe Corporation, which operated a factory at Humboldt, Tennessee, and the stock of Kaut, Lauman, Winter, Inc., which operated a factory at Dixon, Missouri.

These acquired companies produced and sold their shoes outside of the states in which they were located and are presently operated by the Shoe Manufacturing Division of Brown. In these acquisitions Brown obtained two trade names, "Risque" and "Propr-Bilt," and has continued to use those names. Brown increased the number of its manufacturing plants from 20 in 1945 to second place in the industry, with 42 plants operated, by 1956.

In 1926 Brown acquired the stock of Moench Tanning Company, Inc., which operated two tanneries. Brown now operates factories that supply some of its wood heels, soles and shoe cartons. It has steadily increased its production of leather, cut soles, heels and cartons and has expanded and acquired manufacturing facilities therefor. Its manufacturing division operates a centralized purchasing and distribution facility for buying and supplying the manufacturing needs of its various shoe plants, and its large quantity purchasing results in definite price advantages.

(Sales and Assets)

Between 1950 and 1955 Brown's total dollar sales increased from $89,313,000.00 to $159,481,000.00 and its assets from $36,490,000.00 to $72,396,000.00 Its total net sales and assets have consistently increased since 1955.

There is a dispute between plaintiff and defendants on the manner in which the above assets were arrived at and determined. However, regardless of the dollar figures, the evidence here is undisputed as to the fact that in 1955 Brown was the fourth largest shoe manufacturer in the United States. It produced in that year, 25,648,000 pairs of shoes, or 3.97% of the nation's total production. In 1957, when combined with Kinney, Brown's production increases to 29,105,105 pairs of shoes, or 5% of the nation's total shoe production and would place it third in the industry.[5]

Asset-wise, pair production-wise and net sales-wise, Brown, with the acquisition of Kinney, would move from the fourth position in the industry to the third position.

B. History of Kinney

Kinney was established in 1894 and operates four manufacturing plants producing men's, women's and children's shoes. These plants sell their products principally to Kinney's own retail outlets but do sell some unbranded shoes to chain stores, mail order houses and other distributors.

[*Principal Business—Retailing*]

Kinney's principal business, however, is the operation of family-style retail shoe stores. It operates in more than 270 cities

[5] The 3 top shoe manufacturers, *viz.*, International, Endicott-Johnson and Brown (including Kinney), produced about 17% of the nation's total shoe production in 1957.

The top 24 manufacturers produced about 35% of the nation's total and thus the top 3 produced about ½ of the top 24's production for 1957.

When the top 4 (which adds General Shoe Corp.) is considered, they produced about 23% of the total shoe production and had about 65% of the top 24's production.

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throughout the United States and at the time of trial had approximately 411 such retail stores. Its retail stores obtain about 20% of their shoes from their own manufacturing plants and 80% from other manufacturing sources, now including Brown and Regal.

In 1954 Kinney purchased no shoes from Brown or any of its affiliates. By 1957, 7.9% of all of its purchases, in the amount of $1,546,856.00, were from Brown and Regal, making Brown the largest single supplier of Kinney's shoes. By 1957 Kinney's wholesale sales to Brown and Wohl retail outlets tripled and by the first half of 1958 had more than quadrupled. During this same period Kinney's sales to independent retailers diminished.

(Sales and Assets)

[*Rank in Industry*]

Kinney's net sales increased from $35,228,000.00 in 1950 to $51,661,000.00 in 1955. During this same period its assets grew from $13,000,000.00 to $18,000,000.00. While there is some dispute between plaintiff and defendants as to how the asset figures were arrived at, there is no dispute but that Kinney ranked eighth asset-wise among all shoe firms in the nation in 1955, and was twelfth in number of pairs produced and seventh in net sales.

Kinney produced 0.5% of all shoes manufactured in 1955 and had 1.2% of all national retail sales. By the time of trial Kinney had added 51 new retail outlets and is the largest family shoe store chain in the nation.

[Finding of Facts
as to
History of Brown-Kinney]

All of the foregoing the Court finds to be the facts in this cause concerning the history, type of business, size, method of operation and position in the industry of Brown and Kinney.

II.

History of
the Clayton Act

[*Purpose of Act*]

The country's first experience in anti-trust and monopoly legislation was in 1890 when Congress passed the Sherman Act.[6] Thereafter huge consolidations and mergers flourished. In 1911 the Supreme Court enunciated the "rule of reason" in *Standard Oil v. United States,* 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, and many felt that this decision further weakened the Sherman Act and that it was ineffective in halting the growth of trusts and monopolies. The concern for the preservation of the free enterprise system resulted in the enactment of the Clayton Act in 1914.[7] Its purpose was to fill the gaps and to halt anti-competitive acts before they reached the magnitude required by the Sherman Act. See *United States v. du Pont* [1957 Trade Cases ¶68,723], 353 U. S. 586, 589, 77 S. Ct. 872, 1 L. Ed. 2d 1057.

[*Limitations on Section 7*]

After the passage of the Clayton Act, Section 7 thereof was held to have several limitations. One was that it was not believed to apply to vertical mergers, *i. e.,* mergers within the industry proceeding forward to or backward from the ultimate consumer. *United States v. Bethlehem Steel* [1958 Trade Cases ¶ 69,189], 168 F. Supp. 576, 582; Cf. *United States v. E. I. du Pont, supra.* Another was that the section did not cover acquisitions of assets, but only applied to acquisitions of stock. *Thatcher Mfg. Co. v. Federal Trade Commission,* 272 U. S. 554, 47 S. Ct. 175, 71 L. Ed. 405. Other limitations were that the Act itself required that the effect of the acquisition had to substantially lessen competition between the corporation whose stock is acquired and the corporation making the acquisition, and the restraint of commerce was confined to any section or community. 38 Stat. 731, 15 U. S. C. (1946 Ed.) § 18.

[*1950 Amendment*]

In 1950, Congress amended the Clayton Act in order "that the economic system be protected against those forces of monopoly which would destroy it." Congressional Report No. 1191, August 4, 1949, on H. R. 2734 at pages 12-13. That Report shows that the Congress intimated that everybody, business, labor, consuming public and all citizens, both corporate and individual, have a stake in preventing the destruction of our

[6] 26 Stat. 209, 15 U. S. C. §§1-7. For a history of events leading to its passage, see *United States v. Trans-Missouri Freight Assoc.,* 166 U. S. 290, 319, 17 S. Ct. 540, 41 L. Ed. 1007.

[7] 38 Stat. 730, 15 U. S. C. §§ 12-27. Also the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U. S. C. § 41 et seq.

economic system. Section 7, as amended, provides a prohibition of the acquisition of stock or assets "where in any line of commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[1]

[*Effect of Amendment*]

In other words, where the Act had previously dealt only with stock acquisitions and required substantial lessening of competition between the acquiring and acquired corporations and had narrowed the restraint to any section or community, it now prohibits, (a) any acquisition of stock or assets (b) in any line of commerce (c) in any section of the country (d) where the effect may be substantially to lessen competition or tend to create a monopoly. *United States v. Bethlehem Steel, supra,* at l. c. 582: *United States v. E. I. du Pont, supra,* at l. c. 591; *American Crystal Sugar Co. v. Cuban-American Sugar Co.,* (S. D. N .Y. 1957) [1957 TRADE CASES ¶ 68,735] 152 F. Supp. 387, 395, affirmed (2 CCA, 1958) [1958 TRADE CASES ¶ 69,155] 259 F. 2d 524.

III.

[*Issues*]

Therefore, the problem in this and any other Section 7 case is to go to the facts of the case and resolve those facts in the light of the Congressional intention in the Act and the courts' interpretation of both the Congressional intention and the Act.

We have here an acquisition by Brown of the stock of Kinney. This is such an acquisition as contemplated by the statute and once there is such acquisition there then remains three issues present for determination. They are: (1) line of commerce, (2) section of the country, and (3) the impact of the merger.

Let us take up these elements in that order:

(1)

Line of Commerce

[*Product*]

(Government's Contention)

The government here contends that "shoes" as a class, or, in the alternative, "men's," "women's" and "children's" shoes considered separately, should be the "line of commerce".

Plaintiff argues first that shoes are a class product distinguishable from all others; that defendants manufacture, distribute and sell shoes of all types, in numerous sizes and for every member of the family; that the same machinery is used to produce shoes of different types and grades and that production is often converted between types and grades; that component parts of shoes and wages are industry-wide and therefore prices tend to be industry-wide.

For its alternative argument, plaintiff contends that shoes for "men," "women" and "children" are all sold in some stores and that there are also stores selling these separately or in combinations less than all three; that the trade literature speaks in terms of "men's," "women's" and "children's" shoes; that there is sufficient proof to show that each has sufficiently distinct characteristics and uses to make each a separate "line of commerce".

(Defendants' Contention)

Defendants contend that differences in grades, qualities, prices and uses of shoes should be considered in determining the relevant "line of commerce".

In other words, defendants state that where certain lines of shoes might stop at a $3.50 price and another line start at a $4.50 price, each could be a separate line; that price determines quality and thus quality enters the picture of consideration; or, that a shoe might be classified in the trade as a "casual", "dress", "play" or "work", and as such each could be a separate line; that the peculiar characteristics of the product, rather than the constitution or characteristics of the customer, determine whether or not we are dealing with products that have "interchangeability"; that upon these considerations the total shoe product could be separated into "lines of commerce" as to grade, quality, price and use and the government has failed to meet the burden required.

(Review of the Cases)

[*Burden of Proof*]

Before going to the facts in evidence, let us turn to the case law on this subject for any guideposts that might be found to help in resolving the facts.

There can be no question but that the burden is upon the government to establish the "line of commerce". *United States v. E. I. du Pont, supra,* at l. c. 583; *In the Matter of Pillsbury, Inc.,* 50 F. T. C. 555, 569, 8-10 C. C. H. Trade Reg. Rep. § 11582.

[1 See footnote 1 on page 76,097.]

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[*Definition*]

"Line of commerce" refers to a product market and has been defined as any product, or group of products, that has "sufficient peculiar characteristics and uses to make it distinguishable from all other products". *United States v. E. I. du Pont, supra,* at l. c. 593; *United States v. Bethlehem Steel, supra,* at l. c. 589, 592.

[*"Interchangeability"*]

The government and the defendants have cited, explained and tried to rationalize the whole gamut of cases dealing with the problem of the "line of commerce" as it arises in the antitrust field. Some of these cases deal with the theory of "reasonable interchangeability" introduced as a consideration of the relevant market in an earlier du Pont case, commonly called the *Cellophane* case. *United States v. E. I. du Pont* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). See also *American Crystal Sugar Co. v. Cuban-American Sugar Co., supra.* The "price", "grade" and "quality" factors were noted as they were dealt with in *Hamilton Watch Co. v. Benrus Watch Co.,* (D. C. Conn.) [1953 TRADE CASES ¶ 67,485] 114 F. Supp. 307, affirmed (2 CCA, 1953) [1953 TRADE CASES ¶ 67,517] 206 F. 2d 738. The *Bethlehem Steel* case, *supra,* was cited as authority for the establishment of separate lines of commerce within a broad line of commerce.

The earlier *du Pont* (*Cellophane*) case has been distinguished and limited as applying to the monopolization clause of Section 2 of the Sherman Act. See *United States v. Bethlehem Steel, supra,* at l. c. 593, n. 36. Yet, the *American Sugar Co.* case, *supra,* a Section 7 case, leads to conclusion that "interchangeability" cannot be ignored as a factor where, under the circumstances, the products are more or less the same.

[*Competition*]

The *Hamilton Watch Co.* case, *supra,* considered jewelled watches as a "line of commerce" regardless of differences in the number of jewels or the prices charged. The Court held that the two companies competed actively with each other and all other companies in the sale of nationally advertised branded jewelled watches.

In the *Bethlehem Steel* case, *supra,* at l. c. 595, the Court adopted the steel industry as a whole, and within the whole, divided further into separate lines of commerce with respect to various individual steel items. It declared both the whole and the divisions as separate lines of commerce.

[*Price and Quality*]

The case of *International Shoe Co. v. Federal Trade Commission,* 280 U. S. 291, 50 S. Ct. 89, 74 L. Ed. 431, where the Supreme Court overruled the Commission's order prohibiting the acquisition and indicated that prices and quality between the two companies were not the same, can be distinguished from the instant case for three reasons: (1) the precarious financial condition of the acquired (McElwain) company was a determining factor, for at l. c. 301, the Court said:

> "* * * the evidence establishes the case of a corporation in failing circumstances, the recovery of which to a normal condition, was, to say the least, in gravest doubt, selling its capital to the only available purchaser in order to avoid what its officers concluded was a more disastrous fate.";

(2) the companies were found to be competing in entirely different sized communities and; (3) the case was decided in 1930 and at that time Section 7 of the Clayton Act was limited to a lessening of competition between the acquired and the acquiring company.

In the *Hamilton Watch* case, *supra,* the Second Circuit Court of Appeals at l. c. 741, said:

> "Although we now indulge in no ultimate conclusion, we believe the amendment of § 7 in 1950 certainly casts doubt on decisions—including *International Shoe Co.* (citation omitted) and *United States v. Columbia Steel Co.* (citation omitted)."

An analysis of the maze of cases on the subject leads one to the conclusion that a "line of commerce" cannot be determined by any process of logic and should be determined by the processes of observation. See *International Shoe* case, *supra,* at l. c. 299.

Therefore, we must go to the facts in the case and see what the testimony here reveals and make a determination of the "line of commerce" from the practices in the industry, the characteristics and uses of the products, their interchangeability, price, quality and style. In other words, determine how the industry itself and how the

users, the public, treat the shoe product. In this regard, it becomes necessary that each case stand upon its own particular facts.

[FINDINGS OF FACTS AS TO "LINE OF COMMERCE"]

[*Interchangeability as to Manufacturing Process*]

The evidence in the case at hand shows a certain degree of interchangeability in the shoe industry. First, there is the interchangeability in the manufacturing process; for instance, welt shoes may be made for men, women and children and if so, some of the same machinery is used; or machinery for cement shoes, or stitch down shoes, may be as readily applied to the shoe for the large child as for the small child or the young boy or young miss; the factory producing men's shoes may also produce sizes for growing boys or teenagers; the same is true in the women's lines as to growing girls and the young miss; shoe manufacturers allow their sizes to overlap at the ends of their lines to meet the needs and the pocketbooks of their intended customers.

There is this noticeable fact, however, that shoe manufacutrers making "men's" "women's" and "children's" shoes separate their production as to each of the above categories in separate plants.

[*Interchangeability in Price, Style, and Quality*]

Second, there is the question of interchangeability in price, style and quality; for instance, shoes manufactured with cheap quality material are often made to look exactly like the higher priced shoes; the average store window shopper, uninitiated in matters of shoe quality, can easily mistake one shoe for the other; one buyer, without the money to pay for the higher quality, may still want to imitate that quality by buying the cheaper shoe that resembles it; the retailer points out the features about his particular line of shoes by either telling his customer that his is better quality or style, or, that in his price line the better quality and style is imitated.

Therefore, while quality eventually determines both the wholesale and the retail prices, the manufacturers definitely attempt to copy the styles of the higher priced shoes in the lower priced lines and the retailers definitely attempt to sell to the public as a whole, whatever price, style or quality line they may be carrying.

[*Interchangeability of Use*]

Third, there is the interchangeability of the use to which shoes are put by the customer; for instance, one person may wear the casual to work, another to school, another to the country club and yet another wear it on an outing; one person may wear the work shoe to church, while another may wear it to the woods; one may wear his or her "new shoes" to dress up in, and as they get older and shabbier, wear them to work or to do the sun-up to sun-down chores about the house.

Likewise, the size of the foot does not always determine the age of the possessor of the foot. Some boys can, and must, wear men's shoes; some girls may of necessity wear women's sizes; some women, with pride, may slip into the size of a miss. The old cliche of "filling someone else's shoes" is still a mental ability or incentive and not a physical attribute or characteristic. Nor does the type of shoe always determine the use to which it is to be put, for mores, habits, and economics may determine where, when and how often we wear them.

[*Distinction as to Sexes*]

There is this noticeable fact, however, shoes are distinct as to the sexes (except children's) and regardless of overlapping at the beginning and end of the size runs, the male and female population wear distinctly different types of shoes. Children wear the same shoes up to necessary changes required because of size and then the same male and female distinctions take over.

Fourth, the shoe people themselves admit that their trade classifications into "casuals", "misses", "growing boys", "women's dress", "men's dress", "work", "play", "crib", "first steps", and the maze of other characterizations attempted by the manufacturers and the retailers to differentiate their lines or to catch the buying eye, do not determine the use to which the shoe is put or by whom it will be put. They do not agree among themselves as to definitions of these various categories. Many of the categories are used interchangeably and the public uses the shoe product interchangeably.

[*Recognized Classifications*]

There is this noticeable fact, however, that there is one group of classifications

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which is understood and recognized by the entire industry and the public—the classification into "men's", "women's" and "children's" shoes separately and independently. Brown and Kinney each manufacture and sell men's, women's and children's shoes. While there is a close question as to whether "shoes—as such" could be treated as a "line of commerce" and, while there is argument for a breakdown into quality, style, price and intended use, there can be no question or argument either legal, logical or evidentiary, but that it can be said that all "men's shoes", regardless of quality, style, price and intended use, have sufficient peculiar characteristics and uses to make them distinguishable and a "line of commerce". The same can be said separately as to all "women's shoes" and all "children's shoes". On this the government has sustained its burden.

CONCLUSION

LINE OF COMMERCE

[*Men's, Women's, and Children's Shoes*]

The Court finds the foregoing to be the facts and from those facts it is found and determined that the "line of commerce" in this case should be, and is hereby declared to be, "men's", "women's" and "children's" shoes, each considered separately. To classify shoes as a whole could be unfair and unjust; to classify them further would be impractical, unwarranted and unrealistic.

(2)

Section of the Country

[*Geographic Market*]

As previously stated, in addition to "line of commerce" it is necessary to determine "section of the country". Here again, while the word "market" does not appear in the Act, when we talk about "section of the country" we are actually talking about the geographic market.

(Government's Contention)

[*Nation—City or "City and Surrounding Area"*]

The government contends that the nation as a whole constitutes a "section of the country" for both retailing and manufacturing. In the event the Court should not adopt that contention as to retailing, the government takes the alternative position that it should be a city, or a city and the immediate surrounding area.

(Defendants' Contention)

[*"Standard Metropolitan Area"*]

The defendants admit the country as a whole constitutes a "section of the country" for manufacturing, but contend that what they call a "standard metropolitan area" is the proper designation for retailing. They would define such an area as an economic unit which is commonly the result of consolidating political units, its borders being defined by the flow of local commerce as measured by objective economic indicators.

Manufacturing

[*"Nation as a Whole"*]

Brown and Kinney both manufacture and retail "men's", "women's" and "children's" shoes throughout the nation. The parties have agreed that as far as manufacturing is concerned, the whole of the United States is a "section of the country" and the evidence supports this.

CONCLUSION

SECTION OF THE COUNTRY

(Manufacturing)

Therefore, from the evidence and because there is no dispute, the United States is found to be the effective area of competition for manufacturing. From the finding heretofore entered on "line of commerce" the Court further finds that this applies as to "men's", "women's" and "children's" shoes, considered separately.

Retailing

[*Location of Stores*]

This leaves for consideration and further determination the "section of the country" with reference to the retail market. Kinney has its own family shoe stores scattered throughout the United States. Brown has its Wohl-plan stores, its Wohl leased departments, its Regal, Wetherby-Kayser and Brown franchise stores, as well as a few company-operated stores and the independent retailers to which it sells and all are scattered throughout the entire country.

(Review of the Cases)

[*Burden of Proof*]

The burden is upon the government to establish the "section of the country". This has been heretofore covered in discussing

the "line of commerce" and the same citations apply.

In the Senate Committee Report No. 1775, 81st Congress, 2d Session, 1950, when the amendment to Section 7 was being considered, it was stated:

> "What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk." Id. pp. 5-6.

In *Standard Oil Co. v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293, 299 n. 5, 69 S. Ct. 1051, 93 L. Ed. 1371, the Supreme Court said:

> "Since it is the preservation of competition which is at stake, the significant portion of coverage is that within the area of effective competition."

See also Senate Committee Report No. 1755, *supra,* and *United States v. Bethlehem Steel Corporation, supra,* at l. c. 595-596.

The city and surrounding area was adopted as a "section of the country" in the case of *United States v. Maryland and Virginia Milk Pro. Ass'n.* [1958 TRADE CASES ¶ 69,197], 167 F. Supp. 799. The case involved milk dealers in the Washington metropolitan area which consisted of the District of Columbia and nearby Maryland and Virginia. The *Bethlehem Steel* case, *supra,* at l. c. 608, 618-19, adopted the United States as a whole, certain states separately, combinations of states and a quadrant of states, as separate effective areas of competition.

In the *American Crystal Sugar* case, *supra,* at l. c. 398, the Court pointed out that the applicable sections of the country comprising a ten state area and a three state area were "not mere legal abstractions but correspond to the commercial realities of the sugar industry." In *International Shoe, supra,* the Supreme Court distinguished between cities of over 10,000 population and cities of 6,000 or less.

In *Transamerica Corp. v. Board of Governors,* (3 CCA, 1953) [1953 TRADE CASES ¶ 67,536], 206 F. 2d 163, 170, cert. den. 346 U. S. 901, the Court stated:

> "It necessarily follows that under Section 7, contrary to the rule under Section 3, the lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked."

[*Economic Reality*]

Thus, a review of the cases leads this Court to the conclusion that each case must stand upon its own facts as to the determination of the area or areas of effective competition. This area must be determined by economic reality and not necessarily by political boundaries or with mathematical precision. Neither can it be determined solely from testimony of economists.

The economist may give his review of trends and his prognosis of the future, yet, it also remains for the people in the business to tell us the actual effects, the practical results and where and whose competition they meet.

Let us review then, the evidence offered by the parties, both from their economists and from the people in the business.

[FINDING OF FACTS AS TO SECTION OF THE COUNTRY]

[*Areas of Competition*]

The evidence in this cause shows that shoe retailers primarily and generally sell shoes in the following categories: (1) men's, (2) women's, (3) women's and children's and (4) men's, women's and children's, or, the family type store.

Kinney is primarily a family type store and operates attractive places of business with prominent window displays and in good locations in cities of 10,000 or more population and usually in the corporate limits or its environs. Its merchandise is in the low or medium price range, is of excellent quality for the price and imitates the higher priced styles. Its store operations are aggressive and highly competitive.

Brown operates its retail outlets, primarily selling women's shoes through Wohl, men's shoes through Regal, and men's, women's and children's shoes through Wetherby-Kayser, Reilly and others and through the stores that operate under the Brown franchise arrangement. Their stores and leased departments are in cities of 10,000

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or more inhabitants, are well located, attractive, sell low, medium and medium-high priced shoes. The brand names are well advertised and the stores are aggressively operated and competitive.

The area in which this Court sits was thoroughly gone into in the evidence. St. Louis is a city with defined geographical limits; surrounding it is St. Louis County, which is composed of numerous municipal corporations and a large unincorporated area. Across the river in the State of Illinois are other well defined corporate area and their surrounding territories. People from each and all of these areas work, shop and trade in their area and interchangeably.

Within the corporate limits of the City of St. Louis and within the corporate and unincorporated areas around St. Louis, are found many huge concentrated shopping areas. For instance, a large downtown department store will go out into an outlying area, put up a similar store and surround it with building facilities for merchants selling everything from drugs to clothing, to food, to knick-knacks and sundries. These areas cater to personal services such as barber shops and hair dressers, insurance offices, doctors and dentists and many have retail shoe stores. The downtown department store and the outlying department store have the same type of departmental operations, including shoes.

[*Competition Between "Downtown" and "Outlying" Areas*]

The evidence in this case as to the St. Louis area supports the conclusion, and it is a reasonable one, that shoe retailers—downtown, in corporate areas surrounding the downtown, in unincorporated areas surrounding the corporate areas, plus the shoe retailers in between and at the fringes—all are in competition with each other. For example, the worker downtown may buy his shoes during the noon hour while his wife buys her shoes and the children's shoes in the outlying shopping center; or, they may all wait and go to the shoe store together either in the outlying area or downtown. The discriminating buyer might not find the shoe he or she wants in the outlying area and will make a trip downtown to get it. The advertising, carried in the various media of the area, refers to a store and all of its branches in the entire area.

It is further apparent from this evidence that in this area price and quality are not necessarily synonymous factors. As heretofore pointed out in discussing "line of commerce", the buying public may have many reasons why they buy a particular shoe, at a particular price, either in consideration of quality or regardless of quality.

What is true in the evidence concerning the area in which this Court is located is likewise true to greater or lesser extent throughout the entire United States. The United States has seen a tremendous growth in and around large cities. This growth is more evident among cities containing populations of 10,000 and above. People have been moving to metropolitan areas. Industry has been expanding in metropolitan areas and people have moved in and around the places of their work. The mercantile business has expanded to the same areas where the population has increased. Everybody in the same business, in every area where there are lots of people, is in competition with the other fellow who is in the same business. This is true of the shoe retailers and shoe people have so testified.

The testimony in this case shows that Brown franchise dealers in downtown metropolitan areas are competing with Brown franchise dealers in the outlying areas. They are competing with other retailers in the same business. The same is true of Kinney; the same is true of Wohl; the same is true of Regal; the same is true as between Brown, Kinney, Wohl and Regal.

The evidence here shows that retailers of "men's", "women's", and "children's" shoes, whether sold separately or in combinations thereof, are actively, forcefully, competitively and actually vying with those handling a like line for the trade of the people in their cities and the immediate and contiguous surrounding area.

[*Competition Between "Acquiring" and "Acquired" Companies*]

The evidence here shows that more than 12 million pairs of Brown's shoes and 7 million pairs of Kinney's were sold in the same cities. There are at least 141 cities of over 10,000 population, in which there is located a Kinney retail store and there is also a Brown operated, Brown franchise or a Brown plan account outlet. These stores are all in competition with each other in those cities at the retail level in the sale of

the "men's", "women's" and "children's" shoes handled and with every other shoe retailer therein located and so handling. These Brown stores have a varying share of the retail market therein, as do Kinney's stores; those percentages are substantial and if combined would become more substantial.

What then is the "section of the country" as it relates to shoes retailing and as it can be determined by this evidence? Is it the city limits? Is it the city and surrounding areas? Is it the standard metropolitan area?

CONCLUSION
SECTION OF THE COUNTRY
(Retailing)
[*City and Surrounding Area*]

The Court finds the foregoing to be the facts as supported by the evidence of this case and, it is the Court's conclusion therefrom that the areas of effective competition for retailing purposes cannot be fixed with mathematical precision or by political boundary. However, when determined by economic reality, for retailing, a "section of the country" is a city of 10,000 or more population and its immediate and contiguous surrounding area, regardless of name designation, and in which a Kinney store and a Brown (operated, franchise, or plan) store are located.[8]

In reaching this conclusion, the Court also finds the government has sustained its burden and adopts all findings of fact heretofore set forth in discussing the "History of Brown and Kinney", the "Line of Commerce" and such findings of fact as may hereafter be set forth.

(3)
Impact of the Merger
[*Effect on Competition*]

The third phase of a Section 7 case is the impact of the merger because the Act prohibits an acquisition in a line of commerce, in any section of the country, where the effect may be to substantially lessen competition or tend to create a monopoly.[1]

(Review of the Cases)

In *United States v. Bethlehem Steel, supra,* at l. c. 603, it was stated:

> "The ultimate question under section 7 is whether an acquisition may substantially lessen competition or tend to create a monopoly within the relevant market. The government is not required to establish with certitude that competition in fact will be substantially lessened. Its burden is met if it establishes a reasonable probability that the proposed merger will substantially lessen competition or tend to create a monopoly. * * *
>
> "There may be a substantial lessening of competition or tendency to monopoly when a merger substantially increases concentration, eliminates a substantial factor in competition, eliminates a substantial source of supplies, or results in the establishment of relationships between buyers and sellers which deprive their rival of a fair opportunity to compete."

And at l. c. 606, the Court further stated:

> "The increased concentration which would result from the merger cannot be considered in a vacuum; it cannot be divorced from the history of mergers and acquisitions, which in large measure accounts for the existing high degree of concentration in the industry."

See also Senate Report 1775, *supra;* H. R. Rep. No. 1191 p. 8; *United States v. du Pont* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586, *supra.*

In *United States v. du Pont* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586, *supra,* at l. c. 592, the Supreme Court said:

> "We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within reach of the section whenever the reasonable likelihood appears that the acquisition will result in restraint of commerce or in the creation of a monopoly of any line of commerce. * * * Judge Maris correctly stated in *Trans-America Corp. v. Board of Governors,* 206 F. 2d 163, 169:
>
> 'A monopoly involves the power to . . . exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary . . . to find that . . . [the defendant] has actually achieved monopoly power but merely that stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud. Since by definition monopoly involves the power to eliminate competition a lessen-

[8] The reason the Court has used the "10,000 or more" population figure is because Kinney stores are located in cities of such size and the evidence in this case dealt with such sized cities.

[1] See footnote 1 on page 76,097.]

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ing of competition is clearly relevant in determining the existence of a tendency to monopolize. * * *' "

[*Prior to 1950 Amendment*]

Before the 1950 amendment the Act was held not to apply to vertical mergers and the courts were only confronted with horizontal mergers. In these, the trend was for big companies to acquire other big companies and the impact was either readily apparent or obviously imperceptible. When the amendment was under consideration, we find this reading in the Senate Report, *supra,* p. 5:

"As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them * * *."

And in the same Report, p. 3:

"The figures presented * * * show that in the field of manufacturing above, the 25 largest corporations in 1948 owned 27 percent of the total assets of all manufacturing corporations, or a little more than average of 1 percent of the assets for each of the 25 corporations.

"The enactment of the bill will limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."

[*"Minute Acquisitions"*]

Certainly it is evident that Congress intended to encompass minute acquisitions which tend toward monopoly and to do so in their incipiency. Courts have recognized the necessity to act toward a violation as it begins, rather than wait until it has become *fait accompli.* See *du Pont* and *Bethlehem Steel* cases, *supra.*

[*Test of Legality*]

In a determination of these factors it becomes necessary to review, not only the practices of the companies involved, but also the trends in the industry. In the *American Crystal Sugar* case, *supra,* the Second Circuit held that the lower court correctly understood and applied the proper test of legality when it said:

"He stressed the necessity for consideration not merely of competition between the two companies, but also the competitive situation of the industry." Id. at 572.

When we review the cases and the Act as presently written, in the light of Congressional intent, it is concluded by this Court that the impact of the merger must be determined from factual situations of the companies involved and from trends in the industry. Likewise, we are not so much concerned with percentages, as such, but with what these percentages mean in examination under the light of the facts of the case and the economic realities involved.

[*Percentages*]

What difference can it make that Brown has only 5% of the shoe production and Kinney 0.5%, when Brown is the fourth largest firm in the United States and Kinney with only 1.2% of all retail shoe sales is the largest family shoe chain retailer? Their combination moves Brown to third place in the industry. Does it then make sense to say that this is imperceptible because the percentages are small? Or rather, doesn't it make sense to say, that regardless of percentages or size, the test is, what do the facts show as to the trends in the industry and the true economic impact of this particular merger, which takes place among an industry having a few large firms that control a sizeable segment of the total with the balance divided among hundreds of others having only minute segments.

It is upon this analysis that the Court shall review the impact of the merger.

[Findings of Facts as to Impact of Merger]

Trend in the Industry

[*Manufacturers Obtaining Retail Outlets*]

There is evidence in the record of a definite trend in the shoe industry of manufacturers of "men's", "women's" and "children's" shoes obtaining retail outlets that sell said shoes separately or in combinations thereof as heretofore defined. For example, International Shoe Company had no retail outlets in 1945, but by 1956 had acquired 130; General Shoe Company had 80 retail outlets in 1945 and 526 by 1956; Shoe Corporation of America, in the same period, went from 301 to 842; Melville Shoe Company from 536 to 947; and Endicott-Johnson from 488 to 540. And, as significant, or even more significant in this case, Brown, with no retail outlets in 1945 had acquired

845 such outlets by 1956.[9]

The evidence here shows that between 1950 and 1956, there were 9 independent shoe firms, operating 1,114 retail shoe stores, that became subsidiaries of large firms and ceased their independent operations. By 1956, the 6 largest firms owned and operated 3,997, or 18%, of the nation's 22,000 shoe stores and the 13 largest firms operated 4,736, or 21%, of them.[10]

[*Limitation of Independent Manufacturers' Market*]

The evidence here also shows a definite trend in the industry to the effect that once manufacturers acquire retail outlets they definitely increase the sale of their own manufactured product to these retail outlets. The parent company becomes a larger and larger supplier of its acquired retail outlets and the outlets' purchases from independent manufacturers definitely and consistently become less and less. Chain stores and company-dominated stores are drying up the available outlets for independent manufacturers. Thus, the effect of this vertical integration in the shoe industry has been to increase the number of outlets dominated by large manufacturers and to seriously limit the market to which independent manufacturers are able to sell.

The evidence here shows that there is also a definite trend in the industry toward the decrease of the number of plants manufacturing shoes. Of the companies representing 95% of the entire industry, the number of plants operated decreased from 1207 in 1950 to 1048 in 1956. Of the 1048 shoe manufacturing plants in 1956, about 20%, or 212, are owned and operated by 10 companies. Between 1950 and 1956, 7 companies independently operating 25 shoe manufacturing plants have become acquired by the 10 companies now operating 20% of all shoe manufacturing plants.

[*Effect on Independent Retailers*]

The testimony in this case further shows that independent retailers of shoes are having a harder and harder time in competing with company-owned and company-controlled retail outlets. National advertising by large concerns has increased their brand name acceptability and retail stores handling the brand named shoes have a definite advertising advantage. Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control and assists and price control. These advantages result in lower prices or in higher quality for the same price and the independent retailer can no longer compete in the low and medium-priced fields and has been driven to concentrate his business in the higher-priced, higher-quality type of shoes—and, the higher the price, the smaller the market. He has been placed in this position, not by choice, but by necessity.

Brown-Kinney a Part of Trend

[*Nation's "Dominant" Shoe Firm*]

The evidence here shows that Brown, its affiliates and Kinney are a definite part of this trend in the industry. In fact, Brown has been a moving factor in this trend. As stated earlier in this Opinion, the evidence shows that in 1955 Brown sold no shoes to Kinney, but by 1957 had become its largest single supplier of shoes. That Wohl's purchases from Brown increased from almost $3,000,000.00 to over $12,000,000.00 from 1950 to 1957. That Brown's sales to Wetherby-Kaiser increased from $28,000.00 to $138,000.00 during the time Brown was acquiring control and today Brown sells it 50% of all its requirements. That percentage-wise, Wohl's purchases from Brown

[9] And on May 1, 1958, the following retail outlets were in operation:

Brown Franchise Stores	647
Regal Outlets	92
Wohl Plan Accounts	208
Wohl Leased Departments (In 243 stores)	457
Total	1,404
Kinney	416
Combined Total	1,820

[10] There were over 70,000 stores selling shoes but the census department classifies a shoe store as one that has over 50% of its gross receipts entirely from the sale of shoes. The 22,000 figure is determined as retail shoe stores having such percentage of sales.

The six firms' percentages of nation's total retail shoe store operation for 1956:

Melville Shoe Co.	4.3%
Shoe Corp. of America	3.8
*Brown (not including franchise stores)	3.8
Endicott-Johnson	2.4
General Shoe	2.3
Edison (not a manufacturer)	1.3
Total	17.9%

International Shoe, the nation's largest shoe manufacturer (but one of the 13 largest firms above considered) had only 0.5% of the nation's total.

* If Brown and Kinney were combined, Brown's percentage would be 5.7% and would raise the above total to 19.8%.

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increased from 12.8% in 1950 to 33.6% in 1957, and Kinney's purchases from Brown increased from zero to 7.9% by 1957.

The evidence in this case further shows that one manufacturer who supplied Wohl with $1,230,527.00 worth of shoes in 1955, sold them less than $100,000.00 worth of shoes in 1958. Another manufacturer's sales to Wohl decreased from over $340,000.00 in 1950 to $68,970.00 in 1957. Other suppliers lost sales to Brown-controlled outlets in varying amounts and degrees.

The evidence here further shows that Brown, with the acquisition of Kinney, would have more retail outlets than any other manufacturer of shoes. That it would move from third to second in the industry in net sales.[11] That when considered from both the manufacturing and retail outlet standpoint, it would become the dominant shoe firm in the country.

Other Factual Findings

[*Manufacturer-controlled Retail Outlets*]

This Court finds from the evidence that while the acquisition of Kinney's manufacturing facilities might only slightly affect commerce on a nation-wide scale (5% to 5.5%), the greatest impact of the merger on manufacturing would be felt in the advantages of the company-controlled retail outlets. This impact is connected with manufacturing in that large manufacturers (including Brown) are acquiring retail outlets which purchase from them and smaller independent manufacturers are losing that market as the purchases increase. This substantially lessens competition between manufacturers and Brown has been, is, and is likely to continue to be, an ever growing part of this result.

[*Tendency Toward Monopoly*]

This Court further finds that the acquisition by Brown of Kinney's large and vast retail outlets (which results in the increase of the ultimate retail market sales of the combined products of their two manufacturing enterprises) would definitely increase the final consumption of their combined product with advantages being obtained that tend toward monopoly both in ultimate sales increase and through price or profit advantage. If, by advantages in buying, selling, insurance, assists in business planning and practices, advertising and credit arrangements, the percentage of the retail sales by the combined company-owned and company-controlled stores increases, so likewise their power to control price increases; so likewise does their power to sell more and more of their own shoes tend to create a monopoly.

[*Merger Would Result in Prohibited Effects*]

This Court further finds that the merger of Brown and Kinney would have a definite and substantial impact and effect upon shoe retailing of "men's," "women's" and "children's" shoes in every city of over 10,000 population and its immediate and contiguous surrounding area, and wherein a Brown and Kinney store is operated. This impact would be felt by other retail merchants in the same lines. This impact would result from buying and pricing advantages which would inure to Kinney by being a part of Brown and because of its already well solid position in the retail field. This impact would be felt in these areas by other manufacturers, especially the small independent manufacturer, in decreased outlets for his product. This impact would but add to the trend in the industry and to the past practices by Brown. The effect would be to substantially lessen competition and it definitely tends to create a monopoly in these areas.

[*Domination of Mass Market*]

The Court further finds from the evidence that due to the nature of the shoe industry, no one manufacturer, no one retailer, no one manufacturer-retailer combined, has a large percentage of the market, wholesale or retail. Yet, a small group of firms control a sizeable segment of the market.[12] These firms definitely set the price and style trends. These firms are better able to meet the style trends and finance the change over. These firms are better able to acquire company-owned stores and thus acquire ready-made markets for their production. These firms are better able to meet the changing conditions of the retail markets

[11] Of the top 12 firms in the nation in 1956 (considering Brown and Kinney combined) 6 had less than 91.1 million dollar sales each, per year. The 6 largest ranged from 126.1 to 266.8 million each, per year. The smallest of these 12 had 16.4 million whereas Brown and Kinney combined would have had 219.1 million.

[12] See ft. nt. 5, 10, and text paragraphs supported thereby.

and to dominate the mass market in the low and medium priced fields.

[*"Acquiring" Company as Supplier of "Acquired" Company*]

This Court further finds that Kinney sold 6.4 million pairs of shoes in 1955, which it purchased from outside sources. This exceeds the production of any one manufacturer below the top six. As Brown continues to supply more and more shoes to Kinney and as Kinney converts more and more of its manufactured product to Brown affiliates, the effect on competition is already evident and the possibility is apparent.

This Court further finds that with Brown as a supplier and the advantages resulting therefrom, Kinney becomes a more dominant factor in each retail market in which it operates a store. It is eliminated as a competitive factor as against Brown and as independent retailers are forced to other lines or from the market, the tendency toward monopoly is already in effect and the further possibility is apparent.

[*Elimination of Independents*]

This Court further finds that as the Brown-Kinney experience is weighed in the same scale with what is happening in the industry in the large manufacturer-retail outlet acquisitions, the trend is toward the eventual elimination of small manufacturers and independent retailers.

(Conclusion)

[*Effect on Buying Public*]

Whether the customer—the buying public—would or would not benefit may be highly speculative. It is self-evident, however, that Congress has recognized that the final result of increased power can and will result to the detriment of the public.

We can only eat an apple a bite at a time. The end result of consumption is the same whether it be done by quarters, halves, three-quarters, or the whole, and is finally determined by our own appetites. A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same.

[*Increasing Percentage of Market*]

If manufacturers, such as Brown, sell at wholesale in the area of effective competition, their product (through all types of outlets) must of necessity reach the retail market of that area. Their company-owned and controlled retail stores have a percentage of that market and a combination of their businesses increases that percentage. Such increase, regardless of percentage amount, gives them power. Such power not only tends to create a monopoly, but substantially lessens competition by eliminating the effectiveness of the independent retailer and the smaller manufacturer.

[*Motives*]

Regardless of our economic or other philosophy; regardless of our ideas or thoughts about how good or how bad "bigness" or "control" may be; regardless of how necessary it may be for the smaller to grow bigger and the bigger to better compete with the biggest;[13] regardless of all of these—the Congress has, down through the years, definitely tightened the screws upon acquisitions in the effort to prevent mergers and acquisitions where, as now ultimately defined, competition is substantially lessened, tendency toward monopoly is created, either or both.

[*Increased "Concentration" in Industry*]

It is this Court's conclusion that the merger of Brown and Kinney would increase concentration in the shoe industry, both in manufacturing and retailing. The fourth manufacturer would become the third; the top four companies would control 23% of the production market and Kinney and Brown would have one-fifth of that; the two would become the largest operator of retail shoe stores in the nation; and Kinney becomes a smaller market for other manufacturers.

[13] One of defendants contentions was its necessity to compete with other larger companies. Their motives are not a determining factor, however, for in *U. S. v. du Pont* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586, 607, the court stated:

"Similarly, the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without design to overreach anyone, including du Pont's competitors, does not defeat the Government's right to relief. It is not requisite to proof of a violation of § 7 to show that restraint or monopoly was intended." See also *Bethlehem Steel, supra*, at 1. c. 617.

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[*Elimination of "Substantial Competitive Factor"*]

It is this Court's conclusion that the merger would eliminate Kinney as a substantial competitive factor to Brown in the shoe retailing field. The most aggressive retail chain in the nation, now a potent competitor of Brown, would become but another adoptive child of an already big family.

[*Manufacturer-Retailer Relationship*]

It is this Court's conclusion that the merger would establish a manufacturer-retailer relationship which deprives all but the top firms in the industry of a fair opportunity to compete. Kinney's already powerful position in the retail field is made more powerful by the proposed affinity with Brown. Other manufacturers have already suffered; other retailers have felt the effect; the reasonable probability is the further substantial lessening of competition and the increased tendency toward monopoly.

Holding

[*Reasonable Probability of Violation*]

From all the facts heretofore found, from all the evidence herein and all reasonable inferences therefrom, this Court finds, concludes and holds that there is a violation of Section 7 (15 U. S. C. § 18) since, in fact and in reasonable probability, it is established:

(1) That while the acquisition of the manufacturing facilities of Kinney by Brown, would but slightly lessen competition or tend to create a monopoly when considered alone, the combination of the manufacturing-retailing facilities of Brown and Kinney would substantially lessen competition and tend to create a monopoly in the manufacturing of "men's," "women's" and "children's" shoes, considered separately, throughout the United States as a whole.

(2) That the acquisition of Kinney by Brown would substantially lessen competition and tend to create a monopoly in manufacturing-retailing and in retailing alone, in "men's," "women's" and "children's" shoes, considered separately, in every city of 10,000 or more population and its immediate and contiguous surrounding area, regardless of name designation, and in which a Kinney store and a Brown (operated, franchise or plan) store are located.

(3) That the government has sustained the burden of proof required therefor and the Court shall enter judgment requiring defendant Brown to relinquish and dispose of the acquired stock of defendant Kinney and thereafter enjoining Brown and Kinney, their agents, servants, officers and employees from acquiring any interest in the stock or assets of the other defendant.

Further Holding

[*Disposition of Stock—Further Hearing*]

There is one further aspect of this case which the Court should reserve for further consideration. The temporary order of Judge Hulen[4] allowed the acquisition to continue under certain restrictions and requirements. If this judgment should become final in its present form, the defendant Brown would be confronted with the necessity of the disposition of the stock of Kinney. This could have far-reaching effects and consequences.

In *United States v. du Pont, supra,* the Supreme Court, in overruling the trial court's decision, ordered that the district court conduct a

> ". . . further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The district courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case'. (citation omitted)" Id. 607-608.

It is this Court's conclusion that should this judgment become final, this Court should hear any evidence which the defendants might wish to offer touching the effects of the disposition of the stock and suitable manner in handling same. The government should be given an opportunity to express opposition or suggestion therein.

Therefore, the judgment to be entered will provide for such further hearing, rulings and final order.

[4 See footnote 4 on page 76,098.]

[¶ 69,533] General Gas Corporation v. National Utilities of Gainesville, Inc.

In the United States Court of Appeals for the Fifth Circuit. No. 18002. Dated November 16, 1959.

Appeal from the United States District Court for the Northern District of Georgia. BOYD SLOAN, District Judge.

Robinson-Patman Price Discrimination Act

Price Discrimination—Practices Constituting Discrimination Under Clayton Act, Section 2(a)—Local Price Cutting—Public Interest—Effect on Competition.—In an action charging an interstate seller of liquefied petroleum gas with lowering its price in a local area, while maintaining its prices elsewhere, in order to drive a local competitor out of business in violation of Section 2(a) of the Clayton Act, a preliminary injunction ordering the interstate seller to maintain what the trial court considered the prior general price was vacated. The reviewing court held that the proof did not establish facts essential to the granting of the order in its present form in that (1) the prior general price was less than that found by the trial court, since other competitors were charging lower prices and the plaintiff, while charging the same price, was granting free services, (2) the proof of irreparable damage to the plaintiff was "weak" at best, (3) it was in the best interest of the public to have the benefit of every legal price cut, and (4) since the plaintiff was contending for what it claimed was the prior recognized status, whatever injunctive relief was given should be equally binding on it. However, a temporary injunction would be proper if the parties were required to compete on an even basis, and the competitive basis was made realistic as to the remaining competitors.

See Price Discrimination, Vol. 1, ¶ 3505.840, 3506.250, 3506.440, 3506.500, 3506.620, 3508.545, 3515.500.

Private Enforcement and Procedure—Injunctive Relief for Violations of Antitrust Laws—Price Discrimination—Pretrial Procedures—Preliminary Injunction.—A preliminary injunction ordering an interstate seller of liquefied petroleum gas to abandon a price cut in a single area and restore a "general" price was vacated. The reviewing court found that the proof did not establish facts essential to the granting of the order in its existing form. While the court could not fashion a new order because the plaintiff might not want the order in the new form, and because the trial court should have the freedom to add any other terms it might wish to add, the court did remand the case with two suggested modifications: (1) reduce the level of prices in the area to more nearly approximate what the reviewing court felt was the prior general level, and (2) bind both parties by the equitable relief, since the prior order might have placed plaintiff in a preferred position. It was also held that, on appeal from such a preliminary injunction, the sole issue before the court was whether the trial court had abused its discretion; the merits of the controversy were left open for further consideration and future determination.

See Private Enforcement and Procedure, Vol. 2, ¶ 9024.70, 9026.15, 9027.15.

Private Enforcement and Procedure—Injunctive Relief from Violations of Antitrust Laws—Price Discrimination—Necessary Averments—Irreparable Injury—Destruction of Business.—A trial court's finding that a local seller of liquefied petroleum gas would be irreparably injured (put out of business) by an interstate seller's price cutting in a local area while maintaining its regular price in other areas, which supported a temporary injunction prohibiting the interstate seller from this practice, was found to be weak at best. The reviewing court, noting that the period of delay pending trial was only some nine months, and that other competitors testified that they could compete at a figure closely approximating the interstate seller's price, vacated the injunction and remanded the case.

See Private Enforcement and Procedure, Vol. 2, ¶ 9022.05, 9022.50.

For the appellant: Cubbege Snow, Macon, Ga., and Robert B. Thompson, Gainesville, Ga.

For the appellee: John N. Crudup, Gainesville, Ga.

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Vacating an order of the U. S. District Court, Northern District of Georgia, 1959 Trade Cases ¶ 69,447.

Before HUTCHESON, TUTTLE and WISDOM, Circuit Judges.

[*Price Discrimination—Appeal from Preliminary Injunction*]

TUTTLE, Circuit Judge [*In full text*]: This is an appeal from the grant by the trial court of a preliminary injunction which, in effect, required the appellant to abandon a deep price cut in the sale of its products and to restore a general price which the court found to have been previously prevailing.

Although we do not on this appeal undertake to resolve the legal questions that must ultimately be disposed of if the plaintiff below is to be entitled to recover under Section 2 of the Sherman Act as amended, or under the provisions of the Robinson-Patman Act,[1] it is necessary to consider the appellee's theory of recovery in order to test the appellant's contention that no *prima facie* case was made out to warrant the issuing of a temporary injunction.

[*Local Price Cutting*]

The gist of National's action is that it, as a local company, is engaged in the business of selling liquefied petroleum gas in competition with General in all or parts of thirteen counties in Georgia; that prior to June, 1959, there was an established prevailing price for the sale of such gas of 20¢ less 2¢ a gallon discount for cash or prompt payment to domestic customers and 18¢ less two cents to commercial customers; that during the month of June, General cut the prices to 15.5¢ less two cents to all customers; that such cut was not made in other trade areas in Georgia, but that it was made in National's trade area for the purpose and with the intent to injure, destroy or prevent competition by National; that the introduction of such price, alleged to be so low as to make it impossible for either competitor to make a profit, has the effect to, and tends to, substantially lessen competition and create a monopoly.

The hearing on motion for preliminary injunction was on affidavit only. No oral testimony was heard by the trial court. The court made findings of fact to the effect that since 1954 there was a prevailing price of 20¢ less two cents for 10 days payment, and 18¢ less two cents for domestic and commercial customers, respectively, in the trade area; that the plaintiff provided certain free service to customers that was worth one cent a gallon on the price of gas; General did not provide such free service; that there were some twelve other competitors of the two parties; that National's sales had increased during the years immediately preceding the filing of this action and that such sales were at the average price of 18.17¢ per gallon; that National had approximately 1500 customers and 20 percent of the business, and General had an estimated 1800 customers and approximately 25 percent of the business. It was proved that General's sales had declined during the months immediately preceding the filing of the new prices by it. The court found that prior to the month of June, 1959,

> "there has been, both on the part of the plaintiff and defendant, price cutting in vying for the business of individual customers, but there had not been until the action of the defendant here complained of, an overall price reduction to all customers within the competitive area; that General continued to sell the gas in adjacent areas at 18¢ net and that if National reduced its price to 13.5¢ a gallon net to meet the net price of appellant it could not operate at a profit but would be losing money."

Although recognizing the undoubted correctness of the principle that price cutting for the purpose of getting a competitor's business is not *per se* illegal, *Schine Theatres v. United States* [1948-1949 TRADE CASES ¶ 62,245], 334 U. S. 110, 120, the court seems to have decided that such act here "tends to eliminate plaintiff as a competitor" and it was therefore illegal. The court entered an order enjoining the appellant from continuing in effect the price cuts of June, 1959, and from "maintaining a general sales price in said counties . . . of

[1] The significant limitations on the availability to private litigants of Section 3 of the Robinson-Patman Act, 15 U. S. C. A. 13(a) seems not to have been considered by the trial court in its order, which it based on specific acts proscribed (under some circumstances) by the Robinson-Patman Act.

less than 18¢ [net] per gallon" for domestic consumption or less than 16¢ net for commercial consumption. It provided that it should have no

> "effect on customer sales that have been negotiated in the past, as a business practice, on a bid basis or a customer basis, nor shall it prevent such competition in the future."

The court required the appellee to make a bond for $5,000 for the protection of the appellant. The injunction was to be in effect until the further order of the court. The case is expected to be ready for trial on the merits in April, 1960. Both parties agree that the intervening months are the months of largest sales in this seasonal business.

[*Grounds for Appeal*]

Appellant first filed a petition with this court seeking an order staying the injunction, but, without passing on that petition, we set the appeal down for an early hearing on the merits. Appellant urges that there was a complete failure of proof of such purpose, intent, or tendency to monopolize as is contemplated in the applicable statutes. Moreover, it contends there is a complete absence of proof of threat of irreparable loss to the plaintiff if the injunction had been denied.

We recognize the salutary principle that where the facts are sharply in dispute on preliminary hearing, the trial court should go extremely slow in entering an order that, by its very nature, may seriously interfere with the course of competition. This is particularly so when all the proof, pro and con, is by affidavit and the trial court is unable to sift out, either by hearing the witnesses testify or by the parties' cross-examination, what is true and what is false. *General Electric Co. v. American Wholesale Co.*, 7 Cir. [1956 TRADE CASES ¶ 68,501], 235 F. 2d 606. Moreover, the record here contains several weaknesses of proof as to points which were essential to the establishment by plaintiff of its prima facie case.

I. The Previous Non-Contested Prevailing Prices

The court found that the previous price prevailing in the retail trade area was 20¢ less two cents, and 18¢ less two cents. The affirmative proof offered by plaintiff included an affidavit by one competitor which stated that the entire trade area in which it, the Ritchie Gas Company, Inc., operated five counties, the prevailing price was 17¢ net. Another affidavit introduced by plaintiff showed that gas was sold at a regular 17¢ price in Forsyth County during 1957, 1958, by another competitor, L. & L. Gas Company, and that a reduction to 15¢ had been put into effect during the summer months of the year preceding the June reductions of defendant here complained of. One affidavit shows that another competitor, Southland Butane, Inc., sold at the regular price of 17¢ net during 1957-1958 in four of the counties in the trade area. Another affidavit offered by the plaintiff averred that the regular price of Woodstock Gas & Coal Company in Forsyth County was 17¢ less one cent if paid in 30 days, or 16¢ net. It is not stated that appellant was in any way responsible for this price. E. S. Gilmer, president of Tugalo Gas Company, which competed in three counties with both National and General, said "the prevailing price for L. P. gas in our trade area has been 17¢ net to any consumer. The price has prevailed for the last three years." There was evidence introduced by appellant, which is not denied by appellee, that the price set by it in June, 1959, was not lower than prices offered by at least one of its competitors when the one cent differential for free service was considered. Looking only at the plaintiff's proof as to the existence of a prevailing non-controversial price prior to the June reduction, and the court's finding of the existence of a one cent price differential between plaintiff and defendant, it is clear that the finding that

> "Since 1954 the price of liquefied petroleum gas in the area served by National has been 20¢ per gallon with a two cent per gallon discount if paid within 10 days from delivery, leaving a net price of 18¢ per gallon for domestic consumers"

is without factual basis to support it. So long as there were competitors in the field offering a net price of 17¢ [2] which the Ritchie and other affidavits offered by the plaintiff averred, it cannot be said that, within the context here intended, the price was 20¢

[2] Analysis of the plaintiff's affidavits shows that in nine out of the thirteen counties a regular price of 17¢ net was being maintained by at least one dealer a substantial part of the time after 1954.

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less two cents. Moreover, in making such finding the court did not give effect to its other finding that, as applied to the dispute between the two parties of this litigation the price offered by National included services worth one cent per gallon.

On the record before us it clearly was not permissible for the court to require that the defendant reinstate a price of 20¢ less two cents for cash or prompt payment.

II. Irreparable Damage

The appellee's proof of irreparable damage was in the nature of proof of its current profits at the current yield of 18.44 cents on the average for 1958 sales. It proved a net profit of $19,741.10 before taxes, and showed that a cut of each cent in the amount received for the same number of gallons would result in annual profit reduction of $13,248. There was proof by affidavits of the officers of the plaintiff that National Utilities of Gainesville is unable to compete with General Gas Corporation at a retail market of 13½¢ per gallon and 13¢ per gallon;

> "our break even point is about 16¢ per gallon net, General Gas Corporation's price discrimination by cutting liquified petroleum gas to 15¢ per gallon, 14¢ per gallon, 13½¢ per gallon and 13¢ per gallon [the cut complained of was to 15½¢ less 2 cents for 10 days payment] will completely eliminate us as a competitor . . ."

Proof by a certified public accountant stated:

> "A reduction in the price of L. P. gas to *123½¢* per gallon would result in our immediate irreparable loss to National Utilities of Gainesville, Inc., and would force the corporation out of business." (Emphasis added.)

However, and most significantly, it must be noted that National Utilities offered proof by its other competitors, who asserted that they could compete on the basis of a price of 15¢. Gene Latham, president of L. & L. Gas Company, operating in five counties, including one in this trade area, furnished an affidavit for the plaintiff below in which he said, "L. & L. Gas Company cannot operate its business at a price less than approximately 15¢ per gallon . . ." D. J. Whitmire, treasurer of Southland Butane, Inc., a competitor in 4 counties, said: "Southland Butane, Inc. cannot operate its business at a price less than approximately 15¢ per gallon . . ." J. Hoyt Crow, vice-president and general manager of Woodstock Gas & Coal Company, which competes with both the parties to this litigation in Forsyth County, said: "My company cannot compete with General Gas Corporation at such cut prices [allegedly 13¢]. We cannot make money and stay in business at less than 15¢ per gallon."

To look briefly at the other side, we find proof offered by General[3] that it can and did, during the months of June and July make a profit from the sales at 17¢ less two cents and 15½¢ less two cents; that "not more than forty percent of the customers will avail themselves of the two cents discount for payment within ten days"; that specifically, during the month of July, 1959, when appellant had in effect a price of fifteen and one-half cents, less two cents, its sales price averaged 14.79¢ per gallon. This estimate of the percent of purchasers who would take advantage of the two cents cash discount is not controverted. It would seem, therefore, that the net *average* price per gallon with which National would have to compete is approximately 14¾¢. Three of plaintiff's witnesses testified they could compete at approximately 15¢ and one that it was "unable to meet General Gas Corporation's price cutting below 14¢ per gallon net."

In view of the fact that the period of delay pending trial was some nine months, and, if plaintiff sought to meet the quoted price, it might receive 14¾¢ net on the average, and in light of the testimony of the other competitors who could compete at a figure closely approximating this price, it appears that the proof of irreparable damage to the plaintiff was weak at best.

III. The Public Interest

In this price war, as is true in most such competitive conflicts, there is, of course, one party, the public, that benefits, at least temporarily. The public loses in the long run if the result of such a conflict eliminates the weaker competitor, leaving only one or two who monopolize the field. Any gain

[3] This proof was tendered in this court on General's motion for stay of the injunction. It therefore was not before the trial court.

from temporarily lowered prices can then quickly be wiped out by a price increase that can be instituted by the sole winner. In the temporary injunction entered here, however, we think the right of the public to have the benefit of every legal price cut was inadvertently overlooked by the trial court. It appears without dispute that in nine counties out of the thirteen (these nine include some of the most populous) this product was selling at 17¢ net, and according to the contention of the appellant as to the service practice of its competitors (which the court found to be true as to plaintiff), possibly at the equivalent of 16¢. We think that the maintenance of a price of 20¢ less two cents for cash by court order is, on the record before us, unfair to the public whose interests it is the primary function of the antitrust acts to protect.

IV. Competitive Position of Appellee

The trial court expressly found that the plaintiff, as well as other competitors of appellant, made price cuts from time to time on an individual basis. The Court said:

> "It appears from the record here that in the struggle for business there has been, both on the part of plaintiff and defendant, price cutting in vying for the business of individual consumers, but there had not been until the action of the defendant here complained of, an overall price reduction to all consumers within the competitive area."

In its injunction requiring the defendant to reestablish its general price structure of 20¢ less two cents, the court made the further provision:

> "The injunction granted herein has no effect on customer sales that have been negotiated in the past, as a business practice, on a bid basis or a customer basis, nor shall it prevent such competition in the future."

Appellant contends that this order leaves the plaintiff below and the twelve other competitors free to sell at any price they see fit but prevents it from competing even on a customer to customer basis except to the extent that it can meet a price quoted to an individual customer by plaintiff or the other competitors.

On oral argument in this court appellee's counsel stated that appellee was doing nothing that was forbidden to the defendant. We think that since appellee is here contending for what it claims was a recognized status prior to June 1959, and in light of counsel's apparent acquiescence, whatever injunctive relief is granted to it should be equally binding on it.

The gist of the trial court's decision, as stated in its conclusion, is:

> "It appears from the evidence here that competitors of the defendant corporation were cutting their prices from time to time on a customer basis and, while defendant contends that its broad price cuts in the Athens and Gainesville areas were good faith reductions to meet the equally low price of a competitor, it seems clear that there is this situation: The competitors of General were struggling for business and cutting prices on a customer basis and defendant, General, becoming tired of the struggle customer by customer, declared war with a drastic price reduction over the area in which plaintiff competes."

If it is ultimately proved that in making this price reduction over the whole area the appellant did no more than meet the lowest price of competitors in major parts of the trade area, we think there is considerable doubt whether this would afford a proper basis for granting either injunction or damages. We do not, however, decide this on this appeal, for as we said in *Mansfield Hardwood Lumber Co. v. Johnson,* 5 Cir., 242 F. 2d 45, we regard as correct and controlling here what was said in *Mytinger & Casselberry, Inc. v. Newman,* 7 Cir., 215 F. 2d 382:

> "On appeal from a decree from a preliminary injunction the sole issue before the court was whether district court abused its discretion, and the merits and the controversy would be left open for further consideration and future determination."

Applying this principle to this appeal, in light of the contested legal issues and the showing that, if resolved in favor of the plaintiff, it might be seriously damaged by the loss of customers if it did not compete on a basis that would cause financial loss which would be difficult if not impossible to measure, we cannot say that the granting of a temporary injunction was beyond the court's power. So long as the plaintiff and defendant would be required to compete on an even basis the temporary injunction would not seriously injure the appellant if the competitive basis fixed in the injunction is made realistic as to the remaining competitors in the trade area.

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We conclude that if the trial court should see fit to modify the temporary injunction so as to prohibit both the defendant and the plaintiff from selling or offering to sell to any domestic customer, except under existing unexpired contracts, for less than 18¢ with a two cent discount for cash within 10 days, and to commercial customers, defined as the court defined them in its findings of fact, for less than 16¢ less two cents, sufficient protection would be afforded to both parties without depriving the public of the benefits of a somewhat lower price than that prescribed in the order appealed from.

In suggesting such an order we do not, any more than did the trial court, resolve any of the issues, either legal or factual. These will then properly be determined on a full trial of the case.

We hold that in respect of the price of 20¢ less two cents for prompt payment, and 18¢ less two cents, the record did not support the court's findings. Moreover, we think that as to prices of 18¢ less two cents, and 16¢ less two cents, which we here suggest, the record would not support a holding that such general price, even if later found to be improper, would work any irreparable damage to the plaintiff.

This court cannot fashion such injunctive order, for it is not certain that the plaintiff would desire one in such a modified form. Moreover, the trial court should consider the other terms of any order it may see fit to enter. It is therefore necessary that the present order be set aside in order that the trial court may have a free hand within the limits of what we have said in this opinion and the prayers of the moving party to enter such order as it may consider right.

The injunction appealed from is vacated and the case Remanded for further proceedings not inconsistent with this opinion. Costs of this appeal will be divided equally between the parties. Because of the seasonal nature of the business of both parties and the emergency of the appeal, it is Ordered that the mandate shall be issued forthwith.

[¶ 69,534] United States of America v. San Diego Grocers Association, Inc., et al.

In the United States District Court for the Southern District of California, Southern Division. No. 28475-Cr. Filed October 8, 1959.

Case No. 1451 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Corporations Dissolved Before or After Return of Indictment.—A California corporation indicted for a Sherman Act violation after dissolution, and another corporation indicted after taking steps towards dissolution were not entitled to a dismissal of the action. They were corporations existing under or authorized by the laws of a state within the meaning of Section 8 of the Sherman Act. The California statute provides that the existence of a dissolved corporation continues for the purpose of prosecuting or defending "actions." The word "actions" applies to both civil and criminal actions. Even assuming that it was the legislative intent that "actions" referred only to civil actions, that narrow interpretation could apply only to state actions, since a state could not immunize its corporations against federal criminal prosecution. Thus, regardless of how the state may construe it, that statutory provision sufficiently continued the existence of the corporations for the purposes of the Sherman Act.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.300.

For the plaintiff: James M. McGrath and Stanley E. Disney, Department of Justice, Antitrust Division, Los Angeles, Cal.

For the defendants: Hillyer, Crake & Irwin; McInnis, Focht & Fitzgerald; Luce, Forward, Kunzel & Scripps; Stanford & McDonough; and Gray, Cary, Ames & Frye, all of San Diego, Cal.; Alfred C. Ackerson and Johnson, Bates & Sheffield, both of Los Angeles, Cal.; Donahue, Richards & Sheffield, Oakland, Cal.; Pillsbury, Madison & Sutro, San Francisco, Cal.; and Powell & Martinson, Vista, California.

Opinion

[*Motions to Dismiss Indictment*]

JAMES M. CARTER, District Judge [*In full text*]: Motions to dismiss an indictment, filed on behalf of two defendants raise generally the question as to the effect of the dissolution of a corporation upon a subsequent criminal prosecution.

In September 1958 a federal grand jury sitting in this district commenced an investigation which culminated in an indictment on June 5, 1959, charging thirteen corporations, engaged in the retail sale of groceries, and a trade association with conspiring to restrain trade in violation of Section 1 of the Sherman Act (15 U. S. C. 1). Two of the defendants, both incorporated under the laws of the State of California, have filed motions to dismiss the indictment for reasons set out below.

[*Dissolution of Defendants*]

The motion of Will-Free Inc., is supported by an affidavit of its former president, Mr. Foster Willett. In February 1959, and while he was the sole owner and president of Will-Free Inc., the board of directors voted to dissolve. In March, Will-Free Inc., transferred its grocery assets to Food King, Inc., which Mr. Willett also owned. In payment for these assets, Food King gave to Will-Free a promissory note for $5700.00. Thereafter, Will-Free Inc., made a final distribution of its assets, consisting principally of the note, to Mr. Willett, its sole stockholder, and in May 1959 completed its formal dissolution under the laws of the State of California. The records show that a subpoena *duces tecum* was served on Will-Free Inc., in September 1958, and that Mr. Willett was a witness before the grand jury. Presumably he was aware before the dissolution of Will-Free Inc., of the investigation which resulted in the indictment.

The motion of Linferg Super Market, Inc., and its supporting affidavit recite that its assets were purchased in March 1959 by Mayfair Markets (also a defendant in this case), and that thereafter Linferg Super Market, Inc., filed a formal certificate of election to dissolve with the Secretary of State, as a step toward dissolving under the laws of the State of California. Linferg Super Market, Inc., was not dissolved on June 5, 1959, the date of the return of the indictment, and consequently was a corporation existing under the laws of the State of California on that date.

[*Effect of Dissolution*]

The precise question presented by these motions is whether a criminal prosecution for violation of the antitrust laws can be maintained against Will-Free Inc., which had dissolved before it was indicted, and against Linferg Super Market Inc., which had taken steps toward dissolving, but had not completed its dissolution at the time it was indicted. It seems clear that such prosecutions can be maintained.

[*"Existence" Under State Law*]

Section 1 of the Sherman Act provides penalties for any "person" violating its provisions, and Section 8 of the same act[1] defines a "person" as including "corporations . . . existing under or authorized by . . . the laws of any State . . .". This inquiry then turns on the question whether the movants are corporations "existing" under the laws of the State of California so far as Sections 1 and 8 of the Sherman Act are concerned.

The motion of Will-Free Inc., will be discussed first. If it has sufficient "existence" under the California law, despite its dissolution, to meet the requirements of Section 8 of the Sherman Act, Linferg Super Market, Inc., which is not dissolved, must surely possess such "existence".

[*Defense of "Actions"*]

The pertinent sections of the California law are found in Sections 5400 and 5401[2] of the Corporations Code of the State of

[1] Sherman Act, Section 8 [26 Stat. 210; 15 U. S. C. § 7.] The word "person," or "persons," wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, and laws of any State, or the laws of any foreign country.

[2] § 5400. *Continued existence of dissolved corporations: Purposes for continued existence.* A corporation which is dissolved by the expiration of its term of existence, by forfeiture of existence by order of court, or otherwise, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing

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California of 1947. Section 5400 provides in part that after its dissolution, a corporation "nevertheless continues to *exist* for the purpose of . . . prosecuting and defending *actions* by or against it . . .". [Emphasis supplied.]

Counsel for the defendants urge that this court should follow *United States v. Safeway Stores, Inc.* [1944-1945 Trade Cases ¶ 57,208], 140 F. 2d 834 (C. A. 10, 1944). In that case the Court of Appeals for the Tenth Circuit had to consider whether Section 399 of the Civil Code of California 1941, which is substantially the same as Sections 5400 and 5401 of the Corporations Code of 1947, continued the existence of three subsidiaries of Safeway Markets, Inc., which were dissolved under California law before being indicted for violation of Section 1 of the Sherman Act. The court reached the conclusion that Section 399, by specifying that the existence of a dissolved corporation continued for the purpose of defending "actions", referred only to civil and not to criminal actions. On this reasoning the court dismissed the indictment.[3]

This decision by the Court of Appeals for the Tenth Circuit is not binding on this court, which believes that the word "action" should not be construed to apply only to civil cases. No California case or statute is cited by the Court of Appeals to support its reasoning. To the contrary, the statutes of the State of California clearly established that the word "action" is used to include criminal as well as civil prosecutions.[4]

Compare *United States v. Auerbach et al.*, 68 F. Supp. 776, 780 (S. D. C. D. Calif. 1946), where the court states:

> "At common law, an equity case was referred to as a 'suit' in equity, and a law case was referred to as an 'action' at law."

[*State Construction*]

Assuming *arguendo*, that it was the intent of the legislators of the State of California in enacting Section 5400 to continue the existence of a corporation, after its dissolution, only for the purpose of prosecuting and defending civil actions, as is urged by defense counsel, this limitation would apply only with reference to preventing criminal prosecution under State law and would not preclude prosecutions under the Sherman Act. This identical question was discussed by the Court of Appeals for the Fifth Circuit, in *Alamo Fence Company of Houston v. United States*, 240 F. 2d 179 (C. A. 5, 1957), where the argument was made, that a Texas statute continued the existence of a dissolved corporation only for the purpose of civil action. The court in that case wrote at 183:

> ". . . We have no doubt that a state can no more continue the existence of one of its corporations and at the same time immunize it against federal criminal prosecution, than it could have created the corporation in the first instance with such immunity." [Citing for comparison *Northern Securities Co. v. United States*, 193 U. S. 197, 333 and *Barnes Coal Corp. v. Retail Coal Merchants Ass'n*, 4th Circuit, 128 F. 2d 645, 648.]

The recent case of *Melrose Distillers, Inc., et al. v. United States*, (1959) [1959 Trade Cases ¶ 69,335], 79 S. Ct. 763, appears to be controlling on this point. There the Supreme Court had to consider whether the laws of the States of Delaware and of Maryland continued the existence of corporations dissolved under these laws to such an extent as to permit the maintenance of an indict-

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business except so far as necessary for the winding up thereof.

§ 5401. *Abatement of actions.* No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for dissolution and winding up thereof.

[3] The major part of the reasoning of the court in the *Safeway* case seemed to have been based upon the analogy between the dissolution of a corporation and the death of a natural person which causes an abatement of actions against the natural person. (*United States v. Safeway Stores, Inc., supra*, at 836). In a case arising in this circuit, the Supreme Court pointed out: "The parallel has not been the subject of universal admiration . . . and is by no means exact . . .". (*Defense Supplies Corporation v. Lawrence Warehouse Co.*, (1949) 336 U. S. 631 at 634, 69 S. Ct. 762.

[4] California Code of Civil Procedure:

§ 22. [*"Action" defined.*] An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

§ 23. *Special proceeding defined.* Every other remedy is a special proceeding.

§ 24. *Division of actions.* Actions are of two kinds:

1. Civil; and
2. Criminal.

Penal Code of California, 1949:

§ 683. *Criminal action defined.* The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action.

ment charging a violation of Section 1 of the Sherman Act. With certain differences of language unimportant here, the statutes of each State provided "proceedings" could be continued against a corporation after its dissolution. The defendants there urged that in each instance "proceeding" was limited to civil actions, and the corporations could not be prosecuted under the Sherman Act. The Supreme Court stated at p. 765:

> "We have found no Maryland decisions interpreting these sections [the Maryland statutes]; but we are satisfied that the term 'proceeding', *no matter how the state court may construe it,* implies enough vitality to make the corporation an 'existing' enterprise for the purposes of Section 8, of the Sherman Act . . . *We conclude that irrespective of how the Delaware statute may be construed by the Delaware courts,* it sufficiently continued the existence of this corporation for the purpose of Section 8 of the Sherman Act." [Emphasis supplied]

As to corporate existence, generally "state law controls in determining what state law has created," *E. & J. Gallo Winery v. C. I. R.* (9 Cir. 1955) 227 F. 2d 699, 704-5, but if the laws of a State continue a corporation in existence for the purpose of defending "proceedings," regardless of how narrowly State courts may interpret this word, we are satisfied that the "existence" which is continued is sufficient to satisfy the requirements of Sections 1 and 8 of the Sherman Act.

[*Motions Denied*]

The motions of Will-Free Inc., and Linferg Super Market Inc., are denied.

[¶ 69,535] Federal Trade Commission v. Hunt Foods and Industries, Inc.

In the United States District Court for the Southern District of California, Central Division. No. 732-59-Y. Dated October 27, 1959.

Federal Trade Commission and Robinson-Patman Acts

Federal Trade Commission Enforcement and Procedure—Access to Documentary Evidence—Subpoena *Duces Tecum*—Scope and Validity—Relationship to Robinson-Patman Act.—In connection with an investigation into certain practices of a food producing company to determine whether such practices were violative of Section 5 of the Federal Trade Commission Act and Sections 2(a) and 2(d) of the Clayton Act, the court enforced a subpoena *duces tecum* for the production of certain documentary evidence on the grounds that (1) the subpoena would not be burdensome, since the Commission agreed to observe certain protective restraints, (2) the Commission had the power to precede their complaints by an investigation to determine whether there was "reason to believe" acts had been committed in violation of the law, and (3) the investigation was not a guise for an attempt to enforce Section 3 of the Robinson-Patman Act. The Commission may declare conduct to be an "unfair" practice or "method of competition" although that conduct might constitute sales at "unreasonably low prices" within the meaning of that section.

See Price Discrimination, Vol. 1, ¶ 3551; FTC Enforcement and Procedure, Vol. 2, ¶ 8741.55.

For the petitioner: Alan B. Hobbes and Carleton A. Harkrader, Washington, D. C., and Gary B. Lovell, Los Angeles, Cal.

For the respondent: Cushing, Cullinan, Duniway & Gorrill (by Ben C. Duniway, Vincent Cullinan and Eustace Cullinan), San Francisco, Cal., and Herbert S. Herlands, Fullerton, Cal.

Opinion

[*Enforcement of Subpoena*]

Leon R. Yankwich, District Judge [*In full text*]: The Federal Trade Commission,[1] petitioner herein, to be referred to as "The Commission," has been investigating certain practices in interstate commerce of the respondent, Hunt Foods and Industries, Inc., to be referred to as "Hunt," a California corporation with offices at Fullerton, Orange County, California, within this district, and

[1] 15 U. S. C. A., § 41.

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engaged in interstate commerce. The object of the investigation is to determine whether Hunt or its predecessors,

> "in connection with the offering for sale, sale and distribution of processed tomato products, by selling such products at unreasonably low prices with the purpose or intent of eliminating competition, have violated Section 5 of the Federal Trade Commission Act, or by selling such products to different customers at discriminatory prices and by affording customers payments or compensations for facilities or services rendered in connection with the sale of such products not afforded competing purchasers on proportionally equal terms, have violated Section 2(a) and 2(d) of the Clayton Act."

[*Subpoena Duces Tecum*]

In the course of its investigation and pursuant to the congressional authority of the Commission[2] it issued its subpoena *duces tecum*, directed to Hunt and signed by Sigurd Anderson, one of the Commissioners, on April 28, 1959, informing Hunt of the matter and scope of the investigation and directing Hunt to appear on June 16, 1959, at 10 o'clock A. M., at 1747 West Commonwealth Avenue, Fullerton, California, before George W. Elliott or Ralph C. Wilmot, Jr., Attorney-Examiners of the Federal Trade Commission, and produce certain documentary evidence in connection with the investigation described in the subpoena.

The subpoena specifically set forth the scope of the investigation as given above. The documents to be produced were described in certain specifications numbered one to four attached to the subpoena, which are reproduced in the margin.[3]

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[2] 15 U. S. C. A., § 49.

[3] "SPECIFICATIONS

"1. (a) All records and documents (including but not limited to customer purchase orders, contracts of sale, sales, shipping and pre-billing invoices, customer claims, credit memoranda, cancelled checks or vouchers, memorandum billings, cash disbursements journals and cash receipts journals) pertaining to each transaction in which there has been a payment, allowance, credit or the giving of something of value (by way of cooperative advertising, promotional assistance, sales or shipping stimulation, settlement of customer claims or otherwise) to customers or customers of customers in connection with the sale and distribution by the company, its predecessors and subsidiaries of all brands of processed tomato products from July 1, 1956, to the return date of this subpoena within the following company sales districts:

HUNT	SNIDER
2	10
3	31
5	
27	
13	
15	
35	
36	

"(b) Like records and documents for the same period of time with respect to sales made in the territories served by the brokers listed below, or their predecessors or successors:

HUNT	SNIDER
Herbert K. Astman Co.	Bjorkquist Brokerage Co.
Davis Brokerage Co.	Paul Brierre's Sons
Fuller Gay Company	C. R. Caldwell Sons
Green Brothers, Inc.	Chaimson & Robinson
Marks & Georgens, Inc.	Lindgren Brokerage Co.
Miller-Hall-Hopkins	Mattlage Sales, Inc.
Norton-Chadwick Co.	Pohn & Brinkman
C. C. Richardson Co.	Quesenberry & Catlin Co.
Howard Schoenberg	Howard Schoenberg
Seavey & Florsheim, Minneapolis	Taft and Co., Inc.
Paul Sayres Co., Inc.	Tatum Brokerage Co.
	Griffith P. Terry Co.
	W. G. Warnock Co.
	Lee Wilson Co.

"(c) Like records and documents for the same period of time with respect to sales made anywhere within the United States to the customers listed below:

American Stores	Grand Union Stores
The Great A & P Co.	The Kroger Company
The Colonial Stores	National Tea Company
Food Fair Stores	Red Owl Stores
Giant Food Stores	The Winn Dixie Stores

"2. Alternatively in lieu of specification 1, verified schedules showing the amount, nature and character of each such payment, allowance or credit, identifying the transaction and the customer or customer's customer involved, and showing in each instance the product, quantity, brand, size, unit, billing price and total amount billed.

"3. All literature, forms, schedules, bulletins, and informative material used by the company, its predecessors and subsidiaries in any way to apprize salesmen, sales representatives, brokers, customers, and the trade as to the nature, details, and mechanics of regular and special cooperative advertising, promotional assistance, or sales stimulation programs, schemes, plans, or offers related in any way to the distribution or sale of processed tomato products used or offered by the company, its predecessors and subsidiaries within the United States at any time during the period July 1, 1956, to the date of this subpoena.

"4. Copies of all advertising contracts, expense vouchers and other records disclosing all expenditures for advertising, direct or indirect, by the company, its predecessors and subsid-

The subpoena was served by registered mail and was received by Hunt on May 5, 1959. On June 16, 1959, George W. Elliott, Attorney-Examiner of the Commission, convened a hearing for the purpose of receiving the testimony and documentary evidence called for by the subpoena. A reporter's transcript of the brief proceedings shows that, after the Examiner opened the proceedings, Mr. Joseph R. Harmon, the secretary of Hunt, was introduced, as was also Herbert S. Herlands, attorney for Hunt.

[*Failure to Comply*]

Mr. Harmon, in answer to a question by the Examiner, stated that he was authorized by Hunt to respond to the requests contained in the subpoena. The following colloquy then occurred:

"MR. ELLIOTT: Mr. Harmon, what books, papers or documents or other material are you producing at this time and place in response to such request?

"MR. HARMON: On behalf of Hunt Foods, and Industry, Inc., you are hereby advised that that company upon advice of counsel, *declines to comply with the subpoena issued by the Federal Trade Commission under date of April 28, 1959, and addressed to Hunt Foods, an Industry, Inc.*

"MR. ELLIOTT: Mr. Harmon, Have you anything further to say or produce in response to the subpoena?

"MR. HARMON: *Nothing further.*" (Italics added.)

The Examiner then adjourned the proceedings. Later the Commission instituted this action to enforce the subpoena[4] by the filing, in this Court, of a petition, the substance of which has been summarized above.

[*Objections to Subpoena*]

Although at the time of the hearing Hunt did not raise any specific objections, in their answer they challenge the power of the Commission to issue the subpoena, attack the constitutionality of Section 3 of the Robinson-Patman Act,[5] which they claim the Commission is seeking to enforce, and allege invalidity of the subpoena and of the action of the Commission on other grounds to be referred to hereafter.

A lengthy affidavit also sets forth why compliance with the subpoena would impose an unnecessary burden upon Hunt.

I

The Scope of the Subpoena

We dispose of the question of burdensomeness of the subpoena by adverting to the fact that, at the hearing of the matter, the Commission indicated that the scope of the subpoena is not so broad as Hunt thought. It was then suggested by the Court that the Commission file a statement with the Court indicating the limited scope of the inquiry they proposed to conduct so as to allay, as it were, Hunt's fears. Such a statement was filed and counsel for the Commission state in the final memorandum filed in the case that the Commission

"is willing to accept (it) as a binding limitation on it."

In substance, they agree to return to the place where the records are kept during ordinary business hours, limit the number of Commission representatives to three and agree that the Commission representatives will perform the physical work of removing the documents from the files and making copies thereof or notes about them. They will "sample" the documents specified rather than examine all. Hunt will be permitted to observe the Commission representatives at every stage, requiring their only assistance in locating the files containing the specific documents. Photostatic reproductions will be made at the Commission's expense. The stipulation also limits to 760 man hours the time which the Commission representatives will remain at the respondent's place of business.

In brief, the Commission, by this method, gives assurance to the Court that it will observe the protective restraints which, at times, are imposed by courts in the conduct of depositions,[6] interrogatories,[7] and inspection of documents.[8] This being so we need not consider the abstract question raised by Hunt whether the Commission's

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iaries from Dec. 1, 1955 to the return date of this subpoena, together with all other records or documents (including but not limited to a copy of each printed advertisement and each radio and television script) disclosing the exact nature of each advertisement and the particular product or products advertised in each instance."

[4] 15 U. S. C. A., § 49.
[5] 15 U. S. C. A., § 13(a).
[6] Rules 26(b), 30(b), Federal Rules of Civil Procedure.
[7] Rule 33, Federal Rules of Civil Procedure.
[8] Rule 34, Federal Rules of Civil Procedure.

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statement *is, or is not,* a modification of the subpoena. For, concededly, it is an assurance given to the Court by counsel for the Commission, who instituted the action on its behalf, that the restraint and limitation expressed in the statement will be observed in the investigation.

As the Court retains jurisdiction of this matter and will be available to determine any dispute as to any order of compliance to be issued, Hunt *will be protected* against any oppressive or illegal use of the subpoena power, should any be attempted.

II

The Validity of the Subpoena

In truth, it is quite evident that Hunt believes that the entire investigatory proceeding of the Commission lacks validity and would have us so limit this power of inquiry as to do violence to the letter and spirit of the Federal Trade Commission Act under which this action is instituted and the decisions which have interpreted it. At this late date there can be no serious question as to the power of the Federal Trade Commission (and other regulatory commissions) to *precede their complaints* by an investigation to determine whether the facts exist warranting the issuance of a complaint. Indeed, the public is protected when a complaint is preceded by an investigation aimed to determine whether there is "reason to believe" that acts have been committed in violation of law, and, if so, whether they are of a character which is within the jurisdiction of a particular commission. And the courts have uniformly sustained the reasonable exercise of such investigatory powers.[9]

The reason is well stated in one of the cases involving the Federal Trade Commission:

> "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so."[10]

Such an investigation does not involve any question or unreasonable search and seizure, as is argued in the present case. When a similar contention was made in a National Labor Relations case, the answer given by the Supreme Court through Mr. Justice Rutledge was emphatic:

> *"What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions,* applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and in exact compliance with authority granted by Congress."[11] (Italics added.)

In the case before us the statute grants to the Commission the power to prevent unfair methods of competition and to prohibit them by order to desist.[12] In pursuit of these objectives, full investigatory powers are given as to persons engaged in commerce.[13]

III

Constitutionality of the Robinson-Patman Act

There is no merit to the contention that under the guise of investigating alleged violation of the antitrust laws an attempt is being made by the Commission to enforce

[9] *United States v. Morton Salt Co.*, 1950 [1950-1951 TRADE CASES ¶ 62,561], 338 U. S. 632, 642-643; *Oklahoma Press Publishing Co. v. Walling*, 1946, 327 U. S. 186, 208-214; *Automatic Canteen Company of America v. Federal Trade Commission*, 1953 [1953 TRADE CASES ¶ 67,503], 346 U. S. 61, 77-79. See, *Bowles v. Abendroth*, 9 Cir., 1945, 151 F. 2d 407; *Detweiler Bros., Inc. v. Walling*, 9 Cir., 1946, 157 F. 2d 841, 842-843; *Durkin v. Fisher*, 7 Cir., 1953, 204 F. 2d 930, 932; *Woerth v. United States*, 8 Cir., 1956, 231 F. 2d 822, 824-825; *Menzies v. Federal Trade Commission*, 4 Cir., 1957 [1957 TRADE CASES ¶ 68,648], 242 F. 2d 81, 82-84; *Federal Trade Commission v. Waltham Watch Co.*, D. C. N. Y., 1959 [1959 TRADE CASES ¶ 69,242], 169 F. Supp. 614, 616-619. Indeed, if we denied

"its broad power of investigation and subpoena prior to the filing of a complaint," (*Automatic Canteen Company of America v. Federal Trade Commission, supra*, p. 79)

the Federal Trade Commission's adjudicative powers would become illusory, as Judge Knox stated clearly in an early case. See, *Federal Trade Commission v. Smith*, D. C. N. Y., 1929, 34 F. 2d 323, 325.

[10] *United States v. Morton Salt Co., supra* Note 9, p. 642.

[11] *Oklahoma Press Publishing Co. v. Walling, supra* Note 9, p. 196. See, *Menzies v. Federal Trade Commission, supra* Note 9, p. 84; *Federal Trade Commission v. Tuttle*, 2 Cir., 1957 [1957 TRADE CASES ¶ 68,669], 244 F. 2d 605, 614-615.

[12] 15 U. S. C. A., § 45(a) and (b). See, *Federal Trade Commission v. Cement Institute*, 1948, [1948-1949 TRADE CASES ¶ 62,237], 333 U. S. 683, 689-693; *Federal Trade Commission v. Reed*, 7 Cir., 1957 [1957 TRADE CASES ¶ 68,676], 243 F. 2d 308, 309; *Federal Trade Commission v. Tuttle, supra* Note 11, pp. 610-616.

[13] 15 U. S. C. A., § 46(a) and (b).

Section 3 of the Robinson-Patman Act.[14] I am aware of the limitations which the Supreme Court last year placed upon this Act.[15] But its decision merely limited the scope of the Act by denying the right to institute, under it, *a private treble damage action.* It *did not* intend to limit the scope of the Act as to its public enforcement or that of Section 3 as a regulatory penal statute. Indeed, the Court, while not passing on the constitutionality of the provision of the Act relating to violations of the "unreasonably low price" provision of Section 3, expressed no doubts about the validity of the regulatory and penal phases of that provision.[16] That case and a subsequent decision of the Supreme Court condemned price discrimination against one person as violative by the antitrust law.[17] Other decisions have consistently condemned price fixing as unreasonable *per se.*[18]

So it is reasonable to assume that the type of price discrimination which the Commission was investigating in the case before us involved what *might,* upon proof, develop to be an unfair method of competition, which it is the explicit function of the Commission to *investigate, prevent and prohibit.*[19]

The fact that these practices may also be covered by the "unreasonably low price" provision of Section 3 of the Robinson-Patman Act presents no difficulty. For the cases just cited reenforce me in the conviction expressed years ago that that provision is not unconstitutional for vagueness.[20] And the Commission may declare conduct to be an "unfair" practice or "method of competition" and prohibit it although such conduct may also constitute a violation of the Sherman or Clayton Antitrust Act.[21]

This being so, the subpoena here involved must be held to have been issued in compliance with the investigatory powers of the Commission in order to determine whether a complaint should issue.[22] And the subpoena

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[14] 15 U. S. C. A., § 13(a).

[15] *Nashville Milk Co. v. Carnation Co.,* 1958 [1958 TRADE CASES ¶ 68,915], 355 U. S. 373.

[16] In fact, the contrary may be inferred from the language of the court. See, *Nashville Milk Co. v. Carnation Co., supra* Note 15, pp. 378-380.

[17] *Klor's v. Broadway-Hale Stores,* 1959 [1959 TRADE CASES ¶ 69,316], 359 U. S. 207, 212-213. See, *Federal Trade Commission v. Beech-Nut Packing Company,* 1922, 257 U. S. 441, 454.

"The purpose of the antitrust laws is to protect the interstate market from illegal restraints. *If such restraints are applied to one person in the interstate market, then free competition is hurt and damaged."* (*Richfield Oil Corporation v. Karseal Corporation,* 9 Cir. [1959 TRADE CASES ¶ 69,486], No. 15,514, decided October 13, 1959, p. 29 slip sheet text) (Italics added)

[18] *United States v. Socony-Vacuum Oil Co., Inc.,* 1940 [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 210; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 1951 [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211, 214-215; *Northern Pacific Railway Co. v. United States,* 1958 [1958 TRADE CASES ¶ 68,961], 356 U. S. 1, 4-5. This has been the traditional attitude of our courts. See the writer's article, Competition, Real or Soft?, 1953, 14 F. R. D., 199, 207-209.

[19] 15 U. S. C. A., § 45. Price discrimination to injure a competitor is a violation of the antitrust laws. *Moore v. Mead Service Co.,* 10 Cir., 1951 [1950-1951 TRADE CASES ¶ 62,876], 190 F. 2d 540, 541-542. See *Moore v. Mead's Fine Bread Co.,* 1954 [1954 TRADE CASES ¶ 67,906], 348 U. S. 115, 118-120.

Section 5 of the Federal Trade Commission Act (15 U. S. C. A. § 45) "empowers and directs" the Commission to prevent the use of any "unfair method of competition or unfair or deceptive act or practice" in commerce. Selling at unreasonably low prices with the intent of eliminating competition is certainly an unfair method of competition. See, *Moore v. Mead's Fine Bread Co., supra.* The Commission should seek to eliminate such practice at its inception. For, as said in *Federal Trade Commission v. Raladam Company,* 1942 [1940-1943 TRADE CASES ¶ 56,203], 316 U. S. 149, 152:

"One of the objects of the Act creating the Federal Trade Commission was *to prevent potential injury by stopping unfair methods of competition in their incipiency."* (Italics added)

Section 2(a) of the Clayton Act, as modified by the Robinson-Patman Act, (15 U. S. C. A., § 13(a)) declares that it is unlawful, under certain conditions, for a person engaged in commerce to "discriminate in price between different purchasers of commodities of like grade and quality."

Section 2(d) of the Clayton Act, as modified by the Robinson-Patman Act, (15 U. S. C. A., § 13(d)) requires those who grant to some of their customers allowances in connection with the sale of commodities in commerce to make such allowances "available on proportionally equal terms to all other customers."

[20] *F. & A. Ice Cream Co. v. Arden Farms Co.,* D. C. Cal., 1951 [1950-1951 TRADE CASES ¶ 62,848], 98 F. Supp. 180, 188-190. See, *Atlas Building Products Co. v. Diamond Block & Gravel Co.,* 10 Cir., 1959 [1959 TRADE CASES ¶ 69,448], 269 F. 2d 950, 955.

[21] *Federal Trade Commission v. Cement Institute, supra* Note 12, pp. 690-693; *Times-Picayune Publishing Co. v. United States,* 1953 [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, 609.

[22] 15 U. S. C. A., § 49. See, *Fashion Originators' Guild of America v. Federal Trade Commission,* 1941 [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457, 463-466; *Federal Trade Commission v. Cement Institute, supra* Note 12.

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was properly made returnable before an Examiner.[23]

Summary and Conclusion

What precedes and the added comments in the footnotes are sufficient answer to the contentions made by Hunt against the legality of the Commission's action. A more detailed discussion would merely be an elaboration of what is herein expressed, or no more than a repetition of the reasoning of the cases cited in the footnotes answering contentions similar to those made here, based, *in many instances,* on cases also cited here by Hunt.

Most of the cases pointing the other way are early cases in which the courts, faced with a newly created commission empowered to exercise great controls in order to keep our economy free and competitive, sought to restrict it. Whatever validity these cases had is attenuated by later decisions. Trial courts must accept this situation, *i. e.,* we must be guided not by some expression of higher courts *in an old case,* but by the *latest* expressions in the field, whether there be ideally logical consistency or not between the two lines of thought. So we state the following conclusions on the objections made by Hunt:

The Commission has authority to issue the subpoena here involved under its extensive powers to investigate, prevent and prohibit unfair "practices" or "methods of competition" in commerce. The prohibition of discriminatory practices through sales at "unreasonably low prices" to favored customers is within these powers. The concept that unfair competition may arise from such discriminatory practices is a certain and valid standard.

The subpoena was properly made returnable before a hearing officer and was, under the statute and rules of practice of the Commission, properly served by mail upon one of Hunt's officers.[24]

And finally, in view of the nature of the investigation, the scope of the subpoena is not too broad or burdensome.[25]

On the whole subject, I agree with the conclusion reached by Judge Leibell that:

> "It was clearly the purpose of the Congress that the Commission should have adequate subpoena power to perform its duties." [26]

[Enforcement]

It follows that the petitioner is entitled to an Order enforcing the subpoena as prayed for in the Complaint. Formal findings and order fixing a new time for appearance to be prepared by counsel for the Government under Local Rule 7.

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[23] *Federal Trade Commission v. Hallmark, Inc.,* 7 Cir., 1959 [1959 TRADE CASES ¶ 69,319], 265 F. 2d 433, 437-438; *Federal Trade Commission v. Scientific Living, Inc.,* D. C. Pa., 1957 [1957 TRADE CASES ¶ 68,673], 150 F. Supp. 495.

[24] 15 U. S. C. A., § 45(f); Rule § 1.35, 16 Code of Federal Regulations, 1959 Pocket Part, p. 11; Rule § 3.4(a)(i), Ibid, p. 23. *Menzies v. Federal Trade Commission, supra* Note 9, pp. 83-84.

[25] See, *United States v. American Locomotive Co.,* D. C. Ind., 1946, 6 F. R. D., 35, 36-37; *Kainz v. Anheuser-Busch, Inc.,* D. C. Ill., 1954 [1954 TRADE CASES ¶ 67,708], 15 F. R. D. 242, 247-249, *(a private treble damage antitrust case in which extensive interrogatories requiring search of files were allowed).*

The scope of the inquiry here is limited, both as to the subject matter and as to the persons dealt with. So are the documents relating to them sought by the subpoena. (See, *Federal Trade Commission v. Hallmark, Inc., supra* Note 22, p. 439.) They do not cover the broad range found not "relevant" in *Federal Trade Commission v. American Tobacco Co.,* 1924, 264 U. S. 298, 306-307, or the demand for which Judge McGohey found "unreasonable" in *Re Grand Jury Investigation (General Motors Corp.)* D. C. N. Y., 1959 [1959 TRADE CASES ¶ 69,409], 174 F. Supp. 393. Nor are they so "unrelated" to the proposed inquiry as I found the documents sought in *Martin v. Chandis Securities Co.,* D. C. Cal., 1940, 33 F. Supp. 478.

[26] *Federal Trade Commission v. Tuttle, supra* Note 11, p. 614. The legislative history confirms the view that the bills before the Congress creating the Commission intended to extend the subpoena power to any "investigation which may be undertaken" (House Report 533) in order that the Commission should have "extensive power of inquiry." (Senate Report 597, as both are quoted in *Federal Trade Commission v. Tuttle, supra,* pp. 614-615.)

[¶ 69,536] **United States v. Eli Lilly and Company, et al.**

In the United States District Court for the District of New Jersey. CR. 173-58. Dated November 30, 1959.

Case No. 1387 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Price Fixing—Conspiracy to Fix Prices in Sale of Polio Vaccine to Public Authorities—Uniform Prices as Proof of Conspiracy—"Most Favored Customer" Clause in Government Purchase Contracts as Price "Floor."—Five producers of polio vaccine, in a criminal antitrust action charging them with conspiring to fix prices and eliminate competition in the sale of polio vaccine to domestic public authorities, were acquitted on the ground that the Government's proof furnished no basis for an inference of an agreement or combination among the producers. The Government's case, in large measure, consisted of the testimony of the producers' officers and employees. Those witnesses testified, however, that their pricing practices were based on independent business considerations and denied any collusion or agreement with any other producers. Further, the producers' claims of innocence were apparently buttressed by the presence of a "most favored customer" clause in Government purchase contracts. It was pointed out in the testimony that, by the operation of that clause, a "floor" was placed on domestic prices, since a price reduction would have resulted in an "across-the-board" cut to not only the Federal Government but, through the operation of the Polio Assistance Act and the "little most favored customer" clauses contained in some state contracts, to the states as well. Furthermore, with the exception of one of the producers, in the fall of 1956, all of them were, at all times, able to sell all the vaccine they could produce. Under such circumstances, they could not be expected to lower their prices. The contention that their refusal to reduce their prices was the result of an agreement was only "suspicion and conjecture."

The Government also contended that the producers, while maintaining uniform prices in the United States, charged lower and "disparate" prices in the foreign market. The court found, however, that any differences in the two markets arose by virtue of the "most favored customer" clause in the Government's contracts. That clause did not apply to sales made to foreign public authorities; therefore, price reductions in the foreign market did not require similar reductions to domestic public authorities. After the expiration of that clause, and its disappearance as a practical marketing influence, disparate bidding, previously seen only in the foreign market, appeared in the domestic market.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.360, 2005.410, 2011.065, 2011.282.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Conspiracy to Fix Prices of Polio Vaccine—Trial—Evidence—Proof Beyond a Reasonable Doubt—"Reasonable Hypothesis of Innocence" as Ground for Acquittal.—A Federal District Court, in a criminal antitrust action charging five producers of polio vaccine with conspiring to fix prices, granted the defendants' motions for a verdict of acquittal on the ground that the Government had failed to meet the test imposed upon it in "circumstantial evidence" cases, namely, the elimination of every "reasonable hypothesis of innocence." In such cases, unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. Here, the Government's endeavor to prove the guilt of the defendants out of the mouths of their own officers and employees resulted in testimony which, if believed, tended to establish the innocence of the defendants. There was testimony to the effect that the defendants' pricing practices were based upon independent business considerations, that a "floor" had been placed upon domestic prices by the presence of "most favored customer" clauses in the Government's own purchase contracts, and that the demand for polio vaccine had kept up with the supply, thereby justifying the producers' refusal to lower their prices. Thus, the Government's contention that the producers' actions were not independent, but were contrived by prior agreements

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among them, was only "suspicion and conjecture." There was "no bridge over the gap from fact to inference."

See Department of Justice Enforcement and Procedure, Vol 2, ¶ 8029.500, 8029.675.

[*Price Fixing Conspiracy Charged—Polio Vaccine*]

The Court [FORMAN, District Judge, *in full text*]: I take it that we are all here, and I will proceed to rule upon the pending motions.

They have been made under Federal Criminal Procedure Rule 29 to strike the evidence presented by the Government in relation to bids and quotations in foreign markets, and on behalf of all defendants for judgment of acquittal of them on Counts 1 and 2 of the indictment on the ground that the evidence presented by the Government is insufficient to sustain a conviction of the offenses charged, and under Count 2 for the additional reason that the Government has failed to prove that the District of New Jersey is a proper venue for trial of the offenses charged in the indictment.

It is unnecessary to dilate upon the well known history surrounding the now-famous discovery by Dr. Jonas Salk of poliomyelitis vaccine. It is sufficient for the purpose here to say that the National Foundation for Infantile Paralysis supported his discovery in March of 1953 of a vaccine to immunize against and prevent the disease, and set about the task of conducting tremendous numbers of trials to ascertain the safety and efficacy of the vaccine. Under its auspices, manufacturers of biologicals were called together to undertake production of the so-called Salk polio vaccine.

Of the eleven companies invited, the defendants herein, Eli Lilly and Company, Allied Laboratories, Inc., through its Pitman-Moore Division, which will be referred to herein as Pitman-Moore, American Home Products Corporation, with its Wyeth Division, herein referred to as Wyeth, Merck & Company, Inc., with its Sharp & Dohme Division, herein referred to as Merck Sharp & Dohme or Sharp & Dohme, and Parke, Davis & Company, evinced their interest and agreed to engage in the manufacture. A sixth firm, Cutter Laboratories, also committed itself. Later on, during the course of its manufacture of the vaccine, difficulties developed which caused Cutter to terminate its production.

The early stages were exceedingly experimental and, in fact, were designed to furnish the vaccine for the enormous number of field trials to ascertain the effectiveness of the vaccine. Even before these tests were terminated, the Foundation determined to have on hand a stockpile of vaccine in case the vaccine was adjudged safe for use.

The five defendants together with the Cutter Company engaged in contracts with the Foundation for the purpose of producing such a quantity of vaccine and the contracts which each of them entered into with the Foundation are dated in July and August of 1954 and are Exhibits G-22 to 26 inclusive.

Meanwhile, Dr. Francis, designated to make the ultimate test of the vaccine, reported favorably April 12, 1955. In April and May of 1955, the Health, Education and Welfare Department of the Government, hereinafter referred to as HEW, called upon each manufacturer to attend in Washington and each manufacturer agreed to go along with a pattern, a voluntary allocation of the manufactured vaccine through the Foundation for commercial purposes and to governmental health agencies.

[*Polio Assistance Act*]

On August 12, 1955, the Polio Assistance Act was passed and by its terms the Surgeon General was empowered to allocate to the states and territories vaccine to be paid for out of appropriations by the Federal Government, and provision was also made for the states to purchase polio vaccine directly and to be reimbursed by the Federal Government. The original act called for an appropriation of $30 million. It expired February 26, 1956, but it was extended to June 30, 1957 and a further appropriation of $30 million was provided. The only sources of supply of the vaccine were the five companies herein named as defendants, and the Cutter Company, until its career as a supplier came to an end.

Each company sold its vaccine through its individual sales and distribution system, the details of which in each instance will be more fully treated at a later juncture.

Up to the enactment of the Polio Assistance law, each company sold its vaccine pursuant to the voluntary allocation plan, supplying the National Foundation until its commitment with it was fulfilled.

After the passage of the national Polio Assistance Act, each company now licensed to manufacture and sell the vaccine submitted bids to agencies of the national government and to the health agencies of the states and subdivisions.

Pursuant to the law the HEW allocated vaccine or funds for its purchase to the states on a system designed to achieve equitable distribution.

[*Alleged Agreements to Fix Prices*]

The Government's charge in this case is that in bidding to public agencies for the first six months in 1955 through December 31, 1957, the defendants and others engaged in unlawful conspiracy, entered into on or after January 1, 1954, in restraint of interstate trade and commerce among the several states in the sale of polio vaccine in violation of the Sherman Antitrust law, 15 U. S. C. 1, as in Count 1 of the indictment. The combination and conspiracy was alleged to have consisted of continuing agreements, understandings, plan and concert of action among the defendants and others, the substantial terms of which have been that they would (A) submit uniform prices and quotations for sales of polio vaccine to public agencies (B) to adopt uniform and non-competitive terms and conditions for such sales and (C) to adopt uniform and non-competitive methods for pricing of polio vaccine on sales to public authorities.

In Count 2 of the indictment, Section 3 of the Sherman Antitrust law was alleged to have been violated in that the commerce involved ran to the territories and the District of Columbia.

[*Inference of Illegal Agreement—Circumstances*]

The Government submitted that the circumstances from which the illegal agreement may be inferred are eleven in number, and I will take them up in the order in which they have been generally argued by counsel in discussing the motions before me.

(A) *Uniformity of Price and Methods of Pricing for Sale to Public Authority.*

Tabulations which were offered by the Government were intended to show price uniformity in sales made by the five defendants of polio vaccine to public authority throughout the period of the indictment, G-112 to G-116 inclusive referred to as the Blue Books. The tabulations reflect five periods of pricing.

It should be understood that there developed packaging of this vaccine in vials of 3 cc's, in vials of 1 cc, three such vials to the package, and in vials containing 9 cc's.

The periods into which the pricing in the Blue Books fell are as follows:

From April 12, 1955, through February 5, 1956, during which the price for polio vaccine was 7.12-7.13 per 9 cc vial.

From February 6, 1956 through May 14, 1956, $6.33-6.34.

From May 15, 1956 through April 17, 1957, 5.70.

From April 18, 1957 through September 30, 1957, 5.13.

From October 1st, 1957 through December 31st, 1957, 5.13 remained the price, with certain exceptions, apparently on an *ad hoc* basis.

The last cut to public authority generally was one by Pitman-Moore in December 1957 to $4.78. Transcript 3018.

The Government urged that its evidence proved that the price uniformity was not inevitable and did not result from the defendants' independent decisions to follow each others' prices, but could only have resulted from agreement among the defendants to adhere to uniform means and methods of pricing in selling polio vaccine to public authority.

The use of the 9 cc vial size was brought out by the substantial demand of the customers who were almost universally for it. Transcript 909. Mr. White, Transcript 624. Mr. Hovey, Transcript 2714. Mr. Greeve of HEW, Transcript 2893. Mr. Jewett's difficulty with the 3 cc vial: Wyeth tried to market its three 1 cc package and quit it, and Pitman-Moore tried a higher price for the 3 cc package and found it unsuccessful. Transcript 1422-5.

No defendant was shown to anticipate the large part the Government would play in the purchase of vaccine, although all had

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notions that boards of health of cities, counties and states would be looked to for some activity. Early thought on this ranged from 5 to 10 per cent on the part of Lilly to an outside of 20 per cent. Wyeth expected a small public market according to G-68 of April 19, 1955. To be sure, when initial prices were instituted, no one could divine that Congress would in the following August implement its assistance with an appropriation of $30 million.

Merck Sharp & Dohme claims to be affected time-wise differently than the other defendants named in the indictment, and this subject will be treated here, perhaps out of regular order. The indictment and bill of particulars allege that the defendants entered the conspiracy not later than July 1st, 1955. All the defendants had set their prices by April 20, 1955 and had quoted to public authority uniformly by July 1st, 1955 except Merck Sharp & Dohme, the prices of which were not set until January 17, 1956.

On May 23rd and 24th, 1955, all the defendants except Merck Sharp & Dohme set their prices for HEW contracts under voluntary allocation. Lilly, Transcript 1863; Pitman-Moore, Transcript 1259; Wyeth, Transcript 2913; and Parke, Davis, Transcript 2555.

Mr. Kuryloski, representing Merck Sharp & Dohme, could not submit a price at that time. In December of 1955 and January of 1956, Mr. Greeve of HEW held meetings with Merck Sharp & Dohme's representatives and advised them on the marketing procedures of other defendants. Minutes of meetings are Merck Sharp & Dohme Exhibits 27 and 28.

The Government's theory for holding Merck Sharp & Dohme as a defendant is predicated upon two documents said by the Government to implicate Merck Sharp & Dohme, which will be mentioned later.

(B) *Advance Knowledge of Initial Price.*

Lilly was by far the most successful of the manufacturers and its organization, stimulated by public curiosity concerning the new preventive of the dread poliomyelitis, even before the rendition of the Francis Report on April 12, 1955, was understandably anxious to give information to its customers. They wanted to know two things: When would they be able to get the vaccine and what would be its price. These subjects were the almost constant concern of Mr. Beesley, president of Lilly, and Mr. Teel, executive vice-president, during the latter part of 1954 and into 1955.

In December of '54 Mr. Teel was talking about prices of $3.60 for 3 cc's, $1 per cc, $9 for 9 cc's, with a long list price of $15 less 40 per cent, Transcript 1871-1876. These prices were talked about, and as early as October of 1954 Lilly had told its distributor in Spain that the price would be not more than $3.60 per 3 cc, less 15 and 7 per cent, Lilly Exhibit 8. This information was hedged with the warning that the price might change without previous notice, but was being furnished ostensibly to lay the foundation for the registration of an import license into Spain.

On February 15, 1955, Mr. Teel wrote to Mr. Beesley that he had had an opportunity to discuss the proposed pricing of polio vaccine with Mr. J. K. Lilly, who had approved the following prices as mentioned in G-32.

G-32 is dated February 15, 1955 and is as follows:

> "Mr. E. N. Beesley, cc—Mr. J. K. Lilly.
>
> "Yesterday I had an opportunity to discuss the proposed pricing of polio vaccine with Mr. J. K. Lilly, who has approved the following prices: Single package, one immunization, Net trade $3.60. Multiple package, three immunizations, Net trade $9.00.
>
> "It is noted that because of the public interest in this vaccine and the pressures that will be exerted on boards of health to furnish vaccine in certain cases, we may anticipate that a substantial percentage of sales will be made through this medium and that it will therefore be necessary to establish a special price to boards of health which is in line with custom in the trade.
>
> "I understand that the Foundation has just submitted a proposal in regard to delivery of the vaccine under contract and that there are several other questions that must be settled before we can reach a final conclusion as to how the product will be announced to the trade. It is for this reason that I believe it is a bit premature to make the announcement of the prices referred to above. However, once the production questions are answered, I think that it might be advisable for us to start taking advance orders during the first ten days of March."
>
> Signed "Forrest Teel."

On March 3, 1955 Lilly sent its letter No. 1 "Polio Vaccine Marketing Plan" to its domestic salesmen, Government Exhibit

65 in evidence. This exhibit is addressed to Lilly salesmen, domestic. It is entitled "Polio Vaccine Marketing Plan, letter No. 1." It appears since it is a basic document in the case that it will be well to read it in full.

"General Considerations. A. It is impossible at this time to estimate the release for shipments of polio vaccine.

"B. Government license must be granted before the commercial vaccine may be shipped by any manufacturer.

"C. The Francis Report indicating the degree of vaccine effectiveness in the 1954 trial is expected in April.

"D. Eli Lilly and Company will sponsor jointly with the Foundation a closed-circuit television program, which will feature men prominent in the field of immunology, and others who have co-operated in the development of the vaccine. You will receive additional information on this subject at an early date.

"E. The vaccine, when licensed by N.I.H., '—the National Institute of Health—' will carry a short dating—perhaps six months.

"F. For some relatively short period it will be necessary to allocate the vaccine in order to insure the widest possible use.

"G. It is understood that no firm sales or deliveries may be made until after the vaccine is licensed by the National Institutes of Health.

"Premarketing Sale of Vaccine.

"You will be informed very soon when to start taking provisional orders for the vaccine from physicians and druggists. Since it will not be possible to ship the vaccine prior to government licensure, it will be necessary for us to forego the customary practice of 'filling the pipeline' before announcement.

"Until we have a clearer picture as to the amount of vaccine that will be available, it would be hazardous to speculate as to quantities that will be available.

"It follows that at that time no guarantee should be made to anyone. To do so would invite embarrassment and disappointment.

"Sale and Shipment of Vaccine.

"When you are officially authorized to take provisional orders, the following procedure will be followed. Druggists' and physicians' orders may be obtained for quantities up to your total allocation. Please keep in mind that the vaccine will be administered in three equal doses of 1 cc each, with an interval of one week between the first and second injections, and the final injection four weeks later.

"The physician's order should be turned through the selected druggist in the customary manner, with copies going to your district manager. The wholesaler's copy should carry the notation—in a prominent place—'Being supplied from Indianapolis.'

"The usual third-party-order procedure *will not* be followed since we will ship on the home office copies of retailers' L-80's. The home office copies are to be mailed the last working day of the week in an envelope marked 'POLIO' on both sides. To facilitate entry and handling, retailer and physician orders should be separated.

"Prices to Physicians and Retailers.

"Retailer, one immunization, 3 cc vial, Net trade $3.60, List $6.00. Three immunizations, 9 cc vial, $9, net trade, List $15.

"Physician, quote the customary ⅙ on one immunization $4.20, three immunizations $10.50.

"City, County, State Boards of Health and other Tax-Supported Institutions.

"These accounts will be shipped from Indianapolis only, transportation prepaid. Vaccine should not be shipped to druggists for delivery.

"Sales to these outlets should be wired to Indianapolis, stating requirements and furnishing billing information. Acceptance of order will be wired; however, on occasion it may be necessary to make divided shipments.

"When a wholesaler sells an institution direct, he will receive the regular discount and will be charged with one-half of the transportation charges.

"The following prices will be in effect with these institutions: Single immunization (one 3 cc vial) $2.85. Three immunizations (one 9 cc vial) $7.13. These prices reflect a discount of 50% and 5% from list.

"All sales to these institutions will be final and merchandise will be nonreturnable.

"Occasionally it may be customary and necessary to supply these outlets through a retailer. In such instances, a 10% handling charge will be allowed on receipt of a copy of the billing at board of health rates, bearing your signature indicating delivery and approval.

"On transactions of this kind (a retailer involved) it is contemplated that the wholesaler's profit will be essentially that provided on a Supplement A basis. Complete details for handling will be supplied later.

"May we again call to your attention: This letter is not your signal to proceed with the taking of provisional orders; you will be informed of that date very

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shortly. Your usual fine co-operation in putting this program into effect is anticipated.

"Yours very truly, ELI LILLY AND COMPANY."

[*Price Establishments*]

It might be well at this point to state the price establishments in amounts and dates covering the entire period, so that they may be held in mind during the considerations of this comment.

The initial pricing, as we have seen, was made in G-65, as read, by Lilly on March 3, 1955. It was followed by an announcement of Parke, Davis on March 14, 1955, in which the public authority prices were mentioned as $7.12 and $2.85.

Wyeth's announcement came forth on March 15, 1955, with prices of $3 for the three 1cc vial, later $7.12 for the 9cc vial and $2.85 for the 3cc.

Pitman-Moore followed on April 20, 1955 with $7.13 and $2.85.

Merck Sharp & Dohme's announcement of $7.12 did not come out until January 17, 1956.

[*Reductions*]

The first reduction in price from 7.13 to 6.33 in the area in which we are concerned in this case was made by Lilly on February 3, 1956, to be effective February 6, 1956. This was followed by an announcement by Wyeth on February 8, 1956 with a price of $6.33, and on February 10, 1956 by Merck Sharp & Dohme with a price of $6.33, and on February 10, 1956 also by Pitman-Moore with a price of $6.34 and $2.59, 3 cc's, and by Parke, Davis on February 24 of a price of $6.33 for the 9 cc's.

The second reduction was made by Parke, Davis on May 14, 1956 to a price of $5.70, followed the next day by Eli Lilly to the same price, on the 16th of May by Pitman-Moore to $5.70, and on the 17th of May by Wyeth to $5.70, and on May 22 by Merck Sharp & Dohme to $5.70.

The third reduction occurred on April 18, 1957 and was made by Merck Sharp & Dohme to $5.13. The same amount was announced on April 22, 1957 by Lilly, on April 29, 1957 by Parke, Davis, on May 2, 1957 by Pitman-Moore and on May 6, 1957 by Wyeth.

Subsequent reductions were made in the late fall of 1957. The first one was a reduction by Wyeth to $4.92 in a bid to the State of Maryland, the second on December 4, 1957 by Merck Sharp & Dohme in a bid to New York City, but that was preceded, I believe, by a bid on October 28, 1957 of $5.02 to Baltimore. The New York City bid was $4.78.

On the 9th of December, 1958, Parke, Davis bid $4.52 to New York State on an invitation for 105,000 vials, and Pitman-Moore bid $4.78 to the State of Maryland on December 16, 1957 which it makes into a general reduction of $4.88 less 2 per cent, or $4.78 net on the 30th of December, 1957.

Prior to March 3, 1955, Lilly had no discount for state, city and county health agencies. It did, however, give Federal agencies a discount of 40, 15 and 7 per cent. In fixing its discount for the polio vaccine, Mr. Beesley and Mr. Teel directed their Mr. Abendroth to check other drug houses to ascertain the custom in the trade for discounts to state, county and city health agencies. Mr. Abendroth reported that the latter were receiving discounts of 50 and 5. These were accepted by Lilly for city, county and state health agencies and thereafter, to avoid discrimination between state and Federal agencies, the Lilly discount to the Federal Government of 40, 15 and 7 was changed to 50 and 5. It is to be noted that 50 and 5 provided a slightly higher price than the 40, 15 and 7, although on other Federal biologicals the discount remained 40, 15 and 7. This is from the transcript, 1934-48 and 1954.

Mr. Valentine, President of Pitman-Moore, fixed a $7.50 list price for the three 1cc vials, or a net of $4.50 before he left for Europe on February 6, 1955. Pitman-Moore's prices came out in their house magazine, called "Planned Detailing, Sales," Pitman-Moore Exhibit 15. He testified that he came to no decision as to discount until his return from Europe, which was in the latter part of February, after copy for "Planned Detailing" had gone to the printer. It was not until after Lilly had formally announced its prices on March 3, '55 that he decided to meet them and hence, although "Planned Detailing" went out as printed on March 9, 1955, it carried a supplement entitled "Definite Prices Now Established on Poliomyelitis Vaccine," whereas "Planned Detailing" gave the following information as to price—this quotation is from "Planned Detailing":

"PRICE?

"At this time we cannot quote a firm price, but you may state that the package of three 1cc vials will cost not more than $7.50 List, $4.50 Net. (Note following paragraph.)

"DISCOUNTS?

"A new discount policy is necessary for this product. Price to physicians will be List less 25%; net price to retailers will be List less 40% (no additional discounts); price to wholesalers will be List less 40% and 16⅔%."

The supplement reads as follows:

"Since the accompanying special issue of Planned Detailing went to press, definite prices on Poliomyelitis Vaccine (Bio. 175) have been established. They are:

"List price $6.00
Price to physicians ..... $4.50 (list less 25%)
Price to retailers ..... $3.60 (list less 40%)
Price to wholesalers ..... $3.00 (list less 40% & 16⅔%)

"Note, on page two of Planned Detailing, the paragraph on new discount policy. Although no trade discount will be allowed retailers on Poliomyelitis Vaccine, it does qualify for annual RDA rebate."

Pitman-Moore's price to doctors was not corrected until March 16 when it was made $4.20, like Lilly's, G-65. The $4.20 was arrived at by discounting the RDA rate by 30 per cent by Pitman-Moore. Lilly took its long list less 40 per cent and then added one-sixth. The first time it quoted a public authority price was on April 20th to the New Jersey State Board of Health.

A look at Pitman-Moore's initial pricing shows that under its old system where the regular discounts applied, its list was $7.50. The doctors received a discount of 40 per cent, leaving $4.50. Druggists, when purchasing from wholesalers, had a 40 per cent discount, or $4.50, and when buying direct, had discounts of 40 per cent and 15 per cent, or $3.82. Wholesalers had discounts of 40 per cent and 16⅔ per cent.

In the "Planned Detailing" magazine, which went in the mail on March 9, the new discount policy was described as list $7.50, doctors' discount 25 per cent, or $5.62, druggists, 40 per cent, or $4.50, and wholesalers, 40 and 16⅔ per cent, or $3.75.

In the flyer that accompanied "Planned Detailing", which was made up after the Lilly prices were announced, the list was fixed at $6 with a 25 per cent for doctors, giving them a price of $4.50; a discount of 40 per cent to druggists, giving them a list of $3.60—or giving them a net price of $3.60, and wholesalers their discounts of 40 and 16⅔ per cent, making that net $3.

On March 16, to give place to the adjustment to meet the Lilly doctor price of $4.20, Pitman-Moore applied a 30 per cent discount to its $6 list, making the doctors' net $4.20, as indicated heretofore.

[*Public Agency Price*]

The public agency price was set April 20, 1955, when response to a telegram from the Department of Health of New Jersey, imparted the information that the price would be $2.85 for 3cc and $7.13 for 9cc.

The reasons for Pitman-Moore's adoption of these price quotations, and the revolutionary character of them with regard to their previous business history, will be stated in some detail later.

The Government presses that Wyeth had advance knowledge of Lilly's price because its president, Mr. Howard, wrote a letter to a Canadian associate on February 11, 1955, G-27, in which he said, among other things:

> "We have no information as to what competitors are going to do on pricing so I can only guess. My guesstimate is that it will be in the neighborhood of $3 to $4 (our take) for a complete immunization of three doses."

It asks us to compare this letter with a letter of Mr. Charron of Lilly's Foreign Department, writing to his associate on February 9, 1955, G-147, in which he expresses himself in part as follows:

> "But in spite of these handicaps, Mr. Bard and I have worked out some estimates for various areas in Latin America which we feel are reasonably conservative. Please note that the estimates vary according to the price. Since the date of your memorandum there have been rumors that the price would not be from $3.00 to $7.00 per immunization, but might range from around $2.00 per immunization. If we could get some commitment regarding the ultimate price at which this product will be offered, even with the other uncertainties, I think some firm orders might be secured in advance of actual marketing date."

The Government also points to a letter from Lilly's Abendroth to the Department

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of Public Health in Shawnee, Oklahoma, dated February 18, 1955, G-201, in which Mr. Abendroth, Manager of the Pricing and Development Department of Lilly, says:

"At this time it is impossible for us to give you a definite price on this vaccine that would apply to a health department. To date we have not been able to run any exact costs on this vaccine and this is the reason we are unable to give you a definite reply. As near as we can estimate, the cost of a single immunization will be somewhere between $3.00 and $4.00, and the cost of a single immunization in a bulk vial, consisting of three immunizations, will be slightly less than the figure mentioned above. There is a possibility that the vaccine may be slightly less than the price mentioned above as this depends entirely on the exact costs in the manufacture of the vaccine."

Mr. AuBuchon of Wyeth testified that he did not know of Lilly's prices until he heard of it through one of his salesmen who had secured a copy of Lilly's publication of its initial prices, G-65. He had it forwarded to him posthaste, but did not receive it until March 6. He testified that when he did receive it he said, "Well, this is what I have been waiting for; this is what I need." Transcript 2876. He said that he meant that he had been anxious to have his company make a publication of prices, and with Lilly's public announcement he felt that he would now be permitted to do so. The Government, on the other hand, suggests that his explanation gives rise to the inference that he had advance knowledge of the price. If Merck Sharp & Dohme had any advance knowledge of prices, they made no use of them for they quoted none until January of 1956, following meetings of their Mr. Kuryloski and Mr. Greeve of the HEW. Merck Sharp & Dohme had no vaccine upon which to quote during 1955.

Parke, Davis set its public authority price on February 25, 1955 following a meeting of company officials at which "someone" reported the Lilly price of $3.60 per 3cc, Transcript 2370. Parke, Davis insisted that Lilly's activity was very hectic and brought out that it was necessary on February 11, 1955, for Lilly to issue a letter of admonition to its salesmen. Parke, Davis 6.

"In the absence of formal instructions from Indianapolis," quoting from PD-6, "we can readily appreciate the action which some of you gentlemen, as well as our salesmen, may have taken with respect to soliciting orders for polio vaccine. It has come to our attention that some of our salesmen have been encouraged to solicit orders—even going so far as to indicate to physicians the probable price and method of packaging. It seems to us that, since neither the price nor the method of packaging polio vaccine has been established, plus the fact that no official release of such information has been authorized, it would be unwise and even dangerous for any of us to go out on a limb to the extent just mentioned. Such action could easily lead to considerable embarrassment to the company, and in the end do more harm than good.

"Certainly we do not want to discourage anyone from giving physicians and retailers all the information released to date regarding the company's participation in the polio project, perhaps even going so far as to include the present belief that Eli Lilly and Company will have adequate supplies of the vaccine if and when it is officially approved.

"We therefore would like to request that your salesmen be advised to confine their remarks regarding polio vaccine to the information authorized to date, and under no circumstances should they make any commitments with respect to probable price or packaging, or make any statements implying that polio vaccine has been, or will be, approved for sale.

"Your immediate cooperation in this instance will be appreciated." Signed LeBien.

The next category is: *Adoption of and Adherence to 50% and 5% Discount.*

In 1946 Lilly abolished all county, city and town discounts. These accounts paid the net price the retailer got, namely 40 per cent off list.

Concern for setting a special price for public authority is reflected in G-32, the Teel to Beesley memo, February 15, 1955, in which Mr. Teel stated:

"It is noted that because of the public interest in this vaccine and the pressures that will be exerted on boards of health to furnish vaccine in certain cases, we may anticipate that a substantial percentage of sales will be made through this medium and that it will therefore be necessary to establish a special price to boards of health which is in line with custom in the trade."

Similar concern was expressed from time to time in the Product Addition and Deletion Committee report of Lilly, G-148. Finally, as stated earlier, it was left to Mr. Abendroth to investigate the discounts employed by other drug houses, and as a result the allowance of the 50 and 5 discount to state, city and county agencies and the substitution of the same for the 40, 15 and 7 theretofore allowed Federal agencies, was established.

It is interesting to note that this applied only to polio vaccine and that the Federal discount of 40, 15 and 7 continued to apply to biologicals other than polio vaccine.

Mr. Valentine of Pitman-Moore concedes he practically copied Lilly's discount system and adapted it to Pitman-Moore hoping to change the traditional system of Pitman-Moore which, as has been mentioned heretofore, dealt with the dispensing physician in contrast to the prescription physician, Pitman-Moore wanted very badly to use the exploitation of polio vaccine as a vehicle with which to revise its merchandising approach. Transcript 1408.

Wyeth did not use discounts but quoted net prices less 2 per cent. In any event, it met competition by coming out with the price of other manufacturers of polio vaccine. It followed the Lilly announcement except that it published $7.12 instead of $7.13 to public authority on the 9cc vial.

Merck Sharp & Dohme had established discounts of 50 and 5 to city, county and state in 1952. In 1949 discounts of 40, 16⅔ and 5 per cent were used in sales to the Federal Government. It continued to apply the latter in sales to the Federal Government. It is to be noted that the result of the application of 40, 16⅔ and 5 is identical with 50 and 5.

Parke, Davis followed a practice of long standing to quote discounts of 50 and 5 per cent on biologicals. Parke, Davis sometimes gave further reductions (discounts) on quantity shipments and, in fact, during April 1, 1955 to December 31, 1957, some were given on other biologicals. An additional cut or discount was given in December 1957, as has been stated, to New York State when Parke, Davis reduced its price from $5.13 to $4.52 on the order 105,000 vials.

The next category, D, *Defendant's Proclivity for Discussing Prices.*

The Government submits that the evidence shows that attendance by the defendants' representatives at meetings of the Foundation furnished opportunities for them to speak of various phases of the production of the vaccine, including prices.

There is also produced a memo dated July 30, 1954, written by F. M. Hadley, an official of Lilly, to Messrs. Beesley, Teel and Wheeler, in which he says:

> "Harry Loynd told me this morning that they have completed their contract with the Polio Foundation, and following is the price schedule:
>
> "Single immunization $1.21
>
> "Three immunizations $3.15
>
> "Our prices were, respectively, $1.26 and $3.50, and if the discount should apply our prices would be $1.07 and $2.98, respectively."

The stockpiling contracts were signed by Lilly on July 21st, 1954, and by Parke, Davis, of which Mr. Loynd was president, on July 30th, 1954, so that this information seems to be after the event and, of course, deals with the price to the Foundation.

Then there is the testimony of Mr. Beesley that at a Foundation meeting on May 13th, 1954, Mr. O'Connor of the Foundation suggested that the producers discuss price, and so forth, together, and Mr. Beesley, a member of the Indiana Bar, declined, stating that he felt it would not be proper to engage in such conversation. The conversations were not had and the contracts were negotiated separately with each company.

[*"Price Talk" Forbidden*]

Lilly introduced a memo of 1952, L-12, forbidding price talk by its employees with its competitors.

The Government offered the following points of contract between Pitmore and other defendants. Mr. Valentine had on occasion spoken with Mr. Beesley socially. Transcript 1031.

Mr. Valentine phoned Mr. Loynd of Parke, Davis after Parke, Davis's announced price cut of May 14, 1956 to ascertain whether it was true. Transcript 1390. Mr. Valentine admitted that he would call Sharp & Dohme and other defendants concerning pricing practices if he had a question regarding them. Transcript 1022-1023.

At a National Wholesale Drug Association meeting, Mr. Valentine stated that he

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had inquired concerning the number of "depots" Parke, Davis had. Incidentally, he received a rather noncommittal reply, which turned out to be less than informative. The conversation took place with a Mr. Carl Johnson, I believe.

In G-39, Mr. Ball on July 24, 1956, wrote to Mr. Ruch of Pitmore that he talked to Mr. Stuart Smith, vice-president in charge of marketing for Wyeth, to confirm

> "that their price for poliomyelitis vaccine to the physician is actually $7.20. I learned that they do not have a long list price, but list only net prices, and the above prices apply to all classes of trade, including the retail pharmacist, surgical supply dealer and the physician. I'm not certain about wholesalers, but feel that they must offer a wholesale discount.
>
> "In any event, it's confirmed that the above price is being offered to physicians, and that they are actively soliciting new direct accounts. Their reasoning is that when a limited number of druggists were passing their price on to the physician without any mark-up it was creating so much confusion they decided on one price for all classes of trade. This includes not only Poliomyelitis Vaccine but also their injectables, penicillin, etc.
>
> "They point out that they have no surgical supply dealer's discount, and with that class of trade we have a 15% advantage, and that they have no rebate plan with the druggist, which, of course, we do.
>
> "Under the circumstances, it appears that on direct sales to the physician Wyeth will definitely have us at a disadvantage, and unless we elect to follow a pricing pattern similar to theirs, I can't see any logical answer except to continue as we are at the present time. We can discuss this when you return."

In G-141, Mr. John Galloway, in charge of publicity for Pitman-Moore, reported on August 27, 1954 on a conference with Mr. Basil O'Connor of the Foundation. Among other things, he says:

> "You will be interested, in connection with promotional plans, that most of the people present felt that public health groups will jump on the bandwagon if the Francis report is favorable. O'Connor thought that we could expect to see free vaccination of all first graders within a few years and even in 1955 a very large part of all available vaccine might be used by public health agencies. One of the Wyeth representatives started to explain why the industry should promote sales of the vaccine to these buyers, to forestall state agency production, but he was interrupted by the other Wyeth representative. I got the impression that the interruption was designed to prevent the first speaker from divulging Wyeth's plans inadvertently. If they are going to encourage free vaccination by state and county agencies, we're going to have strong competition in the area where we are most vulnerable."

But Mr. Valentine denied any early realization of the public agency part in any program and in fact disagreed with Mr. Galloway's interpretation of Mr. O'Connor's statement.

Merck Sharp & Dohme's Mr. L. E. Arnow wrote a memo to file on May 14, 1954, G-54 in evidence, on the meeting at the Waldorf-Astoria of May 13 called by Mr. O'Connor of the Foundation. In it he said:

> "It was evident to the S&D people present from conversation with other industrialists that the companies now producing believe that 50¢ per cc. probably is the smallest figure that would persuade them to undertake large scale production at this time. It seems probable that each of the six companies will submit this figure to Mr. O'Connor. In rather casual conversations with Mr. Loynd, of Parke Davis, and Mr. Beesley, of Lilly, we gained the impression that current costs vary between 40¢ and 60¢ per cc. for finished, packaged material. It was our impression also that these costs include general and administrative expenses.
>
> "In private conversations with the other producers, it is evident that most of them will suggest that the foundation pay them the agreed on sum per cc. each month in order to finance the production of the vaccine. If the vaccine is marketed in the usual way, this money obviously then would be refunded to the foundation. This point was not discussed in the open meeting."

But Mr. Valentine testified that he discussed the proposal for monthly billing in the open meeting. Transcript 1543.

Mr. Ruch wrote Mr. Warren, both of Pitman-Moore, on September 24, 1956, G-38:

> "We appreciate the comments in your letter of September 6 concerning competitive polio vaccine activity by both Wyeth and Lilly.
>
> "Sometime ago Wyeth developed a single price discount policy and this holds true on their entire injectable line—not just polio vaccine. They are quite concerned about the single price policy, for obvious

reasons. I had an opportunity to discuss this with their vice president for sales at a recent FWDA meeting. They are not at all pleased with it and are contemplating some changes. No dates were mentioned, however.

"It would make little difference what Lilly offered as a discount because they only sell to their franchised wholesalers who in turn are not permitted to handle any other brand as long as Lilly is able to supply.

"Each manufacturer, Roy, has their own discount policy and have made an effort to fit polio vaccine into the policy without too much disturbance. In almost every instance it has placed an advantage on one particular class of trade, but of course another manufacturer has the advantage with another class. As an example: Wyeth has an advantage on direct sales to physicians; we offer retail druggists up to 7½ per cent rebate and have a special 15 per cent discount for SSAs.

"I hope these remarks are of assistance to you. As always we appreciate hearing field reports and any other comments you care to make concerning the competitive situation will be most welcome."

G-129 and G-130 are an exchange of letters dated June 23 and 25, 1956, respectively, in which Mr. Valentine is told by one of his salesmen that he has observed an invoice from Wyeth billing polio vaccine at $6 per vial to McCormack Brothers, operators of two drug stores and a warehouse. He is curious to know whether Wyeth classes the account as a wholesaler. Mr. Valentine replied that he had been told "by the people involved that they rate this firm as a chain, and since they maintain a warehouse, they are entitled to the wholesale price." Mr. Valentine testified that he called Wyeth and got the information which was the subject matter of this letter from "someone" there.

It will be recalled that it was Dr. Arnow of MS&D who wrote the memo, G-54, reporting on the meeting with the Foundation. G-83 is a memo from Mr. J. J. Weissmuller of Merck Sharp & Dohme International to J. E. Monz of the same, dated April 12, 1955, in which he says:

"Mr. S. T. Bryan gave me the following prices which S&D Division is expected to establish.

"1 x 3cc vial	RD 3.60 vial
3 x 1cc amp.	3.60 pkg.
3 x 1cc amp.	2.85 pkg. (for State Board of Health)
1 x 9cc vial	RD 9.00 vial
1 x 9cc vial	7.13 vial (for State Board of Health)

"The information above is merely conveyed for informative purposes. The product name will be given to us later."

Merck Sharp & Dohme did not in fact announce its price to public authority, as stated before, until January 17, 1956. The exhibit refers to S. T. Bryan who is a liaison man between Merck Sharp & Dohme and its International, and he is quoted as having given prices which "the S&D Division is expected to establish."

In G-55, dated July 8, 1954, Mr. Kenneth D. McGregor wrote a memo to Mr. Loynd and others concerning the Polio Foundation contract. In it he says among other things:

"It was understood that Mr. Fritsch would talk with Mr. Beesley prior to Lilly meeting the Foundation and that I will talk with Mr. Wheeler afterward."

Mr. McGregor and Mr. Wheeler were respectively general counsel to Parke, Davis and Lilly. At Transcript 1930, Mr. Beesley testified that he never met Mr. Fritsch who is now deceased.

As to the category E. *Abnormal Company Pricing Procedures:*

G-148 is a report on the work of Lilly's Products Additions & Deletions Committee. It appeared that the subject of pricing was referred to the Marketing Committee, which took no action upon it. Mr. Beesley testified, Transcript 2194, that pricing was not the function of this committee. At Transcript 1807, Mr. Beesley related the details concerning the elements which were considered in determining price. At Transcript 1982, he testified that costs and these many factors were not added together for the purpose of setting the prices, but they were all considered, as well as what price the public would accept as ultimately governing the decision.

Pitman-Moore had a new product committee but it did not make any recommendation for the price on polio vaccine, which was set by Mr. Valentine, in consultation with Mr. Ball, his assistant, and Mr. Ruch, his sales manager.

Wyeth had a so-called form M89 procedure which governed prices and price changes. These were normally initiated by the request of the sales manager and in-

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volved the execution of forms to go through the regular channels of the company, which normally took two to three weeks. Mr. AuBuchon testified that the pricing of polio vaccine was accomplished informally by conference with the appropriate executives who acted forthwith. This procedure was countenanced in emergencies and he felt that the polio vaccine pricing situation warranted action similar to the emergency treatment.

Merck Sharp & Dohme is involved in Exhibit G-152, a memorandum from Henry Ditzel to C. W. Foy, which directs arrangement for a catalogue sheet on poliomyelitis vaccine. It is dated January 17, 1956, following the meetings of December 21, 1955 and January 12, 1956 between Mr. Kuryloski of Merck Sharp & Dohme and Mr. Greeve, HEW's liaison man with producers. Mr. Greeve advised Merck Sharp & Dohme how to enter the market in terms of other producers' activities, concerning policies, prices, and so forth.

Summaries of these meetings are found in the Merck Sharp & Dohme exhibits, December 21, 1955 and January 12, 1956, MSD-27 and 28, respectively.

On January 25th, 1956, Mr. Kuryloski said in a letter to Mr. Greeve, Merck Sharp & Dohme Exhibit 30: "We now know how United States Public Health Service wants us to operate."

Merck Sharp & Dohme had refused to quote HEW in May, August and October, 1955.

Parke, Davis pricing and catalogue department was not responsible for either price determination or change. It has no "normal" pricing procedure. Transcript 2358. Mr. David had a limited hand in pricing and almost none in completely new products. Transcript 2286-87. It had no pricing committee. Transcript 2359.

Mr. Loynd set Parke, Davis's price in talks with Mr. Meyer and Mr. Walker. Transcript 2466.

The next category, F. *Pricing Without Reference to Supply and Demand.*

Lilly's change in its distribution system permitted it to lower its list by 11 per cent on February 6, 1956, it had eliminated any allowance to retailers, and though its price was reduced, the net it received was a trifle greater than before. This was done at a time when every other producer was having difficulty in getting its vaccine to pass tests for release.

The second cut, on May 15, 1956, by Parke, Davis was heard of by Mr. Beesley on the ticker in his office. Transcript 2072.

Mr. Beesley had costs checked and said that at this time his supply was catching up with demand, Transcript 2134. The third cut was made by Merck Sharp & Dohme on April 18, 1957. The Grand Jury was already in session, and Lilly consulted counsel for advice. Pursuant thereto it simply followed its business judgment in meeting the cut. Lilly had seen no reason to cut further during the last months of 1956, although it had accumulated an inventory that amounted to 22 million cc's by January 1, 1957. This was quickly diminished in the early months of 1957. Instead of cutting prices during the fall of 1956, Lilly chose to reduce production, claiming this was better business judgment since it had no vaccine that was close to expiration date. In March of 1957, 15 million cc's were sold. Transcript 2144-46.

[*Identical Prices—Lower Bids Solicited*]

Mr. Upchurch, purchasing agent for North Carolina, testified that Mr. Jewett of Pitman-Moore told him that he had vaccine which he was anxious to sell in the latter part of 1956. Fifteen bidders had quoted identical prices and in February of 1957, Mr. Upchurch invited them all to bid lower. None responded. At this time inventories were falling and a cut in price would have affected one bidding adversely under the most favored customer clause in the HEW contract.

Mr. Bartlett of Pitman-Moore's Foreign Sales Department testified that he believed Pitman-Moore had approximately three million doses on hand in November of 1956. Transcript 3403.

[*"Cost Plus" Plan Rejected*]

On November 21, 1956, G-1-R-53-0053, Mr. Ball of Pitman-Moore declined a request of the Armed Services Medical Procurement Agency to determine costs and agree to a cost plus basis.

Mr. Bartlett in a letter to a prospective distributor in South Africa dated October 24, 1956 declared that there was "plenty of vaccine now available"—"many more times than sufficient to meet the domestic demand"—"available supply being drained off." He

spoke of "delay next year." Mr. Bartlett testified that he thought Pitman-Moore had a lot of vaccine on hand but it developed he was very wrong. He wrote the letter to South Africa in the nature of inspiring the prospective purchaser with security that vaccine could be furnished if ordered promptly.

[*Meeting Price Cuts*]

When Pitman-Moore met the first cut, it did so with a bid of 6.34 and maintained this price above the 6.33 cut for about two months. During this time complaints developed to such an extent that it went down to the identical 6.33. Transcript 1484, 1589.

Of the second cut, Mr. Valentine wrote in a letter of May 16, 1956 to Mr. Bartlett in Europe that he did not know why Parke, Davis cut. He supposed it wanted prestige. Transcript 1600.

When Merck Sharp & Dohme announced its April 18, 1957 cut, Pitman-Moore did not follow until May 2, 1957. It was timid about a reduction for it feared liability under the most favored customer clause on all it had sold before.

Pitman-Moore made a fourth cut in December of 1957 to the State of Maryland, bidding 4.78 net. It implemented this in a general cut to public authority on December 30, 1957. Pitmor-53, Transcript 3018.

[*Following Competitors' Prices*]

Wyeth never had a short-dated supply. Its vaccine only had a four-months' life. It started out with a three 1 cc vial which cost more than the 3 cc vial. It tried to get $3.00 instead of $2.85 for it, but the reaction convinced it that it could not get the higher price. Transcript 2877. G-42 and G-70. Wyeth followed Lilly prices. After a discussion it decided to meet the first cut of Lilly of February 6, 1956 on February 8. It learned of the Parke, Davis second cut from an article in the Wall Street Journal of May 15, G-132, and after discussion of its executives it met the reduction on May 16. Transcript 2890.

When Sharpe & Dohme's third cut was announced on April 18, 1957 it decided to meet it on May 6, 1957 although it had had no vaccine from May of 1956 to February 1957 and then only small releases to May of 1957.

November 1, 1957 Wyeth bid a delivered price of $4.92 to the State of Maryland on 4500 vials on a direct bid.

Merck Sharp & Dohme did not have a large inventory in late '56 and '57. It was selling well below its sales level, and Mr. Hovey of HEW testified that a cut was not to be expected if a producer was selling all he could make. Merck Sharp & Dohme's quotations were on an if available basis. G-1-R-57-0218, 0223, 0216.

When Merck Sharp & Dohme made the third cut on April 29, 1957 it was out of the red for the first time, and, as did Parke, Davis, it made the reduction to gain attention. On December 4, 1957 it quoted New York City a price of $4.78 net. Also Merck Sharp & Dohme bid $5.02 to the City of Baltimore on October 28, 1957.

Parke, Davis followed Lilly's cut on February 16, 1956. It was having production troubles but wanted to keep its name before the market. Parke, Davis had no vaccine passing tests from July 16, 1955 to February 24, 1956. It was two and a half million dollars in the red when it decided to make the second cut on May 15, 1956, anticipating its return to the market. This was announced in a news release, G-132, attended with considerable bravado considering its position. It did not give consideration to Lilly's cutting below but determined that the cut would put it prominently back in the eyes of the trade. When the third cut came by Merck Sharp & Dohme on April 18, 1957, Parke, Davis had no choice but to cut once Lilly followed. It received calls from Mr. Schultz of HEW in Washington and Miss Pinto, a Military Purchaser in Brooklyn, inquiring for its decision as to whether it would meet the cut.

In 1957, in December, Parke, Davis made a fourth cut by way of a sealed bid in New York City, as we have heretofore indicated.

The next category, G, *Price Reductions all made through Public Announcement.*

All of the defendants which chose to make formal price reductions did not initiate them through sealed bids but sought to achieve maximum notice and publicity by public announcements. Lilly in its reduction of February 3, 1956 sought to achieve credit for initiating the first reduction.

Parke, Davis designed its public reduction of May 15, 1956 to acquire the maximum free publicity and notice of its being back in the market. It had been a leader in the Foundation program and was embarrassed by its later production troubles,

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Transcript 2417. In December of 1957 it bid to the State of New York by way of a sealed quotation, but its reason for this was that the market pressures had changed.

Merck Sharp & Dohme's intention was not to acquire more business by its public reduction, but, like Parke, Davis, to regain its standing in the market.

Wyeth never initiated a public announced price reduction. It simply followed others, as did Pitman-Moore. They also claimed their sealed bid quotations late in 1957 were the result of changed market conditions and the expiration of the effect of the most favored customer clause in the HEW contracts. Nevertheless, the resort by those defendants who initiated reductions by public announcement thereof rather than through channels of sealed bidding is claimed by the Government to be evidence from which the inference may be drawn that there was agreement among them upon this course.

H. *Failure to Give Usual Terms to Public Authority.*

Lilly. The Government claims that the conduct of defendants with regard to allowing quantity discounts, transportation charges and returns of merchandise was an agreed design upon the part of the defendants to support the uniformity of prices of the vaccine. Lilly maintained the policy throughout of refusing quantity discounts and did not tender them even to the General Services Administration, the Government Procurement branch.

Lilly followed a practice of shipping its merchandise F. O. B. destination, a course most favored by its buyers, as testified to by Messrs. Hovey of HEW and Mr. Nicholson of Milwaukee. Furthermore, HEW by the end of 1956 required all defendants to pay for air express, as most appeared to have been doing anyway. G-1-R-57-0167, 0148, 0158, 0176, 0185. As to returns, the Product Addition & Deletions Committee of Lilly recommended no returns on polio vaccine, G-148. Indeed, its policy was not to permit returns on biologicals generally.

Mr. Valentine of Pitman-Moore remembered vaguely that a quantity discount was once given to the General Services Administration during what he thought was the so-called 50 and 7 discount period. That is quite early in the polio marketing program. Transcript 1482, but all quantity discounts were ultimately eliminated even from the General Services Administration catalogue.

As to transportation, Pitman-Moore first paid ordinary charges F. O. B. destination. Where air express was directed, the customer was required to pay the difference, but in October of 1956 the defendants undertook to pay air charges as well.

In the matter of returns of polio vaccine, "Planned Detailing" Pitmor-15, specified that it would accept none from any class of trade, but General Services Administration could return under the Pitman-Moore catalogue, Transcript 810.

There was no evidence that any public agency ever sought to return polio vaccine. Transcript 810.

Wyeth allowed no quantity discounts, although in its GSA contract it agreed that special prices would be quoted on quantity lots on request. It received no such request. Transcript 807.

Wyeth paid transportation by air F. O. B. destination. Initial shipments by Wyeth to HEW were labeled "No Returns." This label was later removed but there were no returns of polio vaccine.

In Merck Sharp & Dohme 27 and 28, Mr. Greeve of HEW was said to have apprised Merck Sharp & Dohme of Wyeth's method [of] handling returns. Merck Sharp & Dohme asserted that since its inventory was below sales level, it had valid reason to decline quantity discounts. Indeed, Mr. Hovey of HEW supports that assertion. Merck Sharp & Dohme shipped by ordinary transportation F. O. B. destination, but eventually came to paying for transportation by air. Shipping its merchandise F. O. B. destination had been a long-standing policy of Merck Sharp & Dohme since 1937, reemphasized in 1948 and 1955. Transcript 2723 and Merck Sharp & Dohme Exhibits 34 and 35.

Parke, Davis had no set rule on these discounts. In the New York City bid in December of 1957 a low price was quoted on a large order for 105,000 vials, Transcript 2341, 2495.

From April 1, 1955 to December 31, 1957 some discounts where given on other biologicals, Transcript 2341, but no quantity discounts were permitted while Parke, Davis was in the red on polio vaccine. Transcript 2343.

Parke, Davis shipped F. O. B. destination as described for Merck Sharp & Dohme. It insisted that a quote of 5.586, Parke, Davis' then established and net price to public authority, made to the State of New York F. O. B. its plant, was not an error and did not lower the price of merchandise but reflected the fact that multiple destinations in New York State were involved.

Contracts of Parke, Davis with GSA of September of 1956, Exhibit G-1-R-58-0126 provided that polio vaccine would be returnable. Later Parke, Davis stamped invoices "No Returns" to discourage them. Transcript 2471. But generally polio vaccine, like any other biological of Parke, Davis, was returnable. Transcript 2470.

Mr. Hovey of the HEW testified that its contract did not provide for returns and never asked for such provision, and Mr. Kimble testified that out-dated vaccine was never a problem, Transcript 666.

Since it is now the time of our usual recess and since there is considerable further to go, I suggest for your benefit and mine that we take the usual five minutes.

(Short recess.)

The Court: We now come to the category I, *Distribution Practices Which Assured Uniformity.*

The Government sought to show that each defendant took steps to assure that the price quoted to public authority for its brand of polio vaccine would not deviate from an established price no matter how the vaccine was sold to public authority.

Historically Eli Lilly has always sold to wholesalers. These are referred to as Lilly franchise wholesalers. Nevertheless, initially retailers received 10 per cent on sales made to public authority below the state level. In passing, it should be noted that Lilly reserved the right to quote direct to the Federal Government as did each of the other defendants. Indeed, Mr. Hovey and Mr. Nicholson testified that it was their preference, as purchasing agents to receive bids directly from the manufacturers as opposed to wholesalers or retailers. Transcript 723, 349.

The handling allowance permitted retailers by Lilly was eliminated on February 6, 1956 by what has been referred to throughout the case as an agency agreement. G-133. This agreement permitted the wholesaler to quote Lilly's newly-established public authority price of $6.33 less 2 per cent or 6.20 net. The choice of submission was left to the wholesaler. According to Mr. Beesley, this caused chaos among the wholesalers, Transcript 2064, and in view of the importance of the wholesalers to Lilly, it became a very disturbing situation. To rectify this condition, Lilly purchased a second agency agreement on July 13, 1956, G-134, which provided that the wholesaler would quote Lilly's then-established public authority price of 5.70 less 2 per cent or 5.586. It should be noted that both agreements provided that no handling allowance for retailers was contemplated.

Parenthetically, it should be noted that according to a letter dated April 4, 1955, and written by Mr. F. C. Abendroth, manager of the pricing development department of Lilly, a sale to a city, county or state institution was to be made through a retailer when "absolutely necessary" and that a 10 per cent handling allowance would be paid only upon condition that the retailer sell the vaccine at a price not less than the established board of health or public authority price,

> "and if he sacrifices part of his handling charge in order to obtain the business, we will not allow the retailer a handling charge . . . In other words, the vaccine must be sold at 7.13 per package to the board of health." G-62.

Mr. Abendroth's letter was a reply to an inquiry from a Lilly representative in Denver, Colorado, dated March 30, 1955, G-63, in which the writer made the following observation:

> "Some thirteen or fourteen years ago when we sold our biological products through a retailer to a health institution we allowed this retailer to deduct 16⅔, as I recall, and in addition gave him a 10 per cent handling charge. However, if this retailer upon bid, or in any other fashion, passed on to the health department any portion of his 10 per cent handling charge, or bid the item at less than net trade less 16⅔ per cent, we did not allow him any handling charge in this type of violation."

Mr. Abendroth's letter, G-62, of April 4, 1955, antedated the most favored customer clause by approximately six months. Further, it appears that Lilly had never used such an agency agreement before those which appear herein and Lilly, since the

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introduction of the agreement, has used the agreement on only one other occasion.

According to the testimony, the retailers' handling allowance was eliminated on polio vaccine in 1956 because they, the retailers, were no longer needed.

Lilly's agency agreements were an admitted attempt to do all that could be legally done to maintain a uniform price among its wholesalers which Lilly considered so vital to its wellbeing.

Mr. Beesley testified, Transcript 2237, that Lilly never pressured a dealer or refused either a handling allowance or delivery, although Lilly did ask that wholesalers sell at the regular price. Further, he testified that Lilly did not like its products to be footballed and that in order to implement that policy, the agency agreement was drawn.

Prior to the advent of polio vaccine Pitman-Moore's activity had been devoted to the veterinary field of medicine and to the dispensing physician in the area of human medicine. I mean the emphasis had been on the veterinary field of medicine. There came a time, however, before the Salk vaccine program got under way, when the management of Pitman-Moore concluded that it was time for them to change that emphasis in their sales from the dispensing physician to the prescribing physician and they were looking for a product that would afford them the opportunity to make this transition. It was the testimony of Mr. Kenneth Valentine, president of Pitman-Moore, that polio vaccine appeared to be that product. Mr. Valentine further testified that Pitman-Moore realized that its entire system of discounts and distribution would have to be revamped if the transition was to be successful. Indeed, preliminary steps had already been taken. For example, market testing was already being conducted at the time that the Salk vaccine program got under way.

Thus it was that the end of the allocation system on July 31, 1956 saw Pitman-Moore directly faced with a problem in distribution. Specifically, the allocation system had in effect provided for Pitman-Moore an automatic system of distribution which did not necessitate Pitman-Moore having its own wholesalers or other outlets.

Mr. John R. Jewett, coordinator of polio vaccine sales for Pitman-Moore, realized that the end of allocation was the start of Pitman-Moore's necessary acquisition of in-state bidders or representatives. Mr. Jewett had correctly observed that in-state bidders frequently enjoyed an advantage over their out-of-state counterparts, especially in the matter of tie bids. Mr. Jewett discussed this problem with Mr. H. O. Ball, his immediate superior, then went on a vacation and when he returned found that his thoughts on in-state bidders were being implemented by Mr. Ball in the form of an agency agreement which was eventually published as G-13, September 14, 1956, a letter to all MD's and combination salesmen.

This agreement was implemented in G-105, September 21, 1956, a letter to a Raleigh, North Carolina pharmacy. That is, it is an actual agency authorization from Pitman-Moore permitting the pharmacy to bid Pitman-Moore's vaccine at Pitman-Moore's then-established price for a 10 per cent handling allowance.

Prior to September 14, 1956 Pitman-Moore had already selected some firms to bid its product. Transcript 2942. Mr. Jewett emphasized that this was not an agency relationship, Transcript 2943. Thus, on August 2, 1956, the Thrifty Drug Company had been authorized to submit a bid on 50,000 vials of polio vaccine to the State of Illinois. However, Pitman-Moore or Thrifty did not receive the award, and no allowance was in fact paid. On this bid, Thrifty had split its 10 per cent allowance with the state. To preclude the successful submission of a bid below its established price to public authority, Pitman-Moore endeavored to arrange with the state that it would bid directly and if successful, would pay an allowance to a local firm.

It should be noted that the Pitman-Moore agency agreement provided for the handling allowance to be paid on sales to city, county and state authorities, Transcript 2942, and that no allowance would be paid if a price lower than that established was bid. Transcript 3095 and 2952.

Mr. Jewett testified that agency agreements applied to any product. Thus, if a potential bidder desired authorization to quote on a Pitman-Moore product, he would so inform Pitman-Moore, and if the parties agreed, the agency document would be drawn. As with polio vaccine, no allowance was permitted if a price below that then established was bid.

In January 1957 Mr. Louis Wolin of New York obtained authorization to submit a bid on Pitman-Moore polio vaccine to the City of Milwaukee. Mr. Wolin split his potential 10 per cent allowance with Milwaukee and, pursuant to the agreement, Pitman-Moore refused to deliver. Transcript 357-8.

Wyeth's distribution was made through five distributors, Transcript 2905 and 6, although wholesalers were used when necessary and handling charges were allowed in such instances. Transcript 2908-11.

From August 1955 to April 10, 1957 Wyeth gave allowances on city, county, state sales to public authorities of polio vaccine to its five distributors. On the latter date, it discontinued this practice as to polio vaccine only, G-161, elimination of handling allowances dated April 10, 1957, Transcript 2908.

[*"Most Favored Customer" Clause*]

It appears that the Thrifty Drug Company already mentioned in connection with Pitman-Moore, submitted a bid to the State of Illinois of 6.76 on January 13, 1956. G-112, page 3. Thrifty also bid below Wyeth's established price on polio vaccine on February 2, May 16, May 28 and June 14, 1956. Thrifty's practice of bidding below the producer's established price was made impractical by the November 2, 1956 amendment to the most favored customer clause, G-1-R-57-0175, which reads as follows:

> "It is further understood and agreed that in the event vaccine is sold to or for the use of public health agencies at a price lower than the contract price during the contract period, such reduction shall apply to the contract."

This was an enlargement of the application of the original most favored customer clause of October 6, 1955, G-1-R-57-0105 which reads as follows:

> "It is further understood and agreed that in the event a price reduction on vaccine is made to health agencies, during the contract period, such reduction shall apply to this contract. In no case shall prices exceed those charged to any other health agency."

Merck Sharp & Dohme sold directly to the Federal agencies. Before October 1956 Merck Sharp & Dohme allowed wholesalers a 10 per cent handling charge on state bids when necessary. Transcript 2598-99. After October 1956 it no longer did so on polio vaccine only because wholesalers were no longer needed. Transcript 2601.

Prior to October 1956, retailers could also quote city, county and state public authorities in their own behalf and receive a 10 per cent allowance. Transcript 2581.

It was Merck Sharp & Dohme's practice to advise its wholesalers of its bids in order to inform the wholesaler of his cost. Transcript 2584. According to Merck Sharp & Dohme, the wholesaler was free to quote any price. An example of this was submitted through the testimony of Mr. Harkness, who submitted a bid to the State of Kansas below that then established by Merck Sharp & Dohme. The testimony was to the effect that Merck Sharp & Dohme was "elated" at Mr. Harkness's low bid. Unfortunately, it appears Mr. Harkness's bond was not sufficient to cover his bid and accordingly he was not successful. It is noteworthy that although Mr. Harkness had apparently been doing business with the State of Kansas for a long time, he had never had any difficutly because of his bond before the incident just related.

It should also be noted that Mr. Harkness had bid Lilly's vaccine at 5.536 rather than the Lilly established price of 5.586 net. Following his submission of that bid, Mr. Harkness received a call from his wholesaler, McPike, who informed him first that the Fair Trade agreement precluded the submission of a bid below the price then established which did not influence Mr. Harkness, and, second, that by virtue of the Lilly agency agreement with McPike, no handling allowance was contemplated for the retailer, that is, Mr. Harkness. As a result of this conversation, Mr. Harkness withdrew his bid on Lilly vaccine because, said Mr. Harkness, he did not want to be the cause of McPike losing his Lilly franchise.

Mr. Kuryloski testified, Transcript 2581, that Merck Sharp & Dohme's regular distribution system was adopted for polio vaccine, and that pursuant thereto the retailers could quote city, county, state in their own behalf until October 1956 as noted heretofore. Wholesalers could do likewise, Transcript 2582.

Parke, Davis sold directly to the state as well as to the Federal Government. Prior to October 1, 1956 both wholesalers and retailers were technically able to bid to

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public authorities below the state level. Transcript 2490. In fact, however, none had ever done so. On October 1, 1956, even this possibility was eliminated by virtue of the withdrawal of the 10 per cent handling allowance, a matter which had been first considered in 1950, and which was not brought about solely by polio vaccine, with the result that Parke, Davis never paid a handling charge to anyone but a very small number of distributors which it maintained for the sake of having a local address. This was the practice as to all Parke, Davis products, Transcript 2484.

The Parke, Davis normal system of distribution was through 22 branches supplemented by 1195 biological depots. A biological depot is a retailer who stocks a complete line of all Parke, Davis biologicals for which he receives 40 and 15 for service distribution. In 1956 Parke, Davis realized 60 per cent of its sales through these depots. Transcript 2491.

Parke, Davis argued that it did not engage in policing activity as to any of its bidders. The record, however, indicates that two bids of 5.027, as opposed to 5.0274 net, the then-established Parke, Davis price, made to the State of New Hampshire on May 7, 1957 and the State of Connecticut on May 28, 1957, were withdrawn by its Boston branch.

Mr. Stephen David, pricing and cataloguing manager of Parke, Davis, testified at Transcript 2333 that he received a telephone call from Mr. Hearty, the manager of the Parke, Davis Boston branch, who indicated that a price of 5.027 had been quoted whereupon Mr. David told Mr. Hearty that 5.0274 was the correct quote. Mr. David did not recall whether the call was about Connecticut or New Hampshire but thought that his instructions were used to cover both bids. Transcript 2335.

J. *Uniform Resistance to Attempts by Purchasing Agents to Break Price.*

The Government produced evidence through the testimony of Federal purchasing agents that attempts were made to devise bid invitations in such a way as to force the defendants to vary either their price or the terms and conditions of sale of polio vaccine, none of which were accepted by the defendants. This, represented the Government, showed agreement upon the part of the defendants to maintain uniform prices.

Lilly refused to grant further discounts in line with its longstanding policy and also declined to give separate billing for shipping costs in continuation of its policy never to do so.

At the request of HEW, Mr. Rose of General Services Administration solicited offers from Lilly and all other defendants for vaccine to be delivered without specification as to containers and otherwise on a broad basis, sometime during late '56 or early '57. The amount contained in the offer was estimated to be 400,000 cc's. All defendants returned bids quoting 5.586, G-1-R-57-0216. This was at a time when inventories were supposed to be unusually high, and Mr. Rose expected that his solicitations would produce a reduction in the bidding. Lilly's inventory was high but within six weeks the inventory began to melt away; besides, the defendants found no attraction in the solicitation because they said the Government's requirement was only estimated at 400,000 cc's and could have been less.

[*Inducement to Reduce Bids*]

In the fall of 1956, Mr. Slocum, purchasing agent for New York, sought to secure a deviation in bidding by providing for bids F. O. B. plant instead of F. O. B. destination and also in soliciting for bids in two ways. The bidder had a choice between Part 1 of the invitation wherein four items were solicited individually and Part 2 where in the same four items were solicited, but if the bidder reduced the price on any one of them, he would receive the award for all four, which amounted to more than $140,000 in the aggregate.

Lilly, as did others, declined to reduce on this inducement. It is true that its inventory was rising and stood at 22,000,000 cc's in January of 1957, but these were sold by March of '57. It was during this period, the fall of 1956, that Lilly made the determination to reduce production rather than to take a cut in price.

On January 7, 1957 Mr. Upchurch, the North Carolina purchasing agent, solicited bids for some 8,000 vials to be delivered from February 1957 to June 1957. On the receipt of identical quotations, he solicited bidders, again without success. It is to be noted that by February 1, 1957 sales were very heavy.

Commander Mazzone, late of the Armed Services Medical Procurement Agency (ASMPA), testified that on October 19, 1956, November 1, 1956 and January 28, 1957, he awarded bids to Parke, Davis by virtue of the fact that all bids submitted were the same, with the result that under the applicable regulations Parke, Davis, which was located in a distressed labor area, received the awards. Two other producers, Eli Lilly and Pitman-Moore inquired independently as to the basis upon which Parke, Davis was awarded the October 19th and November 1st bids.

Commander Mazzone testified that he explained the application of the regulations to the representatives of Lilly and Pitman-Moore when each called and told them that they might overcome Parke, Davis's advantage by having the regulations changed or by lowering their prices. The awards mentioned were for orders totaling $55,000, $134,000 and $201,000 respectively.

The Government stresses the fact that no defendant lowered its price to ASMPA, despite the advice of Commander Mazzone, but the defendants point to the most favored customer clause, by the terms of which any price reduction to ASMPA would have been applied to all sales of polio vaccine to Federal authorities and by virtue of the Polio Assistance Act and the little most favored customer clause employed by some of the states to virtually every domestic public authority.

Apparently for one reason or another these defendants thought it best to forego lowering their prices in order to win the ASMPA bids in favor of seeking to sell their vaccine elsewhere. Indeed Pitman-Moore shortly thereafter sold very substantial quantities of vaccine to ASMPA.

I am aware of the fact that throughout this very period Lilly's inventory was growing at such a rate that as Mr. Beesley testified production was severely cut back. However, I am also aware of the fact that although this inventory was approximately 22 million cc's on January 1, 1957, it was completely expended by March.

Pitman-Moore admittedly declined to become involved in any reduction of its bids which would reflect diminution in any price quoted to HEW because of the most favored customer clause. It also was solicited by the same purchasing agents as mentioned in connection with Lilly and remained obdurate to any invitation to make reductions or changes in connection with the invitation devised by Mr. Slocum, purchasing agent for New York, in which he requested that the shipments be made F. O. B. plant. Pitman-Moore did, however, offer to itemize the shipping cost to the various fourteen destinations in New York so as to give Mr. Slocum a basis for his recovery from counties to which the shipments were made.

Mr. Upchurch testified that Mr. Jewett of Pitman-Moore said he had vaccine and was anxious to sell but also said that Mr. Jewett stated that the supply had caught up with the demand for Pitman-Moore as of late December 1956 and early January 1957.

Wyeth was not among those invited to rebid by Mr. Upchurch, purchasing agent for North Carolina. It had no vaccine during the time that Messrs. Slocum, Rose, Hovey and Commander Mazzone concerned themselves with inviting lesser bids during the latter part of 1956. Wyeth did refuse to give a cost breakdown or to enter into price redetermination agreements with the Military Procurement Agency because it was against its policy so to do.

Merck Sharp & Dohme replied to the invitation to quote on an estimated 400,000 cc's that it was short of inventory, and could not quote for delivery in accordance with the invitation, but was willing to quote depending on availability of stock on the basis of its established price of 5.586 net.

Parke, Davis did respond to Mr. Slocum's invitation to bid F. O. B Detroit as requested but the bid was at the established price of 5.586. The reason for this submitted by Parke, Davis was that shipping was called for to 14 separate destinations in New York State. Therefore, Parke, Davis submitted that the full price would only reflect extra cost of preparation of paper work covering the multiple shipments. It viewed price-cutting to any one purchasing agent as but the commencement of a series of price cuts which it viewed as a disastrous policy to pursue.

In the fall of 1956, during which the solicitations for 400,000 cc's estimated were made and the Slocum invitations were proffered, neither Wyeth or Merch Sharp & Dohme had any of the vaccine available. Compare G-1-R-57-0223, November 1, 1956 of Merck Sharp & Dohme.

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Assuming the correctness of the Government's assertion that there was a large inventory of polio vaccine during the fall of 1956, it must be noted that by March 1, 1957 the entire polio vaccine supply had been practically exhausted and a shortage resulted. Thus, for whatever reason, all the defendants except Wyeth, which was not producing at the time, were out of polio vaccine in March of 1957.

K. *Some Quotations to Foreign Public Authority Varied in Price Terms and Conditions of Sale.*

The Government showed that while defendants uniformly quoted the same price to domestic public authority there were occasions when the defendants quoted disparate prices to foreign public authority under comparable market conditions. Shipping terms were granted to such foreign authorities that differed from those permitted domestic authorities. The Government further submitted that polio vaccine was sold to foreign public authority at prices less than domestic prices on the ground that it was "short-dated" although short-dated vaccine was never offered at a reduced price to domestic public authority even during periods when the vaccine was in long supply.

The Government claims that the difference between the foreign situation and the domestic situation was such as to lead to the inference that the defendants' uniformity of price to domestic authorities could have only been maintained pursuant to agreement among them and not through independent action. The instances to which the Government points occurred in five Latin-American countries: Venezuela and Costa Rica in July and August of 1956, Uruguay and Brazil in July and August of 1957 and Chile in October of 1957.

Lilly received an order for the Venezuelan Government from its district manager there, dated July 18, 1956, at the rate of 5.43 F. O. B. Indianapolis. This was pursuant to an early letter written by Lilly in February of 1955 that its price in export countries would be on a net trade basis less 20 and 5 per cent. This pricing was changed in mid-July of 1956 and the Venezuelan representative was informed by letter of the change which was to the price charged public agencies in the United States and would be 5.70 less 2 per cent F. O. B. Indianapolis. This letter crossed that of the Venezuelan representative in the mail. Nevertheless, he was directed to withdraw his bid of 5.43 and substitute the authorized bid of 5.70 less 2 per cent F. O. B. Indianapolis.

Meanwhile, Merck Sharp & Dohme authorized a quote of 5.43 F. O. B. New York and Wyeth on July 2 accepted a Venezuelan purchase offer of 5.43.

In Costa Rica, in August of 1956, Lilly entered a bid of 5.70 less 2 per cent F. O. B. Indianapolis. All bids, of which this was one, were set aside and new quotations solicited. At the last moment, the Costa Rican Government demanded that the bid should be C. I. F. rather than F. O. B. plant. The representative established the C. I. F. quotation by deducting the 2 per cent cash which brought it down to 5.586 net and added 4 and 4/10ths cents as insurance and freight charges, coming up with a C. I. F. price of 5.63 net.

In Uruguay in August of 1957 Lilly entered a bid of 5.13 less 2 per cent cash discount or 1 per cent representing the Uruguayan tax, the merchandise to be shipped C. I. F.

In Chile, a similar bid of 5.13 less 2 per cent C. I. F. was authorized by Lilly on October 25, 1957.

There is no quotation to Brazil by Lilly.

It would therefore appear that Lilly maintained its domestic prices except that in the summer of 1957, Lilly found that competition was quoting the equivalent of its F. O. B. Indianapolis price but delivering for that price. It thereupon quoted C. I. F. prices to meet the competition.

In Costa Rica, in August of 1956, Pitmore's first authorized quote was $5.75 C. I. F. Its second quote was $5.61 C. I. F. The domestic price at that time was 5.70 less 2 per cent F. O. B. destination. Pitman-Moore claimed that $5.61 C. I. F. Costa Rica was an equivalent of the domestic quote.

Pitman-Moore did not quote in Venezuela, but in August of 1957 it bid to Uruguay at 5.13 less 2 per cent C. I. F., subject to the 1 per cent Uruguayan tax.

In Brazil in August 1957 it authorized a quotation of 5.027 C. I. F. when the domestic price was 5.13 less 2 per cent F. O. B. destination.

In Chile in October of 1957 it entered the same bid.

Wyeth's only authorized quotation in Costa Rica was $5.70 F. A. S. Philadelphia

in August of 1956. In Venezuela, Wyeth accepted a government purchase order of $5.43 on July 2nd, 1956, but could not deliver the merchandise.

Wyeth bid only in Costa Rica and Venezuela in foreign sales situations set up by the Government.

In Costa Rica in August of 1956, Merck Sharp & Dohme's first bid was $5.75 C. I. F. or $5.70 F. O. B. New York. Its second bid was $5.45 C. I. F. The latter quotation was a reaction to the Pitman-Moore bid of $5.46.

In Venezuela in August of 1956 Merck Sharp & Dohme bid $5.43 F. O. B. New York, a reaction to a Wyeth bid which in turn was a reaction to the erroneous bid of Lilly.

In Uruguay, Merck Sharp & Dohme's bid in August of 1957 was $5.0274 C. I. F.

Merck Sharp & Dohme did not bid in Chile but on July the 11th, it bid in Brazil $5.027 C. I. F.

Parke, Davis bid in August 1956 in Costa Rica $5.73 less 2 per cent C. I. F. on both occasions. The 3-cent differential over $5.70 represented the difference between the domestic F. O. B. destination and the foreign C. I. F. Parke, Davis did not bid in Venezuela. On July 26, 1957, Parke, Davis bid in Uruguay $5.13 less 2 per cent C. I. F., or $5.02 net.

Parke, Davis said that its representative, J. J. Williams, entered this bid without authority, but it later appeared that the vaccine was actually sold by Parke, Davis for $4.69.

In Chile, Parke, Davis bid on October 14th, 1957, $5.13 less 2 per cent C. I. F. It later reduced this to $4.62 less 2 per cent C. I. F. because it had come into competition with Connaught, the Canadian firm which was offering a 10 cc vial for $5.13.

In Brazil on August 20th, 1957, Parke, Davis quoted a price of $5.025 C. I. F. This superseded a quote of $5.027 C. I. F. of June 26, 1957, and was made to meet competition reported by Parke, Davis's Brazilian representative.

It further appears that in April, June and November of 1955, Parke, Davis bid $6.84 less 2 per cent (6.7032 as opposed to the continental United States price of 6.9874 net) to the Commonwealth of Puerto Rico. This price was the export trade price less 20 and 5 per cent. This worked out to be 40, 20 and 5 off $15. Transcript 3803.

Parke, Davis has represented it did not sell any polio vaccine to any domestic public authority in 1955. Mr. Bratzel, at Transcript 3808, testified that he could not say whether the Puerto Rican bids were ever shipped or not.

It further appears that on two occasions Parke, Davis sold to Argentina vaccine which was considered short-dated. The first of these transactions occurred on August 25, 1956, and involved vaccine with an expiration date of September 23, 1956, or less than one month. The price was $4.50 or approximately 20 per cent less than the United States public authority price of $5.70 less 2 per cent.

The second of these transactions occurred on September 21, 1956 and involved vaccine having expiration dates of December 23 and 26, 1956. This vaccine was sold for about $5.10 or $5.13, and reflected a compromise between—at $5.70, the established domestic price, and the Argentine offer of $4.50, the price per vial of the first shipment.

These transactions necessitated that Parke, Davis represent to the Government that it had endeavored to sell this vaccine domestically but without success. Such a representation was, in fact, made and is found in Parke, Davis 24, 25. Transcript 3823, 26.

In this connection, Mr. Stephen David, pricing and catalogue manager of Parke, Davis, testified that from April 1, 1955 to December 31, 1957, he never received an invitation to bid on short-dated vaccine except the foregoing Argentina invitation.

It should be noted, however, that on August 21, 1956, the Armed Services Military Procurement Agency solicited an emergency bid of 10,000 vials but that Parke, Davis replied stating that it had no vaccine available. Transcript 3793, G-1-R-59-0031. It was argued that although the Argentine short-dated vaccine was not shipped until August 25, 1956, the vaccine itself had been committed prior to August 21, 1956.

On September 4, 1956, ASMPA again solicited a bid from Parke, Davis for 13,334 vials of polio vaccine. Transcript 3793. G-1-R-59-0036. Parke, Davis replied, offering vaccine having an expiration date of December 19, 1956 (3½ months) at $5.586, the Parke, Davis then-established price to domestic authority.

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The record is devoid of any indication that ASMPA would have been interested in short-dated vaccine as such.

I note that the purchasing agent of the State of New York, Mr. Slocum, solicited bids for vaccine having an expiration date of not less than two months, in October 1956. There is, however, no indication that Parke, Davis had available any vaccine that would have met with Mr. Slocum's requirements.

G-186 and 187 are letters of June 12 and September 10, 1957, transmitting *pro forma* invoices from Parke, Davis to the Rykinskoop Bureau of The Hague, Netherlands. Transcript 3797. They show that Parke, Davis shipped 41,818 vials and 7,500 vials on each occasion. Of these quantities the Rykinskoop Bureau was billed for 40,485 and 7,267 vials respectively. Parke, Davis did not charge for the remainder of the vials.

These transactions were apparently occasioned by the fact that the Rykinskoop Bureau of the Netherlands Government could only pay a price which amounted to the domestic Parke, Davis price for 40,485 and 7,267 vials respectively, although the need was for 41,818 and 7,500 vials. In order to obtain the order, Parke, Davis billed the Bureau for the quotient which resulted when the funds available to the Bureau were divided by the then-established domestic public authority price of $5.13 less 2 per cent, $5.0274. The difference between the number of vials ordered and the number of vials paid for at that price was shipped free in both instances.

Parke, Davis conceded that these transactions represented price cuts. They were certainly a departure on its part from its strict adherence to uniformity on the domestic scene.

These transactions which, incidentally, were not proposed by the Government in its proffer of proof of foreign sales, must take their place in a consideration of all of the other circumstances brought out in the Government's case.

[*Motion for Acquittal—"Circumstantial Evidence Case"*]

In this Circuit, the rule governing the determination of a motion for acquittal made under Rule 29 in a circumstantial evidence case—and this is such a case—is clear. It has been set out in *United States v. Gasomiser Corp.*, 7 FRD 712 (D. Del. 1947) at page 718, where Judge Rodney wrote:

> "This then being a criminal case based upon circumstantial evidence, in order for the motions of the defendants to be denied guilt must be the only reasonable hypothesis from such evidence. If there is any other reasonable hypothesis, although admittedly guilt may also be a reasonable hypothesis, then the defendants are entitled to judgments of acquittal. In this circuit, it is clear that 'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.' *United States v. Laffman*, 3 Cir., 1945, 152 F. 2d 393, 394; *United States v. Tatcher*, 3 Cir., 1942, 131 F. 2d 1002, 1003; *United States v. Russo*, 3 Cir., 1941, 123 F. 2d 420, 423, or, as it has been otherwise stated by many courts in this circuit, 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.' *Paul v. United States*, 3 Cir., 1935, 79 F. 2d 561, 563; *Nicola v. United States*, 3 Cir., 1934, 72 F. 2d 780, 786; *Grant v. United States*, 3 Cir., 1931, 49 F. 2d, 118, 119. . . ."

[*"Reasonable Hypothesis of Innocence"*]

Simply stated, this requires that the Government not only prove the defendants' guilt based on a reasonable hypothesis beyond a reasonable doubt, but also that the Government simultaneously eliminate every other reasonable hypothesis of innocence. It hardly need be stated that in making this determination, the evidence introduced in the Government's case must be looked at in the light most favorable to it. But this does not mean that every possible inference in favor of the Government is drawn from the evidence—but only that inferences reasonably deducible therefrom are to be drawn.

In *Gasomiser*, Judge Rodney said further, at page 721:

> "It should be made clear, however, that while all the government's evidence is accepted as true, the court may very well look to the defense evidence for the purpose of ascertaining a reasonable hypothesis other than guilt. In many cases, a motion for judgment of acquittal made at the close of the government's case will be denied because there is no apparent reasonable hypothesis from the circumstances other than that of guilt. Indeed, in most cases any hypothesis other than guilt can

only be shown in defense. The government usually is interested solely in presenting its own case, and inferences other than guilt can only be shown by facts at variance with the hypothesis of the government itself. If the rule that 'unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused' has merit, then the rule must be invoked at a time when it may have value. After the defense evidence has been presented, therefore, such a motion may be granted for the reason that the defense evidence has presented a reasonable hypothesis other than guilt which may be inferred from all of the government's evidence. Whenever such a hypothesis exists, the case should not be allowed to go to the jury, because any inference drawn by the jury would be no more than the jury's determination as to which of two reasonable hypotheses be the correct one, and defendants in criminal cases based upon circumstantial evidence alone are entitled to have their presumption of innocence sustained as a matter of law when the inference of innocence is a reasonable one under the evidence."

[*Testimony of Defendants' Officers and Employees*]

Now, the instant motion comes at the conclusion of the Government's case, and ordinarily the defendants would not, at this stage in the trial have had the opportunity to present what they consider reasonable hypothesis of innocence. But that has not been true in this case.

The defendants are corporations, personified through their corporate officers and employees. They enjoy no privilege against self-incrimination and, while the individuals would if they themselves were defendants, such is not the case. Thus the Government's case has consisted in large measure of the testimony of high-ranking corporate officers and employees of the defendants, *viz.* the president of Eli Lilly and the executive vice-president of Eli Lilly International; the president of Pitman-Moore, the vice-president in charge of exports for Pitman-Moore and the coordinator of polio vaccine sales for Pitman-Moore; the sales manager of Wyeth and the vice-president, director of sales for Wyeth International the director of sales and marketing of MS&D, the president of MS&D International and the MS&D International sales territory coordinator; the vice-president of Parke, Davis in charge of domestic sales, the assistant to the director of the western overseas division of Parke, Davis and the manager of the pricing and catalogue department of Parke, Davis.

This approach, an endeavor to prove the guilt of the defendants out of the mouths of their own officers and employees, resulted in testimony tending to establish the innocence of the defendants, if believed, because each of the foregoing witnesses either testified that his determinations, practices and policies as to polio vaccine were based upon independent business considerations only, and were in no wise the result of an understanding or agreement, tacit or otherwise, with any other defendant, or at least gave no testimony tending to establish the contrary. Indeed, each corporate officer asked, emphatically denied collusion, agreement or understanding of any kind with any defendant. Put another way, then, the testimony of each of the defendants' officers and employees, if believed, tends to establish a reasonable hypothesis of innocence.

These hypotheses have been noted heretofore in piecemeal fashion in reviewing the eleven-plus factors relied upon by the Government to establish guilt.

In broad, but not necessarily all-inclusive summary, they are as follows:

As to Lilly:

(a) Lilly's president, Mr. Eugene N. Beesley, testified that his determination of price was based on many factors, including manufacturing costs, business risks, and a consideration of the price which the traffic would bear, and not on any agreement with any other producer of vaccine.

(b) Mr. Beesley further testified that in the opinion of the Lilly Company, the Lilly franchised wholesalers were a vital factor to the economic welfare of Lilly and that because of that fact, the agency agreements were necessary in order to bring order out of the chaos and confusion that had resulted among the Lilly wholesalers when they were bidding disparately.

(c) The change in the distribution setup of Eli Lilly which precluded the allowance of a handling charge to retailers as of February 6, 1956 was occasioned by the fact that the sale of polio vaccine did not necessitate the use of the retail outlet.

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(d) The change in Lilly's discount structure to the Federal Government on biologicals from 40, 15 and 7 to 50 and 5 resulted from a determination that the public authority on the state and lower levels should not be required to pay a higher price than the Federal Government, and since the Abendroth survey of the custom in the trade indicated that a discount of 50 and 5 to city, county and state public authority was in order, according to trade custom, the Federal Government's discount was conformed thereto in order to remove any discrimination. This change in discount structure resulted in the Federal Government paying a slightly higher price for the vaccine than it would have paid under the old discount system of 40, 15 and 7. This change was implemented only as to the vaccine.

(e) Lilly's use of the agency agreement and refusal to give quantity discounts beyond those already established for a particular class of customer appears to be in line with Lilly's firm adherence to the doctrine of fair trade, according to the testimony.

Pitman-Moore:

(a) As noted heretofore, Pitman-Moore was faced with a rather significant transition as to change of emphasis from the area of dispensing physician and veterinarian to the prescribing physician with a heavier emphasis in human medicine than had previously been the case.

(b) Pitman-Moore was, according to the testimony, seeking to obtain or establish in-state bidders in order to maintain and develop its sales not only on polio vaccine but on other products as well. Its previous system of distribution had not provided sufficient for this type of outlet. In order to achieve these bidders, the agency agreement was utilized.

(c) In its discount structure, Pitman-Moore followed consciously, but independently, according to the testimony, the Eli Lilly Company in an area where it had not previously had an occasion to develop any practice of its own.

Wyeth:

(a) Wyeth gave no discounts according to the testimony but set a price for each class of trade or customers, which price it did not reduce except when forced to do so by a competitor, at least during the period of the most favored customer clause. In late 1957, however, Wyeth did make a price reduction in a sealed bid to the State of Maryland.

(b) Wyeth, too, had production troubles which kept it out of the market for all practical purposes during late '56 and early '57.

(c) Wyeth, according to the testimony, exercised no policing or other supervision over those who bid its products as evidenced by the fact that in the first half of 1956, the Thrifty Drug Company bid Wyeth's vaccine on five occasions at a price below that then established by Wyeth.

Merck Sharp & Dohme:

(a) The testimony developed that Merck Sharp & Dohme did not establish a price on polio vaccine for sale to public authority in the United States until January 17, 1956, because of certain technical difficulties.

(b) Because of its late entry into the vaccine market, it was faced with a significant deficit. When, however, this deficit had been eliminated or overcome in April 1957, it established a reduction in polio vaccine price.

(c) Merck Sharp & Dohme's January 1956 entry into the polio market was preceded by meetings between Mr. Greeve of the HEW and Mr. Kuryloski, an associate of Merck Sharp & Dohme on December 21, 1955 and January 12, 1956. At those meetings, Mr. Greeve informed Mr. Kuryloski in some detail of the customs and policies then prevailing among the other producers of polio vaccine.

(d) It was further testified that Merck Sharp & Dohme exercised no control or pressure over its wholesalers or those who bid its products. In support of this, Merck Sharp & Dohme pointed to the Harkness bid in Kansas, referred to earlier.

Parke, Davis:

(a) Parke, Davis was another sufferer from production troubles and was at one time two and a half million dollars in the red. Nevertheless, it met the Lilly cut of February 6, 1956 in order to keep its name before the market.

(b) Furthermore, it established a cut itself in May 1956 in order to put its name and product, in this case polio vaccine, before the public with vigor.

[*Uniform Domestic Prices—Disparate Foreign Prices*]

There were two other factors which must be examined as to all the defendants simul-

taneously. These are: (1) almost unvaried price uniformity in the United States and (2) pricing to foreign countries. The latter is subdivided by the Government into (a) those instances where the defendants quoted prices below those then being quoted to domestic public authority and (b) those instances where the defendants quoted disparate prices.

[*"Most Favored Customer" Clause as Price "Floor"*]

With regard to uniformity, Merck Sharp & Dohme has succinctly pointed out that the most favored customer clause was, in effect, a floor below which a defendant would be reluctant to go domestically on any given bid since to do so would have resulted in an across-the-board cut to not only the Federal Government but, through the operation of the Polio Assistance Act and the little most favored customer clauses contained in some state contracts, to the states as well.

[*Supply and Demand*]

Furthermore, with the exception of Eli Lilly and Company in the fall of 1956, all of the defendants were at all times able to sell all the vaccine they could produce. As to Lilly's inventory of approximately 22 million cc's on January 1, 1957, the record indicates that by March 1957 this entire supply had been sold. As Mr. Hovey of the HEW testified,

> ". . . if any company could sell all they produced at the price of the current contract we naturally would not expect them to bid any lower on a new contract." Transcript 700-701.

It is interesting to note that when Pitman-Moore reduced its price on February 10, 1956 to 6.34 to public authorities in contrast to a reduction to 6.33 by the other four producers, the purchasing agent of Michigan complained that Pitman-Moore was charging a different price than the other producers, in this case a one cent higher price. This and other complaints resulted in Pitman-Moore's dropping its price to 6.33 on April 20, 1956.

Mr. Walker of Parke, Davis testified that in April 1957, following the price reduction of Merck Sharp & Dohme, he received calls from Mr. Schultz of the HEW and Miss Pinto, a military purchaser from Brooklyn, inquiring as to Parke, Davis's intention in meeting the reduction of MS&D. According to Mr. Walker, Mr. Schultz and Miss Pinto indicated that they were holding up orders for Parke, Davis until the new price was set.

Indeed, Wyeth's initial price was set higher than Lilly's in the case of the three cc shipments; that is, Lilly was charging 2.85 for a 3 cc vial whereas Wyeth was initially charging $3.00 for three lcc vials. Mr. AuBuchon testified that he believed his packaging to be superior, and that each vial contained one injection, thereby obviating the need to reinsert the needle in the rubber stopper covering the vial. However, the complaint from Wyeth's customers was such that it was forced to meet the Lilly price, which it did on April 8, 1955.

Again, Mr. Greeve, the liaison man between HEW and the vaccine producers, outlined the expectations of HEW to MS&D when the latter was preparing to enter the market in December of '55-January of '56 in terms of the conduct of the other producers, including price and discount structure.

[*Expiration of "Most Favored Customer" Clause*]

I have earlier stated the Government's division of the defendants' activities with respect to the sale of polio vaccine to foreign authorities. That is, disparate prices and prices below those then prevailing domestically to public authorities. However, there appears to be what is perhaps a more significant division, based upon the most favored customer clause. Thus, the foreign sales may be grouped into those made during the period that the most favored customer clause was in effect, that is, October 1955 through June 1957, and those made thereafter.

The former grouping includes bids made to Venezuela in July and August 1956 by Lilly, Wyeth and Merck, Sharp & Dohme, and to Costa Rica in August 1956 by all five defendants. While an argument might be made that the most favored customer clause applied to sales made to foreign public authorities, it seems clear that such was not the understanding of the defendants with the possible exception of Pitman-Moore, nor was that the understanding of the Government. Thus, during this period when the most favorable customer clause was operative in the United States, there

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was no similar force in the foreign market in terms of a benefit inuring to domestic public authority by virtue of a lower price having been offered to foreign public authorities.

Although the most favored customer clause expired contractually on June 30, 1957, it remained in effect as a practical matter until all the Government funds allocated to the polio program had been expended. Thus, the use of sealed bids and resultant breakdown in price uniformity did not occur domestically until October 1957. However, it is interesting to note that apparently within three months the established price to public authority in the United States had been reduced from $5.13 less 2 per cent, or $5.0274 net to $4.88 less 2 per cent, or $4.78 net—Pitmore-53—and not, incidentally, $4.7824 net, which would have been the result of the normal application of a 2 per cent discount to a price not ending in a zero or five, at least as applied to sales made to public authorities by these defendants during the operation of the most favored customer clause. That uniform application with its resultant price carried to four decimal places, was perhaps to be anticipated or expected in view of the operation of that clause, and in the case of Eli Lilly and Company, necessarily to its relationship with its wholesalers.

In any event, the fact that the most favored customer clause did not disappear as a practical marketing influence on the same date that it expired contractually appears to account for the time lag between the expiration of the most favored customer clause, June 30, 1957, and the appearance in the domestic market of disparate bidding in sealed bids previously seen only in the foreign market.

[*Differences in Domestic and Foreign Prices—Cause*]

The defendants have pointed up other differences between the market abroad and at home. Without exception, I find them of little or no impact. Any significant difference, therefore, must arise by virtue of the most favored customer clause.

That clause was the invention, not of the defendants, but of the Government. In its original form (October 1955) it did not apply to sales of vaccine made by a wholesaler or retailer as opposed to sales made by a manufacturer to a public authority. Thus, while Thrifty Drug Company, for example, might split its 10 per cent handling allowance and, in fact, bid and sell Wyeth vaccine to the City of Milwaukee at a price less than that established and maintained by Wyeth on its direct sales to public authority under the original most favored customer clause, without causing a general reduction in the price of Wyeth vaccine to public authority, it could not do so under the amended or revised most favored customer clause of November 2, 1956. Both the original and the amended or revised most favored customer clauses have been heretofore set out verbatim.

[*"Inevitable Result" of Clause*]

The obvious, indeed the inevitable result of the amended most favored customer clause was to effect an ever greater degree of price uniformity than had previously existed. There is no suggestion that this clause had its origin anywhere but in the Federal Government. Indeed, this clause is but one instance of the Government's unprecedented interest in the manufacture, allocation, distribution and sale of a biological, in this case Salk vaccine.

[*Acts Consistent with Innocence*]

Thus, the defendants in this case were brought together by a common objective, innocent enough, that is, the project of furnishing the National Foundation of Infantile Paralysis with vaccine for its field testing and looking toward the day when the vaccine would be approved for general public use stockpiling. Admittedly, even in these endeavors it is clear that the defendants were not moved by eleemosynary motives. Their contract provided for recovery of their costs and indemnification for damages. And for the period of the Government contracts, October 1955 to June 30, 1957, the most favored customer clause appears to buttress securely their claim to acting in a manner consistent with innocence in refusing to reduce their prices.

[*Conspiracy Only a "Suspicion"*]

The economic theory upon which the Government charges that absent an agreement among them, they would have reduced their prices at least to the extent urged by Messrs. Rose, Slocum and Upchruch, does not face the reality of the operation of the most favored customer clause as developed

by the defendants in the Government's case. Consequently, there remains only the fact that the buyers persisted in soliciting lower and different prices while each seller with equal persistence refused to lower its price or change its terms. That a particular defendant so reacted to the invitation of the purchasing agents by reason of a previous connivance and agreement with a fellow producer or producers and not independently never rises higher than the level of a suspicion and certainly does not meet the test imposed upon the Government in a criminal case, resting only upon circumstantial evidence in such a way as to eliminate any reasonable hypothesis of innocence.

When screened by the protection of the presumption of innocence and the necessity of overcoming every reasonable hypothesis consistent with innocence as these defendants are, and mindful of viewing the evidence in the Government's case in the light most favorable to it, there remains only the allegation that the defendants consciously charged uniform prices to public authorities in the United States for their polio vaccine and refused to reduce them, although repeatedly asked to do so. That their actions were not independent and were contrived by prior agreements among them cannot be but a matter of suspicion and conjecture. The plus factors which the Government has undertaken to prove in this case do not furnish the basis from which valid inferences of agreement and combination among the defendants may be drawn.

[*"Gap" Between Fact and Inference*]

And this is true, although the Government's plus factors herein may be said to stretch somewhat beyond those of the *cement* case, 268 U. S. 588 (1925) and *Pevely Dairy Company v. United States* [1948-1949 TRADE CASES ¶ 62,526], 178 Fed. 2d 363, Eighth Circuit, 1949. Nevertheless, they do not reach those appearing in either the *Morton Salt* case [1956 TRADE CASES ¶ 68,412], 235 Fed. 2d 573, Tenth Circuit, 1956, or the *C. O. Two Fire Equipment* case [1952 TRADE CASES ¶ 67,290], 197 Fed. 2d, 489, Ninth Circuit, 1952. There is no bridge over the gap from fact to inference as in the last two cases by way of any of the defendants' conduct.

[*Ruling on Motions*]

Since the evidence relating to domestic bids and the proofs concerning foreign market quotations have been adverted to, the motions to strike such evidence will be denied.

[*Acquittal Granted*]

As to the main motions of each defendant for a verdict of acquittal on Count 1 of the indictment, they are granted.

Count 2 must fall with the disposition of Count 1, apart from the challenge to venue, and the motions to acquit under Count 2 will also be granted.

The Clerk will so notify the jury.

That is the end.

[¶ 69,537] Atchison, Topeka and Santa Fe Railway Co., et al. v. Aircoach Transport Association, Inc., et al.

In the United States Court of Appeals for the District of Columbia Circuit. No. 14,053. Filed September 23, 1959.

Appeal from the United States District Court for the District of Columbia. JOSEPH MCGARRAGHY, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Applicability of Sherman Act to Common Carriers—Jurisdiction of District Court and Interstate Commerce Commission—Referral of Issues to Commission Prior to Court's Decision.—A Federal appellate court refused to recall and clarify its earlier mandate (1958 TRADE CASES ¶ 68,958) authorizing a trial court to request the assistance of the Interstate Commerce Commission in determining whether the Commission was empowered by law to confer antitrust immunity upon certain "joint agreements" by railroads which allegedly violated the antitrust laws, and, if so, whether the Commission had validly conferred such immunity on those agreements. In denying the motion to recall and clarify, the appellate court noted that the trial court had

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requested the assistance of the Commission in those matters. It had been contended that the trial court had erroneously revised the appellate court's earlier mandate because of a supervening decision of another panel of the appellate court in another case involving different parties.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.355, 2039.70; Private Enforcement and Procedure, Vol. 2, ¶ 9007.60.

For the appellants: David I. Shapiro and Gerhard P. Van Arkel, Washington, D. C.

For the appellees: Douglas F. Smith, Stuart S. Ball, Howard P. Robinson, Howard J. Trienens, and Richard J. Flynn (Sidley, Austin, Burgess & Smith); John Bodner, Jr.; Hugh B. Cox and Paul F. McArdle (Covington & Burling); William E. Miller, Stephen Ailes, Richard A. Whiting (Steptoe & Johnson), all of Washington, D. C.

Denying a motion to recall and clarify an earlier mandate of the U. S. Court of Appeals, District of Columbia Circuit, 1958 Trade Cases ¶ 68,958. For prior opinions of the U. S. District Court, District of Columbia, see 1959 Trade Cases ¶ 69,334 and 1957 Trade Cases ¶ 68,762.

Before: WILBUR K. MILLER, BAZELON and BURGER, Circuit Judges.

Order

[*Antitrust Immunity*]

PER CURIAM [*In full text*]: Upon consideration of appellees' motion to recall and clarify the mandate of this court, and it appearing that a copy of the opinion and a certified copy of the judgment of this court was transmitted to the District Court on March 14, 1958, 102 U. S. App. D. C. 355, 253 F. 2d 877 and that under the provisions of said opinion and judgment the District Court was authorized, *inter alia,* to request the assistance of the Interstate Commerce Commission in determining whether the Commission is empowered by law to confer antitrust immunity upon the joint agreements of the railroads, and, if so, whether the Commission validly did so in this case; and that the resolution of these issues depends upon the following:

1. Whether or not the railroads' practices under the joint agreements were "rates, fares . . . or charges" within the meaning of § 5(a) of the Interstate Commerce Act, 102 U. S. App. D. C. at 360-61, 253 F. 2d at 882-83; and

2. The extent to which the Commission has power to control, supervise and regulate these rates, 102 U. S. App. D. C. at 361-62, 253 F. 2d at 883-84; and

It appearing that the District Court requested the assistance of the Commission in these matters, it is

ORDERED by the court that the motion to recall and clarify is denied.

[¶ 69,538] **Leo Greenstein and Harvey Good v. National Skirt & Sportswear Association, Inc.; International Ladies' Garment Workers' Union; Joint Board of Cloak, Suit, Skirt and Reefer Makers' Union; and Skirt Makers' Union, Local # 23, ILGWU.**

In the United States District Court for the Southern District of New York. Civ. 152-76. Filed November 10, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Monopolies—Labor Unions Under Sherman Antitrust Act—Antitrust Legality of Collective Bargaining Agreement—Alleged Conspiracy Between Union and Non-Labor Group (Garment Manufacturers' Association).—Two members of an association of manufacturers and jobbers of ladies' sportswear garments, in an action charging that a collective bargaining agreement between the association and a garment workers' union was a part of an antitrust conspiracy to restrain trade, fix prices, and create a monopoly, were denied a preliminary injunction to stay arbitration proceedings commenced by the union under the agreement. The manufacturers sought to bring their claim within the doctrine of *Allen Bradley Co. v. Local Union No. 3,* 1944-1945 TRADE CASES

¶ 57,386 (holding that labor unions, while normally exempt from the operation of the antitrust laws, are liable if they conspire with non-labor groups to achieve illegal, non-labor objectives), but there were no evidentiary facts to support the charge of a conspiracy between the union and the non-labor association. If, as asserted by the union, the allegedly illegal provisions in the collective bargaining agreement were demanded and obtained by the union's independent action in furtherance of the welfare of the employees they represented, then the *Allen Bradley* case was "inapposite." Thus, the manufacturers would have had a cause of action only if they could have established that the challenged provisions of the agreement were the result of, or were used to further, a conspiracy between the union and the non-labor association to achieve an illegal restraint of trade, price fixing, or other conduct condemned by the antitrust statute.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063; Monopolies, Vol. 1, ¶ 2520.

Combinations and Conspiracies—Price Fixing—Alleged Price Fixing Provision in Collective Bargaining Agreement Between Labor Union and Manufacturers' Association—Labor Unions Under Antitrust Laws.—Two manufacturing members of an association of manufacturers and jobbers of ladies' sportswear garments failed to establish the antitrust illegality of a clause in a collective bargaining agreement between the association and a garment workers' union whereby the members of the association each agreed to pay their contractors "an amount at least sufficient to pay their workers the wages and earnings provided for in the agreement, and in addition a reasonable amount to cover overhead." The manufacturers, evidently relying on the "overhead payment" provision, contended that the agreement had been subverted for price fixing purposes since the "overhead" provision, in effect, required the contractors to sell their garments at the same level of prices. However, "overhead" costs would "vary from contractor to contractor" and it was not clear as to how that provision would result in price fixing on a conspiratorial basis. Also, the union contended that the "overhead" provision was demanded in order to insure that no part of the labor costs paid to a contractor would be diverted by him for "overhead" or other non-labor costs. The court, in denying the manufacturers a preliminary injunction to stay arbitration proceedings instituted by the union under the collective bargaining agreement, held that there was no evidence of a conspiracy between the union and the non-labor association.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181, 2101.063; Monopolies, Vol. 1, ¶ 2610.600.

Combinations and Conspiracies—Exclusive Dealing—Collective Bargaining Agreement Restricting Garment Manufacturers to Services of "Union Shop" Contractors—Reasonableness of Restraint—Labor Unions Under Antitrust Laws.—Two manufacturing members of an association of manufacturers and jobbers of ladies' sportswear garments failed to establish the alleged antitrust illegality of a clause in a collective bargaining agreement whereby the association's members agreed to maintain "union shops" or designate "union shop" contractors. The manufacturers, charging that the provision constituted an illegal restraint of trade, urged that their designations of contractors were "ineffectual" unless approved by a union board. However, they stated no instance where the union board had refused to give such approval, and made no claim that there had been an arbitrary refusal to give such approval in order to further an illegal purpose. Since 80 per cent of the production was carried on in shops not owned by members of the association, and since the manufacturers and contractors in the industry were engaged in an "integrated production effort," the provision in question was clearly designed to secure "union shop" conditions in the industry. The court also held that there was no evidence of a conspiracy between the union and the non-labor association.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.285, 2005.690, 2101.063; Monopolies, Vol. 1, ¶ 2610.300.

For the plaintiffs: Ruben Schwartz, New York, N. Y.

For the defendants: Abraham Schlesinger (Max Zimny and Peter J. Schlesinger, of counsel) for Skirt Makers' Union Local # 23, ILGWU, and Morris P. Glushein for International Ladies' Garment Workers' Union, all of New York, N. Y.

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[*Labor Unions Under Antitrust Laws*]

EDWARD WEINFELD, District Judge [*In full text except for omissions indicated by asterisks*]: Plaintiffs move for a preliminary injunction to stay an arbitration hearing before the Impartial Chairman designated in a collective bargaining agreement between the defendant National Skirt and Sportswear Association, representing employers, hereafter called "the Association", and the three union defendants, hereafter collectively referred to as "the Union." The membership of the Association is composed of jobbers and manufacturers of ladies' sportswear garments. The plaintiffs, manufacturers, have been members of the Association since 1951 and as such are bound by the terms, and entitled to the benefits, of the agreement between it and the Union.

[*Antitrust Legality of Collective Bargaining Agreement*]

The agreement, which has been in effect since June 1958, expires in May 1961 and is basically a renewal of prior agreements, the first of which was entered into in 1933. It provides against strikes and lockouts, and also contains a specified procedure for the resolution of disputes and grievances. In the event disputes are not resolved at the final stage of the grievance procedure they are referred to, and determined by the Impartial Chairman, who is granted power to conduct hearings and whose decision shall be final.

Plaintiffs operate what is known as an "inside shop" where they manufacture only a part of the garments they sell and distribute. The balance of their output is produced by sub-manufacturers and contractors to whom plaintiffs deliver goods, either uncut or cut, for processing into garments.

On October 2, 1959, the Impartial Chairman notified the plaintiffs that the union defendant Local 23 had filed a complaint charging them with violations of the agreement and that a hearing thereon would be held on October 26, 1959. The alleged violations were:

(1) failure to make payments to designated Health and Welfare, Retirement, and Severance Funds, hereinafter referred to as "welfare funds";

(2) manufacturing of the garments with non-union, non-designated and non-registered contractors;

(3) failure to settle piece rates of garments produced by non-union, non-designated and non-registered contractors.

The complaint also charged that the plaintiffs maintained more than one set of books to conceal violations and to evade provisions of the agreement and failed to submit all their books and records for examination by a union representative.

Three days before the scheduled hearing on these charges, the plaintiffs commenced this action, naming their own "Association" and the Union as defendants. They charge that certain provisions of the collective bargaining agreement violate the Labor Management Relations Act of 1947 and the Sherman Act, and consequently are unenforceable. Upon the filing of the complaint, the plaintiffs moved for a preliminary injunction to stay the hearing before the Impartial Chairman, claiming that their alleged violations are based upon the provisions of the agreement which the suit seeks to invalidate, and that if the proposed hearing were held the plaintiffs would be deprived of "our rights and our suit rendered valueless."

[*Preliminary Injunction Sought*]

Plaintiffs, to obtain the drastic relief of staying the arbitration procedure which has been applied in this industry under the present and prior agreements for more than twenty-five years, must show: (1) a likelihood that their attack upon the alleged illegal provisions will be sustained upon a hearing on the merits,[1] and (2) even if so, that irreparable injury will result unless an immediate restraint is granted.[2]

Thus we first consider the substance of the charges of illegality. These break down into an attack, first, on the welfare fund provisions, and, second, on other clauses of the contract which allegedly restrict competition and result in price-fixing.

* * *

[1] *Anderson-Friberg, Inc. v. Justin R. Clary & Son* [1950-1951 TRADE CASES ¶ 62,852], 98 F. Supp. 75 (S. D. N. Y. 1951); *Williams v. Transcontinental Gas Pipe Line Corp.*, 89 F. Supp. 485 (W. D. S. C. 1950).

[2] *United States v. Adler's Creamery, Inc.*, 107 F. 2d 987 (2d Cir. 1939), cert. denied, 311 U. S. 657 (1940).

Alleged Price-Fixing, Restraint of Trade and Monopolization of Trade

[*Antitrust Conspiracy Charged*]

The plaintiffs' second cause of action challenges other provisions of the agreement, the enforcement of which, they allege, constitutes an unlawful combination and conspiracy by the defendants to control the manufacture and sale of garments made by the plaintiffs and others in violation of the Sherman Antitrust Act. In end result, the basic charge is price-fixing and unreasonable restraint of trade.

[*Background of Garment Industry*]

The significance of the provisions under attack and the illegal results attributed to their enforcement can better be appreciated against the background of conditions in this industry which have been recognized as *sui generis*.[11] The barest outline will suffice for the purposes of this motion.

Manufacturers such as the plaintiffs produce only a portion of garments in their own shops, so-called "inside shops"; the balance are manufactured away from their premises by outside sub-manufacturers or contractors whose employees work on the manufacturers' material, either cut or uncut. Presently more than 80% of the workers in this industry work in the shops of contractors. This is usually referred to as the "outside system of production." It has its genesis in a fiercely competitive struggle by manufacturers of garments at the turn of the century which caught the workers in the industry, at that time mostly recently arrived immigrants, in between, depressed their wages and resulted in intolerable working conditions.

The defendant international union was then organized and waged an aggressive campaign to unionize the industry and to better conditions. In an effort to avoid unionization, and to evade all direct responsibility to production employees, manufacturers who operated inside shops, the then prevalent method of manufacturing and marketing of garments, abandoned their shops. Instead they contracted out all or a part of the work to outside contractors whose employees worked on materials supplied by the manufacturers. And so the outside system of production came into being. These contractors generally were marginal operators without financial resources and again the worker was exploited.

The abandonment by a manufacturer of direct production on his own premises also brought into being the "jobber". The jobber had no direct dealing with employees, was not responsible to them for wages, and was unconcerned with hours and adequate standards. He also engaged contractors for the production of his garments and by this method shifted all responsibility for employee conditions to the contractor. The jobber as a class competed with the inside manufacturer. The contractors were in fierce competition with one another for the patronage of jobbers and inside manufacturers. The essential basis of this intense competition was reduced labor costs. The brunt of this economic rivalry was borne by the workers and reflected itself in depressed wages and substandard labor conditions.[12] The Union, as well as enlightened leaders in the industry, sought to correct the demoralizing effects upon employees brought about by the jobber-contractor system. The problem of the industry, also one of public concern, was the subject of investigations by public agencies and commissions which recommended either legislation or remedial programs.[13]

In the light of the historical conditions which led to the contractor system and its attendant evils, the employees of the entire industry were the subject of Union concern and all bargaining agreements through the years have reflected not only a purpose to correct conditions, but to prevent their recurrence.[14] It is against this background

[11] 95 Cong. Rec. 8709 (1949).

[12] Report of Advisory Commission in the Cloak and Suit Industry appointed by Governor Alfred E. Smith of New York State in 1924. A very exhaustive and illuminating analysis of practices and conditions in the industry is set forth by the late Mr. Justice Shientag, who was a member of the Commission, in *Abeles v. Friedman*, 171 Misc. 1042, 14 N. Y. S. 2d 252 (1939).

[13] Reports of the United States Industrial Commission, Volume XV; Report of Advisory Commission, note 12 supra. See also *In re Larry Jay, Inc.*, 3 A. D. 2d 386, 160 N. Y. S. 2d 790 (1957), aff'd without opinion, 4 N. Y. 2d 912, 151 N. E. 2d 93 (1958); *Abeles v. Friedman*, 171 Misc. 1042, 14 N. Y. S. 2d 252 (1939).

[14] Indeed the current agreement provides: "Since the ultimate source of employment and wages paid to employees of contractors . . . is the employer . . . the parties . . . acknowledge that a member of the Association who supplies work to contractors . . . is directly concerned with the payment of the wages of the workers employed by his contractors . . . ." Paragraph Seventh (e) at p. 10.

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that the various clauses under attack must be considered.

[*Challenged Agreement*]

The current agreement provides that for the purpose of eliminating substandard labor conditions, to protect the employment opportunities of the workers covered by the agreement, and to secure enforcement of the provisions of the agreement, every Association member agrees to

(1) maintain a union shop if he manufactures on his own premises, and if not,

(2) he will designate contractors or sub-manufacturers who conduct union shops and have entered into contractual relationships with the Joint Board and/or the Union,

(3) pay to contractors or sub-contractors an amount at least sufficient to pay their workers the wages and earnings provided for in the agreement, and in addition a reasonable amount to cover overhead.

[*"Union Shop" Agreement as Restraint of Trade*]

The complaint alleges that these provisions are designed as part of a combination or conspiracy by the defendants to restrain trade, to fix prices and to create a monopoly in the garment industry. The basis of the complaint is not clearly spelled out in the affidavits submitted by plaintiffs in support of their motion and to the extent there is reference thereto, it is of a general conclusory nature. Evidently, the claim of illegal restraint of trade rests upon items 1 and 2 noted above. However, these are clearly designed to secure union shop conditions in the industry since 80% of production is carried on in shops not owned by Association members. The manufacturer and the contractor, though functioning, theoretically, as separate entities, are engaged in an integrated production effort.[15] The unique nature of this phase of the garment industry was recognized by the principal sponsor of the Taft-Hartley Act who indicated that the secondary boycott features of the Act were not intended to apply to the manufacturer-contractor relationship in this industry.[16]

[*Union "Approval" of Contractors*]

The plaintiffs urge that although they and other Association members are free to designate their contractors, this is ineffectual unless the Union Joint Board approves. No instance, however, is stated as to any claimed refusal to give approval to designations nor is any claim made that there has been an arbitrary refusal in order to further an illegal purpose.

[*Alleged Price Fixing Provision*]

Item 3 above is calculated to assure that the wage levels established by the agreement are maintained. However, plaintiffs contend that those provisions have been subverted for price-fixing purposes. Their contention rests upon the requirement that the manufacturer pay contractors, not only amounts sufficient to pay the workers the wages stipulated in the agreement, but in addition,

> "a reasonable amount . . . to cover his (the contractor's) overhead which each member of the Association shall settle separately with his contractors . . ."

There is no averment either in the complaint or the affidavits as to any specific price-fixing activity between the Association and the Union. Evidently relying on the overhead payment provision, the plaintiffs contend that this in effect requires the contractor to sell his garments at the same level of prices as all other contractors. However, overhead payments obviously would vary from contractor to contractor

[15] This aspect of the industry is expressly acknowledged in the current agreement. It provides that the parties acknowledge "that each member of the Association and his contractors . . . who manufacture garments . . . for him . . . are closely allied and have a close unity of interest with each other in the manufacture of such garments, and that, in any labor dispute, to the extent of any work performed on such garments, a member of the Association and his contractors . . . are not 'neutral' . . . but are jointly engaged in an integrated production effort." Paragraph Sixth (b) at p. 7.

[16] 95 Cong. Rec. 8709 (1949). The recently enacted Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 86th Cong., § 704 confirms this view. It contains a specific amendment to section 8(b)(4) but makes the secondary boycott provisions inapplicable to "persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry . . . ."

and just how this provision would result in price-fixing on a conspiratorial basis is not made clear. On the other hand, the Union contends that the overhead provision was demanded to insure that no part of the labor costs paid to a contractor would be diverted by him for overhead or other non-labor costs.

[*Conspiring With Non-labor Groups*]

The plaintiffs seek to bring their claim within the holdings of *Allen Bradley Co. v. Local Union No. 3*,[17] and *United Brotherhood of Carpenters v. United States*,[18] but their papers are barren of any evidentiary fact to support the charge of conspiracy between the Union and the Association. Evidently recognizing this, and to bolster their unsubstantiated charges, plaintiffs have submitted a copy of an indictment returned against another union, a member of the International herein, based upon a collective bargaining agreement and practices thereunder which they say closely parallel those in this case. On a motion for an injunction, facts, and not charges, are required if a party is to prevail. The Court has not considered the indictment relevant on this motion. An indictment is not a substitute for evidence. Neither the Association defendant nor the defendant unions are the subject of any indictment. In any event, an indictment is an accusation and has no probative value. A union, no less than a corporation, is entitled to the same presumption of innocence that protects individuals.[19]

[*Independent Action—Labor Objective*]

The Union urges that the various provisions of the agreement under attack were designed in light of the past practices and abuses which victimized the workers, whether engaged by inside manufacturers, jobbers, or outside contractors, to assure their permanent elimination and to assure further that the manufacturer and jobber would not divorce themselves from responsibility for the wages, working conditions and welfare of the worker who produces the product which they sell and market. These provisions, says the Union, are the result of hard bargaining, reflect its independent effort to protect its members by insuring a fair wage, maintenance of adequate standards of work and prevention of recurrence of past demoralizing practices. If these protective clauses were demanded and obtained by the Union, as they assert, as a matter of independent action in furthering the welfare of the employees they represent, then the *Allen Bradley* case, which was predicated on joint and conspiratorial action between the employer and the union, is inapposite. Only if plaintiffs can establish that the attacked clauses were the result of, or used to further, a conspiracy with the Association or others to achieve an illegal restraint of trade, price-fixing, or other conduct condemned by the antitrust statute, would plaintiffs have a cause of action. They submit no facts to support such a charge but rest their attack solely on the clauses in question. Contrariwise, the Union affirmatively, by affidavit ot one of its officials, swears that the provisions were demanded for the purpose of protecting the interest of its members and to maintain and preserve desirable standards which were achieved only after a long struggle to overcome the known evils which had plagued the industry and its workers through the years.

[*Temporary Injunction Denied*]

Thus, with respect to each asserted cause of action there appears to be substantial doubt as to plaintiffs' legal position, assuming there were no factual dispute, which there is. Upon the record presented, the plaintiffs have not established that their right to ultimate relief is so clear as to entitle them in advance of trial, where factual and legal issues may be fully explored, to the drastic relief of an injunction.[20]

Neither have plaintiffs shown that irreparable injury will result if the hearing on the charges against them is permitted to proceed before the Impartial Chairman . . . .

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[17] [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797 (1945).
[18] [1946-1947 TRADE CASES ¶ 57,545], 330 U. S. 395 (1947).
[19] *United States v. Standard Ultramarine and Color Co.* [1955 TRADE CASES ¶ 68,237], 137 F. Supp. 167, 174 (S. D. N. Y. 1955).
[20] *Anderson-Friberg, Inc. v. Justin R. Clary & Son* [1950-1951 TRADE CASES ¶ 62,852], 98 F. Supp. 75 (S. D. N. Y. 1951).

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[¶ 69,539] C. A. Page Publishing Co., Inc. v. Telford Work, et al.

Marietta Page v. Telford Work, et al.

In the United States District Court for the Southern District of California, Central Division. Civil Nos. 14390-WM and 14391-WM, respectively. Opinion dated October 21, 1959, filed October 23, 1959. Findings of Fact and Conclusions of Law dated November 19, 1959, filed November 23, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Necessary Averments—Interstate Commerce—Effect on Interstate Commerce as Contrasted with Effect on "Business Engaged In" Interstate Commerce—"Legal Advertising" in Local Area.—Community newspapers in the Los Angeles area, in treble damage actions charging them with injuring other publishers by alleged Sherman Act violations in the solicitation of bids for "legal advertising," were granted summary judgment on the ground that the acts complained of had no anti-competitive effects on any interstate commerce. The parties, all of whom were connected with local publishing, were engaged in interstate commerce by virtue of their regular purchase of newsprint from sources outside the state, their carriage of some national advertising and news items, and the fact that they had a few out-of-state subscribers. However, that interstate trade in which the parties were engaged suffered no anti-competitive effects from the acts complained of. The test of jurisdiction is not that a business *engaged in* interstate commerce be affected, but that the business' *interstate commerce* be affected.

The market involved, legal advertising in the Los Angeles area, was an "intrastate activity." Control over that market would have afforded no leverage to gain control of the interstate markets in newsprint, national news, or national advertising, no matter how successfully the local legal advertising market was monopolized, since the major users of those interstate services and commodities, such as the great metropolitan dailies, were not dependent upon legal advertising revenues. Furthermore, there was no appreciable interstate market for Los Angeles legal advertising. While one of the plaintiffs had 13 out-of-state subscribers and carried an average of 5 legal advertisements for out-of-state clients per issue, those were not "substantial" or "appreciable" amounts of interstate commerce by any standards.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

For the plaintiffs: Wright, Wright, Goldwater and Wright.

For the defendants: Rollin L. McNitt, Edythe Jacobs, and W. Alan Thody.

Opinion

[*Interstate Commerce*]

SOLOMON, District Judge [*In full text*]: Each case is now before the court on plaintiffs' motions for partial summary judgment, and on defendants' motions for summary judgment; each motion is directed to the issue of jurisdiction under the Sherman and Clayton Acts. Both cases raise the identical jurisdictional issues, and are treated together. The court has taken testimony in addition to the affidavits of counsel, and the parties are in agreement that all evidence relative to the jurisdictional issue is now before the court.

[*Parties*]

Plaintiff C. A. Page Publishing Company owns and publishes the Commercial News, a general business newspaper serving the Los Angeles area.

Defendants are a number of community newspapers serving small neighborhoods in and around Los Angeles and the Los Angeles Newspaper Service Bureau together with several of its officers. The Bureau is owned substantially by the defendant newspapers and represents them in the solicitation of legal advertising.

[*"Legal Advertising" Market—Antitrust Charges*]

Plaintiff seeks treble damages under the Sherman and Clayton Acts.[1] It claims that collusive and illegal bidding by defendants caused the Commercial News to lose printing contracts for the 1951 and 1954 Los Angeles delinquent tax lists. More partic-

[1] 15 U. S. C. §§ 1, 2, 4, 13, 15, 18 and 26.

ularly, plaintiff contends that defendant newspapers

(1) fixed rates for legal advertising published in their newspapers,

(2) appointed Telford Work to submit collusive and illegal bids,

(3) pooled forces and facilities to print and publish legal advertising so as to be in a position to outbid on public legal advertising all publishers who were not members of the Bureau,

(4) pooled receipts,

(5) sought to restrain the general public from placing legal advertising with non-member newspapers,

(6) sought by threats, intimidation, and duress to destroy non-member newspapers,

(7) divided the market territorially among its members,

(8) placed prohibitive restrictions on new membership,

(9) bought out various non-member newspapers,

(10) succeeded in effectively eliminating competition by non-member newspapers in the publishing of legal advertising.

Plaintiff contends that these activities enabled one of the defendant newspapers to obtain the contract to publish the Los Angeles delinquent tax list on bids of $52,000 in 1951, and $76,000 in 1954, as against plaintiff's bids of $109,000 in 1951 and $120,000 in 1954. Plaintiff estimates that its costs in printing the lists, had it been the successful bidder, would not have exceeded $24,000 for either list. Thus, it seeks over a half million dollars in damages, representing three times its estimated net profit of $85,000 in 1951, and $96,000 in 1954.

[*Companion Case*]

In the companion case, consolidated for trial, plaintiff Marietta Page brings a stockholder derivative action on behalf of Consolidated Printing and Publishing Company, the former publisher of the Los Angeles Daily Journal, a newspaper primarily engaged in the publication of legal advertising for the Los Angeles area.

She alleges that defendant newspapers sought to destroy the Journal, a non-member of the Bureau, and by their activities impaired the revenues of the Journal so severely that the owners of Consolidated were forced to sell out for one million dollars less than the former value of the Journal. Thus, plaintiff seeks, for Consolidated, $3,000,000, treble its alleged loss.

[*Jurisdiction—Interstate Commerce*]

Plaintiffs argue that a newspaper is by its nature engaged in interstate commerce, and therefore acts which interfere with the normal operation of a newspaper business necessarily affect interstate commerce sufficiently to satisfy the jurisdictional requirements of the Sherman and Clayton Acts.

We may assume that the plaintiff and defendant newspapers are engaged in interstate commerce by virtue of (1) their regular purchases of newsprint from sources outside of California, (2) their carriage of some national news and feature items, (3) their carriage of some national advertising, and (4) a few out-of-state subscribers.

[*Test*]

However, the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the offensive acts affect the interstate commerce of such business or any business. Furthermore, it is not all economic consequences to interstate commerce which confer jurisdiction but only those anti-competitive consequences which the statutes are designed to prevent.[2]

[2] "The word 'affect' is used in two different situations under the antitrust laws. A case under the antitrust laws, so far as the interstate commerce element is concerned may rest on one or both of two theories:

(1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.

(2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but substantially *affected* interstate commerce.

"Under both of these theories, the transactions complained of must *affect or have an effect* on interstate commerce or the requirements of the statute are not satisfied. Under the 'in commerce' theory, the ultimate effect on interstate commerce is the impact on that commerce under a qualitative and not a quantitative test. If there is price fixing or division of the market involved, there are violations *per se*, as a matter of law. Where there is involved no price fixing or division of the market, the effect of the transactions complained of may be a question of law or a mixed question of law and fact.

"Turning to the second alternative, where acts wholly within intrastate commerce substantially affect interstate commerce, these acts

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[*Cases Considered*]

This principle was very well expressed in *Mandeville Farms v. Sugar Co.*, 1947, [1948-1949 Trade Cases ¶ 62,251], 334 U. S. 219, 234, where the court stated:

> "[G]iven a restraint of the type forbidden by the Act . . . and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence."

In *Sears, Roebuck & Company v. Blade*, S. D. Cal. 1953 [1953 Trade Cases ¶ 67,475], 110 F. Supp. 96, Sears brought a treble damages action against its former Los Angeles advertising manager and several local engravers, arising out of an alleged kickback arrangement between the manager and his co-defendants in the sale to Sears of engravings and mats.

Ample facts appeared to qualify Sears as a business engaged in interstate commerce, and the court so found. Nevertheless, the court dismissed the action on the express ground that the acts complained of were not alleged to have restrained or have tended to restrain these interstate activities in which Sears was engaged. Accord. *Feddersen Motors v. Ward*, 10 Cir. 1950 [1950-1951 Trade Cases ¶ 62,579], 180 F. 2d 519, *Boro Hall Corp. v. General Motors*, 2 Cir. 1946 [1940-1943 Trade Cases ¶ 56,228], 130 F. 2d 196, on rehearing. See also *Brenner v. Texas Co.*, D. C. N. D. Cal. 1956 [1956 Trade Cases ¶ 68,314], 140 F. Supp. 240, 243.

In every case cited by plaintiff involving news media, a defendant had restrained, or attempted to restrain, competition in the interstate market for national news and advertising. *Lorain Journal v. United States* [1950-1951 Trade Cases ¶ 62,957], 342 U. S. 143 (1951); *Farmers Guide Co. v. Prairie Co.*, 293 U. S. 268 (1934); *Greenspun v. McCarran*, D. C. Nev. 1952 [1953 Trade Cases ¶ 67,439], 105 F. Supp. 662, and *United States v. The Times-Picayune Publishing Co.*, D. C. E. D. La. 1952 [1952 Trade Cases ¶ 67,285], 105 F. Supp. 670.

In each of these cases, newspapers, enjoying dominant positions in local or regional newspaper markets, utilized various methods outlawed by the Sherman Act, to draw advertising from competing news media, in order to drive competitors out of business and to monopolize local markets for interstate news and advertising.

In *Evening News Publishing Co. v. Allied Newspaper Carriers of N. J.*, 3 Cir. 1959 [1959 Trade Cases ¶ 69,291], 263 F. 2d 715, an association of newspaper carriers utilized its dominant position of the home delivery market to force the Evening News to abandon the use of newsboys in order to restrain and monopolize home deliveries of the News. The court held that the dissemination of national news and advertising was "an essential element of [the newspaper's] being", and that home delivery is "an integral part of the interstate operation".

[*No Interference with Interstate Commerce*]

In the present case, the loss of the delinquent tax list contracts was not alleged to have threatened the normal operation of the Commercial News—a newspaper of general circulation neither primarily devoted to, nor economically dependent upon legal advertising. Thus, although the Commercial News carried substantial amounts of national news and display advertising, there was no interference with the flow of such news and advertising to Commercial News readers. On the other hand, the Los Angeles Daily Journal, which is primarily devoted to legal advertising, carried insignificant quantities of national news and display advertising, so that even if we assume that the original Journal was eliminated as a competitor and the current Journal is a new and distinct entity, the elimination of the Journal also did not interfere with the flow of national news and display advertising.

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may occur before goods enter the flow of commerce, or after they leave the flow of commerce. Here we have a question of fact as to whether the wholly intrastate acts substantially affect the flow of commerce.

"After determination of the issue as to whether the wholly intrastate acts substantially affect the flow of commerce, we then reach the same problem that is reached under the 'in commerce' theory, namely the ultimate effect or impact of the acts complained of on interstate commerce and again the test is a qualitative one and not a quantitative test, and again is a question of law, or a mixed question of law and fact." *Las Vegas Merchant Plumbers Ass'n. v. United States*, 9 Cir. 1954 [1954 TRADE CASES ¶ 67,673], 210 F. 2d 732, 739, n. 3.

Furthermore, even if the original Journal had carried substantial news and advertising and even if the Commercial News had been destroyed by defendants' activities, no showing could have been made that the defendants had any control or potential control over the interstate markets for newsprint, national display advertising, or the dissemination of national news. This is no case of creeping monopolization. *Klors v. Broadway-Hale Stores,* 1959 [1959 TRADE CASES ¶ 69,316] 359 U. S. 207. Plaintiffs assert that the defendant newspapers were able to destroy the Journal by the exercise of control over the local legal advertising market. But this control could afford them no leverage to gain control of the interstate markets in newsprint, national news, or national display advertising, no matter how successful their monopoly of the legal advertising market, since the major users of these interstate services and commodities, such as the great metropolitan dailies, are not dependent upon the revenues brought by legal advertising.

[*Interstate Market for "Legal Advertising"—Amount*]

If there existed an appreciable interstate market for Los Angeles legal advertising or a Los Angeles market for legal advertisements placed by out-of-state clients, a case might be made out for the anti-competitive effects of defendants' activities on these markets. No such markets exist. The Journal is the only newspaper involved which is primarily devoted to legal advertising. It is the only newspaper involved whose out-of-state readers are particularly interested in legal advertising. The Journal has only 13 out-of-state subscribers, three of whom are complimentary. Similarly, legal advertisements for out-of-state clients appeared in the Journal regularly, though on a very small scale (averaging 5 items per issue), and a great majority of these items were placed by local counsel. These are not "substantial" or "appreciable" amounts of interstate commerce by any standards, and we hold that these items also come within the maxim *de minimis.* See, e.g. *Klors v. Broadway-Hale Stores, supra,* at 211; *Mandeville Farms v. Sugar Co., supra,* at 234; *United States v. Yellow Cab Co.,* 1946 [1946-1947 TRADE CASES ¶ 57,576], 332 U. S. 218, 225. Cf. *Mabee v. White Plains Publishing Co.,* 1945, 327 U. S. 178, 181; *Labor Board v. Fainblatt,* 1938, 306 U. S. 601, 607.

[*Cases Dismissed*]

Plaintiffs' motions for partial summary judgments are denied, and defendants' motions for summary judgments are granted. Both cases are dismissed. No costs.

Findings of Fact and Conclusions of Law on Motions for Summary Judgment

[*C. A. Page Publishing Co., Inc. v. Telford Work*]

This cause came on to be heard, before the Honorable Gus J. Solomon, Judge, on motion of the Defendants for Summary Judgment and on cross-motion of the Plaintiff for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff and Defendants being represented by their respective attorneys of record, Defendants having filed their several motion papers, and Plaintiff having filed its several opposition papers, and its several motion papers on cross-motion for summary judgment, and the Court having heard testimony in addition to the affidavits and exhibits filed and referred to by the respective parties, and it appearing to the Court that the parties are in agreement that all evidence relative to the issue of jurisdiction is before the Court, and the matter having been submitted for decision; wherefore, the Court, being fully advised in the premises, and the Court having rendered its decision, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. Plaintiff, C. A. Page Publishing Co., Inc., a California corporation, owns and publishes the Commercial News, a general business newspaper serving the Los Angeles area.

2. Defendants are the owners and publishers of a number of community newspapers serving small neighborhoods in and around Los Angeles and the Los Angeles Newspaper Service Bureau, a California corporation, Mutual Newspaper Publishing Co., a California corporation, and the several officers of said corporations. The Los Angeles Newspaper Service Bureau, hereinafter referred to as "Bureau" and its subsidiary corporation, Mutual Newspaper Publishing Co., are owned substantially by the de-

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fendant newspaper publishers. Mutual Newspaper Publishing Co. publishes The Los Angeles Daily Journal, a newspaper primarily engaged in the publication of legal advertising for the Los Angeles area. Bureau represents the newspaper defendants in the solicitation of legal advertising.

3. Plaintiff seeks treble damages under the Sherman and Clayton Acts, 15 U. S. C. §§ 1, 2, 4, 13, 15, 18 and 26.

4. Plaintiff claims that collusive and illegal bidding by defendants caused the Commercial News to lose printing contracts for the year 1951 and 1954 for the publication of the Los Angeles County delinquent tax lists. More particularly, plaintiff contends that defendant newspapers

(a) fixed rates for legal advertising published in their newspapers,

(b) appointed Telford Work to submit collusive and illegal bids,

(c) pooled forces and facilities to print and publish legal advertising so as to be in a position to outbid on public legal advertising all publishers who were not members of the Bureau,

(d) pooled receipts,

(e) sought to restrain the general public from placing legal advertising with non-member newspapers,

(f) sought by threats, intimidation, and duress to destroy non-member newspapers,

(g) divided the market territorially among its members,

(h) placed prohibitive restrictions on new membership,

(i) bought out various non-member newspapers,

(j) succeeded in effectively eliminating competition by non-member newspapers in the publishing of legal advertising.

5. Plaintiff contends that these activities enabled one of the defendant newspapers to obtain the contract to publish the Los Angeles County delinquent tax list on bids of $52,000 in 1951, and $76,000 in 1954, as against plaintiff's bids of $109,000 in 1951 and $120,000 in 1954.

6. Plaintiff estimates that its costs in printing the said delinquent tax lists, had it been the successful bidder, would not have exceeded $24,000 for either list.

7. Plaintiff seeks over a half million dollars in damages, representing three times its estimated net profit of $85,000 in 1951, and $96,000 in 1954.

8. Plaintiff and defendant newspapers engage in interstate commerce by virtue of (1) their regular purchases of newsprint from sources outside of California, (2) their carriage of some national news feature items, (3) their carriage of some national advertising, and (4) a few out-of-state subscribers.

9. The loss of the delinquent tax list contracts was claimed to have threatened the normal operation of the Commercial News, a newspaper of general circulation neither primarily devoted to, nor economically dependent upon legal advertising.

10. Although the Commercial News carried substantial amounts of national news and display advertising, there was no interference with the flow of such news and advertising to Commercial News readers.

11. There is no showing, and no showing could here be made, that defendants had any control or potential control over the interstate markets for newsprint, national display advertising, or the dissemination of national news.

12. This is no case of creeping monopolization of any interstate market.

13. Plaintiff claims that defendant newspapers were able to destroy the Los Angeles Daily Journal by the exercise of control over the local legal advertising market. Such control of the local legal advertising market could afford defendants no leverage to gain control of the interstate markets in newsprint, national news, or national display advertising, no matter how successful a monopoly could be gained of the legal advertising market, since the major users of those interstate services and commodities, such as the great metropolitan dailies in the Los Angeles area, are not dependent upon revenue brought by legal advertising.

14. No appreciable interstate market exists either for Los Angeles legal advertising or for legal advertisments in Los Angeles placed by out-of-state clients. No such interstate markets exist.

Conclusions of Law

1. There is no genuine issue as to any of the foregoing facts which are determinative of the cause.

2. The market involved in the instant case is an intrastate activity which is not in trade or commerce between the states.

3. The interstate trade or commerce in which plaintiff and defendants engage did not suffer any anti-competitive effects from the acts of defendants of which plaintiff complains.

4. The activities of defendants with relation to legal advertising did not have any anti-competitive effect on any interstate market.

5. There is no jurisdiction of the Federal Court in this case under the antitrust laws.

6. Defendants are entitled to a summary judgment dismissing this action, and Judgment should be entered accordingly.

Findings of Fact and Conclusions of Law on Motions for Summary Judgment

(Marietta Page v. Telford Work, et al.)

[*Summary Judgment*]

This cause came on to be heard, before the Honorable Gus J. Solomon, Judge, on motion of the Defendants for Summary Judgment and on cross-motion of the Plaintiff for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff and Defendants being represented by their respective attorneys of record, Defendants having filed their several motion papers, and plaintiff having filed her several opposition papers, and her several motion papers on cross-motion for summary judgment, and the Court having heard testimony in addition to the affidavits and exhibits filed and referred to by the respective parties, and it appearing to the Court that the parties are in agreement that all evidence relative to the issue of jurisdiction is before the Court, and the matter having been submitted for decision; wherefore, the Court, being fully advised in the premises, and the Court having rendered its decision, finds the facts and states the conclusions of law as follows:

Findings of Fact

[*Parties*]

1. Plaintiff, Marietta Page, brings a stockholder's derivative action on behalf of Consolidated Printing and Publishing Company, hereinafter referred to as "Consolidated," the former publisher of the Los Angeles Daily Journal, a newspaper primarily engaged in the publication of legal advertising for the Los Angeles area.

2. Defendants are the owners and publishers of a number of community newspapers serving small neighborhoods in and around Los Angeles and the Los Angeles Newspaper Service Bureau, a California corporation, Mutual Newspaper Publishing Co., a California corporation, and the several officers of said corporations. The Los Angeles Newspaper Service Bureau, Inc., hereinafter referred to as "Bureau," and its subsidiary corporation, Mutual Newspaper Publishing Co., hereinafter referred to as "Mutual" are owned substantially by the defendant newspaper publishers. Mutual publishes The Los Angeles Daily Journal, the newspaper previously published by Consolidated, and which was purchased by Mutual from all of the stockholders of Consolidated. Bureau represents the news paper defendants in the solicitation of legal advertising.

[*Charges*]

3. Plaintiff seeks treble damages for Consolidated under the Sherman and Clayton Acts, 15 U. S. C. §§ 1, 2, 4, 13, 15, 18 and 26.

4. Plaintiff claims that defendant newspapers sought to destroy the Los Angeles Daily Journal, a non-member of the Bureau, and by their activities impaired the revenue of the Journal so severely that the owners of Consolidated were forced to sell out for one million dollars less than the former value of the Journal.

5. Plaintiff contends that defendant newspapers

(a) fixed rates for legal advertising published in their newspapers.

(b) appointed Telford Work to submit collusive and illegal bids.

(c) pooled forces and facilities to print and publish legal advertising so as to be in a position to outbid on public legal advertising all publishers who were not members of the Bureau.

(d) pooled receipts.

(e) sought to restrain the general public from placing legal advertising with non-member newspapers.

(f) sought by threats, intimidation, and duress to destroy non-member newspapers.

(g) divided the market territorially among its members.

(h) placed prohibitive restrictions on new memberships.

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(i) succeeded in effectively eliminating competition by non-member newspapers in publishing of legal advertising.

6. Plaintiff seeks, for Consolidated, $3,000,000.00 treble its alleged loss.

[*Interstate Commerce*]

7. Defendant newspapers engage in interstate commerce by virtue of (1) their regular purchases of newsprint from sources outside of California, (2) their carriage of some national news feature items, (3) their carriage of some national advertising, and (4) a few out-of-state subscribers.

8. Consolidated engaged in interstate commerce by virtue of (1) regular purchases of newsprint from sources outside of California (2) a few out-of-state subscribers. The Los Angeles Daily Journal, primarily devoted to legal advertising, carried insignificant quantities of national news and display advertising.

9. Even if Consolidated, former owner of the Los Angeles Daily Journal, had been eliminated as a competitor by reason of the activities of defendants in relation to legal advertising, such elimination of Consolidated as a competitor, would not have interfered with the flow of national news and display advertising in interstate commerce.

10. No showing was, or could have been made, that the defendants had any control or potential control over the interstate markets for newsprint, national display advertising, or the dissemination of national news.

11. This is no case of creeping monopolization of any interstate market.

12. Plaintiff claims that defendant newspapers were able to destroy the Los Angeles Daily Journal by the exercise of control over the local legal advertising market. Such control of the local legal advertising market could afford defendants no leverage to gain control of the interstate markets in newsprint, national news, or national display advertising, no matter how successful a monopoly could be gained of the legal advertising market, since the major users of those interstate services and commodities, such as the great metropolitan dailies in the Los Angeles area, are not dependent upon revenue brought by legal advertising.

13. No appreciable interstate market exists either for Los Angeles legal advertising or for legal advertisements in Los Angeles placed by out-of-state clients. No such interstate markets exist.

14. The Los Angeles Daily Journal is the only newspaper involved which is primarily devoted to legal advertising. It is the only newspaper involved whose out-of-state readers are particularly interested in legal advertising. It has only 13 out-of-state subscribers, three of whom are complimentary. Legal advertisements for out-of-state clients appeared in the Journal regularly, though on a very small scale (average 5 items per issue), and a great majority of these items were placed by local counsel. These are not "substantial" or "appreciable" amounts of interstate commerce by any standards, and come within the maxim of *de minimus*.

Conclusions of Law

[*Effect on Interstate Commerce*]

1. There is no genuine issue as to any of the foregoing facts which are determinative of the cause.

2. The market involved in the instant case is an intrastate activity which is not in trade or commerce between the states.

3. The interstate trade or commerce in which plaintiff and defendants engage did not suffer any anti-competitive effects from the acts of defendants of which plaintiff complains.

4. The activities of defendants with relation to legal advertising did not have any anti-competitive effect on any interstate market.

5. There is no jurisdiction of the Federal Court in this case under the antitrust laws.

[*Summary Judgment Granted*]

6. Defendants are entitled to a summary judgment dismissing this action, and Judgment should be entered accordingly.

[¶ 69,540] A. O. Novander, Inc. v. Chapel Hill Gardens, Inc.; Jas H. Matthews & Co., Inc., and Jas. H. Matthews & Co.

In the United States District Court for the Northern District of Illinois, Eastern Division. Civil Action No. 58 C 1667. Dated November 17, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Restricting Use of Competitors' Products—Cemetry Markers.—An owner of two cemeteries was prohibited by a consent decree, which was entered in a private antitrust action, from preventing, restricting, or discouraging "outside" dealers from selling markers for installation in its cemeteries. More specifically, the owner was prohibited from (1) making unreasonable requirements as to the alloy content of markers to be installed in its cemeteries, (2) requiring a separate certificate as to the alloy content of each marker to be installed in its cemeteries, (3) requiring lot owners to pay excessive and unreasonable installation, "foundation," and "care" charges for markers to be installed in its cemeteries, (4) enacting any unreasonable rules and regulations which would make it impossible for lot owners to purchase markers from "outside" dealers for installation in its cemeteries, and (5) informing lot owners that markers for installation in its cemeteries could not be purchased from any other person.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.825.

Private Enforcement and Procedure—Suit for Injunctive Relief—Consent Decree—Specific Relief—Modification of Contracts and "Rules and Regulations" Relating to Sale and Installation of Cemetery Markers—Specific Prices Set by Judgment.—An owner of two cemeteries, in a consent decree entered into between itself and an "outside" dealer in cemetery markers, was ordered to (1) modify its contracts for the sale of cemetery markers in such a manner as to show a break-down of the total price charged to lot owners, (2) modify its "rules and regulations" so as to require each manufacturer desiring to have its markers installed in the owner's cemeteries to furnish only one initial certificate as to the alloy content of the manufacturer's markers, (3) make specific charges, as set out in the judgment, for installation, "foundations," and "care" of markers, (4) furnish a yearly certificate, to the plaintiff's attorney, as to the use of certain "funds" created for the care of the markers in its cemeteries, and (5) file with the clerk of the court, and serve on the plaintiffs' attorney, a copy of its rules and regulations as revised in accordance with the judgment.

See Private Enforcement and Procedure, Vol. 2, ¶ 9024.40.

Department of Justice Enforcement and Procedure — Consent Decrees — Use of Government Consent Decree in Subsequent Private Action—Private Consent Decree in Which Parties Concede Applicability of Provisions in Government Consent Decree.—A private antitrust action in which dealers in cemetery markers charged a manufacturer and an owner of two cemeteries with imposing various restraints on the sale and installation of such markers was terminated by the entry of a consent decree between the dealers and the owner of the cemeteries. The manufacturer was dismissed, with the consent of the dealers, after agreeing that (1) the dealers were within the class of persons contemplated by a Government consent decree in a provision which directed the manufacturer to sell to all retailers upon non-discriminatory terms and conditions, and (2) the owner of the cemeteries was within the class of persons contemplated by the Government consent decree in provisions which, among other things, prohibited the manufacturer from dealing with "any cemetery" which unreasonably restricted the installation of markers in its cemetery. The owner of the cemeteries, a defendant here but not in the earlier Government action, conceded that it was included in the latter provision of the Government decree, and in certain other provisions thereof.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8241; Private Enforcement and Procedure, Vol. 2, ¶ 9024.

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For the plaintiffs: Albert J. Meserow.

For the defendants: Crowell and Leibman for Jas. H. Matthews & Co. and Jas. H. Matthews and Co., Inc.; and Kelly and Cohler for Chapel Hill Gardens, Inc.

Final Judgment

Part I

[*Consent Decree*]

EDWIN A. ROBSON, District Judge [*In full text except for omissions indicated by asterisks*]: Plaintiffs having filed their complaint herein on September 9, 1958; the defendants, Jas. H. Matthews & Co., a Pennsylvania corporation, and Jas. H. Matthews & Co., Inc., an Illinois corporation, having appeared by their attorneys; and the plaintiffs and the defendants, Jas. H. Matthews & Co., Inc. and Jas. H. Matthews & Co., by their attorneys, having consented to the entry of Part I of this Final Judgment without admission by any party in respect of any issue of fact or law;

And it appearing to the Court, before any testimony has been taken herein, and without any trial or adjudication of any issue of fact or law herein, and upon consent of the plaintiffs and the defendants, Jas. H. Matthews & Co., a Pennsylvania corporation, and Jas. H. Matthews & Co., Inc., an Illinois corporation, that:

[*Government Consent Decree*]

1. Following the filing of this action on September 9, 1958, there was entered on November 5, 1958 a Final Judgment in Civil Action No. 16818, entitled *United States of America v. Jas. H. Matthews & Co., a Pennsylvania corporation* [1958 TRADE CASES ¶ 69,187], in the United States District Court for the Western District of Pennsylvania. The Final Judgment in Civil Action No. 16818 is as follows: * * *

[*Persons Referred to in Government Consent Decree*]

2. Jas. H. Matthews & Co., a Pennsylvania corporation, agrees that it will not deny that plaintiffs were within the class of persons contemplated by the reference in Section IV(A) of said Final Judgment in Civil Action No. 16818 [1958 TRADE CASES ¶ 69,187], to "any person regularly engaged in the business of selling markers or monuments at retail".

3. Jas. H. Matthews & Co., a Pennsylvania corporation, agrees that it will not deny that Chapel Hill Gardens, Inc. was within the class of persons contemplated by the reference to "any cemetery" in Section V (D), (G) and VI (A) of the said Final Judgment in Civil Action No. 16818 [1958 TRADE CASES ¶ 69,187].

It Is Therefore Ordered, Adjudged and Decreed That:

[*Manufacturers Dismissed*]

4. Defendants, Jas. H. Matthews & Co., a Pennsylvania corporation, and Jas. H. Matthews & Co., Inc., an Illinois corporation, be and they are hereby dismissed from this action with prejudice and without costs.

Part II

[*Cemetery Operator*]

And it further appearing to the Court that the defendant, Chapel Hill Gardens, Inc. by itself and through its wholly owned subsidiary (hereinafter referred to as "Chapel Hill"), is the owner and operator of two (2) cemeteries in the metropolitan area of Chicago known as Chapel Hill Gardens South and Chapel Hill Gardens West; that the complaint herein is brought under the Sherman Antitrust Act;

And it further appearing to the Court before any testimony has been taken herein, and without any trial or adjudication of any issue of fact or law herein, and the attorneys for plaintiffs and defendant Chapel Hill having consented to the entry of Part II of this Final Judgment with respect to Chapel Hill and plaintiffs,

It Is Therefore Ordered, Adjudged and Decreed That:

[*Single Plaintiff Dismissed*]

5. Upon motion of plaintiffs herein, Rita Cesaro doing business as F. Cesaro Monument Co., one of the plaintiffs, be and she is hereby dismissed as a party plaintiff.

It Is Further Ordered, Adjudged and Decreed That:

6. The reference to "any cemetery" of "Cemetery" in Sections V (D), (G) and VI (A) of the said Final Judgment, in Civil Action No. 16818 [1958 TRADE CASES ¶ 69,187], hereinbefore set forth, does include defendant Chapel Hill.

[*Restraining Installation of Outside Dealers' Cemetery Markers*]

7. The defendant Chapel Hill is enjoined and restrained from directly or indirectly preventing, restricting and discouraging plaintiff dealers from selling markers for installation in the cemeteries operated by Chapel Hill, except as provided from time to time in its rules and regulations, not inconsistent with this decree.

[*Unreasonable Requirements—Alloy Content*]

8. The defendant Chapel Hill is enjoined and restrained from directly or indirectly preventing, restricting and discouraging sales of markers by plaintiff dealers for installation in said defendants' cemeteries by making unreasonable requirements for certain specific alloy contents in the markers, except as hereinafter provided by the revised rules and regulations of Chapel Hill.

[*Certificates of Alloy Content*]

9. The defendant Chapel Hill is enjoined and restrained from requiring a separate certificate of alloy content for each marker to be installed in Chapel Hill cemeteries, except as provided in its revised rules and regulations hereinafter set forth.

[*Unreasonable Charges*]

10. The defendant Chapel Hill is enjoined and restrained from directly or indirectly preventing, restricting and discouraging sales of markers by plaintiff dealers for installation in Chapel Hill cemeteries by assessing and requiring lot owners to pay excessive and unreasonable installation, foundation and care charges for markers, except that said charges shall from time to time be fixed and determined as hereinafter set forth.

[*Unreasonable Rules and Regulations*]

11. The defendant Chapel Hill is enjoined and restrained from enacting any unreasonable rules or regulations which would make it impossible for a lot owner to purchase a marker from plaintiff dealers for installation in Chapel Hill cemeteries.

[*Availability of Markers*]

12. The defendant Chapel Hill is enjoined and restrained from directly or indirectly informing its lot owners that markers cannot be purchased for installation in Chapel Hill cemeteries from any person other than Chapel Hill.

[*Specific Relief—Modification of Contracts*]

13. The defendant Chapel Hill is hereby ordered and directed, within thirty (30) days from date hereof, to modify its sales and contracts for markers to list separately and specifically the allocation of the total price, as follows: (a) the selling price of the marker, (b) the installation and foundation charges, (c) the amount of the "early care fund" deposit which will be set aside upon its books as a reserve, (d) the amount of the "late care fund" deposit and (e) the total price thereof to the lot owner.

[*Single Certificate of Alloy Content*]

14. The defendant Chapel Hill is hereby ordered and directed, within thirty (30) days from date hereof, to modify its rules and regulations to provide and require each bronze manufacturer desiring to have its marker installed in Chapel Hill cemeteries to furnish only one initial certificate containing a representation and warranty setting forth the minimum alloy content of said marker, style, finish and color thereof which conforms to the rules and regulations of Chapel Hill and that all subsequent markers of said manufacturer will comply and conform with said minimum alloy content, style, color and finish thereof, as specified in said certificate; subsequent separate certificates shall not be required of the same bronze manufacturer, except in specific individual instances in which Chapel Hill shall have a reasonable doubt as to compliance with the foregoing.

[*Specific Charges to Be Made*]

15. The defendant Chapel Hill is hereby ordered and directed, within thirty (30) days from date hereof, to make the following charges for installation, foundations and care of markers, as follows:

(a) 7¢ (seven cents) per square inch of said marker for installation, service and foundations for markers.

(b) 5½¢ (five and one-half cents) per square inch of said marker for "early care" of markers, said sum to be separately set forth in its books, and the principal and income of said "early care fund" reserve to be used solely for the care, upkeep and main-

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tenance of markers for the first five (5) years after installation.

(c) 5½¢ (five and one-half cents) per square inch of said marker shall be deposited in a trust fund with the Chicago Title and Trust Company of Chicago as Trustee, under existing trust agreements, the income thereof to be used exclusively for the care and maintenance of markers in said defendants' cemeteries after five (5) years from installation.

(d) Said charges and provisions shall be equally applicable to all markers, whether with vases or without.

[*Price Changes—Notice Required*]

16. The aforesaid charges for installation, service, foundations and care are fixed as of this date but are subject to increase or decrease, depending upon general economic conditions, labor, material and any other costs or factors, and that if any of these conditions justify a change in said charges, defendant Chapel Hill may do so by notifying plaintiff dealers and their attorney, in writing, at least thirty (30) days prior to their effective date and the determination of such increase or decrease shall be made by defendant Chapel Hill from time to time based upon the conditions above mentioned.

[*Use of Certain Funds—Certificate Required*]

17. Within a reasonable time after written request by plaintiffs' attorney, defendant Chapel Hill shall once a year, for a period of five (5) years hereafter, after the close of its fiscal year, furnish a certificate by its then certified public accountants to the attorney for plaintiffs certifying as to the use of its "early care fund reserve" and its trust fund for care of markers in its cemeteries.

[*Rules and Regulations—Filing Required*]

18. The defendant Chapel Hill shall, within sixty (60) days from date hereof, file with the Clerk of the United States District herein in the above cause, and serve a copy on attorney for plaintiffs herein, a copy of its rules and regulations relating to markers and memorials and contracts revised as aforesaid.

[*Applicability of Judgment*]

19. This judgment shall be applicable to and binding upon the officers, directors, agents, employees, successors and assigns of defendant Chapel Hill.

[*No Adjudication or Admission of Allegations*]

20. The consent of defendant Chapel Hill to the entry of this decree shall not be an admission, nor shall anything contained in this decree be an adjudication, of any matter or issue of fact or law alleged in said complaint or that defendant Chapel Hill has heretofore at any time or in any manner committed any act or done anything which it is hereinabove restrained or enjoined from doing in the future.

[*Costs*]

21. This decree is entered without costs or damages to or against any party hereto.

[*Jurisdiction Reserved*]

22. This Court reserves jurisdiction hereof for purposes of enforcing the terms and conditions of Part II of this Final Judgment.

[¶ 69,541] Radiant Burners, Inc. v. Peoples Gas Light and Coke Company, Natural Gas Pipeline Company of America, Texas-Illinois Natural Gas Pipeline Co., Crown Stove Works, Northern Illinois Gas Company, Florence Stove Company, Sellers Engineering Company, Gas Appliance Service, Inc., Autogas Corporation, Norge Sales Corporation and American Gas Association, Inc.

In the United States Court of Appeals for the Seventh Circuit. No. 12638. Dated December 3, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. SULLIVAN, District Judge.

Sherman Antitrust Act

Combinations and Conspiracies—Test of Unreasonable Restraint—*Per Se* Violation—Boycott—Refusal to Approve Gas Burner.—A manufacturer's complaint charging that gas utility companies, gas burner manufacturers, and a trade association engaged in a

conspiracy, pursuant to which the association refused to approve its burners and the utilities consequently refused to supply gas for its burners, did not establish a *per se* violation of the Sherman Act. Distinguishing the case of *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 1959 TRADE CASES ¶ 69,316, the court held that the alleged facts did not establish a concerted refusal by the defendants to enter into any business relationship with the manufacturer. In fact, the only business dealing involved between the parties was the association's test of the manufacturer's burners, and there was no refusal to test but only a refusal to approve. No boycott, conspiracy to boycott, or other form of *per se* violation was established by the facts alleged. It was not shown that the association's action had the effect of unreasonably restraining competition. While the complaint alleged that the tests made by the associations were not based on valid, unvarying, objective standards, there was no allegation that the denial of approval was the result of arbitrary or capricious action or that approval was unreasonably denied. Also, there was no allegation concerning the reason given for the denial of approval or that said reason was not true in fact. Allegations as to the safety, efficiency, and durability of the manufacturer's burners did not supply this omission.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Public Injury.—A manufacturer's complaint charging that gas utility companies, gas burner manufacturers, and a trade association engaged in a conspiracy, pursuant to which the association refused to approve its burners and the utilities consequently refused to supply gas for its burners, was dismissed on the ground that the complaint failed to allege any injury to the public. The alleged facts did not establish a *per se* violation of the antitrust laws which would have eliminated the need for showing public injury, and there was no allegation of such general injury to the competitive process that the public at large would suffer economic harm. The allegations failed to show that there had been any appreciable lessening in the sale of conversion gas burners or that the public had been deprived of a product of over-all superiority. There was no allegation that the denial of approval was arbitrary or capricious or that the association gave some reason which was not true.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475, 9009.600.

For the plaintiff-appellant: Joseph Keig, Sr., John O'C. Fitzgerald, and Victor Neumark, Chicago, Ill.

For the defendants-appellees: Clarence H. Ross, George O'Grady, Horace R. Lamb, James W. Good, Jr., Charles K. Bobinette, Harold A. Smith, Arthur D. Walton, Jr., Justin A. Stanley, Robert E. Cronin, Burton Y. Weitzenfeld, Samuel Weisbard, Edward Griffin, Robert W. Murphy, and Charles W. Houchins, Chicago, Ill.

Affirming a decision of the U. S. District Court, Northern District of Illinois, Eastern Division, 1959 TRADE CASES ¶ 69,311; for prior opinions of the U. S. District Court, Northern District of Illinois, Eastern Division, see 1959 TRADE CASES ¶ 69,309, 69,310; 1958 TRADE CASES ¶ 69,173; and 1957 TRADE CASES ¶ 68,909.

Before HASTINGS, Chief Judge, DUFFY and CASTLE, Circuit Judges.

[*Treble Damage Action*]

CASTLE, Circuit Judge [*In full text*]: Radiant Burners, Inc., plaintiff-appellant, (herein called plaintiff) a manufacturer of conversion gas burners and gas furnaces brought suit in the District Court seeking recovery of treble damages from and injunctive relief against defendants-appellees. Plaintiff's second amended complaint charged defendants with conspiracy and combination, in violation of 15 U. S. C. A. § 1, for the purpose of controlling the manufacture, sale, use and installation of gas burners and gas heating devices and restraining the trade and commerce of manufacturers of such devices in a manner thereinafter described. The defendants-appellees are American Gas Association, Inc., (herein called AGA); Peoples Gas, Light & Coke Co. and Northern Illinois Gas Company (herein called Utilities); Natural Gas Pipeline Company of America and Texas-Illi-

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nois Natural Gas Company (herein called Pipelines); Autogas Corporation, Crown Stove Works, Florence Stove Company, Gas Appliance Service, Inc., Norge Sales Corporation and Sellers Engineering Company (designated in the complaint as Manufacturers). It is alleged that AGA is a membership corporation and its membership embraces (1) public utility corporations, including Peoples and Northern; (2) hundreds of manufacturers of machinery, equipment and devices used in the collection, transmission and distribution of gas; (3) pipeline companies transmitting gas to utilities and large industrial users; and (4) individuals and other legal entities.

[*Alleged Antitrust Violations*]

The activities of defendants-appellees alleged to be in violation of 15 U. S. C. A. § 1 are their forming or joining AGA for the purpose of controlling the manufacture, sale, use and installation of gas burners, gas heating devices and gas equipment:

"* * * in the manner described as follows:

A. The defendant, AGA, has laboratories in Cleveland, Ohio, and Los Angeles, California, each of which purports to test the utility, durability and safety of gas burners and other gas equipment. These tests made by AGA are not based on valid, unvarying, objective standards, and AGA can make and arbitrarily and capriciously does make determinations in respect of whether a given gas burner or equipment has passed its test. AGA then affixes its seal of approval only on those gas burners and appliances which it has determined have passed its test.

B. The defendant gas burner and equipment Manufacturers, some of which are in competition with the plaintiff, along with the defendant Utilities, Peoples and Northern, are, or have been represented on the committee of AGA which decides whether or not given gas burners and equipment warrant AGA approval.

C. The Utility defendants, Peoples and Northern, and other Utilities, are legal monopolies in the various communities in which they serve gas, and as such have power to influence, and do influence, prospective purchasers of gas burners and other gas equipment in respect of the gas burners and equipment which are to be installed and used in communities each serves gas. * * *"

[*"Approval" Withheld*]

Plaintiff avers that it is not possible to successfully market gas equipment, including its Radiant Burner, unless AGA approved because AGA and Utilities (a) refuse to provide gas for use in equipment not AGA approved, (b) refuse or withdraw authorization and certification of dealers who handle gas burners or equipment not AGA approved, (c) prepare and circulate false and misleading reports that equipment not AGA approved is unsafe, unreliable or lacking in durability, (d) Utilities discourage prospective purchasers from buying or installing equipment not AGA approved and refuse to permit its display in public areas of their offices and (e) induce municipalities and government agencies to pass ordinances which require that no gas burner or equipment shall be used within their limits unless such gas burner or equipment bears the seal of approval by AGA.

Plaintiff asserts it tendered its Radiant Burner to AGA for approval on two occasions and that AGA has not approved it. Plaintiff alleges that gas burners approved by AGA are not as safe and as efficient and no more durable than plaintiff's Radiant Burner. It alleges that dangers present in AGA approved burners, their expensiveness and the expensiveness of their operation result to some extent in the public's failure to convert to gas heating and the public is thus deprived of the cheapest form of fuel available.

Plaintiff alleges it was forced to forego establishing dealerships in several localities because its Radiant Burner did not have the required AGA approval and that it was forced to withdraw from two areas because of local requirements, made by ordinances or public officials, that gas burners have AGA approval.

[*Injury to Plaintiff*]

It is alleged that the illegal conspiracy and combination has prevented plaintiff from recovering substantial sums expended in the development, manufacture and attempted sale of its Radiant Burner and caused plaintiff to lose substantial profits from sales it would have otherwise obtained.

Motions to dismiss filed by defendants-appellees were allowed by the District Court and the complaint dismissed for failure to state a cause of action. Plaintiff appealed.

[*Issues*]

The main contested issues are (1) whether the allegations of the complaint establish a *per se* violation of 15 U. S. C. A. § 1 (a boycott or a conspiracy to boycott) eliminating a showing of injury to the public, or (2) if not, whether the allegations of the complaint establish the requisite injury to the public.

[*Per se Violations*]

Plaintiff contends that the allegations of the complaint establish a *per se* violation of the antitrust law and that it is unnecessary to show injury to the public. In support of this contention heavy reliance is placed upon *Klor's Inc. v. Broadway-Hale Stores, Inc.* [1959 TRADE CASES ¶ 69,316], 359 U. S. 207 and *Fashion Originators' Guild of America, Inc., v. Federal Trade Commission* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457. In those cases the essential basis for a boycott was present. In *Klor's* the complaint charged that certain manufacturers and distributors of appliances conspired among themselves and with a competitor of Klor's either not to sell to the latter or to sell to it only at discriminatory prices and on highly unfavorable terms. In *Fashion* the charge was that members of the Federation who are affiliated with the Guild agreed to sell their products only to those garment manufacturers who in turn agreed to sell only to cooperating retailers. In the instant case no buyer-seller relationship between plaintiff and any of defendants-appellees is involved. The allegations do not establish a concerted refusal by defendants-appellees to enter into any business relationship with plaintiff. In fact the only business dealing involved between plaintiff and any of the defendants-appellees was AGA's test of plaintiff's Radiant Burner, and there was no refusal to test, but only a refusal to approve. No boycott, conspiracy to boycott or other form of *per se* violation is established by the facts alleged.

[*Unreasonable Restraints*]

It is pertinent to note that although the complaint alleges that tests made by AGA "are not based on valid, unvarying, objective standards, and AGA can make and arbitrarily and capriciously does make determinations" in granting its approval, there is no allegation that AGA's denial of approval of plaintiff's Radiant Burner was the result of arbitrary or capricious action or that approval was unreasonably denied. No allegation whatsoever is made concerning the reason given (or that no reason was given) for AGA's denial of approval or that said reason was not true in fact. Plaintiff's allegations as to the safety, efficiency and durability of its Radiant Burners do not in our view supply this omission. We deem the complaint insufficient for lack of this material element, no *per se* violation having been shown. Without such allegations there is a failure to show that the action of AGA has the effect of unreasonably restraining competition. In *Northern Pacific Railway Company v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1, 4, the Court, in this connection, had occasion to observe:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. *Standard Oil Co. of New Jersey v. United States,* 221 U. S. 1; *Chicago Board of Trade v. United States,* 246 U. S. 231."

[*Public Injury*]

It is our opinion that the complaint also fails to allege such injury to the public as is essential to plaintiff's right to maintain its action. In the absence of a *per se* violation the Sherman Act protects the individual injured competitor and affords him relief, but only under circumstances where there is such general injury to the competitive process that the public at large suffers economic harm. *Cf. Rogers v. Douglas Tobacco Board of Trade, Inc.* 5 Cir. [1959 TRADE CASES ¶ 69,350], 266 F. 2d 636. The primary purpose of the statute is to protect the public from monopoly. In *Feddersen*

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Motors v. Ward, 10 Cir. [1950-1951 TRADE CASES ¶ 62,579], 180 F. 2d 519, 522 it was said:

"But injury to plaintiff alone is not enough upon which to predicate such an action. There must be harm to the general public in the form of undue restriction of interstate commerce. An appreciable part of such commerce must be the subject of the monopoly, restraint, or conspiracy. And a general allegation of the forming of such a combination or conspiracy with resulting injury to the public and to the plaintiff is not enough. While detail is not necessary, it is essential that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendency, or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

The allegations of plaintiff's complaint fail to establish that there has been any appreciable lessening in the sale of conversion gas burners or gas furnaces or that the public has been deprived of a product of over-all superiority. Although plaintiff claims its burner better in safety and efficiency from certain standpoints and as durable as those approved by AGA such allegations do not establish that the factors mentioned are the only ones determinative of over-all quality or safety. In this connection it is again significant that plaintiff makes no allegation that AGA's denial of approval of its Radiant Burner was arbitrary or capricious or that AGA gave some reason which was not true.

[*Elements Not Shown*]

The allegations of the complaint considered as a whole and viewed in the light most favorable to the plaintiff fail to show the existence of the elements prerequisite to its right to maintain an action under 15 U. S. C. A. § 1.

It is not necessary to consider additional contentions made by individual defendants as to the complaint's shortcomings in so far as it attempted to state a claim against them.

[*Dismissal Affirmed*]

The District Court's judgment order of dismissal is affirmed.

Affirmed.

[¶ 69,542] M. O. Dantzler v. Dictograph Products, Inc.

In the United States Court of Appeals for the Fourth Circuit. No. 7951. Argued November 3, 1959. Decided November 19, 1959.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. WILSON WARLICK, District Judge.

Robinson-Patman Price Discrimination Act

Price Discrimination—Services or Facilities Furnished by Seller—Advertising for Benefit of Newly Appointed Distributor—Services of Offices and Staff and Letterhead Paper and Factory Technician—Proportional Equality—Advertising Allowances.—A hearing aid manufacturer discriminated against a distributor (plaintiff) by furnishing a newly appointed distributor, before the termination of the distributorship contract with the plaintiff-distributor, services and facilities connected with the handling, sale, and offering of products purchased from the manufacturer, upon terms not proportionally equal to those accorded the plaintiff-distributor. The manufacturer sent letters to users and prospective users of its hearing aid which announced the appointment of the new distributor, announced a free hearing aid service clinic in connection with the opening of the new distributorship, and recommended that the reader visit the new distributor. The manufacturer also furnished free of charge to the new distributor the services of one of its factory technicians to inspect, clean, adjust, and make minor repairs to hearing aids brought to the new distributor during the operation of the clinic. While it would have been impossible for the manufacturer to have done for the plaintiff-distributor exactly what it did for the new distributor, since it could not have referred to the plaintiff as a new distributor, "proportional equality" required that users and prospective users, circularized by the manufacturer, should at least have been told that the plaintiff was still a distributor (even if about to be terminated as such), and the addressee should not have been advised to visit only the new distributor.

Evidence did not, however, support the charges that the manufacturer (1) paid to or for the benefit of the new distributor, advertising allowances which were not made available to the plaintiff or (2) offered for sale or sold through the new distributor, receiver cords and batteries at less than list prices and gave to the new distributor such discounts or allowances as were necessary to enable such sales to be made. There was no evidence that the manufacturer would not have paid for advertising by the plaintiff. Also, there was no evidence that the sale of cords and batteries at less than list prices was an "offering for sale and selling through the" new distributor or that the manufacturer gave the new distributor "discounts or allowances . . . necessary to enable such sales to be made."

See Price Discrimination, Vol. 1, ¶ 3522, 3524, 3524.550, 3524.950.

For the appellant: John G. Golding (William B. Webb on brief).

For the appellee: O. W. Clayton (Clayton & London on brief).

Before Soper and Haynsworth, Circuit Judges, and R. Dorsey Watkins, District Judge.

[*Price Discrimination Action*]

R. Dorsey Watkins, District Judge [*In full text*]: Appellant, M. O. Dantzler (Dantzler) sued appellee, Dictograph Products, Inc. (Dictograph), the first count, alleging unlawful discriminations in violation of the Clayton Act, United States Code, Title 15, Section 13(d) and (e), and the second count alleging unlawful breach of contract, breach of confidential relations thereunder, and wrongful and malicious abuse by Dictograph of customer lists of Dantzler. At the conclusion of evidence on behalf of Dantzler, the District Judge withdrew the case from the jury, and entered judgment dismissing the case with prejudice. The appeal is only from the dismissal of the claim under the Clayton Act, the cause of action for breach of contract having been abandoned.[1]

The facts, construed most favorably for Dantzler, show that in March 1954 Dantzler and Dictograph entered into a contract, revised on September 1, 1954, under which Dantzler became the Charlotte, North Carolina, distributor for Acousticon hearing aids in 17 counties in North Carolina and four counties in South Carolina. Dantzler handled only Dictograph products, although the contract did not require him to deal exclusively in them. From March 1954 until April 1, 1957, Dantzler was the only formally appointed Dictograph representative in this territory assigned to him.

[*Distributor Contract*]

The September 1, 1954 contract provided that:

"8. This agreement may be terminated at any time with or without cause by either party hereto, by posting written notice thereof in the United States Registered Mail . . ."

The contract also provided that upon termination of the contract by either party, Dictograph might make and retain copies of Dantzler's lists or collections of names and addresses of users of Acousticons.

The agreement further provided that the distributor was an "independent business man and is not constituted and shall not be considered an employee or agent of" Dictograph.

[*New Contract*]

On March 12, 1957, Dictograph sent a form letter to all Distributors, including Dantzler, stating that in order to conform with the requirements of the Federal Trade Commission, a revised Acousticon Distributor Franchise Agreement had been prepared. Two copies executed by Dictograph were enclosed, and the addressee was asked to sign and return one of them. This was a departure from previous practice, under which the Distributor signed first. The new agreement was identical with, or substantially similar to, the September 1, 1954 Agreement between Dantzler and Dictograph, but Dantzler did nothing about accepting or rejecting the new agreement until April 23, 1957.

In the early part of March, 1957, Dictograph approached Harold K. Green and Jerry K. Green, former Acousticon distributors but at the time selling other hearing aids in Charlotte, North Carolina, and negotiated with them, as a result of which a distributor agreement was signed by the Greens on March 27, 1957, and by Dicto-

[1] At the argument on appeal, counsel for Dictograph stated, without challenge or contradiction, that Dantzler had originally sued Dictograph in the State courts for breach of contract; had voluntarily dismissed that suit, and then filed this suit in the United States District Court for the Western District of North Carolina.

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graph on April 1, 1957. This was in form similar to the Dantzler Agreement of September 1954, and covered the identical territory.

[*Seller's Services and Facilities*]

Dictograph prepared 2900 copies of a letter dated March 25, 1957, (the so-called "Dear Friend" letter) signed by its Chairman of the Board, 1344 copies of which were mailed at Dictograph's expense to users whose names and addresses were obtained from lists maintained by the defendant in its home office (which list included names and addresses of users who had been customers of the plaintiff) and to prospective users of Acousticon in the Charlotte area, announcing the "reappointment" [2] of the Greens as a distributor of Dictograph products. It also announced a hearing aid service clinic to be held on April 1, 2, and 3 in connection with the opening of the Green distributorship. The remainder of the letters were delivered to the Greens for their use. At least some of the letters contained notice of a special offer of batteries and receiver cords at less than the usual price during the clinic.

Dictograph also paid for four newspaper advertisements of the opening of the Green distributorship; and furnished free of charge to the Greens the services of one of its factory technicians to inspect, clean, adjust and make minor repairs to hearing aids brought to the Greens' place of business on April 1 to 3, 1957.

Dantzler did not know of any of the negotiations or arrangements with the Greens until one of his customers brought him, on March 27, 1957, a copy of the "Dear Friend" letter.

[*Cancellation Notice*]

On April 18, 1957, Dictograph sent Dantzler a formal notice of cancellation of his September 1, 1954 contract, under paragraph 8 thereof, and notice that the offer of a new contract under the March 12, 1957, letter had been withdrawn. On April 23, 1957, Dantzler replied, stating in part:

> "So far as I am concerned our contract of September 1, 1954, was terminated long before you sent this letter by your breaking the contract through appointment of another distributor and your actions connected with that appointment."

[*Statute*]

Dantzler claims that Dictograph's conduct is violative of United States Code, Title 15, Section 13(d) and (e) reading as follows:

> "15 U. S. C. A. 13(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
>
> "15 U. S. C. A. 13(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contract to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[*Alleged Discriminatory Acts*]

It is asserted by plaintiff that five discriminatory acts were committed, namely:

> "(a) Furnishing to the said Greens the services of the chairman of its Board of Directors to promote the business of the said Greens, which service and facility was not offered or accorded the plaintiff.
>
> "(b) Furnishing to the said Greens the services of its offices and staff and its letterhead paper to distribute letters promoting the business of the said Greens which services and facilities were not offered or accorded to the plaintiff.
>
> "(c) Furnishing to the said Greens the services of a factory technician to clean and adjust hearing aids and to advise customers concerning repairs, all without charge to such customers or to the said Greens, which services were not offered or accorded to the plaintiff.
>
> "(d) Paying to or for the benefit of the said Greens, advertising allowances for the promotion of their sales of the products of the defendant, which allowances

[2] Factually this was correct. To a prospective user, it might well connote a renewal, rather than a new appointment.

were not made available on proportionately equal terms to the plaintiff.

"(e) Offering for sale and selling through the said Greens, receiver cords at one-half of the defendant's established list price and batteries at twenty per cent off of the established list price and giving to the said Greens such discounts or allowances as were necessary to enable such sales to be made."

[*Critical Period*]

It is necessarily admitted by Dantzler that under paragraph 8 of the September 1, 1954, contract Dictograph could at any time, as it did by the letter of April 18, 1957, validly terminate Dantzler's distributorship; and that, therefore, the critical period for the purpose of this suit is March 26, 1957—April 18, 1957.[3] Within that period Dictograph had two Charlotte distributors—Dantzler and the Greens.[4]

The evidence does not support the fourth and fifth alleged discriminatory acts. In April, 1957, Dantzler submitted to Dictograph tear sheets and advertising bills for newspaper advertisements for the month of March, 1957, and was reimbursed on a 50-50 basis. There is no evidence that Dictograph would not have paid for advertising by Dantzler, up to April 18, 1957, an amount equal to what it expended for the Greens; however unlikely this might be.

Also, there is no evidence that the sale of batteries and receiver cords at less than list prices was an "offering for sale and selling through the said Greens". Nor is there any evidence that Dictograph gave the Greens "discounts or allowances . . . necessary to enable such sales to be made." The testimony of Harold K. Green was that he purchased merchandise from Dictograph in March 1957, prior to the opening of the Green distributorship.[5] Dantzler testified that "Very few hearing aids, I say very, very few hearing aids are sold at list prices at any time."

Literally, of course, it would have been impossible for Dictograph to have done for Dantzler exactly what it did for the Greens, since it could not have referred to Dantzler as a new distributor. However, the "Dear Friend" letter,[6] sent to all known users and prospective users of Acousticon, reads as if the Greens were the only distributor in Charlotte; refers to the free hearing aid clinic to be conducted by the Greens on

[3] There is no evidence or claim that the "Dear Friend" letter of March 25, 1957 was mailed before its date. As the mailing was from Jamaica, New York, and as one of Dantzler's customers brought in a copy on March 27, 1957, the earliest effective date would seem to be March 26, 1957.

[4] Although as noted, the Greens did not sign their contract until March 27, 1957, and Dictograph did not accept until April 1, 1957, the case in this aspect must be viewed in the light most conceivably favorable to Dantzler.

[5] An interrogatory propounded to Dictograph asked whether receiver cords for hearing aids were sold by Dictograph to the Greens in 1957 prior to April 1, 1957. The answer, offered in evidence by Dantzler's attorney, was:

"Yes, so as to be available for sale by Jerry K. Green and Harold K. Green at the Hearing Aid Clinic April 1, 2 and 3, 1957."

[6] The letter, on the letterhead of Acousticon International, reads as follows:

"March 25, 1957

"Dear Friend:

"Acousticon takes great pleasure in announcing the reappointment of Harold K. Green and Jerry K. Green as Acousticon distributors in Charlotte, North Carolina. They are located at:—

"Carolina Hearing Aid Company
Suite 503—Independence Building
Corner Trade and Tyron Streets
Charlotte, N. C.
Telephone: EDISON 4-7340

"Harold and Jerry Green have been associated in the hearing aid business for many years and due to the excellence of their scientific fittings they have built up a following of many satisfied hearing aid users in both North and South Carolina.

"Acousticon is famous for its complete line of hearing aids that incorporate all the latest scientific developments, including a great variety of powerful instruments that can be concealed on the head with no cords or any other parts to be worn on the body.

"To celebrate the opening, we have arranged for a factory trained technician to conduct a free hearing aid service clinic to be held for three days, Monday, Tuesday and Wednesday, April 1st, 2nd and 3rd. Regardless of the make or model of the hearing aid you are now wearing, take advantage of this opportunity now for free cleaning and adjustment of your hearing aid.

"The attached page gives you all the details of this free Hearing Aid Clinic and I urge you to read it thoroughly. Visit the Carolina Hearing Aid Company on Monday, Tuesday and Wednesday—April 1st, 2nd and 3rd—You will be glad you did."

"Sincerely,
DICTOGRAPH PRODUCTS, INC.
ACOUSTICON DIVISION
Stanley Osserman
Chairman of the Board"

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April 1, 2, and 3, at which any make or model hearing aid would be cleaned and adjusted free; and recommended that the reader visit the Greens "on Monday, Tuesday, and Wednesday—April 1st, 2nd and 3rd—You will be glad you did."

Moreover, the "attached page" again emphasized the "Free Hearing and Service Clinic"; and stated:

"Receiver Cords at Half Price ($1.00 per cord)

"Receiver cords for any make of hearing aid at half price these three days only. (Office sales only).

"Batteries 20% off List Price.

"Batteries for all makes of hearing aids at 20% off list price for these three days. (Office sales only)."

Proportional equality would have required that users and prospective users of Acousticon, circularized by Dictograph, should at least have been told that Dantzler was still a distributor (even if about to be terminated as such), and the addressee should not have been advised to visit only the Greens.

[*Holding*]

We according hold that Dictograph discriminated against Dantzler by furnishing the Greens services and facilities connected with the handling, sale and offering for sale of commodities purchased from Dictograph, upon terms not "proportionately equal" to those accorded Dantzler. See *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 2 Cir., 1949 [1948-1949 Trade Cases ¶ 62,521], 178 F. 2d 150; *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 8 Cir., 1945, [1944-1945 Trade Cases ¶ 57,400], 150 F. 2d 988, cert. den. 1945, 326 U. S. 773, 66 S. Ct. 231, 90 L. Ed. 467.

[*Reversed and Remanded*]

The existence of a count for breach of contract led to substantial confusion in the introduction below of evidence of alleged damage. As the judgment of the District Court must be reversed and the case remanded for a new trial on the Clayton Act count, Dantzler will be afforded an opportunity to offer evidence as to pecuniary losses within the period March 26—April 18, 1957, resulting from Dictograph's discriminatory practices.

Reversed and remanded for a new trial.

[¶ 69,543] Arthur Schwartz, Ira Gershwin, John Jacob Loeb, Dorothy Fields, Virgil Thomson, Douglas Stuart Moore, Gian Carlo Menotti, Samuel Barber, Randall Thompson, Milton Ager, Walter Bishop, Paul Cunningham, Mack David, Milton Drake, James Kimball Gannon, L. Wolfe Gilbert, George Graff, Alex Charles Kramer, Jack Lawrence, Alan Jay Lerner, Edgar Leslie, Jerry Livingston, George W. Meyer, Joseph Meyer, Vic Mizzy, Charles Tobias, Leonard Whitcup, Joan Whitney, Donald Macrae Wilhoite, Jr., also known as Don Raye, Jack Yellen, Victor Young, Robert MacGimsey and William Grant Still, individually and on behalf of other writers and composers of musical compositions similarly situated v. Broadcast Music, Inc., Radio Corporation of America, National Broadcasting Company, Inc., Columbia Broadcasting System, Inc., Columbia Records, Inc., Columbia Music Publishing Company, Master Records, Inc., Okeh Music Publishing Company, American Broadcasting-Paramount Theatres, Inc., General Teleradio, Inc., Mutual Broadcasting System, Inc., Storer Broadcasting Company, National Association of Radio and Television Broadcasters, BMI Canada, Ltd., Associated Music Publishers, Inc., Allen Intercollegiate Music, Inc., David Sarnoff, Frank M. Folsom, Niles Trammell, William S. Hedges, William S. Paley, Frank Stanton, James B. Conkling, Adrian Murphy, Herbert V. Ackerberg, Raymond Diaz, James E. Wallen, J. Harold Ryan, Harold E. Fellows, Carl Haverlin, Justin Miller, Sydney M. Kaye, Merritt E. Tompkins, Robert J. Burton, Glenn Dolberg, Roy Harlow, Harry P. Somerville, Charles A. Wall, John Elmer, J. Herbert Hollister, Leonard Kapner, Paul W. Morecy and J. Leonard Reinsch.

In the United States District Court for the Southern District of New York. Civil No. 89-103. Dated December 7, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Who May Bring Suit—Persons "Injured"—"Direct" as Contrasted with "Remote" Injury—Public Performance, Publishing, and Recording Rights in Musical Compositions—"Target" of Alleged Con-

spiracy.—Thirty-three composers and authors of musical compositions, in a treble damage action charging radio and television networks and their music "acquiring and licensing" organization with conspiring to monopolize the exploitation of musical compositions, were not entitled to sue for alleged injuries to their "nondramatic public performance rights," because they had so divested themselves of such rights, by agreement with a non-profit association of which they were members, that any injury sustained by them was not "direct" but was "secondary and remote." They had "unequivocally" transferred to that association a non-exclusive right to license public performances of their compositions for profit. Also, it was the association, not the individual authors and composers, which (1) marketed and licensed the compositions, (2) negotiated the prices and terms of the licenses, (3) prosecuted claims of infringement, (4) received all royalties and license fees, and (5) determined the distributive share of the pooled royalties and fees to be received by each author and composer. Thus, it was the association, not its individual members, that was engaged in the business of licensing the plaintiffs' compositions for public performance. No substantial reason was advanced as to why the association, the "direct target" of that branch of the alleged conspiracy, had not brought the action.

However, as to the charges that the networks induced music publishers, by payments and otherwise, to refrain from publishing and recording the songs, the claim of direct injury to the individual authors and composers was sufficiently supported to entitle them to maintain the action. They could receive royalties only if the publishers "worked" their songs. Thus, although the authors and composers had transferred their "publishing and recording" rights to the publishers, the networks' alleged payment of "bounties" to the publishers would remove them from the "target area" and place the authors and composers "in the line of fire." Thus, the situation was distinguishable from that involving the divestment of the "public performance for profit" rights to the association; there, it was not claimed that the association caused a diminution of the income of the authors and composers by participating in, or lending itself to, any conduct in violation of its duty to market the compositions.

Further, the court found that the authors and composers had an interest in songs not covered by "publisher contracts" that was "susceptible to damage by the charged conspiracy."

See Private Enforcement and Procedure, Vol. 2, ¶ 9005.55, 9009.275.

Private Enforcement and Procedure—Suit for Civil Damages—Sufficiency of Damage Allegations—"Collateral" Injury and "Inconsequential" Damages—Conspiracy to Suppress Publishing and Recording of Songs.—Radio and television networks and their music "acquiring and licensing" organization, in a treble damage action charging them with conspiring to suppress the publishing and recording of songs, were not entitled to summary judgment on the basis of their contention that any injury to the authors and composers was "only collateral" and that any damage was "inconsequential." Whether the damage was great or slight was a question of fact to be decided by the trier of the facts.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011.200.

For the plaintiffs: John Schulman, New York, N. Y. (John Schulman, M. William Krasilovsky, Elsie M. Quinlan, and Martin Bressler, of counsel).

For the defendants: Rosenman, Goldmark, Colin & Kaye (Samuel I. Rosenman, Max Freund, Seymour D. Lewis, Stuart Robinowitz, Herbert H. Blau, Edward M. Cramer, and Shirley A. Siegel, of counsel) for Broadcast Music, Inc., Storer Broadcasting Co., BMI Canada, Ltd., Associated Music Publishers, Inc., Carl Haverlin, Sydney M. Kaye, Merritt E. Tompkins, Robert J. Burton, Glenn Dolberg, Roy Harlow, Harry P. Somerville, and Charles A. Wall; Cravath, Swaine & Moore (Bruce Bromley, Jack E. Brown, and C. Leonard Gordon, of counsel) for Columbia Broadcasting System, Inc., Columbia Records, Inc., Blackwood Music, Inc. (sued herein as Columbia Music Publishing Co.), Master Records, Inc., April Music, Inc. (sued herein as Okeh Music Publishing Co.), William S. Paley, Frank Stanton, James B. Conkling, Adrian Murphy, and Herbert V. Akerberg (sued herein as Herbert V. Ackerberg); Cahill, Gordon, Reindel & Ohl (Oleg Peter Petroff, of counsel) for Radio Corp. of America, Natl. Broadcasting Co., Inc., David Sarnoff, Frank M. Folsom, Niles Trammell, and William S. Hedges; Hawkins, Delafield & Wood (Clarence Fried, of

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counsel) for American Broadcasting-Paramount Theatres, Inc. and Raymond Diaz; William M. Regan for General Teleradio, Inc., Mutual Broadcasting System, Inc., and James E. Wallen.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1955 Trade Cases ¶ 67,944.

[*Treble Damage Action—Capacity to Sue*]

EDWARD WEINFELD, District Judge [*In full text*]: This is a motion by the defendants for summary judgment in a private antitrust suit brought under sections 4, 12 and 16 of the Clayton Act.[1] The motion is based solely on plaintiffs' alleged lack of standing to sue and hence the merits of the action are not involved.

[*Motions—Prior Proceedings*]

Alternatively, the defendants seek partial summary judgment, should the Court conclude that plaintiffs are entitled to maintain this action as to some, but not all, of their claims for damages. Finally, the defendants move, should the Court conclude that issues of fact exist as to material matters touching upon plaintiffs' capacity to sue, that a separate trial be granted with respect to such facts.

The plaintiffs urge that the record demonstrates they do have standing to sue, and in any event, disputed questions of fact on this issue require the denial of the motion. As to the request for a separate trial, they contend it would be just as expeditious to proceed on all issues, leaving to the trial court the determination of the defendants' contentions.

The motion, supported by voluminous affidavits and exhibits, is based upon facts which have been culled from pre-trial depositions of the plaintiffs and witnesses aggregating more than 20,000 pages of testimony, some 11,000 exhibits consisting of approximately 55,000 pages, and almost 3,000 pages of answers to written interrogatories served pursuant to Rule 33 of the Federal Rules of Civil Procedure.

These pre-trial proceedings, which have extended over a five-year period, forecast an extremely long trial presenting complex issues. This circumstance, however, can play no part in the consideration of this motion. If the plaintiffs have been directly damaged by reason of the wrongful conduct charged against the defendants, they may not be denied their day in court, even though a trial upon the merits and incidental proceedings may take, as the defendants suggest, several years. Equally, it follows, if plaintiffs are without right to maintain this action, then the defendants are entitled to be protected against the heavy burden of expense and effort entailed in a protracted and intricate trial. Moreover, the proper administration of justice requires, in the interests of other litigants who await and are entitled to a trial, that the Court's energies and time be not deflected by an unnecessary and time-consuming trial. This comment is made since the extensive, if not prolific, affidavits and briefs submitted in support of, and in opposition to, the motion, have strayed in a number of instances far and wide from the basic question. The allegations of the complaint charging an illegal conspiracy by the defendants in violation of the antitrust laws, must, for the purposes of this motion, be deemed true.[2] Consequently, those portions of the affidavits which argue the merits of the charges are not pertinent.

[*Issue—Injury to Plaintiffs*]

The issue here falls within a very narrow compass—whether the alleged antitrust conduct of the defendants has injured the plaintiffs in their business or property within the meaning of the antitrust statutes so as to give them standing to maintain this action for treble damages. The voluminous record furnishes a basis upon which a decision can be reached on the question posed. It is difficult to believe that further proliferation of it will yield additional material facts. It is stated that on the limited issue alone thousands of pages of testimony were taken.

The principal documents consisting of the Articles of Association of the American Society of Composers, Authors and Publishers, (hereafter called ASCAP), plaintiffs' agreements with ASCAP and with music

[1] 38 Stat. 731, 736, 737 (1914), 15 U. S. C. §§ 15, 22, 26 (1958).

[2] *Safeway Stores, Inc. v. Wilcox*, 220 F. 2d 661 (10th Cir. 1955); *Reynolds v. Maples*, 214 F. 2d 395 (5th Cir. 1954); *Zell v. American Seating Co.*, 138 F. 2d 641 (2d Cir. 1943), rev'd on other grounds, 322 U. S. 709 (1944).

publishers, are not in dispute.[3] What is principally in dispute is the interpretation which the parties place upon them and the nature of the relationship between the plaintiffs on the one hand and ASCAP and the publishers on the other. Since the motion rests upon documentary evidence, the authenticity of which is not challenged, plaintiffs' admissions and their answers to interrogatories, there are no facts in dispute which are essential to a determination of the tendered legal question[4]—whether the plaintiffs have standing to maintain this action.

[*Parties*]

The plaintiffs, thirty-three in number, professional composers and authors, are engaged in the writing of musical compositions.[5] They bring this action, in their individual capacities and, also, as a spurious class action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure on behalf of approximately 3,000 professional authors and composers of music who allegedly have suffered and will continue to "suffer loss and damage in their business and property" by reason of defendants' conduct in violation of the antitrust laws, set forth in the complaint. Plaintiffs are members of ASCAP.

The defendants include Broadcast Music, Inc., (hereafter referred to as BMI), which is wholly owned by radio and television broadcasting companies. BMI is engaged primarily in the acquisition and licensing of performance rights in musical compositions. The other defendants include the leading radio and television networks, each of which owns and operates radio and television stations. These defendants, together with other broadcasters, organized BMI. Each broadcasting company defendant is a stockholder of BMI. Also named as defendants are subsidiary publishing and recording companies, and various individuals who were or are officers, directors, or executives of one or more of the corporate defendants.

[*Conspiracy to Monopolize*]

The gist of the plaintiffs' charges is that the defendants conspired to dominate and control the market for the use and exploitation of musical compositions, particularly the rights to public performance for profit, to establish and maintain a monopoly thereof and to restrain trade and commerce therein. The ultimate goal, say the plaintiffs, was to control the music industry and thereby to fix and reduce the price to be paid by the defendant networks and their co-conspirators in the broadcasting industry for the use of music on their programs.

[*Music "Pool"*]

Plaintiffs charge that to achieve their conspiratorial objective, the defendants organized BMI in 1939, as the vehicle to maintain a music pool for their joint use and benefit, and have dominated it ever since. In general they allege that to effectuate the conspiracy, the defendants have given preference to the performance of BMI controlled music, have discriminated against the musical compositions written by the plaintiffs and other writers similarly situated, have boycotted, restricted and limited their musical compositions both in broadcasting and recording and have induced other broadcasters and record companies to do the same.

[*Specific Acts Charged*]

Specific acts and conduct of the defendants in furtherance of the conspiracy are enumerated in the complaint. Plaintiffs charge that such conspiratorial acts and conduct have resulted in limited introduction and availability to the public of non-BMI songs and a monopoly in the music industry to the detriment of the plaintiff songwriters, other songwriters and the public. The plaintiffs

[3] In their briefs and upon the argument of the motion, the plaintiffs contended that pre-trial depositions of two witnesses, an ASCAP executive and its General Counsel, had not been completed since they had not cross-examined them. Consequently, they urged that the depositions be disregarded on this motion. The Court was of the view that there was substance to plaintiffs' contention, and to avoid a denial of the motion with leave to renew because of an incomplete record, directed that the examination of the witnesses be completed. Thereafter, the plaintiffs withdrew their objections and consented "that the Court consider and decide the motion upon the record as heretofore presented to it by the parties, including the testimony given by said witnesses as well as the documents produced by said witnesses, which record for this purpose may be deemed sufficient."

[4] *Cf. Associated Press v. United States* [1944-1945 TRADE CASES ¶ 57,384], 326 U. S. 1, 5-6 (1945).

[5] Plaintiffs' counsel refers to them as "writers of music"—a "generic term to describe both those who supply the music, commonly called composers, and those who, supplying the lyrics, are called authors." The individual musical works they produce include popular songs, production songs, and serious music including symphonies and music for ballet and opera.

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allege that the defendants have limited, restricted and prevented (1) the publication of musical compositions written by plaintiffs and others similarly situated; (2) the marketing and sale of published versions thereof; (3) the use and utilization thereof by radio and television broadcasting stations and networks; (4) the use and utilization thereof in the manufacture and sale of phonograph records; (5) the public performance for profit thereof in places of public gathering and entertainment, and (6) the stimulation which use and popularization in each of said segments of the market provides for exploitation in other segments thereof.

[*Alleged Injury*]

In consequence, the plaintiffs claim that they and other writers similarly situated have been injured by an annual loss of income from their musical compositions, depreciation of the price of performance fees and loss of prestige and recognition as authors and composers. Plaintiffs seek treble damages in the sum of $150,000,000 and injunctive relief.

[*"Direct" Injuries Required*]

Section 4 of the Clayton Act[6] provides in pertinent part, as follows:

> "* * * [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

While the foregoing statute contains no language of limitation, the courts have restricted the right to sue thereunder to those persons who are directly injured in their business or property. Those who are indirectly or incidentally injured by the forbidden conduct have been denied standing to assert a claim.

Our Court of Appeals has summarized the rule as follows:

> "Those harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover.
>
> * * *
>
> Undoubtedly, [other] persons suffer some financial loss when anti-trust violations are directed against the corporations in which they have an interest. But not every financial loss due to an anti-trust violation, however remote, gives a right of action."[7]

Similarly, the rule has been stated in *Martens v. Barrett*,[8] as follows:

> "* * * [I]t is universal that where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership."

[*Persons Who Cannot Sue*]

A fairly general pattern has emerged from this concept. The following plaintiffs have been held to be without standing to sue for treble damages under the antitrust laws: (1) a patent owner who licenses his patents to a manufacturer on a royalty basis, for loss of royalties on sales which would have been made but for the antitrust conduct of defendants;[9] (2) shareholders, officers, and creditors of corporations for diminution in value of ownership, loss of earnings, or impairment of corporate ability to pay, due to the impact of antitrust conduct on the corporation;[10] (3) nonoperating

[6] 38 Stat. 731 (1914), 15 U. S. C. § 15 (1958). Section 16 of the Clayton Act. 38 Stat. 737 (1914), 15 U. S. C. § 26 (1958), provides for injunctive relief.

[7] *Productive Inventions, Inc. v. Trico Products Corp.* [1955 TRADE CASES ¶ 68,104], 224 F. 2d 678, 679 (2d Cir. 1955), cert. denied, 350 U. S. 936 (1956).

[8] [1957 TRADE CASES ¶ 68,736] 245 F. 2d 844, 846 (5th Cir. 1957).

[9] *Productive Inventions, Inc. v. Trico Products Corp.* [1955 TRADE CASES ¶ 68,104], 224 F. 2d 678 (2d Cir. 1955), cert. denied, 350 U. S. 936 (1956).

[10] *Bookout v. Schine Chain Theatres, Inc.* [1958 TRADE CASES ¶ 68,987], 253 F. 2d 292 (2d Cir. 1958); *Martens v. Barrett* [1957 TRADE CASES ¶ 68,736], 245 F. 2d 844 (5th Cir. 1957); *Peter v. Western Newspaper Union* [1953 TRADE CASES ¶ 67,408], 200 F. 2d 867 (5th Cir. 1953); *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939), aff'd per curiam, 113 F. 2d 114 (2d Cir. 1940); *Walder v. Paramount Publix Corp.* [1955 TRADE CASES ¶ 68,097], 132 F. Supp. 912 (S. D. N. Y. 1955); *Gerli v. Silk Ass'n*, 36 F. 2d 959 (S. D. N. Y. 1929).

motion picture landlords for depreciation in market value of the property or loss of rents attributable to antitrust violations relating to the showing of pictures at the theatres operated by their lessees,[11] (4) an insurance broker for loss of income due to a conspiracy to deprive the company which he represented of a particular contract;[12] (5) a supplier of raw materials for loss of sales resulting from conduct restricting the business of its major customer.[13] While the instant case bears resemblance to some of the foregoing, it does not fit precisely the pattern of any.

[*"Divestment" of "Business or Property" Rights*]

The defendants' position broadly stated is that the pre-trial record demonstrates that the plaintiffs have so divested themselves to others—ASCAP and music publishers—of rights in their compositions, that they retained no "business or property" susceptible of direct injury within the meaning of the statute; that the conspiracy to restrict compositions written by the plaintiffs, if it injures anyone, directly injures ASCAP and the publishers, and injury, if any, to plaintiffs is indirect, remote and incidental, for which recovery is not permitted under the act.

[*"Transferred" and "Retained" Rights*]

Consideration of this contention requires an analysis of plaintiffs' rights in their musical compositions, the nature of the rights transferred to others and what rights, if any, were retained by plaintiffs.

[*Copyrights*]

A writer of a musical composition under common law possesses the exclusive right to make the first publication and to prevent publication by others. However, upon its first publication the composition passes into the public domain. The author's right in his composition may be preserved by publication with notice of copyright in compliance with the terms and provisions of the Copyright Act.[14] Upon such publication the common law rights are terminated and statutory rights come into being and control.[15] As stated in some of the authorities, "when the copyright comes in, the common law goes out."[16] The statutory rights may be summarized as follows:

(1) *Printing and publishing rights:*

The right to print and sell piano and orchestration copies, folios, composite works and other printed versions of the composition;

(2) *Mechanical reproduction rights:*

(a) The right to manufacture and sell phonograph recordings, electrical transcriptions, tapes and other devices reproducing the composition, including (b) the right to make recordings of the composition in synchronization with motion pictures;

(3) *Public performance for profit rights:*

The right to perform, nondramatically, the composition in public for profit by means of live or recorded presentations.[17]

The rights so granted upon compliance with the statute are separate and inde-

[11] *Melrose Realty Co. v. Loew's, Inc.* [1956 TRADE CASES ¶ 68,358], 234 F. 2d 518 (3d Cir.), cert. denied, 352 U. S. 890 (1956); *Harrison v. Paramount Pictures, Inc.* [1953 TRADE CASES ¶ 67,568], 115 F. Supp. 312 (E. D. Pa. 1953), aff'd per curiam [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405 (3d Cir.), cert denied, 348 U. S. 828 (1954); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 389 (S. D. N. Y. 1939), aff'd per curiam, 113 F. 2d 114 (2d Cir. 1940). The Third Circuit so held in *Melrose* and *Harrison* in spite of the fact that the lessees allegedly participated in the antitrust conduct. The Seventh Circuit declined to follow these cases and in *Congress Building Corp. v. Loew's, Inc.* [1957 TRADE CASES ¶ 68,725], 246 F. 2d 587 (7th Cir. 1957), held that a nonoperating theatre owner-lessor did have standing to sue where the lessee was a co-conspirator or a participant in the practices complained of.

[12] *Miley v. John Hancock Mut. Life Ins. Co.* [1957 TRADE CASES ¶ 68,609], 148 F. Supp. 299 (D. Mass.), aff'd per curiam [1957 TRADE CASES ¶ 68,769], 242 F. 2d 758 (1st Cir.), cert. denied, 355 U. S. 828 (1957).

[13] *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.* [1957 TRADE CASES ¶ 68,602], 147 F. Supp. 907 (D. Mass. 1956).

[14] 17 U. S. C. § 10 (1958).

[15] *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 347 (1908); *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945 (9th Cir. 1954), cert. denied, 348 U. S. 971 (1955).

[16] *E. g., Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*, 216 F. 2d 945, 948 (9th Cir. 1954), cert. denied, 348 U. S. 971 (1955).

[17] The statute also grants to an author a public performance right in dramatico-musical works. Neither this right nor the motion picture synchronization rights are involved herein.

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pendent. They may be retained by the owner or disposed of by him to others either singly or in their entirety, as his interests dictate.[18]

[*Rights Disposed of*]

The burden of the defendants' challenge to the plaintiffs' standing to sue centers about the separate dispositions by plaintiffs of (1) printing, publishing and mechanical reproduction rights, sometimes referred to hereafter as the publishing and recording rights, and (2) the nondramatic public performance rights for profit, hereafter referred to as the public performance rights. The claims which center about these rights may be considered separately.[19]

To support their position, the defendants note that the complaint alleges, and the pretrial record establishes, that plaintiffs' and other writers' compositions are marketed through (1) the printing and sale of sheet music, (2) the licensing of recordings on phonograph records and other mechanical reproductions, and (3) the licensing of public performance rights. Accordingly, the defendants argue that since the plaintiffs have granted, for commercial exploitation, their public performance rights to ASCAP and their recording and publishing rights to the publishers, from whom they receive payments therefor, any injury to plaintiffs is indirect and secondary; that the conspiracy, if it injures anyone directly, injures ASCAP and the music publishers; that the right to sue for damages for such direct injuries is with them and not with the plaintiffs.

[*Contracts*]

In all, 7,000 songs have been composed by plaintiffs herein.[20] As to all, the public performance rights are the subject of agreements with ASCAP by virtue of plaintiffs' membership therein.

As to 5,800 of the total number, the publishing and recording rights are the subject of agreements entered into by plaintiffs with publishers.

As to the remaining 1,200, no publishing or recording contracts are in effect. The plaintiffs are the common law or statutory copyright owners.

The Nondramatic Public Performance Rights and ASCAP

[*Authors and Composers' Non-profit Association*]

The complaint emphasizes that a principal objective of the conspiracy was control of the public performance rights in musical compositions. Hence, we turn first to this aspect of the defendants' attack upon plaintiffs' standing to sue. This involves a consideration of ASCAP and the agreement under which it licenses the nondramatic public performance for profit of plaintiffs' compositions.

[*Licensing Rights Vested in Association*]

ASCAP is a nonprofit unincorporated association which was formed in 1914 to protect its members against piracies of their works and generally to promote their interests. It grants licenses and collects royalties for the nondramatic public performance for profit of the works of its members.[21] Its duration is 99 years. Its membership includes two groups, authors and composers of music, referred to as "writer members", and music publishers. The writer members, including plaintiffs, number in excess of 3,000. ASCAP's general management is vested in a Board of Directors which since prior to 1941 has consisted of an equal number of writer and publisher members. Under the Articles of Association, all members, writers and publishers alike, execute agreements vesting in ASCAP the right to license, upon a nonexclusive basis, the nondramatic public performance of works written or published by the members. Pursuant thereto, these plaintiffs, writer members, entered into uniform agreements with ASCAP. The agreements provide in part that:

> "The Owner [the publisher or writer member] sells, assigns, transfers and sets over unto [ASCAP] for the term hereof,

[18] *Interstate Hotel Co. v. Remick Music Corp.*, 157 F. 2d 744, 745 (8th Cir. 1946), cert. denied, 329 U. S. 809 (1947); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843, 846-47 (D. Minn. 1948), appeal dismissed, 177 F. 2d 515 (8th Cir. 1949).

[19] *Cf. Ring v. Spina*, 148 F. 2d 647, 653 (2d Cir. 1945).

[20] This was the total number which at the time of plaintiffs' last examination had been published, placed with a publisher, or registered with ASCAP for performance credits. It does not include works written thereafter.

[21] ASCAP also licenses other compositions in its repertory, obtained by contract with foreign societies.

> the entire exclusive[22] right of public performance * * * in each musical work,"

of which he is the copyright owner either alone or jointly with others, or in which he has any right, title or interest, or which during the term of the agreement may be written, composed, acquired, owned, published or copyrighted by the owner, alone, jointly, or in collaboration with others. The agreement further provides that with respect to every such musical work, the right of public performance

> "shall be deemed assigned to [ASCAP] by this instrument and shall vest in and be the absolute property of [ASCAP] for the term hereof * * *."

These agreements cover substantially all the 7,000 compositions written by the respective plaintiffs. They expire December 31, 1965.

[*Licenses Granted by Association*]

ASCAP, through its licensing department, grants performance licenses to users of music. They are of two kinds: (1) a blanket license, and (2) a program license. The blanket license is the type generally issued. It grants to the music user for its term the right to perform all the music in ASCAP's catalogue upon payment of a flat fee which does not vary according to the number of ASCAP compositions used by the licensee or the number of programs in which they are played. Under the program license the broadcaster pays ASCAP a fee only for each program in which ASCAP's music is used. The terms of the licenses and the rates to be charged are decided by ASCAP's Board of Directors. Individual members do not pass upon, approve, ratify or reject license terms agreed to by the Board.

[*Royalties and Fees Collected by Association*]

All royalties and license fees collected by ASCAP are pooled in a common fund. Control over and disposition of all funds received is vested in the Board of Directors. The funds are first disbursed to meet operating expenses and payments due to affiliated foreign societies. Upon payment of the foregoing plus reserves which may be set up, the net amount remaining is distributed among the members upon order of the Board of Directors. The amount to be distributed is divided into two equal parts: one for allocation among publisher members and the other for allocation among writer members.[23] The royalties payable to individual writer members are determined by a Writers' Classification Committee composed of writer members of the Board of Directors. The Committee is empowered to determine a writer's status with respect to his share of royalties. In fixing the status of a member, certain criteria are imposed by the Articles of Association upon the Committee.[24] These include the number, nature, character and prestige of works composed, written or published by the member, the length of time his works have been a part of the ASCAP catalogue, their popularity and vogue. Primary consideration is to be given to the performance of the compositions as indicated by objective surveys. The system of distribution used by the Writers' Classification Committee has been changed from time to time.

[*Plaintiffs Have Granted No Licenses*]

With respect to the 7,000 songs, public performance licenses have been granted only by ASCAP. Plaintiff members since 1941 have not granted a single license although they assert an equal right to grant nonexclusive licenses, a point hereafter considered.

[*Contentions*]

The defendants emphasize that the terms of plaintiffs' membership in ASCAP plus ASCAP's activities in marketing for public performance the works of the plaintiffs and other writers compel a finding that it is not the plaintiffs but ASCAP which is in the business of licensing the compositions. Accordingly, they urge that the force of the defendants' alleged illegal conduct is visited directly, and in the first instance, upon ASCAP which receives all the licensing

[22] Despite this provision, ASCAP only has a nonexclusive right to license such performances. A provision in a consent decree entered in 1941 (*United States v. ASCAP*, Civ. No. 13-95, S. D. N. Y., Mar. 4, 1941) enjoined ASCAP from acquiring or asserting exclusive performance rights in the compositions. Thereafter, a clause was added at the end of the agreements stating that the grant made by the owner was modified by the consent decree. Following the entry of an amended decree in 1950 the word "exclusive" was omitted from the agreements.

[23] Articles of Association of ASCAP, Article XV.

[24] *Id.* Article XIV.

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fees and only indirectly upon plaintiffs in the form of reduced royalties.

Plaintiffs, however, contend that their business is not only that of creating and writing songs and compositions, but also includes exploiting and promoting their songs; that ASCAP is simply the vehicle through which they effect public distribution of their products. They urge that ASCAP is only an agent, "the middle-man between the songwriter and the user"—that they "utilize the services of ASCAP as a licensing and collection agency." Plaintiffs also refer to it as a "co-operative society" and as "a conduit through which the fees flow from the users to the members themselves." Consequently, they contend, the direct loss falls upon them and not ASCAP.

[*Association, Not Individual Members, Is "Direct Target"*]

No purpose is served in attempting to define the precise jural nature of ASCAP whether "co-operative society", "agent", "conduit",[25] or "middle-man", as plaintiffs variously contend or, as the defendants contend, "a corporate-like entity" or an association whose entire membership has a "joint and common interest" in this action similar to the members of a partnership. Theoretical concepts must give way to reality.

The stubborn facts are that the plaintiffs under the Articles of Association by which they are bound[26] have executed agreements which unequivocally transfer to ASCAP a nonexclusive right to license public performances for profit of their compositions; that it is ASCAP, and ASCAP alone, which has marketed and licensed the 7,000 songs written by plaintiffs; that it was not the plaintiffs but ASCAP which negotiated the prices and terms of the licenses; that it was not the plaintiffs but ASCAP which prosecuted claims of infringement of plaintiffs' compositions. It is ASCAP and not its licensees from which the plaintiffs and their fellow members receive royalties. It is ASCAP which determines how much each composer shall receive. The amount distributable to a plaintiff of his share of the fund is beyond his control. Thus, even were it accepted that ASCAP is a "co-operative society" which renders services exclusively in the interests of its members, this would "not remove its activities from the sphere of business."[27] Its business nature is not affected by its nonprofit character.[28]

The thrust of the alleged conspiracy insofar as the public performance rights are concerned is directed against ASCAP as the licensor of the totality of all its members' compositions and not as against particular members or particular compositions. The licensing activities of ASCAP are extensive and represent a vast business enterprise. It has licensed 3,475 radio stations; 21 national and regional radio networks; 453 television stations and 3 television networks. In 1955,[29] 85 per cent of all radio performances and 90 per cent of all television performances of copyrighted music were licensed by ASCAP. In a single year it has issued more than 26,000 general licenses to hotels, night clubs, restaurants and similar public places, motion picture theatres, drive-ins, wired music operators and others. In 1956, its receipts from licenses were close to $25,000,000 and after required disbursements it distributed almost $19,000,000 to its members. No matter what name may be applied to ASCAP, no matter what its jural character, as a consequence of the grant of rights by its members to it, the competition in the field of nondramatic public performances for profit is between ASCAP and BMI and not between plaintiffs or other composers and BMI. Indeed, plaintiffs themselves virtually concede this. In answer to an interrogatory, they stated:

> "* * * The rights of public performance for profit of the musical compositions written by [plaintiffs and other writers

[25] Our Court of Appeals has recognized that ASCAP is not a mere agency or conduit for its members. Reversing a District Court ruling which dismissed an action brought by two publisher members (corporations) and ASCAP for infringement of copyright, the Court stated "any recovery of damages * * * would go to the society, and the corporate plaintiffs were necessary parties merely because they hold their respective causes of action in trust for the society." *Buck v. Elm Lodge, Inc.*, 83 F. 2d 201, 202 (2d Cir. 1936). There are many cases where the vindication of the right of public performance of members' songs was brought in the name of ASCAP, e. g., *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931); *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202 (1931).

[26] *Gem Music Corp. v. Taylor*, 294 N. Y. 34, 38, 60 N. E. 2d 196, 198 (1945).

[27] *American Medical Ass'n v. United States* [1940-1943 TRADE CASES ¶ 56,254], 317 U. S. 519, 528 (1943).

[28] *Cf. Associated Press v. National Labor Relations Board*, 301 U. S. 103, 128-29 (1937).

[29] The last year for which records were presented.

similarly situated], except in rare instances, are cleared through ASCAP or defendant BMI."

No matter how phrased, it cannot obscure the fact that ASCAP, and not the individual composers, is the direct target of the alleged conspiracy. Any other conclusion flies in the face of reality.

The situation here presented comes within the doctrine enunciated by Judge Learned Hand in *Bookout v. Schine Chain Theatres Inc.* [1958 TRADE CASES ¶ 68,987], 253 F. 2d 292, 295 (2d Cir. 1958), that "all claims under the Anti-Trust Acts rest upon wrongs done by the suppression of competition and must be initiated by a party whose commerce has been directly injured."

The conclusion is compelled that in practice and in fact it is ASCAP which was and is engaged in the business of licensing plaintiffs' compositions for public performance; that for that purpose plaintiffs have so divested themselves of their public performance rights to ASCAP that any injury resulting from the conspiracy was primarily and directly upon ASCAP; that injury, if any, sustained by the plaintiffs is secondary and remote.

[*Retained Rights Not Susceptible of Direct Injury*]

The plaintiffs seeks to avert this conclusion, relying upon certain retained rights with respect to their compositions, which independently of those granted to ASCAP, they claim are susceptible of direct injury by reason of defendants' conduct.

First, the fact that plaintiffs retained a separate right to grant nonexclusive licenses (assuming *arguendo* that the right remained with the plaintiffs)[30] does not alter the remote nature of any claimed injury. While the 1941 decree voided the exclusive licensing right in ASCAP, the fact is, as already noted, that no plaintiff granted nondramatic public performance licenses.[31] The reason is apparent. The blanket licenses issued by ASCAP permit the performance of all compositions in ASCAP's repertoire and hence there is no need for a user to obtain a license from any individual ASCAP member to perform that member's particular composition. The nonexclusive right allegedly retained by the plaintiffs is more apparent than real. The only loss plaintiffs could have suffered was loss of income from ASCAP.

As to the right to restrict nondramatic performances by ASCAP's radio and television licensees, this has rarely been exercised. Its purpose is to enable an author to protect his composition against indiscriminate performances. This hardly gives support to a claim of direct injury.

As to plaintiffs' contention that they retained rights concerning the use of said compositions in dramatico-musical settings, the complaint does not allege, nor is evidence presented, that the conspiracy was directed toward these rights, and hence this furnishes no basis for holding that plaintiffs have standing to sue.

Neither does the right to resign from ASCAP give the plaintiffs standing to sue for alleged diminution of income received from ASCAP during the period of membership. Plaintiffs in fact have not resigned. Even if they did, while it would terminate all existing assignments, the resignation would be subject to any right or obligation existing between ASCAP and its licensees and further, to the withdrawing members' right to a proportionate share of distributions from royalties accruing under existing licenses. ASCAP would continue to have the right to grant nonexclusive licenses in a resigned writer's composition as long as his publishers and collaborators remained members of ASCAP.[32]

The rights retained by plaintiffs, whether they be called rights of reversion, recapture, restriction, resignation or otherwise, upon this record are not of such a nature that they are susceptible of direct damage or

[30] The defendants dispute that the plaintiffs still retain this nonexclusive right in view of their contracts with the publishers which granted them "all rights" in the compositions not granted to ASCAP. In view of the disposition here made it is unnecessary to decide this issue.

[31] While plaintiff Schwartz in his affidavit suggests that some of the composers granted consents to users of music, his answers to interrogatories categorically state: "The licenses for nondramatic performance for profit for all compositions noted in Schedule A have, since 1940, been issued by ASCAP." It appears that the very limited consents referred to were not for nondramatic performances but were rather consents to perform songs on ASCAP's restricted list or consents to make dramatic performances. At best they are *de minimis*.

[32] *Broadcast Music, Inc. v. Taylor*, 10 Misc. 2d 9, 55 N. Y. S. 2d 94 (Sup. Ct., N. Y. Co. 1945).

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support a claim of direct injury under the charged conspiracy. The hard fact that will not down is that, despite these retained rights, plaintiffs have not, during the period of the conspiracy, licensed public performances of their compositions. ASCAP and ASCAP alone performed that function. There is no showing that the plaintiffs intended to exercise these rights for the purpose of licensing their songs for public performance,[33] or that the defendants did anything to interfere with plaintiffs' exercise of them. Injury to them, if any, was not only remote but the fact remains that the primary impact an injury was upon ASCAP as the licensor of its members' songs and the recipient of the fees therefor.

Finally, plaintiffs stress their promotional activities to popularize their songs to derive greater income and urge this as constituting part of their business which they say has been injured by the defendants' conduct. They refer to individual efforts to induce orchestra leaders, performers, disc jockeys, and others, to play their songs as well as efforts to interest record companies in recording them. But these various activities are no different from those engaged in by an author attending a book luncheon, lecturing before college and other groups, or appearing on radio and television programs. The activities of a composer, even though the end result may mean increase in sales of sheet music or records of his composition, do not mean he is in the business of promoting his songs any more than an author of a book is in the business of publishing simply because he seeks by promotional action to increase the sales of his books.

[*Avenue of Relief—Action by Association Itself*]

In the instant case, unlike others where a plaintiff who was held to be indirectly damaged was denied a right to sue, an avenue of relief is open to the plaintiffs and all other members of ASCAP on whose behalf they allege they bring this action. No substantial reason has been advanced why ASCAP has not brought the action or why it has not been vouched into the action. The fact that ASCAP is a nonprofit organization does not mean that direct injury cannot be inflicted upon it by illegal antitrust conduct of others, just as that fact does not mean that ASCAP cannot itself indulge in antitrust conduct.[34] The fact is that ASCAP has sued and has been sued. Indeed, were ASCAP to bring an action based upon the alleged illegal conduct of the defendants by reason of claimed injury and recover a judgment, the proceeds in the first instance would be the property of the association, and subject to the payment of its debts. A recovery would permit distribution to be made to the individual plaintiffs and other members of ASCAP as determined by the Writers' Classification Committee in accordance with the by-laws.[35]

[*No Capacity to Sue*]

Upon all the foregoing, the Court holds that with respect to the nondramatic public performance rights, the plaintiffs are without standing to sue.

We now consider whether the plaintiffs have standing to sue with respect to publishing and recording rights.

The Publishing and Recording Rights and the Publishers

[*Rights Transferred to Publishers*]

The plaintiffs have entered into agreements with 300 music publishers, who are also members of ASCAP. Under these they have transferred to the publishers their unpublished original compositions with the right to secure copyright therein and all rights thereunder, subject to the performance rights granted to ASCAP. The agreements cover approximately 5,800 of the 7,000 compositions written by the plaintiffs. They are substantially similar and provide:

[33] *Cf. Triangle Conduit & Cable Co. v. National Electric Products Corp.* [1944-1945 TRADE CASES ¶ 57,422], 152 F. 2d 398, 399 (3d Cir. 1945); *American Banana Co. v. United Fruit Co.*, 166 Fed. 261 (2d Cir. 1908), aff'd 213 U. S. 347 (1909).

[34] *American Medical Ass'n v. United States* [1940-1943 TRADE CASES ¶ 56,254], 317 U. S. 519 (1943).

[35] *Cf. American Cooperative Serum Ass'n v. Anchor Serum Co.* [1946-1947 TRADE CASES ¶ 57,447], 153 F. 2d 907, 912-13 (7th Cir.), cert. denied, 329 U. S. 721 (1946). What was said in *Loeb v. Eastman Kodak Co.*, 183 Fed. 704, 709 (3d Cir. 1910), although the reference was to stockholders of a corporation is equally pertinent here:

"Certainly it is not apparent that the [antitrust act] was intended to or did confer upon hundreds or thousands of stockholders individual rights of action when their wrongs could have been equally well and far more economically redressed by a single suit in the name of the corporation."

"The Writer hereby sells, assigns, transfers and delivers to the Publisher a certain heretofore unpublished original musical composition written and/or composed by the above-named Writer now entitled * * * including the title, words and music thereof and the right to secure copyright therein throughout the entire world, to have and to hold the said copyright and all rights of whatsoever nature thereunder existing * * *."

The agreement further provides for the payment by the publisher to the writer of stipulated royalties based upon the number of copies of sheet music sold, and a percentage of gross sums received from recording licenses. There can be no doubt that the essential marketing and exploitation of the publishing and recording rights has been carried on under the contracts by the plaintiffs' publishers; that plaintiffs themselves, with but rare exceptions, have never granted any license pertaining to any right in such compositions; that it is the publishers who are in the business of publishing and issuing licenses for recordings and other mechanical reproductions of the plaintiffs' compositions.

Again the defendants stress that it is the publishers who in the first instance receive the income from the sale of sheet music and the licensing of recording upon which royalty payments to the plaintiffs are based. Thus, insofar as the complaint charges interference with the exploitation of the publishing and recording rights in plaintiffs' songs, the case at first blush would seem to compel the same conclusion as that reached in the instance of ASCAP.[36] Notwithstanding, plaintiffs, aside from questioning their precise relationship with their publishers,[37] here urge that other factors are present which give them standing to sue.

[*Charges—Suppression of Musical Compositions*]

The plaintiffs have offered testimony on their pretrial examinations and in their affidavits in opposition to this motion with respect to various practices allegedly engaged in by the defendants in furtherance of the conspiratorial objective.

They charge that music publishers with whom they had contracts were induced by subsidies, restrictive covenants, incentive payments and other devices including payments of salaries of publishers' employees, to refrain from publishing and exploiting plaintiffs' songs; that recording companies were induced by various methods not to record plaintiffs' songs; that these activities were all for the purpose of suppressing plaintiffs' musical compositions altogether or to discriminate in favor of BMI songs. Plaintiffs further allege that some publishers, who were ASCAP houses, organized BMI companies and although in theory functioning separately, in fact, because of special concessions granted by BMI to the publishers, refrained from promoting non-BMI music or curtailed its exploitation. Plaintiffs name firms who engaged in this practice.

Publishers to whom plaintiffs transferred their compositions with the right to secure the copyrights were obligated to exploit them in good faith for the benefit of the composers, as well as for themselves.[38]

[*Alleged Payments to Publishers*]

The essence of these charges is that the defendants, in furtherance of the alleged conspiratorial objective to control the music market, induced publishers, including some under contract to plaintiffs, by various means, to withhold exploitation and marketing of plaintiffs' compositions in printed and recorded form; that in order to induce the publishers to do so, the defendants made payments to the publishers to cover their loss in income by reason of nonexploitation of plaintiffs' songs, thus making them whole to the detriment of the plaintiffs; that by such payments, defendants removed the incentive for, and interfered with the duty upon, the publishers to promote the marketing of plaintiffs' songs.

[36] The defendants point out that the rights given to the publishers are not burdened with the same reserved rights as in the instance of ASCAP.

[37] Plaintiffs contend that their contractual relationship with the publishers is a profit-sharing arrangement. The courts, however, appear to have held otherwise, and term the relationship as one of debtor and creditor. *Steinbeck v. Gerosa*, 4 N. Y. 2d 302, 317, 151 N. E. 2d 170, 178, appeal dismissed, 358 U. S. 39 (1958). See also, *Ring v. Spina*, 148 F. 2d 647, 652 (2d Cir. 1945). Plaintiffs also claim that their agreement with the publisher is "a personal service arrangement."

[38] *Broadcast Music, Inc. v. Taylor*, 10 Misc. 2d 9, 21, 55 N. Y. S. 2d 94, 104 (Sup. Ct., N. Y. Co. 1945); *In re Waterson, Berlin & Snyder Co.*, 48 F. 2d 704 (2d Cir. 1931).

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[*Damage to Songwriters*]

The Court's function on this motion is not to weigh and pass upon the merits of the charges. Should the proof sustain the charges, it would be difficult to challenge plaintiffs' claim of direct injury. This branch of the conspiracy appears, upon the facts alleged, to be directed not against the publishers but rather against the songwriters. A conspiracy may have more than one objective and its force directed against one or more intended victims. The target area of the conspiracy was broad enough to include plaintiffs insofar as the publication and recording rights are concerned.[39] Upon the facts alleged, the publishers were not damaged since they received compensating payments from the defendants; the only persons damaged were the songwriters. The wrongful acts had a direct impact upon the composers who were injured thereby and not upon the publishers who were made whole. The bounties granted to the publishers removed them from the target area of the defendants' attack and placed plaintiffs directly in the line of fire. We note particularly the comment of the Court of Appeals in *Productive Inventions, Inc. v. Trico Products Corp.*:[40]

> "No hard and fast rule can be laid down in these situations as the line between direct and incidental damage is not always definable with clarity."

[*Situations Distinguished—Participation in Wrongful Conduct*]

The fact that the plaintiffs divested themselves of the publishing and recording rights does not deprive them of standing to sue. They could receive royalties only if the publishers, in good faith, worked their compositions. Here the charge is that the very function which the publishers undertook to perform had been interfered with and rendered sterile by the acts of the defendants.

The significant distinction in the ASCAP situation is that no claim is made that ASCAP participated in or lent itself to any conduct in violation of its duty to market plaintiffs' compositions, which resulted in diminution of income to the plaintiffs. On the contrary, as already noted, the force of the conspiracy was directed against ASCAP as the licensor of its entire catalogue of songs.

The instant situation is also readily distinguishable upon the facts from the cases relied upon by the defendants. It is more nearly akin to the case of a landlord who is permitted to maintain a suit for damages where his lessee is charged with being a co-conspirator or a participant with the defendants in the wrongful conduct which led to a diminution of the landlord's income. While here it is not charged that the music publishers were co-conspirators, sufficient has been alleged to indicate that the defendants in effect used ready and complaisant music publishers to deprive plaintiffs of a market with respect to the publishing and recording of their compositions.

[*"Direct Injury" Sufficiently Charged*]

Under all the circumstances presented, plaintiffs have set forth enough to support their claim of direct injury due to the acts and conduct charged against the defendants so as to entitle them to maintain this claim. Accordingly, this aspect of the defendants' motion is denied.

Plaintiffs' 1200 Songs as to Which No Publisher Contracts Are in Effect

[*Interest Susceptible to Damage*]

There remains for final consideration the defendants' contention with respect to the 1,200 songs as to which no publisher contracts are in effect. These constitute works of which the respective plaintiffs were either a registered proprietor of statutory copyright, a holder of legal title to common law copyright, or are compositions in which a publisher's right has terminated because of cancellation of the contract. The interest of plaintiffs therein was susceptible to damage by the charged conspiracy. Here the plaintiffs claim the publishing and recording market was entirely foreclosed to them by reason of defendants' action. While defendants acknowledge that plaintiffs are the common law or statutory copyright owners of these compositions, they minimize their value and contend that any injury was only collateral

[39] *Cf. Karseal Corp. v. Richfield Oil Corp.* [1955 TRADE CASES ¶ 68,020], 221 F. 2d 358 (9th Cir. 1955).

[40] [1955 TRADE CASES ¶ 68,104] 224 F. 2d 678, 680 (2d Cir. 1955), cert. denied, 350 U. S. 936 (1956).

and any damage inconsequential. This contention is without substance. Whether the damage is great or slight is a question of fact to be decided by the trier of the fact. Accordingly, the defendants' motion likewise is denied with respect to the 1,200 songs.

Settle order on notice in accordance with the foregoing.

[¶ 69,544] Charles Walder, et al. v. Paramount Publix Corp., et al.

In the United States Court of Appeals for the Second Circuit. No. 12—October Term, 1959. Docket No. 25471. Argued October 9, 1959. Decided December 1, 1959.

Appeal from grant of defendants' motion for summary judgment, entered at pre-trial, United States District Court for the Southern District of New York, DIMOCK, J., by which plaintiffs' claim for treble damages under the antitrust laws was dismissed. Affirmed.

Clayton and Sherman Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Injury to Corporation Created as Result of Alleged Conspiracy—Summary Judgment.—A summary judgment against the trustees of a dissolved theatre operating corporation was affirmed on the ground that the trustees failed to show that the corporation had been injured. The corporation, according to the complaint, was the fruition of an alleged conspiracy in violation of the antitrust laws, that is, it was claimed that but for the alleged violation, the corporation would never have come into existence. To escape their predicament of complaining that the very acts which created their corporation also injured it, the trustees contended that a co-conspirator, though not a defendant, received more from the corporation than it contributed. For the co-conspirator's $1,000 contribution to the corporation's $2,000 capital, the co-conspirator received exactly what it paid for, a 50 per cent interest in a corporation that had no assets except the capital paid in. Even assuming that there was evidence that the rent paid by the corporation was unfairly low and that the point was still open to plaintiffs despite their failure to appeal an order finding the rent to be fair, the aggrieved party was the lessor, another plaintiff, and not the operating corporation.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.275.

For the plaintiffs-appellants: Claudia Pearlman (Edgar A. Buttle, of counsel), New York, N. Y.

For the defendants-appellees: Louis Phillips (E. Compton Timberlake, Marvin H. Ginsky, Bernard E. Kalman, of counsel), New York, N. Y., for Paramount Pictures Inc. (In Dissolution), Paramount Film Distributing Corp., and Paramount Pictures Corp.; Jerome B. Golden (E. Compton Timberlake, of counsel), New York, N. Y., for American Broadcasting-Paramount Theatres, Inc.; Royall, Koegel, Harris & Caskey (John F. Caskey, Stanley Godofsky, of counsel), New York, N. Y., for TCF Film Corp. a New York corporation now dissolved, Warner Bros. Pictures Distributing Corp., and RKO Radio Pictures, Inc.; and Schwartz & Frohlich (Myles J. Lane, Bernard R. Sorkin, of counsel), New York, N. Y., for Columbia Pictures Corp.

Affirming a decision of the U. S. District Court, Southern District of New York, 1958 Trade Cases ¶ 69,150; for prior opinions of the U. S. District Court, Southern District of New York, see 1957 Trade Cases ¶ 68,883, 68,650; 1956 Trade Cases ¶ 68,572, 68,275; and 1955 Trade Cases ¶ 68,170, 68,097.

Before LUMBARD, WATERMAN and FRIENDLY, Circuit Judges.

[*Ownership and Operation of Theatre*]

WATERMAN, Circuit Judge [*In full text*]: From the year 1928 to the present time the Walder family, through various corporations has had exclusive ownership of the Tivoli Theatre, a neighborhood motion picture house in Miami, Florida. Save for the period between 1937 and 1947 operation of the theater also has been exclusively in the hands of the Walders. Until 1931 ownership and operation were both in the name of Tivoli Theatre, Inc. In 1931 ownership

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was transferred to Walwal Corporation. In 1937 Tivoli Operating Corporation was organized to replace Tivoli Theatre, Inc. in the operation of the theater. The total subscribed capital of Operating consisted of $2,000: $1,000 paid in by Walwal and $1,000 paid in by Paramount Enterprises, Inc.[1] Operating paid Walwal an annual rent of $9,600; Enterprises exerted its efforts in obtaining films for the Tivoli; and the net proceeds were divided between Walwal and Enterprises in proportions which varied over the ten-year existence of the arrangement. In 1947 these arrangements were terminated, and operation of the theater passed to Tivoli Amusement Company, Inc., a corporation wholly owned by the Walder family. In 1951 the members of the Walder family, in their various capacities, filed a private antitrust action alleging that Enterprises was included in management of the Tivoli Theatre, and in the profits therefrom, only because of prior coercion exerted by defendants in preventing the Tivoli Theatre from receiving motion pictures for exhibition which the theater would have obtained had distribution been on a properly competitive basis. Thus plaintiffs alleged injury from practices condemned in *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948).

[*Plaintiffs*]

In the complaint there were five plaintiffs or groups of plaintiffs—(1) the members of the Walder family individually; (2) the members of the Walder family as trustees for Tivoli Theatre, Inc., a dissolved corporation; (3) the Walwal Corporation; (4) Tivoli Amusement Company, Inc.; (5) two members of the Walder family as two of the surviving three trustees of Tivoli Operating Corporation, a dissolved corporation.[2] At various stages of the pre-trial proceedings all the plaintiffs have been eliminated from the case[3] except the plaintiffs in category (5), the trustees of Operating Corporation. As to them, on September 29, 1958 the district court, in an unreported opinion, granted defendants' motion for summary judgment [1958 TRADE CASES ¶ 69,150]. This appeal followed.

[*Injury to Corporation*]

This lengthy discussion of the facts and the present posture of the case has been necessary in order to underscore the fact that the solitary question facing this court is the propriety of the district court's action in entering summary judgment against the trustees of Operating Corporation. No other plaintiffs are involved. As stated in the preceding paragraphs, Operating Corporation was, according to the Walder complaint, the fruition of the alleged conspiracy in violation of the antitrust laws; *i.e.*, plaintiffs claim that but for the alleged violations Operating Corporation would never have come into existence. Thus the present plaintiffs complain that the very acts which created their corporation have also injured it, a difficult position for the trustees here to maintain successfully. In an effort to escape their predicament plaintiffs contend that Enterprises, a named co-conspirator though not a defendant, received as a result of the alleged coercion more from Operating than it contributed. Plaintiffs argue that Enterprises contributed only $1,000 in exchange for the far more valuable right to proceeds from the management of the theater resulting from the extremely favorable lease which Walwal offered to Operating. Plaintiffs' argument, however, is

[1] During the period here involved Paramount Enterprises operated theaters in the Miami region and was a wholly owned subsidiary of defendant Paramount Pictures, Inc.

[2] Operating was formally dissolved on Oct. 12, 1948.

[3] A detailed history of the litigation is necessary at this point. The original complaint was filed on September 4, 1951. In an opinion dated June 24, 1955 and reported at [1955 TRADE CASES ¶ 68,097] 132 F. Supp. 912 (S. D. N. Y. 1955), Judge Weinfeld granted defendants' motion for summary judgment to the extent of eliminating the Walders from the case, both as individuals and as trustees of Tivoli Theatre, Inc. Judge Weinfeld reasoned that the Walders individually had no standing since the only injuries alleged related to corporations of which the Walders were stockholders. Judge Weinfeld then held that under the controlling Florida law, the trustees of a dissolved corporation, fully as much as the dissolved corporation, were bound by the requirement that suits by a dissolved corporation be brought within three years after final dissolution.

On December 17, 1956 Judge Leibell granted summary judgment dismissing Walwal from the case. He held that Walwal had received a fair rent from Operating in the ten-year period of Operating's existence. Walwal appealed from this decision, but on June 12, 1957 the appeal was dismissed for failure to prosecute.

On June 5, 1958 Judge Dimock dismissed the complaint as to Tivoli Amusement. No appeal was taken.

patently unsound. For its $1,000 contribution to Operating's capital Enterprises received exactly what it paid for, a 50% interest in a corporation that had no assets except the capital the two parties paid in. And even if we should assume that there was evidence to support plaintiffs' contention that the rent under the lease was unfairly low and that the point was still open to plaintiffs despite their failure to prosecute their appeal from Judge Leibell's order finding the rent to be fair,[4] the aggrieved party would be Walwal, not Operating. The district court quite properly concluded that Operating could not demonstrate injury. Cf. *Fanchon & Marco, Inc. v. Paramount Pictures* [1955 TRADE CASES ¶ 68,125], 133 F. Supp. 839, 845 (S. D. N. Y. 1955).

[*Affirmed*]

Disposing of the case as we do, we do not reach appellees' other contentions.

Judgment affirmed.

[¶ 69,545] **The Minneapolis & St. Louis Railway Company v. United States of America, et al. State of South Dakota v. United States of America, et al. State of Minnesota v. United States of America, et al.**

In the Supreme Court of the United States. October Term, 1959. Nos. 12, 27, and 28, respectively. Dated December 14, 1959.

On Appeals from the United States District Court for the District of Minnesota, Fourth Division.

Sherman Antitrust Act and Interstate Commerce Act

Combinations and Conspiracies—Construction of Sherman Act—Applicability to Common Carriers and Regulated Industries—Rail Carriers—Acquisitions Exempted from Antitrust Laws by Interstate Commerce Act.—A trial court properly found that a railroad acquisition approved by the Interstate Commerce Commission did not violate Section 1 of the Sherman Act or Section 7 of the Clayton Act. Section 5(11) of the Interstate Commerce Act, a more recent and more specific expression of congressional policy, relieves acquiring carriers "from the operation of the antitrust laws" where the Commission approves the transaction. The Commission is not authorized by that section to "ignore" the antitrust laws, but it is not so bound by them that it must permit them to "overbear" what it finds to be in the "public interest." A contrary view would permit the Commission to authorize only those acquisitions which do not offend the antitrust laws, a conclusion that would render meaningless the exemption provided for in Section 5(11). Congress left the task of determining the competitive effects of railroad acquisitions to the wisdom and experience of the Commission. Here, after an extended analysis of the facts and the evidence, the Commission found that no significant lessening of competition would result from the acquisition, a determination which rested upon adequate findings that were, in turn, supported by substantial evidence.

See Combinations and Conspiracies, Vol. 1, ¶ 2039.70.

Interlocking Directorates—Transactions Between Organizations Having Directors in Common—Competitive Bidding Requirements of Clayton Act, Section 10—Antitrust Exemption Provided by Interstate Commerce Act.—A trial court properly found that a railroad's proposed purchase of another railroad's stock did not violate Section 10 of the Clayton Act. That section prohibits a common carrier from having "any dealings in securities" of more than $50,000, in the aggregate, in any one year, with another corporation having directors in common with the carrier, unless the purchases are made by competitive bidding under regulations prescribed by the Interstate Commerce Commission. The evident purpose of that section was to prohibit a corporation from abusing a carrier by "palming off" upon it securities, supplies, and other articles without competitive bidding and at excessive prices through "overreaching" by, or other misfeasance of, common directors. But here, even if the transaction might, under other circumstances, violate Section 10 of the Clayton Act, Section 5(11) of the Interstate Commerce Act authorizes the Commission to approve

[4] See footnote 3, *supra*.

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the purchase if the Commission finds that the approval would be in the public interest. Further, Congress has expressly said that, upon such approval by the Commission, the carrier shall be relieved "from the operation of the antitrust laws." Here, the Commission fully considered all the factors bearing on the matter, including the contracts under which the railroad proposed to acquire a 50 per cent interest in the other railroad's stock, and, after doing so, approved them. That action of the Commission did not exceed the statutory limits of its discretion and, under Section 5(11), operated to relieve the acquiring carrier from the operation of Section 10 of the Clayton Act.

See Interlocking Directorates, Vol. 1, ¶ 4420.60.

For the appellant (Docket 12): Max Swiren, Chicago, Ill.; James E. Dorsey, John G. Dorsey, and Richard Musenbrock, Minneapolis, Minn.

For the appellants (Docket 27): Parnell Donohue, Attorney General; Ernest W. Stephens; and Herman L. Bode, Assistant Attorney General, Pierre, S. D.

For the appellants (Docket 28): Miles Lord, Attorney General, and Harold J. Soderberg, Assistant Attorney General, St. Paul, Minn.

For the appellees (Docket 12): J. Lee Rankin, Solicitor General; Robert A. Bicks, Acting Assistant Attorney General; Richard A. Solomon, Attorney, Department of Justice; Robert W. Ginnane, General Counsel, and B. Franklin Taylor, Jr., Associate General Counsel, ICC; for the United States. Grenville Beardsley, Attorney General, and Harry R. Begley, Special Assistant Attorney General, for the State of Illinois. Starr Thomas and Carl E. Bagge, Chicago, Ill., and Edwin A. Lucas, Philadelphia, Pa., for the Atchison, T. & S. R. R .Co., the Pennsylvania R. R. Co., and the Pennsylvania Co. Robert H. Walker, Keokuk, Ia.; Max J. Lipkin, Corporation Counsel, Peoria, Ill.; Fred V. Stiers, City Attorney, East Peoria, Ill.; Verle W. Safford, Peoria Assn. of Commerce, Peoria, Ill.; Don B. Pioletti, City Attorney, Eureka, Ill.; Lyman R. Fort, Attorney for Lomax, Stronghurst, Ill.; Leon L. Lamet, City Attorney, Warsaw, Ill.; Blaine Ramsey, Canton Chamber of Commerce, Canton, Ill.; Lawrence B. McNunn, City Attorney, Canton, Ill.; Fred R. Miller, City Attorney, Gilman, Ill.; Milo Fleming, City Attorney, Watseka, Ill.; and Lynn C. Sieberns, Village Attorney, Gridley, Ill., for municipalities and shippers along the lines of Toledo, Peoria & Western R.R. Co.

For the appellees (Docket 27): Same as Docket 12.

For the appellees (Docket 28): J. Lee Rankin, Solicitor General.

For a prior opinion of the U. S. District Court, District of Minnesota, Fourth Division, see 1958 Trade Cases ¶ 69,140.

[Railroad "Acquisitions" Under Antitrust Laws]

MR. JUSTICE WHITTAKER delivered the opinion of the Court *[In full text]*: These appeals present questions arising out of rival applications by several rail carriers to the Interstate Commerce Commission under § 5(2) of the Interstate Commerce Act[1] for

[1] Section 5(2) of the Interstate Commerce Act (24 Stat. 380, as amended, 54 Stat. 905, 49 U. S. C. § 5(2)) provides, in pertinent part, that:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for . . . two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . .

* * *

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier . . . . seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify . . . [designated parties], and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . .

"(c) In passing upon any proposed transaction under the provisions of this paragraph,

authority to acquire control of Toledo, Peoria & Western Railroad Company.

[*"Acquired" Railroad—Background*]

"Western" is an independent, short-line "bridge carrier"[2] of through east-west traffic by-passing the congested Chicago gateway. Its line is about 234 miles long, extending from its connection with the Pennsylvania Railroad Company ("Pennsylvania") at Effner, on the Illinois-Indiana state line, westward, through Peoria, to its connection with the main line of the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") at Lomax, Illinois, and thence southwesterly a short distance to Keokuk, Iowa. Its headquarters, shops and yards are located in East Peoria where it has 24 executives and where, and elsewhere along its line, it has about 225 other employees. It has connections for the interchange of traffic with 16 railroads, the principal ones being with the Pennsylvania at Effner, with the Santa Fe at Lomax, and with the New York, Chicago & St. Louis Railroad Company ("Nickel Plate"), the Illinois Terminal Railroad Company, the Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Minneapolis & St. Louis Railway Company ("Minneapolis") at Peoria. Its interchange connections with the other 10 railroads are at 17 other towns along its line.

Western has outstanding 90,000 shares of common capital stock, 82% of which is owned by the testamentary trustees of the estate of George P. McNear—Wilmington Trust Company and Guy Gladson—and the remaining 18% is owned by members of the McNear family, a bank and the president of Western. In 1954, the trustees determined to sell their Western stock, and rival efforts were commenced by Minneapolis, on the one hand, and by the Santa Fe and Pennsylvania, on the other hand, to purchase it. (Four of Wilmington Trust Company's directors were also directors of Pennsylvania.) Those negotiations culminated in a contract between the trustees and the Santa Fe, dated May 26, 1955, providing for the sale by the former and purchase by the latter of the stock at a price of $135 per share, subject to the Commission's approval.[3] Soon afterward, like agreements were made by the Santa Fe with the holders of the remaining 18% of the Western stock.

On June 28, 1955, the Santa Fe entered into a contract to sell to the Pennsylvania Company, a wholly owned subsidiary of Pennsylvania, 50% of the outstanding capital stock of Western at $135 per share,[4] subject to approval of the Commission.

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the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

* * *

"(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected . . . ."

[2] The term "bridge carrier" appears to mean a short-line carrier which transports through traffic from one long-line carrier to another.

[3] During the negotiations, Minneapolis first offered $69.50, and later $80, per share for the stock. On April 15, 1955, the Santa Fe and Pennsylvania each obtained letter commitments from the trustees for the sale to each of them of 26% of the Western stock at a price of $100 per share. (Near the same time the Rock Island made a like offer to the trustees for 26% of the Western stock, but that offer was not accepted.) But a dispute arose—and apparently still exists between the trustees and Pennsylvania—with respect to the validity of those commitments. Thereupon, Minneapolis offered the trustees $133 per share for the Western stock, but that offer was not accepted, and on May 26, 1955, the Santa Fe, acting, as the Commission found, "on behalf of that carrier alone," agreed with the trustees for the sale by the former and purchase by the latter of all of the Western stock held by the trustees at a price of $135 per share, and those parties on that date entered into a contract, accordingly, subject to approval of the Commission.

[4] The contract of June 28, 1955, between the Santa Fe and the Pennsylvania Company provided that it was without prejudice to any claims, causes of action or rights, which Pennsylvania may have against the trustees of the McNear estate with respect to the letter commitment of April 15, 1955, for the sale by the trustees to Pennsylvania of 26% of the Western

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[*Proceedings Before the ICC*]

On July 8, 1955, the Santa Fe and Pennsylvania Company and its parent, Pennsylvania, applied to the Commission under § 5(2) of the Act[5] for approval of those stock purchase agreements and the consequent joint control of Western. The Minneapolis intervened and objected to the application, as did also the States of Minnesota and South Dakota and their respective public service regulatory commissions.

Thereafter, on October 13, 1955, the Minneapolis applied to the Commission, under the same section of the Act, for authority to acquire sole control of Western, expressing its willingness to enter into contracts with Western's stockholders to purchase their stock at the same price and on the same terms as set forth in their existing contracts with the Santa Fe. The Santa Fe, the Pennsylvania Company and Pennsylvania intervened in the latter proceeding and objected to the Minneapolis application.

On motion of Minneapolis, the Commission consolidated the two proceedings. Thereafter, seven other railroads having interchange connections with Western's line intervened. Two of them sought authority, at all events,[6] and two others of them sought authority, under stated conditions,[7] to participate, under § 5(2)(d) of the Act, in the acquisition of the Western stock on an equal basis with the successful applicant. The State of Illinois, 18 cities or towns and seven chambers of commerce located on or along Western's line, two labor organizations representing Western's employees, and a large number of shippers over Western's line, intervened in support of the Santa Fe-Pennsylvania application and in opposition to the Minneapolis application.

After an extended consolidated hearing before him, the Commission's examiner issued a proposed report recommending approval of the Santa Fe-Pennsylvania application and dismissal of the Minneapolis application. Thereafter, upon exceptions, and briefs and arguments in their support, Division 4 of the Commission issued its report. It was confronted, as it said, with four alternative proposals, (1) for authorization of joint control of Western by the Santa Fe and Pennsylvania, (2) for authorization of sole control by the Minneapolis, (3) for authorization of two other railroads, at all events, and of two more railroads, under stated conditions, to participate in the acquisition of the Western stock on an equal basis with

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stock: and that, in the event Pennsylvania should acquire from the trustees, under that letter commitment, all or any part of such shares, the obligation of the Santa Fe under the contract to sell Western shares to the Pennsylvania Company was to be reduced accordingly. It appears that litigation was then, and is yet, pending by Pennsylvania against the trustees for the enforcement of the letter commitment of April 15, 1955.

The contract also contained a covenant which, in essence, provided that (1) Western "will continue to be operated as a separate and independent carrier with responsible management located along its line in order to preserve to shippers and communities the present direct access to its officials," (2) that Western's properties will be maintained and improved, (3) that Western "will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of" Western, (4) that all "existing routes and channels of trade via [Western] will be maintained and kept open without discrimination between connecting lines of railroad," and (5) that the Board of Directors of Western shall consist of 11 members, of whom one shall be the president of the company, two shall be officers of the Santa Fe, two shall be officers of the Pennsylvania Company, or Pennsylvania, or both, and the remaining six shall be prominent citizens not connected with either of the parties but selected by them through mutual agreement.

[5] See note 1.

[6] The New York, Chicago & St. Louis Railroad Company ("Nickel Plate") and the Chicago, Rock Island & Pacific Railroad Company ("Rock Island") sought authority, under § 5(2)(d) of the Act (see note 1), to be included in the acquisition of Western's stock on an equal basis with the successful applicant or applicants.

[7] The Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Wabash Railroad Company ("Wabash") did not object to approval of the Santa Fe-Pennsylvania application, provided the order required continuation of present routes and channels of trade via existing junctions and gateways and of all existing traffic and operating relations and arrangements, but they asked, in the event any railroad other than the Santa Fe and Pennsylvania be authorized to acquire an interest in Western's stock, that they, too, be authorized to participate therein to the same extent as any such other railroad.

The Illinois Central Railroad Company ("Illinois Central"), the Gulf, Mobile & Ohio Railroad Company ("Gulf") and the Chicago & North Western Railway Company ("North Western") asked that, if either application be approved, the order be conditioned to require the maintenance of all routes and channels of trade via existing gateways. The Monon Railroad Company asked that if the Santa Fe-Pennsylvania application be approved, the order contain a requirement that Pennsylvania shall grant to it certain trackage rights, and, if not done, that the Santa Fe-Pennsylvania application be denied.

the successful applicant,[8] and (4) denial of both applications.

The Commission observed that

> "[t]hese proceedings represent a new and more complicated phase in the administration of § 5, since [they involve] 2 applications for authority to control the same property, and petitions by 4 other carriers for inclusion in the transaction under varying circumstances."

It recognized that, under § 5(2) of the Act and the National Transportation Policy,[9] it was required to

> "weigh whether each application is consistent with the public interest, with or without inclusion of other railroads, considering not only other intervening petitions seeking such inclusion but also the other applicant and nonparticipating railroads as well."

It thought that the burden of proof was

> "most heavy for an applicant in a proceeding like this, because it must not only overbalance the claims of those seeking to share in the control but also of those seeking to exclude it from the transaction."

It conceived it to be its duty, under the Act and the National Transportation Policy, to "arrive at a standard of public interest and determine which of the various plans of control most nearly approximates it."

The Commission found that the Santa Fe-Pennsylvania plan contemplates that Western "will continue to be operated as a separate and independent carrier with responsible management located along its lines"; that it "will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of the Western," and that all "existing routes and channels of trade via the Western will be maintained and kept open without discrimination between connecting lines of railroad." It found, on the other hand, that the Minneapolis plan "unequivocally contemplates the disappearance of the Western as an independent and neutral connection for the other 15 carriers with which it presently works"; that "[f]or all practical purposes the Western would be integrated, consolidated and merged into the Minneapolis for ownership, management, and operation"; that features of the Minneapolis plan "would be extremely harmful to other carriers"; that Western's headquarters office at Peoria would be eliminated, leaving only a trainmaster and a roadmaster at that point, and that the employment of most of Western's 24 executives and 225 other employees would be severed.

[*Acquisition Consistent with Public Interest*]

The Commission further found that "[o]nly the Minneapolis and its supporting interveners, the States of Minnesota and South Dakota, advocate the disappearance of the Western as a separate and independent operating carrier," and that all other parties to, and intervenors in, the proceedings "insist that the separate and independent operation of the Western under its present local management is a public necessity." It then found that the "[p]ublic interest demands that the present policies of the Western in all respects be continued." It thereupon made the ultimate finding, required by § 5(2)(b) of the Act, that the acquisition and plan of operation by the Santa Fe and Pennsylvania, subject to stated conditions, was

> "within the scope of § 5(2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed [by them] are just and reasonable; and that the transaction will be consistent with the public interest."

The Commission then entered its order approving the Santa Fe-Pennsylvania application, dismissing the Minneapolis application, and denying the petitions of the several intervening railroads which sought to participate in the acquisition of the Western stock. 295 I. C. C. 523.

Thereafter, Minneapolis petitioned the whole Commission for a reconsideration, and alternatively requested that, if the approval of the Santa Fe-Pennsylvania application be permitted to stand, it be authorized to participate equally with those railroads in the purchase of Western's stock on the same terms. That petition was denied.

[*Proceedings in Trial Court*]

Minneapolis then timely filed a complaint in the District Court for Minnesota against the United States and the Interstate Commerce Commission to vacate the Commission's order. The States of Minnesota and South Dakota and their respective regulatory commissions, being interested in strength-

[8] See notes 6 and 7.

[9] 49 U. S. C., n. preceding § 1, 54 Stat. 899.

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ening the Minneapolis, which operates in those States, intervened in support of the complaint. The defendants answered, asserting the full legality of the Commission's order. The Santa Fe, the Pennsylvania, the Pennsylvania Company, the State of Illinois, the 18 cities and seven chambers of commerce and the numerous shippers who were intervenors before the Commission, intervened in opposition to the complaint. The Nickel Plate intervened, complaining that the Commission had improperly denied its request to participate in the purchase of the Western stock.

A three-judge court was convened and, after hearing, rendered its opinion and judgment sustaining the Commission's order. [1958 TRADE CASES ¶69,140] 165 F. Supp. 893. On separate appeals by the Minneapolis, the State of Minnesota and its regulatory commission, and the State of South Dakota and its regulatory commission, the case was brought here and we noted probable jurisdiction. 359 U. S. 933. All of those who were defendants and intervenors in opposition to the complaint in the District Court, except the Nickel Plate, are appellees in this Court.

[*Contentions—Fairness of ICC*]

Minneapolis, supported by the States of Minnesota and South Dakota, contends, first, that the Commission improperly adopted at the outset of its report the standard of "separate and independent management" of Western as the criterion governing the comparative merits of the rival plans, which was antithetic to its application, and thereby deprived it of "fair comparative consideration," and that the District Court erred in approving the Commission's action.

The record does not support that contention. Rather, it shows that the Commission's governing standard was the "public interest," although it ultimately did find that the public interest would be best served by Western's continued operation as a "separate and independent carrier." We believe that the recited findings show that the Commission carefully "weighed" and considered "each application" in its labors to determine which, if either, of them was "consistent with the public interest." Its subsidiary findings (a) that the Minneapolis plan "unequivocally contemplates the disappearance of the Western as an independent and neutral connection for the other 15 carriers with which it presently works," (b) that certain features of the Minneapolis plan "would be extremely harmful to other carriers," (c) that the Minneapolis plan contemplates the elimination of Western's office and the separation of its employees, and (d) that numerous witnesses insisted "that the separate and independent operation of the Western under its present local management is a public necessity," fully support its conclusionary finding that the "[p]ublic interest demands that the present policies of the Western in all respects be continued." That finding, though antithetic to Minneapolis' application, did not deprive it of "fair comparative consideration," but, on the contrary, it seems to us, was made by the Commission after full and fair consideration, and the District Court did not err in so holding.

[*Exemptions from Antitrust Laws—Acquisition Approved by ICC*]

Appellants' principal contention appears to be that acquisition of control of Western by Santa Fe and Pennsylvania will create a combination in restraint of commerce in violation of § 1 of the Sherman Act[10] and will lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act,[11] and that the Commission's approval of their application was an abuse of power.

On their face these contentions would seem to run in the teeth of the language and purpose of § 5(11) of the Interstate Commerce Act. That section, in substance, provides that

> "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in . . . any transaction approved by the commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction . . . and any carriers . . . participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law . . . insofar as may be necessary to enable [it] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the

[10] 15 U. S. C. § 1, 26 Stat. 209.

[11] 15 U. S. C. § 18, 38 Stat. 731.

commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." 24 Stat. 380, as amended, 54 Stat. 908, 49 U. S. C. § 5(11).

Section 5(11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act, and in terms relieves the acquiring carrier, upon approval by the Commission of the acquisition, "from the operation of the antitrust laws . . . ." Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co. v. United States* [1944-1945 TRADE CASES ¶ 57,203], 321 U. S. 67, 80, there can be "little doubt that the commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws." 321 U. S., at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to

> "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy." 321 U. S., at 87.

Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest,

> "because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by 'encouraging the organization of stronger units' in the . . . industry. And in authorizing those [acquisitions] it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate [acquisitions] from the requirements of those laws. § 5(11)." 321 U. S., at 85.

It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision.

> "Against this background, no other inference is possible but that, as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy." 321 U. S., at 85-86.

As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in "the public interest." A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws.

> "As has been said, this would render meaningless the exception relieving the participants in a properly approved [acquisition] of the requirements of those laws . . . ." 321 U. S., at 86.

Resolution of the conflicting considerations

> "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the commission 'to the end that the wisdom and experience of that commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed [acquisition] is 'consistent with the public interest.' Cf. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *Pennsylvania Co. v. United States*, 236 U. S. 351; *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344; *Purcell v. United States*, 315 U. S. 381." 321 U. S., at 87-88.

[*Antitrust Issues Considered by ICC*]

Here, the Commission gave extensive consideration to the anti-competitive contentions advanced by appellants, devoting more than five pages of its report to that matter. It found that "[a]ll the carriers endeavoring to participate in its control are in competition with Western"; that the "important thing is not whether there is possibility of competition, but whether there is probability of existing or potential competition being diminished or strangled by the Western under the control of the Santa Fe and the Pennsylvania." After an extended analysis of the complex facts and conflicting evidence, the Commission found that control of Western by the Santa Fe and Pennsylvania would not result in any significant lessening of competition. It pointed to the fact that although the Santa Fe's

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"long haul" is to Chicago and the Pennsylvania's "next to longest haul" is also to Chicago (its longest haul being to St. Louis) the Santa Fe has agreed, and is bound, "to place Lomax on a parity with Chicago from a solicitation standpoint, and . . . the Pennsylvania will recognize Effner as one of its principal interchanges along with Chicago and St. Louis"; that "there may be some diversion of traffic, but such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers."

The Commission also pointed to the fact that Western had been in a prolonged receivership until 1927 when George P. McNear acquired its stock at a receiver's sale, *Toledo, P. & W. R. Co. Acquisition,* 124 I. C. C. 181. It further found that Western's modern existence began at that time and, under the guidance of McNear, was built into a fine railroad; that since McNear's death, in 1947, the present management has continued with much success, the policies he established. Those policies, the Commission found, were, and are, "to maintain strict neutrality between all connections, and to participate in any haul of traffic no matter how slight [as a bridge] carrier through Peoria as an alternative route, bypassing the congested terminals of Chicago and St. Louis," and that those policies are to be continued under the Santa Fe-Pennsylvania plan.

[*No Abuse of Discretion*]

We think it is clear from this summary of its analysis and findings that the Commission fully estimated the scope and appraised the effects of any curtailment of competition which might result from the acquisition of Western by the Santa Fe and Pennsylvania, and, after having done so, concluded that their acquisition and plan of operation of Western would not result in any significant lessening of competition. Congress has left the task of making that determination to the wisdom and experience of the Commission. The determination it has made rests upon adequate findings which are, in turn, supported by substantial evidence and is well within the limits of its discretion under the Act.

[*Interlocking Directorates Under Clayton Act, Section 10*]

Appellants argue that the Pennsylvania, in actuality, contracted to purchase 50% of the Western stock from Wilmington Trust Company, a co-trustee of the McNear trust, and that, since four persons were directors of both companies, that proposed stock purchase violates § 10 of the Clayton Act; that the Commission was without power to approve it; that, in any event, its action in "condoning" it was an abuse of power; and that the District Court, for those reasons also, erred in upholding the Commission's order.

The Commission found that the Santa Fe in entering into the contract of May 26, 1955, with the trustees of the McNear trust was "acting on behalf of that carrier alone." But even if we assume, for present purposes, that it was acting as well for the Pennsylvania, the result must be the same. Section 10 of the Clayton Act prohibits a common carrier engaged in commerce from having "any dealings in securities" of more than $50,000, in the aggregate, in any one year,

> "with another corporation, . . . when the said common carrier shall have upon its board of directors . . . any person who is at the same time a director [of] such other corporation . . . ., except such purchases [as] shall be made . . . by competitive bidding under regulations to be prescribed by [the] commission." 38 Stat. 734, 15 U. S. C. § 20.

Section 10 of the Clayton Act is, of course, an antitrust law,[12] and much of what we have just said relative to the problem of accommodation of § 5(2) of the Interstate Commerce Act and the antitrust laws is equally applicable to this contention. The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors to the financial injury of the carrier and the consequent impairment of its ability to serve the public

[12] It is clear that § 10 of the Clayton Act is included in the "antitrust laws" referred to in § 5(11) of the Interstate Commerce Act. Section 1 of the Clayton Act, 15 U. S. C. (1952 ed.) § 12, provides that " 'anti-trust laws,' as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title." Moreover, § 5(11) avoids any ambiguity by including "all other restraints, limitations, and prohibitions of law, Federal, State or municipal."

interest.[13] But, even if this purchase of securities might, under other circumstances, violate § 10 of the Clayton Act, Congress, by § 5(11) of the Interstate Commerce Act, has authorized the Commission to approve it if it finds that so doing is in the public interest. And Congress has expressly said that, upon such approval, the carrier shall be relieved "from the operation of the anti-trust laws . . . ." A contrary view would, in effect, permit the Commission to authorize only those stock purchases which would not, in the absence of § 5(11), offend the antitrust laws. "As has been said, this would render meaningless the exemption relieving the participants in a properly approved [acquisition] of the requirements of those laws . . . ." *McLean Trucking Co. v. United States, supra,* at 86.

Here, the Commission fully considered the contracts under which the Pennsylvania proposes to acquire a 50% interest in the Western stock and all other factors bearing on that matter and, after doing so, approved them. That action by the Commission did not exceed the statutory limits within which Congress has confined its discretion.

Minneapolis contends that § 5(11) operates only *in futuro* and confers "no authority to purge the taint of a transaction illegal at the time it was brought to the commission." Whether there is merit in that contention, as a legal abstraction, we need not decide, for here the existing contractual arrangements through which Pennsylvania asks authority to acquire 50% of the Western stock look entirely to the future. Neither the stock sale and purchase contract between the trustees and the Santa Fe nor the one between the Santa Fe and the Pennsylvania Company is a consummated transaction, but each is expressly subject to, and will become effective only upon, approval by the Commission. Apart from criminal prosecutions with which we are not here concerned, it seems plain that approval of an acquisition by the Commission operates under § 5(11), as that section says, to relieve the acquiring carrier "from the operation of the anti-trust laws . . . ."

[*Procedural Matters—Findings*]

Appellants next contend that the Commission violated § 8(b) of the Administrative Procedure Act by failing to make findings which, they think, were compelled by the evidence.

There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission, *Riss & Co. v. United States,* 341 U. S. 907, and see *Chicago & Eastern Illinois R. Co. v. United States,* 344 U. S. 917.

The last sentence of § 8(b) provides:

> "All [administrative] decisions . . . shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."[14]

[*Fairness of Price*]

Upon the basis of that language, appellants argue that the Commission should have found that the price which the Santa Fe agreed to pay for the Western stock of $135 per share was excessive. Though the Commission made no express finding upon that matter it did discuss it, pointing out that the certified value of Western's properties for ratemaking purposes was more than $13,500,000; that it has no outstanding preferred stock and is relatively free of debt; that it has a fine earning record; that the transaction was at arm's length; that Minneapolis had offered $133 per share for the stock within a few days of the time when the Santa Fe contracted for its purchase at $135 per share, and that the Minneapolis sought authority in this proceeding to acquire the stock at the same price. The Commission concluded that if $135 per share was a fair price for the one it was also for the other.

[*Operating Expenses*]

Upon the same basis, appellants also argue that the Commission should have found that the Minneapolis application was in the public interest in that its acquisition

[13] The legislative history of § 10 of the Clayton Act, though meager, supports the view stated in the text. In fact, the language of the several drafts of § 10, together with the types of abuses cited in support of its enactment, suggest strongly that the words "dealings in securities" were intended to cover only a carrier's dealings with related persons in its own securities. See H. R. Rep. No. 627, 63d Cong., 2d Sess., p. 3; S. Rep. No. 698, 63d Cong., 2d Sess, pp. 47-48; S. Doc. No. 585, 63d Cong., 2d Sess., pp. 8-9; 51 Cong. Rec. 15943.

[14] 60 Stat. 242, 5 U. S. C. § 1007(b).

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of Western would greatly strengthen both Minneapolis and Western by eliminating many duplicating facilities and by reducing operating expenses by more than $1,770,000 annually. The Commission did not make a specific finding upon that matter, but it did give consideration to it and found that most of that saving—more than $1,300,000 annually—would be at the expense of Western's employees—a matter which, because of the express command of clause 4 of § 5(2)(c) of the Interstate Commerce Act (see note 1), it evidently thought was not consistent with the public interest. Appellants further argue that the Commission should have found that the Minneapolis plan afforded adequate protection to Western's employees by providing for their absorption into the Minneapolis as attrition among its own employees permitted. Again, although the Commission made no specific finding upon that contention it did consider and discuss it, and we think the law required no more.

[*Subsidiary Findings*]

Appellants challenge the Commission's failure to make a number of other subsidiary findings, all of which have been considered, but we find that they relate to contentions that are so collateral or immaterial that the law did not require specific findings upon them. By the express terms of § 8(b), the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are "material." From a thorough examination of the record we are persuaded that the Commission has made adequate subsidiary findings upon all material issues and has made the ultimate findings required by § 5(2), that they support the Commission's order, and are, in turn, supported by substantial evidence.

[*Fairness of Judicial Review*]

Finally, appellants contend that the District Court, because of inadequate subsidiary findings by the Commission, was unable to, or at least did not, afford them a proper judicial review, and merely "rubber stamped" the Commission's order. Whether or not we approve all of the reasons and legal conclusions of the District Court, it is clear that it fairly considered and decided all of the issues raised by appellants, accorded to them a full and fair judicial review, and reached a right result. Accordingly the judgment is Affirmed.

Mr. Justice Douglas dissents.

[¶ 69,546] Noerr Motor Freight, Inc., et al., Appellants in No. 12,750, v. Eastern Railroad Presidents Conference, et al., Appellants in No. 12,751.

In the United States Court of Appeals for the Third Circuit. Nos. 12,750 and 12,751. Argued June 8, 1959. Filed December 10, 1959.

Appeals from the United States District Court for the Eastern District of Pennsylvania. Thomas J. Clary, District Judge.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Conspiracy To Lessen Competition in Long-Haul Carriage of Freight—Campaign To Destroy Good Will of Industry—Fomentation of Governmental Restrictions—Damages—Injunctive Relief.—A trial court finding that railroads, their local association, and a public relations firm engaged in an unlawful conspiracy to injure interstate long-haul truckers and their local association in the northeastern section of the United States was affirmed on the ground that it was soundly based on substantial evidence. On overwhelming evidence, the trial court found that it was no series of individual conspiracies in the various states involved but one large ever-growing conspiracy having as its goal to injure and/or destroy the long-haul trucking industry, and that the main means used to attain such end was primarily a campaign designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating public hostility to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the railroads, all under the guise of public spirited organizations and with the defendants' interest concealed. "The third party apparatus employed by the defendants, while concealing their

own adroit manipulation thereof, in seeking to procure legislative and executive action" was contrary to public policy and illegal. Even assuming that the interference with legislation and executive action was lawful, its entire motivation was shown to emanate from the conspiracy. It was part of the defendants' scheme, and, as such, it violated the Sherman Act.

The record showed the conspiracy completely established against all of the defendants named in the decree, both legal and illegal methods to obtain the illegal objective, and injury to the plaintiffs and to the public. Also, the record justified the injunctive relief against continuing illegal activities; the compensatory damages allowed the plaintiff-association, together with costs and counsel fees; the holding that the other plaintiffs, by reason of a stipulation, were only entitled to nominal damages; and the dismissal of the defendants' counterclaim. The suggestion that the railroads' entire activity, spearheaded by the public relations firm, was merely a perfectly legitimate public relations campaign for legislation "is fanciful in view of the impressive documentation in the record" of the finding "that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large scale lobbying campaign. * * *"

See Combinations and Conspiracies, Vol. 1, ¶ 2005, 2005.280, 2005.410, 2017.121; Monopolies, Vol. 1, ¶ 2610; Private Enforcement and Procedure, Vol. 2, ¶ 9008, 9009.275, 9009.350, 9009.475, 9010, 9011.400, 9011.520, 9011.725, 9011.800, 9012.130, 9022.50, 9024, 9024.40, 9025.

For the plaintiffs-appellants in No. 12,750: Harold E. Kohn, Aaron M. Fine, and Philip P. Kalodner (Dilworth, Paxson, Kalish, Kohn & Dilks of counsel), Philadelphia, Pa.

For the defendants-appellants in No. 12,751: Philip Price and Daniel Mungall, Jr., Philadelphia, Pa.

Affirming the U. S. District Court, Eastern District of Pennsylvania, 1958 Trade Cases ¶ 69,085; for prior decisions of the District Court, see 1957 Trade Cases ¶ 68,827, 1956 Trade Cases ¶ 68,338 and 1953 Trade Cases ¶ 67,544, 67,538.

Before Biggs, Chief Judge, and McLaughlin and Staley, Circuit Judges.

Opinion of the Court

[*Parties*]

Per Curiam [*In full text*]: In this anti-trust action for an injunction and treble damages,[1] forty-one long distance trucking companies and their trade association, Pennsylvania Motor Truck Association, sued twenty-four major eastern railroads, Eastern Railroad Presidents Conference and Carl Byoir Associates, Inc. a New York corporation, the public relations agency for the Conference.

[*Complaint—Counterclaim*]

Plaintiffs charged in their complaint (filed April 30, 1953) *inter alia,* that in or about May, 1949, the defendant Railroads embarked upon an illegal conspiracy, in violation of the civil and criminal provisions of the antitrust laws of the United States, aimed at destroying the plaintiffs and those similarly situated as competitors in the field of the hauling of freight, and at carving out exclusive, monopolistic spheres of operation in the freight transportation business of the United States, so that the railroads would have a monopoly on freight hauling in interstate commerce; that the defendant Railroads worked for those ends through the defendant Conference; that the latter retained defendant Byoir as publicity agent to carry said conspiracy into effect; that thereafter the Conference, its committees, members thereof, the defendant Railroads, their presidents and trustees and other individual defendants and Byoir, with divers other persons unknown to plaintiffs, have acted in combination and concert to obtain the objectives of the conspiracy. The means used are detailed in the complaint; a continuing conspiracy to the date of the complaint is alleged; damage to each of the plaintiffs is asserted, irreparable, continuing injury stated and an injunction asked. Defendants denied the charges of the complaint. In 1956, after the case had been assigned a trial date, October 1, 1956, and while discovery procedures were pending, some of the Railroads and the Conference

[1] Sherman Act, 15 U. S. C. A. § 1 *et seq.*; Clayton Act, 15 U. S. C. A. § 15.

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sought permission to and were allowed to file a counterclaim against the plaintiffs. This claimed that plaintiffs were engaged in an illegal conspiracy to obtain a monopoly of the long haul freight industry in the same part of the United States as set out in the complaint and to force the Railroads out of that part of the transportation business in that area.

[*Trial*]

The case went to trial before Judge Clary on October 1, 1956 and lasted almost four months. There were many witnesses and 968 exhibits. On October 10, 1957, the court in an exhaustive opinion (it covers 73 pages in [1957 TRADE CASES ¶ 68,827] 155 F. Supp. 768-841) found in favor of the plaintiffs against all the defendants on plaintiffs' cause of action and against the defendant counterclaimants and in favor of the plaintiffs on the counterclaim.

[*Substantial Evidence*]

Soundly based on substantial evidence, the trial court found that the Railroads and Byoir, as contended, had conspired in unreasonable restraint of trade to injure the truckers in their competitive position in the long haul freight industry in the northeastern part of the United States; that their immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and in such a manner as to interfere with business relations between shippers and truckers; that instead of meeting the truckers competition in the long haul freight field, the Railroads and Byoir combined to injure and/or destroy the truckers and thereby force the shippers to their detriment to continue to use the Railroads; that they adopted and carried out a full program to obtain that objective; that serious private injury to the truckers was accomplished, definitely a loss of good will to the trucking industry and in some instances that loss of good will being extreme; that their actions destroyed to a large extent the public confidence which the truckers had fairly earned and which might have been increased in the light of the innumerable beneficial accomplishments of the truckers in long haul transportation.

The court found on overwhelming evidence that it was no series of individual conspiracies in the various states involved but one large ever-growing conspiracy as charged having as its goal to injure and/or destroy the long haul trucking industry and that the main means used to attain such end was primarily a campaign designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating public hostility to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads, all under the guise of public spirited organizations and with the defendants' interest concealed.[2]

The record shows the defendants' antitrust conspiracy completely established against all the defendants named in the decree.[3] It

[2] The third party apparatus employed by the defendants, while concealing their own adroit manipulation thereof, in seeking to procure legislative and executive action is contrary to public policy and illegal. *Marshall v. The B. & O. Railroad Co.*, 16 How. 314, 335 (1853); *Angle v. Chicago, St. Paul, etc. R. Co.*, 151 U. S. 1 (1893); *Commissioner of Internal Revenue v. Textile Mills Securities Corp.*, 117 F. 2d 62 (3 Cir. 1940), affirmed 314 U. S. 326 (1941). Cf. *United States v. Silliman*, 167 F. 2d 607 (3 Cir. 1948), cert. den. 335 U. S. 825 (1948).

[3] The attempt to influence legislation and executive action while rightly held by the trial court to be less important than the direct vilification of the long haul trucking industry was nevertheless properly found to be a vital element of the defendants' conspiracy to injure and/or destroy that group. Even assuming the brazen interference with legislation and executive action in this instance was lawful, its entire motivation was shown to emanate from the conspiracy charged. It was part of defendants' scheme to wreck their competitor, to monopolize that branch of commerce for themselves. As such it violated the Sherman Act. *Giboney v. Empire Storage & Ice Co.* [1948-1949 TRADE CASES ¶ 62,391], 336 U. S. 490, 497-502 (1949); *United States v. Krasnov* [1956 TRADE CASES ¶ 68,421], 143 F. Supp. 184 (E. D. Pa. 1956), affirmed [1957 TRADE CASES ¶ 68,829], 355 U. S. 5 (1957); *Atchison, Topeka & Santa Fe Railway v. Aircoach Transport Association* [1958 TRADE CASES ¶ 68,958], 253 F. 2d 877, 887 (Ct. App. D. C. 1958).

American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909), urged below and here by the Railroads, has no real application to the facts before us. The later decisions of the Supreme Court in *United States v. Sisal Sales Corporation*, 274 U. S. 268 (1927) and *Steele v. Bulova Watch Co.*, 344 U. S. 280 (1952), clearly indicate that the *Banana Company* opinion is limited to the proposition that the Sherman Act cannot be invoked against persuading a foreign sovereign to act. *Okefenokee Rural Electric Membership Corp. v. Florida Power and Light Co.* [1954 TRADE CASES ¶ 67,809], 214 F. 2d 413 (5 Cir. 1954) is the other deci-

shows both legal and illegal methods to obtain the illegal objective of injuring and/or destroying the long haul trucking industry. It shows injury to the plaintiffs and to the public. It justifies the injunctive relief against continuing illegal activities of the defendants. It justifies the compensatory damages (trebled by statute) allowed plaintiff Pennsylvania Motor Truck Association, together with costs and counsel fees. It justifies the holding of the district court that the other plaintiffs, by reason of the stipulation which is very clear and is part of the record, are only entitled to nominal damages. It justifies the dismissal of the counterclaim, which action is not disputed by the Railroads except in line with their argument that the counterclaim is similar in content to the plaintiffs' claim.

Though we think it plain from what we have said, it might be well to expressly note that the suggestion that the Railroads' entire activity, spearheaded by Byoir, was merely a perfectly legitimate public relations campaign for legislation is fanciful in view of the impressive documentation in the record of the finding of the trial court

> "* * * *that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large scale lobbying campaign. True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least. The other phase, and the more important one of the campaign, was one of vilification designed to destroy the good will of the long-haul trucking industry. Hence, the Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were not acting as the guardian of the public welfare, as they have so earnestly asserted.*" (Italics supplied).

[*Affirmed*]

Judge Clary's opinion is soundly predicated on the facts and law of this litigation. We are in accord with it. The decree and orders of the district court of July 22, 1958 [1958 TRADE CASES ¶ 69,085] and July 31, 1958 will be affirmed.

[Dissenting Opinion]

BIGGS, Chief Judge, dissenting.

The case at bar merits the attention of the reviewing Court. The record demonstrates that no cognizable offense has been proved under Section 1 or Section 2 of the Sherman Act, 15 U. S. C. A. §§ 1 and 2, and that therefore relief cannot be granted to the plaintiffs under Sections 4 and 16 of the Clayton Act. 15 U. S. C. A. §§ 15 and 26. Moreover, the reach of the decision of the court below is disastrous for it applies the Sherman Act to governmental restraints imposed by statutes enacted by state legislatures and to private activity in procuring such legislation. If the interpretation of the court below and of this court be correct the reach of the First Amendment which guarantees freedom of petition will be unduly limited and to an extent at least, destroyed. Rights guaranteed to the States and to the people by the Tenth Amendment will be endamaged. Heavy sanctions, criminal as well as civil, can be imposed on persons who seek the enactment of laws by Congress or by the legislatures of the States. I shall endeavor to deal first with what can perhaps be properly described as "conventional" antitrust law in relation to the case at bar and at a later point in this opinion will discuss the application of the constitutional guarantees referred to.

What the record proves is the following. Certain interstate trucking companies [1] were engaged in hot economic competition with twenty-four major eastern railroads [2] in the interstate transportation of long-haul freight. The Railroads and the Truckers as groups were avidly desirous of increasing their own respective interstate freight haulage and profits and decreasing those of the competing group. Both Railroads and Truckers hired public relations agencies to aid them. The ERPC engaged Byoir. PMTA engaged Allied Public Relations Associates. The methods employed by the public relations

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sion stressed by the Railroads in the district court and on appeal. That too is hardly an authority for anything pertinent under the instant unescapable facts. There the complaint made no allegation that the conspiracy was directed to ruining a competitor in his business. The later case of *Crummer v. du Pont* [1955 TRADE CASES ¶ 68,042], 223 F. 2d 238 (5 Cir. 1955) and 255 F. 2d 425 (5 Cir. 1958) [1958 TRADE CASES ¶ 69,031], cert. den. 358 U. S. 884 (1958), leaves no doubt but that as of now in the Fifth Circuit Court of Appeals, a conspiracy to drive a competitor out of business is a violation of the Sherman Act even though, as in *Crummer*, its most important element was the obtainment of its objective by secretly moving under the guise and protection of the public interest and through the public authorities.

[1] Represented by Pennsylvania Motor Truck Association (PMTA).

[2] Represented by Eastern Railroad Presidents Conference (ERPC).

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agencies of both the Railroads and the Truckers left much to be desired in respect to moral consciousness. Sources of propaganda were concealed by both sides by the use of the so-called "third-party" technique.

Both Railroads and Truckers and their agencies desired to influence public opinion in order to increase their own good will and to damage that of each other and thereby to procure legislation favorable to themselves and unfavorable to the competing group.[3] There was no difference in substance between the methods employed by Byoir for the Railroads and those employed by Allied Public Relations Associates for the Truckers except that Byoir was more vigorous, more vocal, and more effective. It was a no-holds-barred fight by both sides. The methods employed might well cause justifiable fear to those concerned with the viability of our representative form of government.

Conventional Principles of Law Hitherto Deemed Applicable to Section 1 and Section 2 of Sherman Act Suits

As has been said, the action is based on Sections 1 and 2 of the Sherman Act.[4] It is necessary to discuss the applicability of both sections and it is more convenient to proceed first with a discussion of Section 2. The *Truckers'* case is deficient when viewed in the light of Section 2, the "Monopoly" section, of the Sherman Act. Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." The offense of monopolizing means ". . . to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose ot exercise that power."[5] *American Tobacco Co. v. U. S.* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 809 (1946). Since the Railroads have not effected a monopoly on long-haul freight traffic or destroyed the Truckers' business[6] only an attempt to monopolize or of a conspiracy to attempt to monopolize can be proved against them.[7] A necessary element of an attempt to monopolize is a specific intent to effect that result. *United States v. Columbia Steel Co.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495, 531-534 (1948).

This leads to the issue which is dispositive of the Section 2 phase of the instant case. Can an attempt to monopolize the

[3] A typical example is supplied by Senate Bill No. 615, Session of 1951 of the General Assembly of Pennsylvania, referred to from time to time in the testimony as the "Big Truck Bill", caused to be introduced by the Truckers, which would have raised the permissible weight limits of heavy trucks from 45,000 to 60,000 pounds. The defendants procured the veto of this bill by Governor Fine. A somewhat similar bill, also proposed by the Truckers, was "Bill A-13" in the New Jersey Legislature. Similar legislation was also before the legislatures of New York and Ohio. I shall not detail the various bills in the various State legislatures involved. These are set out in full, with many allied matters, in the opinions of the court below. See [1957 TRADE CASES ¶ 68,827] 155 F. Supp. 768, and opinion on damages. [1958 TRADE CASES ¶ 69,085] 166 F. Supp. 166.

[4] It should be noted that neither the opinion of the court below, [1957 TRADE CASES ¶ 68,827] 155 F. Supp. 768, nor that of this court, pinpoints whether the action is sustained under Section 1 or Section 2 of the Sherman Act.

[5] The complaint alleges a conspiracy to create a monopoly. See paragraphs 12, 13 and 14 of the complaint. I assume therefore that the action at bar was one brought under Section 2 of the Sherman Act but I make no point of any deficiency in pleading as will appear from this opinion in the discussion of the applicability of Section 1 of the Sherman Act, the "restraint of trade" section.

[6] Proof in the record aside, the court below and this court are entitled to take judicial notice that the Railroads have not driven the Truckers out of business.

[7] The circumstances are peculiarly unfitted for the maintenance of a Section 2 case. We do not have before us a situation where one corporation, or even a few corporations, attempt to eliminate all competition so that it, or they will be left with unbridled power over prices, output, and entry into the competitive field. An entire section of what may be called the "transportation industry" consisting of many roads is accused of trying to eliminate another section of the transportation industry, the Truckers, a situation that as far as research indicates has never previously resulted in successful antitrust litigation. Even if the Railroads had actually eliminated the Truckers' competition completely the Railroads' position would be far different than that of the successful monopolist since there still would be competition among the various railroads. Furthermore the interstate ground transportation industry is a regulated industry, with almost every phase of its activity controlled by the Interstate Commerce Commission.

transportation of long haul freight in the sense required by Section 2 be inferred from the evidence? The elements necessary to establish an attempt to monopolize in violation of Section 2 were set out in classic form in *Swift and Company v. United States,* 196 U. S. 375, 396 (1905), and have remained unchanged. In the opinion last cited the Supreme Court said:

> "Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee,* 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

Thus it is clear that in addition to an intent to monopolize, the evidence must prove that the activities of defendants in a Section 2 case create a dangerous probability of monopoly. See again *United States v. Columbia Steel Co., supra.*

The court below found as a fact that vigorous efforts were made by the Railroads and Byoir to injure the Truckers' good will business-wise, to decrease the number of the Truckers' customers, to pass anti-trucking legislation and to increase trucking costs and to prevent the enactment of legislation which would decrease those costs. The proof is not sufficient in the instant case to sustain a Section 2 charge. There is no evidence in this record proving that the efforts of the Truckers or Byoir were liable to bring the long-haul trucking industry to an end. There is no showing that even the most optimistic of the Railroads or Byoir intended, expected, or even hoped, to destroy interstate trucking. The circumstances at bar do not traverse the limitations imposed by the *Columbia Steel Co.* decision. Moreover, there is no proof whatsoever of a "dangerous probability" that a monopoly could result as required by the *Swift* decision. Under the circumstances a cause of action based on Section 2 falls. If the judgment of the court below against the Railroads is to be sustained it must be under Section 1 of the Sherman Act.

But the Truckers have not proved a cause of action cognizable under Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states. . . ." As was said in *Northern Pac. R. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1, 5 (1958), "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those combinations which 'unreasonably' restrain competition". Mr. Justice Black went on to say that certain agreements or practices have such a pernicious effect on competition that they are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use". Mr Justice Black then designates the kind of practices which the courts have deemed to be unlawful in and of themselves and cites the relevant cases.[8] The acts of the Railroads and Byoir were not proved to be such as to cause the case at bar to fall within the category of cases where the principle of unreasonableness is automatically applicable. The court below so found.[9] The issue then becomes: Did the combination or conspiracy here "unreasonably restrain competition"? The record fails to demonstrate that the Railroads and Byoir did so here.

Moreover, and quite aside from the foregoing, restraints which constitute violations of Section 1 are those which involve conspiracies of members of an industry to follow a mutually self-restricting course in the area of their own competence in order to obtain unlawful commercial advantages over customers or suppliers. The plan here, as proved, was to decrease the business of fellow members of the interstate transportation industry, the Truckers. Furthermore the essence of the campaign was not joint ac-

[8] *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031), 310 U. S. 150, 210 (1940), price-fixing; *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (1898), aff'd 175 U. S. 211 (1899), division of markets; *Fashion Originators' Guild v. Federal Trade Comm'n* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457 (1941), group boycotts; *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392 (1947), tying arrangements.

[9] See 155 F. Supp. at p. 816.

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tion for any one of the Railroads acting alone could have achieved the result which was attained. Any Railroad could have hired Byoir. If the law is to be changed in these important respects the revision should be effected expressly by the Supreme Court and not by this tribunal.[10]

But without regard to what I have termed "conventional" antitrust law and whether the suit is sought to be maintained under Section 1 or Section 2, or both sections, I am of the view that the provisions of the Sherman Act are not applicable here because of what is set out in the following three headings of this opinion.

Principles of Antitrust Law Applicable Under the Circumstances at Bar Where Legislative Action Was Invoked or Avoided

The objectives of the Railroads, as found by the court below, are set out and discussed hereinafter under the heading "As to Damages". It is desirable to state again at this point that the principle objective of both Railroads and Truckers was to achieve legislation which would increase their own profits from interstate freight haulage and decrease those of the competing group. The actions of the Railroads and Byoir in this respect were described by the court below as the "fomenting of governmental restriction . . . increasing the cost of operation and/or preventing the carrying of greater loads" by the Truckers, and was held to be an unreasonable restriction of competition.[11] The public interest must be deemed, of course, to be involved here as it is in every antitrust suit but there is also a potent public interest in the right of the individual to act in support of or in opposition to legislation. Does the public interest in this latter right rise superior to the public interest sought to be preserved by the antitrust laws? Does the Sherman Act apply to legislative restraints or to private activity in support of such restraints? I think the decisions demonstrate that the Sherman Act cannot be employed to make such private activities illegal and that whether successful or unsuccessful they do not constitute unreasonable restraints on interstate commerce.

In *Olsen v. Smith*, 95 U. S. 332, 344-345 (1904), where the restraint was imposed by a Texas statute, it was held that the intent of Congress in enacting the Sherman Act was to prevent private, not governmental, actions in restraint of competition.[12] In *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358 (1909), the Supreme Court dealt with a very similar issue, Costa Rica, by what was in effect law, having confiscated property of one corporation at the instigation of a trade rival. Mr. Justice Holmes said that

> "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort . . . is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law."

In *Parker v. Brown* [1940-1943 TRADE CASES ¶ 56,250], 317 U. S. 341, 351 (1943), California had passed a proration statute which restricted competition among raisin growers and fixed prices. Mr. Chief Justice Stone stated: "The Sherman Act makes no mention of the state, as such, and gives no hint that it was intended to restrain state action or official action directed by a state."

There is no doubt that a State of the United States in the exercise of its police power may legislate for the health, safety or welfare of its people or that a State may enact legislation affecting interstate commerce if the law passed does not "impede substantially the free flow of commerce from State to State." *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 767 (1945). An exercise of State police power by the enactment of legislation by the State for a proper objective is constitutionally permissible. In

[10] See *e.g. United States v. Patten*, 226 U. S. 525 (1913), market cornering; *Addyston Pipe & Steel Co. v. United States*, note 8, *supra; Fashion Originators' Guild v. Federal Trade Commission*, note 8, *supra; United States v. General Electric Co.* [1948-1949 TRADE CASES ¶ 62,352], 82 F. Supp. 753 (D. N. J. 1949), market division; *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150 (1940), price-fixing, output restrictions; *United States v. Paramount Pictures* [1948-1949 TRADE CASES ¶ 62,244], 334 U. S. 131 (1948), price-fixing and *United States v. Frankfort Distilleries* [1944-1945 TRADE CASES ¶ 57,338], 324 U. S. 293 (1945), resale price maintenance.

[11] See 155 F. Supp. at p. 833.

[12] Cf. *Mackay Radio & Telegraph Co. v. F. C. C.*, 97 F. 2d 641, 643 (D. C. Cir. 1938).

Stephenson v. Binford, 287 U. S. 251, 276 (1932), the Supreme Court stated:

> "We need not consider whether the [State] act [regulating carriage by truck] in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid."

Cf. *Sproles v. Binford,* 286 U. S. 374 (1932). One of the admitted purposes of the legislation with which we are here concerned was the preservation of State highways and another was the raising of State revenues. It appears clearly that the States involved in the instant case acted within their constitutional power, just as Governor Fine acted within his constitutional power when as Chief Executive of Pennsylvania he vetoed Senate Bill No. 615.[13] To hold otherwise would be to nullify substantially State legislative power.

It is asserted that *United States v. Sisal Sales Corp.,* 274 U. S. 268 (1927), and *Steele v. Bulova Watch Co.,* 344 U. S. 280 (1952), in effect overruled the *American Banana Co.* decision. In the *Steele* case the action was one brought under the Lanham Trade-Mark Act of 1946, 15 U. S. C. A. § 1051 *et seq.,* and was not based on the antitrust laws but more importantly an act of a sovereign was not involved. In the *Sisal* case it was held that the Sherman Act did not apply to what the defendants did in Mexico and Yucatan: *i. e.,* procure discriminatory legislation there. Mr. Justice McReynolds stated, 274 U. S. at p. 276,

> "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our Courts and may be punished for offenses against our laws."

The American Banana Co. decision expressly was not overruled. I can find no Supreme Court decision, unless it be *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 10-11 (1928), note 13, *supra,* which indicates a holding contrary to that of the *American Banana Co.* decision. The *Foster Fountain Packing Co.* case seems distinguishable on the ground appearing in the note cited. But in any event in *United States v. Rock Royal Co-Op.,* 307 U. S. 533, 560 (1939), the defendants attempted to prevent enforcement of a minimum Price Order[14] made by the Secretary of Agriculture on the ground that their competitors had engaged in a conspiracy to monopolize in violation of the Sherman Act by securing the drafting, adoption, and acceptance of the order. Mr. Justice Reed stated:

> "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction."

The facts in *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.* [1954 TRADE CASES ¶ 67,809], 214 F. 2d 413, 418 (5 Cir. 1954), present an interesting analogy to those at bar and are very similar, save only that legislative action was not involved. It was alleged, however, that the State Road Department of Florida acting as a result of a conspiracy in violation of the Sherman Act between Florida Power and Light Company and others, prevented the Okefenokee Rural Electric Membership Corporation from making use of the only feasible route for an electric line along a public highway. It was alleged in the complaint that the defendants had been guilty of a "smear campaign", had made false arguments and had conducted dishonest activities as a result of which the State Road Department refused to grant the permit for the power line. Treating the facts alleged in the complaint as true, the Court of Appeals, in dismissing the suit, stated:

> "As so forcibly illustrated in *Keogh v. Chicago & N. W. Ry. Co.,* 260 U. S. 156, 163, 'Injury implies violation of a legal right.' The plaintiff had no legal right to use the state highway without a permit from the State Road Department, nor the county roads without permission of the Board of County Commissioners, and those authorities have decided against the

[13] Cf. *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 10-11 (1928), wherein the Supreme Court, granting a temporary injunction, held that the purpose of the State act procured by private activity, allegedly to conserve hulls and heads of unprocessed shrimp, was a feigned purpose and therefore was not a valid exercise of State police power.

[14] Order No. 27, under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246.

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plaintiff. So long as their decisions stand the plaintiff has not been legally injured, notwithstanding it may have been irreparably damaged."

Implicit in this ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency however inspired by the acts of individuals.

I conclude (1) that the Sherman Act was not intended by Congress to be applicable to governmental restraints by way of legislation whether or not induced by private activity and (2) that private activities such as those conducted by the Railroads and Byoir under the circumstances presented here cannot be deemed to constitute unreasonable restraints or monopoly under the Act.[15]

The Constitutional Issue

If the reasoning of this opinion as expressed thus far be erroneous, it is necessary to discuss the constitutional questions which are posed by the circumstances and the decision at bar. As I read the opinion of the court below the constitutional protection asserted by the defendants was rejected on the ground that by resorting to a campaign of defamation the Railroads and Byoir invalidated the guarantees of the First Amendment.[16] The majority opinion seems to take a similar view. But I had not hitherto imagined that a constitutional guarantee could be avoided because of the bad conduct of the individual asserting the constitutional right. I do not believe so now. It might be argued, of course, that a determination that a restraint is unreasonable obviates constitutional guarantees but to state this argument demonstrates its invalidity. Cf. *United States v. Columbia Steel Co., supra,* 334 U. S. at p. 522. The vast importance of the right to petition, usually exercised by joint action, was set out by Mr. Justice Brandeis in his dissenting opinion in *Gilbert v. Minnesota,* 254 U. S. 325, 337-338 (1920), as follows:

> "The right [to petition] . . . necessarily includes the right . . . to endeavor to make [one's] . . . own opinion concerning laws existing or contemplated prevail. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril."

Mr. Justice Brandeis' view in the *Gilbert* case became the law in *Dennis v. United States,* 341 U. S. 494 (1951). The First Amendment protects "secular" causes as well as "religious or political ones." *Thomas v. Collins,* 323 U. S. 516, 530-531 (1945). A proposal to tax trucks stands upon the same ground as a religious speech or an unpopular political idea. The expression of "bloc sentiment" is an integral part of our legislative process. *United States v. C. I. O.,* 335 U. S. 106, 143-144 (1948). There can be no question that the "idea" that trucks should or should not be taxed by the States has "social importance". *Roth v. United States,* 354 U. S. 476, 484 (1957).

If persons are to be prohibited access to legislators because their utterances may be offensive to personal taste or morals we have moved far away from the Framers' conception of our republican form of government. The concept of lack of access by

[15] Parenthetically, the court below reached, to me at least, the unusual result that the counterclaims asserted by the Railroads against the Truckers could not be maintained though the counterclaims allege acts of substantially the same character and nature as those of the Railroads and Byoir upon which judgment here is based. It is true that the Railroads conceded that the counterclaims are without merit. This concession was, I think, a necessary one. My view is based on the conclusion expressed in this opinion that the Truckers have not proved a cause of action under the Sherman Act. But the court below held that the Truckers' attempts at favorable legislation were permissible because they were attempting to procure laws that would better their competitive positions in relation to the Railroads. The court explains that the legislation sought would have permitted the Truckers to enter fields previously closed to them and that therefore no violation of the antitrust laws was involved. But business gained by interstate truckers of necessity would be at the expense of interstate railroads. Moreover the position of the court below in respect to the counterclaims not stating a valid and proved cause of action overlooks the "good will theory" advanced by the court itself as the basis for its judgment. That there were attacks made by the Truckers on the good will of the Railroads is indubitable and the court below so found. See 155 F. Supp. at p. 803. The distinction attempted to be made by the court is too subtle for me to grasp. It seems to be based on the theory that under the Sherman Act what is one competitor's meat may be another competitor's poison.

[16] See 155 F. Supp. at pp. 826-829.

the people to a legislature is in its essence totalitarian. If material contrary to good morals, such as obscene matter, is placed by an individual or a group in unenlightened self interest before a State legislature it is, of course, permissible for the State to punish the projectors of such material by criminal or civil sanctions. But the imposition of such sanctions assuredly is not the function of the antitrust laws of the United States. To say that an individual legislator may be over-persuaded or wrongly convinced as to how he should vote is to state a commonplace but to deprive an individual of the right to petition under the guise of protecting private companies from restraint of trade or monopolistic practices is to say far too much and to say it badly. To whom may a person go to attempt to create or change the laws under which he lives if not to his Senators or Representatives, State or National? True, ills may inhere in this democratic process. The legislature may be propagandized by material from a tainted source but this is an abuse which is curable as Congress has cured it.[17] If persons are to be deprived of the right to petition because that right has been subject to abuse, liberty visibly will take flight.

I think that every thoughtful person will agree that the legislative processes cannot be conducted successfully and should not be conducted at all unless members of the public and all interested groups are allowed free access to legislators and legislatures in respect to legislation, pending or proposed. The application of the Sherman Act to limit the free expression of ideas by the public and interested groups, the right to petition, in order to give information, whether pertinent or impertinent, to their legislators and legislatures, would foil the legislative processes which consist in a large part of the balancing of conflicting interests and influences. In this field limitation is the equivalent of prohibition for if persons exercising their right to petition are to be subject to prosecution under the Sherman Act or to damages in civil suits under the Clayton Act, or go in fear of such prosecution or such suits, these persons will not exercise the right to petition and a fundamental constitutional right will be limited or destroyed. Sources of information now open to legislators as to pertinent conflicting interests will be choked-off or obliterated. The scope of the Sherman Act has been greatly enlarged in recent years and it is indeed a flexible statute but I cannot conceive that Congress intended it to be applied to limit or prohibit free access to legislatures or to the inducing of legislative action by private activity.

Moreover, in the instant case the exercise of State police or taxing power is a most delicate area in the fine balance which must be preserved between the States and the National Government. The enactment of legislation in the two fields designated is peculiarly a concern of the States and the enactment of such laws by the legislatures is the last sanctuary of States' rights. Here another provision of the Constitution comes into play. The Tenth Amendment provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

True, State police power has been curbed in the past by Congress by way of the Civil Rights Acts and State taxation has been limited by Congress where it has been deemed to trench on interstate commerce. And see again the quotation from Mr. Chief Justice Stone's opinion in *Parker v. Brown, supra,* 317 U. S. at p. 351, where California had passed a proration statute which restricted competition among growers of raisons and also fixed prices. The principle enunciated is central to the Tenth Amendment for one must always ask oneself, as indicated above, how a State legislature could legislate effectively without information or petitions from those affected by legislation? The argument made by the Truckers in substance is that State action is not being affected but only nefarious conduct by those who induced State action is being curbed. It would seem that action by the State under the circumstances at bar must surely cauterize action by individuals. But if the great liberties guaranteed by the Constitution must be exercised reasonably,

[17] It should be observed that the court below effected legislation for it requires the Railroads and Byoir not to publicize material relating to the Truckers "without disclosing their [own] participation". See paragraph "IV-(6)" of the final decree. I would conclude that this alone would require modification of the form of the injunction entered by the court below and approved by this court. Cf. *N. A. A. C. P. v. Alabama,* 357 U. S. 449 (1958), in which the Supreme Court interdicted the prohibition of "privacy in group association".

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surely the circumstances presented here do not warrant limitation of the right to petition by the Sherman Act. I believe that Congress did not intend or even contemplate such a result.

As to Damages

The court below, as I grasp the contents of its opinion, has concluded that because the Railroads and Byoir embarked on a "Campaign of Vilification" against the Truckers legal damage resulted to them in the form of loss of "good will".[18] The court divided "good will" into two categories: first, good will of the Truckers in respect to their customers, injury by way of loss of business, and, second, loss of the good will of the public, the injury being defined in terms of disability "to avoid the imposition of crippling burdens and restrictions".[19] By stipulation it was agreed by the parties that the only damages claimed by the Truckers were those resulting from gubernatorial veto of certain legislation.[20] Single damages, subsequently trebled were awarded to PMTA. These were assessed on the basis principally of the money, $217,358, spent by PMTA, through Allied Public Relations Associates, for "defensive measures", measures employed by PMTA to aid the Truckers, including the prosecution of the suit at bar. The monies which PMTA spent were expended for the very purposes for which they were contributed by the Truckers to PMTA.[21] It appears therefore that these expenditures made by PMTA were in reality paid for by the Truckers and that PMTA was a mere agent or conduit for the sums expended. I therefore can perceive no basis for the reimbursement of these sums to PMTA by way of allowance of damages to PMTA.

Moreover, the court below, while expressly refusing to allow damages to the Truckers because of the successful efforts of the Railroads and Byoir in defeating legislation sought by the Truckers, nonetheless allowed each of the Truckers nominal damages of six cents, trebled, eighteen cents, because of the Railroads' and Byoir's bad conduct. Since the court below held that no legally cognizable damages could ensue from acts entirely governmental[22] no legal foundation to support these nominal awards appears.

A substantial counsel fee was also allowed to counsel for the PMTA. This award also must fall if the judgment is reversed as I believe it must be.

I am also of the opinion that the injunctive relief granted under Section 16 of the Clayton Act is without justification. My conclusion in this regard is not based on any alleged abuse of legal discretion by the court below. It rests on the broad ground that no facts were proved which,

[18] The court below stated: ". . . [A] real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme." 155 F. Supp. at p. 810 ("Summary").

[19] The court stated: "[T]he use of the term 'good will' . . . relates not only to the direct damage done to the truckers, i.e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportation (loss of business), but refers also to the more subtle type of injury done the entire trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions." 155 F. Supp. at p. 810-811 ("Summary").

[20] Section 3 of the Stipulation is as follows: "The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955."

The court took the position that the section of the stipulation quoted limited the money value of the Truckers' claims but not the nature of their claims. This was an erroneous interpretation of the stipulation. The Truckers called to testify conceded that their respective businesses had been harmed only by the legislative action or inaction that the Railroads and Byoir had effected. At pre-trial conference it was stipulated that the Truckers who had not testified as to this issue would give similar evidence. Following this agreement the stipulation set out in Section 3, *supra*, was entered into. The distinction made by the court between the nature of the damage and the scope of the damage money-wise is invalid and also does violence to the intent of the parties.

[21] See opinion on damages. 166 F. Supp. at pp. 166-168. As has been indicated PMTA is a Truckers' service organization. There is nothing in the record which would support its right to maintain a class suit, real or "spurious", on behalf of the Truckers. No satisfactory theory appears under which PMTA can be held to be entitled to maintain a suit in a representative capacity. See Rule 23, Fed. R. Civ. Proc., 28 U. S. C. Cf. *United States v. Association of American Railroads* [1944-1945 TRADE CASES ¶ 57,417], 4 F. R. D. 510 (N .D. Neb. 1945).

[22] See 155 F. Supp. at pp. 834-835.

under the antitrust laws, could justify the injunctive relief granted.

In conclusion, on the issue of damages, it is desirable, although perhaps not necessary, to comment briefly on the approach of the court below to loss of "good will" as elements of damage. If damages are to be recovered under Section 1 (or for that matter, under Section 2) of the Sherman Act in conjunction with Section 4 of the Clayton Act, there must be proof of damage. As to the loss of good will by the Truckers, business-wise in respect to their customers as defined by the court below, quoted in note 19 *supra*, it is clear there was no showing of any loss of business by any individual Trucker. None of the Truckers had or could have a legally protected interest in the good will of the trucking industry as a whole. Cognizable injury under the Sherman Act must be to some "business or property", *i. e.*, a violation of some property right or business which is recognized by the law.[23] The court below took the position that the trucking industry is a legal entity possessing a cognizable interest in a kind of general good will belonging jointly to all Truckers in the suing group. But the suit at bar is a private antitrust suit. No joint right whatsoever is involved and each Trucker must maintain and vindicate his own separate and individual right.[24] There can be no good will in gross. There is no evidence that any of the Truckers individually suffered or was threatened with any injury to his good name or to his business reputation. This element of damage attempted to be proved by the Truckers was shown to be completely lacking in factual foundation.

For the reasons stated I must dissent. I would reverse the judgment of the court below save only as to that portion of it which denies relief under the counterclaims.

[¶ 69,547] Albert E. Robinson v. Stanley Home Products, Inc.

In the United States Court of Appeals for the First Circuit. No. 5573. Filed December 10, 1959.

Appeal from the United States District Court for the District of Massachusetts. FRANCIS J. W. FORD, District Judge.

Robinson-Patman Price Discrimination Act

Price Discrimination—Brokerage Commissions Under Clayton Act, Section 2(c)—Seller's Reduction of Prices by Elimination of Its Own Broker—"Discrimination" and "Brokerage" Violations Distinguished.—A complaint in which a broker charged its principal, a manufacturer of plastic cups, with terminating the broker's services and then selling directly to a particular buyer at reduced prices was properly dismissed for failure to state a cause of action under Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. After discharging its broker, the manufacturer paid no brokerage, as such, to anyone. Therefore, the question was whether the alleged reduced price to the favored buyer was "an allowance or discount in lieu" of brokerage. All that appeared from the complaint was that the seller would not have been able to make the reduction if it had continued to pay commissions to its broker. However, the court refused to construe the Act as prohibiting a manufacturer from converting to "direct" selling, or from passing on savings to his customers if he did convert to such "direct" selling. Here, even if there were "discrimination," that is, if the prices were not reduced to everyone but only to the buyer in question, it did not mean that the favored buyer received "brokerage," the only matter covered by section 2(c). Just as proof of a "brokerage" violation

[23] See *Harrison v. Paramount Pictures* [1953 TRADE CASES ¶ 67,568], 115 F. Supp. 312, 316, 317 (E. D. Pa. 1953), aff'd *per curiam* on the opinion below [1954 TRADE CASES ¶ 67,721], 211 F. 2d 405, (3 Cir. 1954); *Melrose Realty Co. v. Loew's Inc.* [1956 TRADE CASES ¶ 68,423], 234 F. 2d 518 (3 Cir. 1956), cert. denied, 352 U. S. 890 (1956).

[24] See *Hess v. Anderson Clayton & Co.* [1957 TRADE CASES ¶ 68,728], 20 F. R. D. 466 (S. D. Cal. 1957); *Weeks v. Bareco Oil Co.* [1940-1943 TRADE CASES ¶ 56,173], 125 F. 2d 84 (7 Cir. 1941); *Kainz v. Anheuser-Busch, Inc.* [1952 TRADE CASES ¶ 67,221], 194 F. 2d 737 (7 Cir. 1952); *Bascom Launder Corp. v. Telecoin Corp.* [1950-1951 TRADE CASES ¶ 62,556], 9 F. R. D. 677 (S. D. N. Y. 1950); and *Farmers Co-op Oil Co. v. Socony Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,249], 133 F. 2d 101 (8 Cir. 1942).

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would not be dispelled by a showing that there was no "discrimination," it must equally follow that a showing of "discrimination" does not, of itself, establish a "brokerage" violation. If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a), which prohibits such discriminations, will accomplish the purposes of the Act.

The court, noting that there had been another action between the parties on "apparently the same grounds," expressed "some doubts" about the case of *Henry Broch & Co. v. Federal Trade Commission,* 1958 TRADE CASES ¶ 69,208, on which the other *Robinson* decision (1959 TRADE CASES ¶ 69,453) was based. Both cases held that a *seller's* broker is not covered by section 2(c).

See Price Discrimination, Vol. 1, ¶ 3520, 3520.375.

Private Enforcement and Procedure—Suit for Civil Damages—Jurisdiction of Federal Courts—State and Federal Claims Joined in Single Action—Jurisdiction Over State Claim Where Federal Antitrust Claim Dismissed—"Pendent" Jurisdiction.—Where a Federal District Court found that certain Federal antitrust claims stated no cause of action, it was proper for the court to dismiss other related common law claims. Whatever the limits of "pendent jurisdiction" under the doctrine of *Hurn v. Oursler,* 289 U. S. 238, that doctrine did not require the retention of "dubious" state claims after the Federal claim had been dismissed on the pleadings.

See Private Enforcement and Procedure, Vol. 2, ¶ 9007.

For the appellant: Earl F. Nauss, Jr. and Vincent Galvin, both of Boston, Mass.

For the appellee: George H. Foley of Boston, Mass. (Blair L. Perry of Boston, Mass. and Hale & Dorr were on the brief).

Before: WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

Opinion of the Court

[Treble Damage Action—Price Discrimination]

ALDRICH, Circuit Judge *[In full text]*: This action was brought by plaintiff-appellant, a citizen of Massachusetts, in the district court for the District of Massachusetts under section 4 of the Clayton Act, 15 U. S. C. § 15, to recover treble damages for injuries alleged to have been suffered because of a violation of section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13(c). The defendants were one Gahm, of New Jersey, doing business as Plura Plastics, hereinafter called Plura, as to whom a dismissal was entered for lack of service, and appellee, Stanley Home Products, Inc., a Massachusetts corporation, hereinafter called Stanley. Plaintiff appeals from the allowance of Stanley's motion to dismiss the amended complaint for failure to state a claim upon which relief could be granted.[1]

The amended complaint is somewhat inartistic and loosely drawn, and the first question is one of construction. We have attempted to separate the primary facts from various conclusions of the pleader, in order to apply the familiar rule that only material facts well pleaded are to be considered on a motion to dismiss. *Dunn v. Gazzola,* 1 Cir., 1954, 216 F. 2d 709. The first four paragraphs set forth the basic facts already stated. Paragraph 5 alleges that the plaintiff is a manufacturer's representative in Massachusetts and elsewhere in New England; that he had been employed by Plura as exclusive New England representative to promote the sale of Plura's products (which were to be shipped from New Jersey in interstate commerce), and that plaintiff was to receive a commission on all New England sales "whether or not

[1] The parties have neglected to call to our attention another, seemingly later, action between them on apparently the same grounds, in which the complaint was dismissed as against Plura (whether Stanley was ever served does not appear) for failure to state a violation of the Act. *Robinson v. Stanley Home Products, Inc.,* D. C. D. N. J., 1959 [1959 TRADE CASES ¶ 69,453], 174 F. Supp. 414. We shall not further refer to it, since we have some doubts about the case of *Henry Broch & Co. v. Federal Trade Commission,* 7 Cir., 1958 [1958 TRADE CASES ¶ 69,208], 261 F. 2d 725, *cert. granted,* 1959, 360 U. S. 908, upon which that decision was based.

actually consummated by him." Nothing was mentioned as to the term of this agreement, from which we must assume that it was terminable at will by either party. At the argument plaintiff conceded this assumption to be correct.

[*Charges—Improper Brokerage Commission*]

Abbreviating its rather lengthy allegations, paragraph 6 asserts that plaintiff procured two orders from Stanley for folding cups made by Plura; that thereafter Stanley made an offer directly to Plura to purchase cups in large quantities at what it knew to be "an unreasonably low price" that

> "could be accomplished only by the elimination of the Plaintiff's commission . . . but Stanley wished to procure the elimination of the Plaintiff's services and commission so that it might purchase said cups at the substantially reduced price and thereby obtain the Plaintiff's commission for itself in the form of an unlawful discount, all in violation of 15 U. S. C. Section 13(c)."

Plaintiff further alleged that "Plura forthwith terminated the Plaintiff's services as New England representative[2] and immediately accepted Stanley's offer." There is, incidentally, no allegation of any correlation in amount between the reduction in price and plaintiff's former commission.

Paragraph 7 is not too happily expressed, but we shall construe it, in plaintiff's favor, to mean that following plaintiff's discharge Plura reduced its prices to Stanley only, and not to other customers. However, since there is no indication that Plura employed other brokers, we take plaintiff's stated claim to be that all customers thereafter, and not merely Stanley, purchased direct. Paragraphs 8 and 9 add nothing of substance, other than general allegations of damage. Paragraph 10 is against the now-dismissed defendant, Plura. The remaining paragraphs allege common-law claims against Stanley with which we shall deal later.

[*Conversion to "Direct" Selling Not Prohibited*]

While a party need not plead his evidence, the complaint must contain a sufficient statement of facts which show there is a basis to the claim. Plaintiff here claims under subsection (c) of section 2 of the Robinson-Patman Act, and no other. The specific question under that subsection is whether Stanley accepted from Plura "a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof . . . ."[3] On the facts alleged, after plaintiff's discharge Plura paid no commission, as such, to anyone. The next question, therefore, is whether plaintiff sufficiently shows an "allowance or discount in lieu thereof" within the meaning of the act. There is little discussion of these words in the cases. In *Quality Bakers of America v. Federal Trade Commission*, 1 Cir., 1940 [1940-1943 Trade Cases ¶ 56,060], 114 F. 2d 393, at 400, we used the phrase "commissions or their equivalent." While a reduction in price to the buyer could fall within this definition, obviously not every one would do so. The question must be, what was the purpose of, or the reason for, the reduction? Plaintiff pleads only his unsupported conclusion that it was a discount in lieu of brokerage. He does not allege that the parties so described it; or that it was designed to reimburse Stanley for some brokerage or servicing obligation ostensibly incurred, or even that it was the mathematical equivalent of what Plura formerly paid to the plaintiff. All that appears is that Plura would not have been able to make this reduction if it still paid brokerage. To say that a manufacturer who makes a price reduction when he converts to direct selling has, without more, made an allowance in lieu of brokerage would either be to say that he cannot so convert, or that, if he does, the act forbids his passing on any saving to the customer. We do not so construe it.

[*"Brokerage" and "Discrimination" Distinguished*]

It is true that we have interpreted the complaint as alleging that after Plura ceased to employ a broker its prices were not reduced to everyone. But the fact that there was discrimination between customers does not mean that the favored one received brokerage. The matter covered by section 2(c) is unearned brokerage, *per se*, not dis-

[2] Plaintiff conceded at the argument that this meant a total discharge, not merely as to Stanley.

[3] We do not reach the question of whether a broker whose possible commission has been diverted is a "person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" (15 U. S. C. § 15), a matter on which the court below expressed doubt.

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crimination. *Federal Trade Commission v. Simplicity Pattern Co.,* 1959 [1959 TRADE CASES ¶ 69,361], 360 U. S. 55, 65; *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission,* 3 Cir., 1939 [1932-1939 TRADE CASES ¶ 55,242] 106 F. 2d 667, *cert. denied,* 1940, 308 U. S. 625; *rehearing denied,* 309 U. S. 694. Just as proof of the conduct prohibited by this section is not dispelled by showing that there was no discrimination, *Southgate Brokerage Co. v. Federal Trade Commission,* 4 Cir., 1945 [1944-1945 TRADE CASES ¶ 57,396] 150 F. 2d 607, *cert. denied,* 326 U. S. 774, it must equally follow that a showing of discrimination does not of itself establish a violation. There is no necessity for calling something brokerage that is not. If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act. The district court correctly dismissed the federal cause of action.

[*State Claims*]

The remaining paragraphs of the complaint, 11 and 12, purport to set forth two common-law claims. After incorporating the allegations of paragraphs 1-9, paragraph 11 alleges that "Stanley conspired with Plura to deprive the Plaintiff of his rightful commissions as manufacturer's representative for Plura and to divert said commissions to Stanley." Paragraph 12 alleges that "Stanley did induce and procure Plura to breach the contract between the Plaintiff and Plura so that the commissions that would otherwise be paid to the Plaintiff would be diverted to Stanley in the form of unreasonably large discounts." We have considerable doubts whether either paragraph asserts a valid cause of action for unjustifiable interference with a contractual, or continuing business, relationship. Stanley, as a purchaser from Plura, had a legitimate economic interest to further. Such interest would appear to furnish defendant with a privilege unless defendant had adopted or advocated some illegal conduct. See Restatement, Torts, Ch. 37, § 771. The only impropriety suggested is an alleged violation of section 2(c) of the Robinson-Patman Act, the allegation we have already held unsupported. The district court did not pass on the merits of these claims, however, but held that the federal claim having been dismissed on the pleadings, the court was not obliged to retain a common-law dispute between two Massachusetts citizens, citing *Massachusetts Universalist Convention v. Hildreth & Rogers Co.,* 1 Cir., 1950, 183 F. 2d 497, and *Dixon v. Martin,* 5 Cir., 1958, 260 F. 2d 809. Whatever may be the limits of pendent jurisdiction, we do not regard *Hurn v. Oursler,* 1933, 289 U. S. 238, as requiring, when the federal claim is dismissed on the pleadings, the retention of state claims which are, at best, dubious on their face.

[*Judgment Affirmed*]

Judgment will enter affirming the judgment of the District Court.

[¶ 69,548] The Fair v. Federal Trade Commission.

In the United States Court of Appeals for the Seventh Circuit. No. 12628. Dated December 8, 1959.

On Petition to Review an Order of the Federal Trade Commission.

Federal Trade Commission Act and Fur Products Labeling Act

Fur Labeling—Guaranty by Manufacturer or Supplier Against Mislabeling—Defense for Retailer—Duty of Retailer to Correct Errors in Labeling.—A department store was not guilty of selling misbranded fur products in violation of the Fur Products Labeling Act where it relied in good faith on guarantees from the manufacturer or supplier of each garment that the products were not misbranded. While Rule 34(a) under the Fur Products Labeling Act provides that a person subject to the Act shall corrrect all labels which he has reasonable cause to believe are incorrrect, it merely permits a retailer to correct errors and it does not impose a legal obligation on the retailer to examine the labeling of fur products for errors and to correct all such errors under the burden of forfeiture of its rights under Section 10(a) for failure to discover any such errors as may exist. Lack of good faith, therefore, could not be inferred solely on the ground that the department

store was obligated to examine the labels, regardless of guarantee, and that the store was, therefore, responsible for all errors discernible.

See Fur Labeling, Vol. 2, ¶ 6655.

Fur Labeling—Persons Subject to the Act—Lessor of Independent Contractor Who Retains Degree of Business Control.—Where a department store leased its fur department to an independent contractor, but retained a large measure of business control such as hiring employees, adjusting customer complaints, and advertising furs in its name, it was subject to the Fur Products Labeling Act. The customers had no way of knowing that they were dealing with an independent contractor. It could not be said that the store had gone out of the fur business.

See Unfair Practices, Vol. 2, ¶ 5201.

Fur Labeling—False or Deceptive Advertising—Price or Value—"Fictitious Pricing".—A department store was found to have engaged in "fictitious pricing" in advertising fur products to be sold at prices reduced from "usual" prices. The "usual" prices were not prices at which such merchandise was usually sold by the store. In answering the argument that "usual" meant prices charged by the store or by other merchants for similar goods rather than the same item reduced in price, the court held that the controlling test was the understanding of the consumer who might well believe that the use of the word "usual" price in this sense meant that the item had been "marked down".

See Fur Labeling, Vol. 2, ¶ 6631.46.

Fur Labeling—Records To Be Maintained by Dealer—Price and Value Records.—A department store was found not to have maintained records to support its own contention of what were "usual" prices by its own definition where the testimony of its comparison buyer indicated such inadequate records. Records consisting of prices paid for furs by the store and of prices at which the store offered these furs at retail, including mark-downs and reductions, did not constitute adequate records in the instant case.

See Fur Labeling, Vol. 2, ¶ 6646.61.

Fur Labeling—False or Deceptive Advertising—Quality of Furs—Illustrations.—A department store falsely advertised mink jackets through a misleading illustration. The garments advertised were split-skin mink jackets, while the illustration, although accurately showing the style of the garments offered for sale, pictured a let-out mink jacket—admittedly a higher quality fur garment.

See Fur Labeling, Vol. 2, ¶ 6631.

Fur Labeling—False or Deceptive Invoicing of Furs—Retail Sales Slips.—A department store falsely and deceptively invoiced fur products where the evidence of such invoicing consisted of sales slips issued to the store's retail customers. Such sales slips constituted invoices within the meaning of the Fur Products Labeling Act.

See Fur Labeling, Vol. 2, ¶ 6632.77.

For the petitioner: W. P. Gilbert, G. E. Hale, David L. Dickson, and Charles J. Barnhill, all of Chicago, Ill.

For the respondent: James E. Corkey and Alan B. Hobbes, both of Washington, D. C.

Enforcing in part and vacating in part a Federal Trade Commission order to cease and desist in Dkt. 6822.

Before DUFFY, KNOCH and CASTLE, Circuit Judges.

[*Misbranding Fur Garments*]

KNOCH, Circuit Judge [*In full text*]: This proceeding was instituted June 17, 1957, in a complaint filed by the Federal Trade Commission, charging violations of the Federal Trade Commission Act, the Fur Products Labeling Act, and Rules and Regulations promulgated thereunder, in labeling, invoicing and advertising fur garments sold in The Fair stores.

Both the counsel supporting the complaint and The Fair appealed from the

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Hearing Examiner's provisional order to cease and desist. The Commission, after considering the cross-appeals, vacated and set aside the initial decision. Findings, conclusions, and order of the Commission were substituted *in toto* for the Hearing Examiner's decision. The Fair seeks to review and set aside the Commission's cease and desist order.

[*Issues*]

The issues may be summed up as: (1) whether guaranties furnished by suppliers were "received in good faith" by The Fair, so as to afford a defense to charges of misbranding and deceptive advertising; (2) whether the Commission's findings were supported by substantial evidence; and (3) whether the Commission's order was unduly broad.

[*Proper Defendant*]

In February 1957, The Fair leased its fur departments to an independent contractor who operates them as an independent entity. However, a large measure of control is retained by The Fair in that, for example, all business and advertising is done in the name of The Fair, which approves and actually hires the lessee's employees, makes independent adjustments of customer complaints and accounts, and retains the right to approve advertising. The customers have no way of knowing that they are dealing with an independent contractor. We agree with the Commission in its conclusion that action on the complaint was not barred on the ground that The Fair had gone out of the fur business.

[*Statute and Regulations*]

The Fur Act describes a fur product as misbranded if there is not affixed to it a plainly legible label showing the name or names of the fur producing animal; the fact (if that is the case) that the product contains used, bleached, dyed or otherwise artificially colored fur, or is composed in whole or substantial part of paws, tails, bellies, or waste fur; the registered identification of those who manufacture the product for introduction, introduce it, sell it, advertise or offer it for sale, transport or distribute it into commerce; and country of origin of imported furs.

The Rules and Regulations of the Commission provide for size of type or hand printing, prohibit handwriting, require placement of the above required information on one side of the label only, (with non-deceptive, non-required information on the reverse side where lot or style number and size may be placed) and separate information respecting each different animal fur where more than one is used in the same garment.

[*Misbranding Violations*]

The violations in branding or labeling charged here included: a few handwritten labels containing (in addition to the required data) non-required words "fur name" on the same side; one garment with no fur identification; a handwritten label which omitted the information that the fur was dyed and which contained the non-required words "romance flank muskrat"; more than thirty labels containing non-required words, *e. g.* "romance" and "fur name"; several labels omitting the information that the fur was dyed; about ten labels omitting name or registered number of marketer; several labels omitting the name of mink trimming used on a garment of another fur; more than a dozen labels having the words "Southwest Africa" abbreviated as "S. W. Africa"; and several labels on garments of Persian Lamb in which the word "Lamb" was omitted.

[*Guaranties of Suppliers*]

The Fair contended that any such misbranding was immaterial in character and quantity, but its primary defense was that it relied on a guarantee, allegedly received in good faith, from the manufacturer or supplier of each garment (pursuant to Section 10(a) of the Fur Act) to the effect that the fur products were not misbranded.

Section 10(a) provides:

"No person shall be guilty . . . if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the fur product or fur guaranteed was manufactured or from whom it was received, that said fur product is not misbranded or that said fur product or fur is not falsely advertised or invoiced under the provisions of this Act. Such guaranty shall be either (1) a separate guaranty specifically designating the fur product or fur guaranteed, in which case it may be on the invoice or other paper relating to such fur product or fur; or (2) a continuing guaranty filed

with the Commission applicable to any fur product or fur handled by a guarantor, in such form as the Commission by rules and regulations may prescribe."

The Hearing Examiner found that all these labels were those of the manufacturer or other suppliers, that the majority of the defects were not obvious and could easily have been overlooked, that their discovery required careful scrutiny by one skilled in furs and well versed in the Fur Act and the Commission's Regulations; that the one error of a missing label which could have been easily detected was merely overlooked and had been corrected. Accordingly the Hearing Examiner held that The Fair was entitled to rely on the guarantee and that it could not be held guilty of misbranding.

[*Retailer's Duty to Correct Errors*]

In the Commission's view, however, The Fair was legally obligated to examine and to correct the labels; and The Fair's fur buyer was possessed of the requisite skill to discern the deficiencies, which the Commission thought were all readily apparent on the face of the labels. Thus, the Commission found The Fair's contention of reliance "in good faith" on suppliers' guaranties unconvincing, on the theory that the defects should have been discovered by exercise of ordinary diligence. The Commission relies on its Rule 34(a) which reads:

> "If a person subject to . . . the Act with respect to a fur product finds or has reasonable cause to believe the label affixed thereto is incorrect or does not contain all the information required by the Act and the rules and regulations, he shall correct such label or replace same with a substitute containing the required information."

However, as we read Rule 34(a), it merely permits the retailer to correct errors. It does not, as the Commission contends, impose a legal obligation on The Fair to examine the labeling of fur products for errors in compliance and to correct all such errors under the burden of forfeiture of its rights under Section 10(a) *supra* for failure to discover any such errors as may exist. The Hearing Officer found that The Fair's good faith had not been attacked. He analyzed Section 10(a) as expressing Congressional intention (1) to stop misbranding and faulty labeling at the source; and (2) that enforcement was to be exercised where labeling is initiated, by the manufacturer or supplier who is in the best position to know the character of the furs from which the products are made. We agree. The Commission inferred a lack of good faith solely on the ground that The Fair was obligated to examine the labels, regardless of guarantee, and that The Fair was, therefore, responsible for all errors discernible, by exercise of ordinary diligence, to one possessed of the requisite skill and knowledge of the Act and regulations. As indicated, it is our conclusion that no such duty has been imposed.

The same reasoning applies to the three or four mislabeling defects carried over into advertising copy. Typical of those was omission of the word "lamb" in describing "Persian Paw" and "Black Dyed Broadtailed" jackets.

[*Fictitious Pricing*]

The Commission also found that The Fair engaged in "fictitious pricing" in advertising fur products to be sold at prices reduced from "usual" prices, where the "usual" prices were not prices at which such merchandise was "usually" sold by The Fair. Some, but not all, of these garments had in fact been "marked down". With respect to the others, The Fair contends that "usual" means prices charged by The Fair or by other merchants for similar goods, rather than the same item reduced in price, citing the "Guide for Retail Advertising and Selling", Fifth Edition, 1956, Association of Better Business Bureaus, Inc. That publication warns against use of the word "usually" to mean mark-down in one's own store because the term is to be used to express a comparative price on a special purchase.

As the Commission argues, however, the controlling test is the understanding of the consumer, who might very well believe that use of the word "usual" price in this regard meant that the item had been "marked down." *Progress Tailoring Co. v. F. T. C.* (7 Cir., 1946) [1946-1947 TRADE CASES ¶ 57,440] 153 F. 2d 103, 105; *Mandel Brothers, Inc. v. F. T. C.* (7 Cir., 1958) [1958 TRADE CASES ¶ 68,993] 254 F. 2d 18, 21.

[*Inadequate Records*]

The Commission's finding of failure to maintain full and adequate records rested on the above described finding of fictitious

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pricing. The Commission concluded that records which did not support the prices advertised must be inadequate. This does not necessarily follow. The Fair never asserted that the "usual" prices listed in the advertisements were in all cases its own prices. Besides, The Fair's assistant comptroller testified that many of the records were destroyed in 1957 when the lease to the independent contractor went into effect.

However, the testimony of The Fair's comparison shopper, as to her duties and the type of records she made, did indicate that she was not a fur expert, that her checking duties were performed in no regularly scheduled manner, and that her notations of her investigation of other merchants' prices were not such as to constitute adequate records, even had they all been preserved for submission as evidence.

It is, therefore, apparent that The Fair had not maintained records to support its own contention of what were "usual" prices by its own definition. The Hearing Examiner had based his finding that adequate records were maintained solely on the fact that complete records existed of prices paid for garments by The Fair, and prices at which The Fair offered these same garments at retail, including mark-downs and reductions of those garments.

[*Misleading Illustrations*]

There was one instance of a misleading illustration in advertising. The garments advertised were split-skin mink jackets. The illustration accurately showed the style of the actual garments offered for sale, but, in fact, pictured a let-out mink jacket—admittedly a higher quality fur garment. The Hearing Examiner found that only a fur expert could detect the difference from studying the illustration and that the purchasing public was unlikely to be deceived. He applied the *de minimus* rule and concluded that no violation had occurred. The Commission held otherwise. This was a clear and actual violation and thus, in our opinion, it constituted ground for issuance of a cease and desist order prospective in effect to protect the public.

[*Sales Slips*]

The evidence of false and deceptive invoicing of fur products consisted of sales slips issued by The Fair to its retail customers. The Fair does not contend that these sales slips conformed to the requirements of the Fur Act, or the Rules augmenting it, with respect to invoicing. The Hearing Examiner initially decided that sales slips did not constitute "invoices" within the meaning of the Act. The Commission reversed that decision.

The issue has been resolved for us, in the Commission's favor, by the U. S. Supreme Court in *F. T. C. v. Mandel Brothers, Inc.* [1959 Trade Cases ¶ 69,342] 359 U. S. 385, 390 (1959).

[*Order Vacated in Part*]

We, therefore, direct that the Commission's Cease and Desist Order be vacated and set aside only insofar as it relates to the subject of misbranding. In all other respects, the petition to review and set aside the Order is denied and enforcement is ordered.

Enforcement ordered in part and in part denied.

[¶ 69,549] **United States of America v. Irving Bitz, also known as Morris Grossman, Sam Feldman, Stanley J. Lehman, Harry Waltzer, William Walsh, John Lawrence, Jr., Angelo Lospinuso, William Fello, Rocco Fello, also known as Barney Fello, Charles Gordon, formerly known as Abraham Goldberg, Michael Spozate and Bi-County News Corp.**

In the United States District Court for the Southern District of New York. Cr. 159-162. Filed November 12, 1959.

Case No. 1462 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Monopolies—Practices—Exclusion from Trade—Exclusive Dealing—"Accumulation" of Exclusive Distributorships—Legality—Distribution of Newspapers and Magazines.—Officials of a labor union and wholesale newspaper and magazine distributors were denied

a motion to dismiss a monopoly count in an indictment charging them with conspiring to restrain and monopolize trade in the distribution of newspapers and magazines in certain New York counties. That count charged that the conspirators had agreed to exclude actual or potential competitors of the defendant-distributors from engaging in the distribution of such products in that market. Since there is no objection to an agreement between a manufacturer and a dealer for an exclusive distributorship, the court assumed that it would be lawful for a magazine publisher to allot to a wholesaler an exclusive distributorship in the pertinent area. It did not follow, however, that it was lawful for a single wholesaler to "accumulate" the exclusive distributorships from all of the publishers, as the indictment here alleged.

See Monopolies, Vol. 1, ¶ 2610.300.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Sufficiency of Allegations—Conspiracy to Restrain Distribution of Newspapers—Monopolization—Necessity for Allegation of Public Injury.—A count of an indictment charging officials of a labor union and wholesale newspaper distributors with conspiring to restrain the distribution of newspapers by coercing distributors to pay money to the conspirators as a prerequisite to obtaining labor contracts and by excluding competitors of the defendant-distributors from the trade was held insufficient in law by reason of its failure to allege "public injury." The only specific act charged was "the use of union influence, duress and threats of strikes to compel the payment" of money to certain defendants in connection with the negotiation of labor contracts. *Klor's, Inc. v. Broadway-Hale Stores,* 1959 TRADE CASES ¶ 69,316, did not abolish the rule that there is no violation of the antitrust laws unless there is public injury; it merely pointed out that there is an exception to that rule where a group boycott is involved. It is only in cases of such *per se* violations as price fixing, division of markets, group boycotts, and tying arrangements that proof of public injury is unnecessary. The present conspiracy count did not allege one of those *per se* violations and was therefore insufficient in law.

However, another count of the indictment charging that a monopoly had been obtained was not defective although it alleged no direct public injury. There is high authority for the proposition that monopoly of the relevant market is *per se* unlawful. The court, rejecting the contention that a monopoly in the distribution of magazines could cause no injury to the public because magazines are always sold at "fixed prices," held that other evils of monopoly would remain even if prices were not affected.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.570.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Sufficiency of Allegations—Interstate Commerce—Conspiracy to Monopolize Local Distribution of Publications Received from Publishers in Interstate Commerce.—An indictment's monopoly count charging wholesale distributors of newspapers and magazines with conspiring to monopolize the local wholesale distribution of publications received from publishers in interstate commerce sufficiently disclosed the manner in which the alleged conspiracy "affected" interstate commerce. It was hard to see what more could have been said. The alleged monopoly was one that completely controlled the flow of magazines to wholesalers in two New York counties from outside the state. The defendants would not be immune even if, as contended, all of their operations were intrastate.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.620.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Sufficiency of Allegations—Description of Conspiracy.—It was not necessary for an indictment to state the manner in which alleged conspirators joined in a conspiracy. As long as the conspiracy itself was described in detail, and the defendants would have no difficulty in pleading the judgment in bar of a second prosecution, the indictment was sufficient. The matter could be discovered, if at all, by a motion for a bill of particulars.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.500, 8025.800.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Indictments—Sufficiency of Allegations—Repetitious Counts.—Two counts of an indictment, one

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charging a violation of a statute making it a crime to conspire to monopolize commerce, and another charging a violation of a statute making it a crime to conspire to obstruct commerce by extortion, were not repetitious of each other. There was nothing inconceivable about there being two separate conspiracies, even though it appeared likely that proof under the allegations of one count would be sufficiently broad to justify a verdict of guilty under the other count. The indictment, in alleging that there were two conspiracies, had to be accepted as true. Also, the two counts were permissible to meet the different interpretations which might be placed on the evidence by the jury.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.520.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Sufficiency of Allegations—Duplicity—Charging Two Conspiracies in Single Count.—An indictment's monopoly count was not duplicitous by reason of the fact, that it contained, in addition to the charge of a general conspiracy to monopolize, the allegation that the conspiracy was effectuated by acts which, in another count of the indictment, were alleged to constitute an extortion conspiracy. "The conspiracy is the crime, and that is one, however diverse its objects."

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.540.

For the plaintiff: S. Hazard Gillespie, Jr., United States Attorney, Southern District of New York; Harry G. Sklarsky, Herman Gelfand, Donald Ferguson, Gerald R. Dicker, and John D. Swartz, Attorneys, Department of Justice.

For the defendant: Waldman & Waldman, New York, N. Y., for William Fello, Rocco Fello, and Bi-County News Corp.; Sylvester & Haimoff (Louis Waldman, Louis Haimoff, and Seymour M. Waldman, of counsel), New York, N. Y., for Charles Gordon; Menahem Stim (Allen S. Stim, of counsel), New York, N. Y., for Sam Feldman; Samuel Duker, New York, N. Y., for William Walsh; and O'Donnell & Schwartz (Edith Lowenstein, of counsel), New York, N. Y., for Stanley J. Lehman and John Lawrence, Jr.

Opinion

[*Motions to Dismiss*]

Edward J. Dimock, District Judge [*In full text*]: The allegations of Count One of the indictment will first be summarized. Since these motions deal only with the face of the indictment, this opinion will deal only with the facts therein alleged without regard to actuality.

[*Defendants*]

Newspaper and Mail Deliverers' Union of New York and Vicinity, hereinafter "the Union", has labor contracts with the publishers of all of the principal New York City newspapers and all of the principal magazines published throughout the United States covering such of their employees as are engaged in the handling of newspapers and magazines. It is a provision of these contracts that such publishers can use as wholesalers only such distributors as are themselves under labor contractual relations with the Union. Suburban Wholesalers Association, Inc., hereinafter Suburban Wholesalers, is a New York membership corporation consisting of twelve members who are such distributors and in labor contractual relations with the Union. The necessity of keeping in labor contractual relations with the Union in order to retain the position of wholesaler to the publishers gives strikes and threats of strikes a coercive effect.

The twelve members of Suburban Wholesalers are alleged to distribute the newspapers and magazines in specified sub-areas of the so-called Suburban Area outside of New York City which do not overlap but there is no allegation that they are the sole distributors of the newspapers and magazines in those sub-areas.

Prominent in the list of defendants are officers and representatives of the Union. The rest of it is made up of defendant Bi-County News Corp., hereinafter "Bi-County", and officers, employees and stockholders of various other corporations of undescribed purposes.

Defendants Irving Bitz, Charles Gordon and Bi-County are engaged in the wholesale distribution of newspapers and magazines. Bi-County is alleged to have its principal place of business in Westbury, Long Island. The place of business of the two individuals is not stated.

[*Restraint of Trade*]

Count One of the indictment charges a combination and conspiracy, in restraint of the continuous and regular flow in interstate commerce of newspapers and magazines from various states to members of Suburban Wholesalers located in New York, New Jersey and Connecticut, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" as amended, c. 647, 26 Stat. 209, 15 U. S. C. Section 1, commonly known as the Sherman Act.

[*Antitrust Conspiracy*]

The combination and conspiracy is alleged to have consisted in a continuing agreement and concert of action among defendants and co-conspirators. Its substantial terms have been and are:

"a. To restrain the members of Suburban Wholesalers in their wholesale distribution of newspapers and magazines by coercing and compelling said members to pay to the conspirators various sums of money, as a pre-requisite to obtaining labor contracts with the Union to avoid strikes or the continuation of strikes already called by said Union;

"b. To prevent the shipment of newspapers and magazines in interstate commerce to members of Suburban Wholesalers not acceding to the demands of the conspirators; and

"c. To hinder and exclude or attempt to hinder and exclude actual or potential competitors of defendants Irving Bitz, Charles Gordon and Bi-County."

The combination and conspiracy is alleged to have had the following effects, "among others":

"a. All the members of Suburban Wholesalers have been compelled to pay financial tribute as a condition for engaging in the aforesaid trade and commerce;

"b. Newspaper and magazine publishers have been hindered, restrained or prevented from distributing newspapers and magazines in the Suburban Area to their financial loss and detriment;

"c. Retail news dealers in the Suburban Area have been hindered, restrained or prevented from selling newspapers and magazines to their financial loss and detriment;

"d. Competitors of Irving Bitz, Charles Gordon and Bi-County have been deprived of an equal opportunity to obtain labor contracts with the Union and to compete with these defendants in the wholesale distribution of newspapers and magazines; and

"e. Interstate trade and commerce in the wholesale distribution of newspapers and magazines in the Suburban Area has been unreasonably restrained."

[*Extortion as Means of Effectuating Conspiracy*]

The only allegation as to the means by which the combination and conspiracy has been effectuated is as follows:

"During the period covered by the indictment, the said combination and conspiracy has been effectuated by various means and methods including, but not limited to, the use of union influence, duress and threats of strikes or strikes to compel: (a) the payment of $25,000 by the members of Suburban Wholesalers to defendants Angelo Lospinuso, William Walsh and Harry Waltzer on or about January and February 1955, in connection with the negotiation of a labor contract between the Union and Suburban Wholesalers effective February 1, 1955; (b) the payment of $45,000 by Suburban Wholesalers to defendant Irving Bitz and to defendants Sam Feldman, Stanley J. Lehman, John J. Lawrence, Jr. and Harry Waltzer in connection with the negotiation of a labor contract between the Union and Suburban Wholesalers effective February 1, 1957; and (c) other payments by members of Suburban Wholesalers to various Union officials."

Thus the only allegation of a specific act of any defendant is "the use of union influence, duress and threats of strikes to compel the payment of $25,000 by the members of Suburban Wholesalers" to certain defendants in connection with the negotiations of a labor contract between the Union and Suburban Wholesalers effective February 1, 1955, and the payment of $45,000 by Suburban Wholesalers to certain defendants in connection with the negotiation of a labor contract effective February 1, 1957.

[*Monopoly*]

Count Two of the indictment charges an unlawful combination and conspiracy to monopolize for defendants Irving Bitz, Charles Gordon and Bi-County the interstate commerce of newspapers and magazines from various states in the United States to the members of Suburban Wholesalers in Nassau and Suffolk Counties in the State of

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New York, in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" as amended, c. 647, 26 Stat. 209, 15 U. S. C. Section 2, commonly known as the Sherman Act.

The combination and conspiracy is alleged to have consisted in an agreement and concert of action with the same terms as that alleged in Count One.

The effects of the combination and conspiracy to monopolize are alleged to be the following, "among others":

"a. Publishers of newspapers and magazines have been deprived of an opportunity to use the distributor of their choice in Nassau and Suffolk Counties;

"b. Wholesale distributors that might compete with defendants Irving Bitz, Charles Gordon and Bi-County have been deprived of an opportunity to distribute newspapers and magazines in Nassau and Suffolk Counties;

"c. Competition in the aforesaid interstate trade and commerce in the wholesale distribution of newspapers and magazines in Nassau and Suffolk Counties has been hindered and impeded; and

"d. Defendants Irving Bitz, Charles Gordon and Bi-County have obtained a monopoly in the wholesale distribution of magazines in Nassau and Suffolk Counties."

[*Coercion—Exclusion of Competitors*]

It is alleged that the combination and conspiracy to monopolize has been effectuated by the same acts which were alleged in Count One to have effectuated the combination and conspiracy there charged. Count two adds, however, the following:

"In addition, said offense was effectuated by acts of violence and intimidation in 1958 to coerce publishers to deal with defendants Irving Bitz, Charles Gordon and Bi-County and to exclude competitors from obtaining business from such publishers."

[*Extortion*]

Count Three alleges that defendants Lospinuso, Walsh and Waltzer obstructed commerce and the movement of newspapers and magazines in such commerce by extortion, as defined in Section 1951 of Title 18 U. S. Code, in that they obtained $25,000 from the officers and agents of Suburban Wholesalers, induced by the wrongful use of fear in that defendants named in Count Three

"did threaten the members of Suburban Wholesalers with labor disputes, workstoppages, and other labor troubles in connection with the trade and commerce aforesaid unless and until the members of Suburban Wholesalers paid the aforesaid defendants the said amount of money."

Count Four alleges that the said three defendants conspired to commit the crime charged in Count Three.

Count Five is similar to Count Three in that it charges that the offense of extortion was committed by defendants Bitz, Feldman, Lehman, Lawrence, Waltzer and Spozate, in obtaining $45,000 from officers and agents of Suburban Wholesalers.

Count Six alleges that the said six defendants conspired to commit the crime charged in Count Five.

In Count One all of the named defendants are made defendants.

In Count Two all of the defendants named in Count One except defendants Walsh and Lospinuso are made defendants.

In Counts Three and Four, defendants Lospinuso, Walsh and Waltzer are made defendants.

In Counts Five and Six defendants Bitz, Feldman, Lehman, Lawrence, Waltzer and Spozate are made defendants.

[*Pleas—Motions to Dismiss*]

Defendant Bitz has pleaded guilty to all of the counts in which he was named, Counts One, Two, Five and Six.

All of the other defendants have moved to dismiss Count One. All of them except defendants Walsh and Lospinuso have moved to dismiss Count Two. Defendants Feldman, Lehman and Lawrence have moved to dismiss Counts Five and Six.

[*Public Injury—Klor's Case*]

The motions to dismiss by defendants first raise the question whether Count One charges a crime. It is said that the count does not allege injury to the public and that the other facts alleged do not constitute a crime in its absence. The Government in answer says that *Klor's v. Broadway-Hale Stores* [1959 TRADE CASES ¶ 69,316], 359 U. S. 207, "reversed a Court of Appeals decision to the effect that 'public injury' is a necessary allegation 'before an antitrust violation' can be found. 255 F. 2d 217 (C. A. 9, 1958)".

The *Klor's* case did not abolish the rule that there is no violation of the antitrust laws unless there is public injury; it merely pointed out that there is an exception to that rule where a group boycott is involved. Mr. Justice Black, in discussing *Standard Oil Co. v. United States,* 221 U. S. 1, said for the court at p. 211:

> "The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes or restraints which from their 'nature or character' were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U. S. at 58, 65. As to these classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. Id., at 63-68."

He went on to hold that group boycotts were "in the forbidden category".* In a footnote to this reference to a "forbidden category" he cited *Northern Pacific R. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1, 5. The Court in the *Northern Pacific* case at that page said:

> "However there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price-fixing, *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.,* 85 F. 271, aff'd 175 U. S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm.,* 312 U. S. 457; and tying arrangements, *International Salt Co. v. United States,* 332 U. S. 392."

[*Conspiracy Allegation Insufficient*]

I hold, therefore, that it is only in cases of such *per se* violations as price fixing, division of markets, group boycotts and tying arrangements that proof of public injury is unnecessary. Court One lacks any allegation of public injury or of facts from which it can be inferred. Since it does not allege one of the *per se* violations of the Sherman Act the count is insufficient in law.

[*Monopoly—Public Injury Not Required*]

Count Two cannot be disposed of so easily. Like Count One it alleges no direct public injury. It contains the statement that an effect of the alleged combination and conspiracy to monopolize is that defendants Bitz, Gordon and Bi-County "have obtained a monopoly in the wholesale distribution of magazines in Nassau and Suffolk Counties."

There is high authority for the proposition that monopoly of the relevant market is *per se* unlawful. It will not do to say, as is said here, that a monopoly in the distribution of magazines in Nassau and Suffolk Counties causes no injury to the public since magazines are always sold at fixed prices. Chief Judge Learned Hand in *United States v. Aluminum Co. of America,* 2 Cir. [1944-1945 TRADE CASES ¶ 57,342], 148 F. 2d 416, pointed out that Congress, in passing the antitrust act, was not actuated by economic motives alone, saying, at page 427:

> "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes."

It is true that Judge Hand went on at page 428 to equate monopoly with price fixing because "the only price at which it

* Professor Milton Handler in commenting on the Supreme Court's reversal of Circuit Judge Barnes' decision in the *Klor's* case, Recent Antitrust Developments, 14 Record of the Association of the Bar of the City of New York 318, 349, said:

> "Thus, the principal error of Judge Barnes was not that he assimilated public injury into the rule of reason, but rather that he applied the standard of reason to a restraint which properly falls in the *per se* category. It does not follow that the Barnes approach will not have vitality outside the *per se* arena."

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could sell is the price which it itself fixed". Nevertheless he followed that with the statement that we are not left to deductive reasoning and cited for the general proposition that monopoly is always unlawful: *Swift & Co. v. United States,* 196 U. S. 375, 396; *Standard Oil Co. v. United States,* 221 U. S. 1; *Sugar Institute v. United States* [1932-1939 Trade Cases ¶ 55,107], 297 U. S. 553; *Appalachian Coals, Inc. v. United States* [1932-1939 Trade Cases ¶ 55,025], 288 U. S. 344, 374 and *Fashion Originators' Guild v. Federal Trade Commission* [1940-1943 Trade Cases ¶ 56,101], 312 U. S. 457.

[*Exclusive Dealing*]

Defendants rightly say that there is no objection to an agreement between a manufacturer and a dealer for an exclusive distributorship. Mr. Justice Black in the *Klor's* decision, at page 212, carefully distinguished the case that he had in hand from such an arrangement when he said,

> "This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship."

See also *Denver Stock Yard Co. v. Livestock Assn.* [1958 Trade Cases ¶ 69,019], 356 U. S. 282, 288. Thus I must assume that it would be lawful for the publisher of a magazine to allot to a wholesaler an exclusive distributorship in Nassau and Suffolk Counties. It does not follow, however, that it would be lawful for a single wholesaler to accumulate the exclusive distributorships from all publishers as is here alleged. It may be that the practice of selling magazines at universally fixed prices would prevent such a monopoly from affecting prices but the other evils of monopoly outlined by Judge Hand in the *Aluminum* case would remain.

Defendants say that the matter has been determined in their favor in this Circuit by authority. They say that just such an arrangement as is here alleged was approved in *Interborough News Co. v. Curtis Publishing Co.,* 2 Cir. [1955 Trade Cases ¶ 68,129], 225 F. 2d 289. There the Curtis Publishing Co. and other publishers transferred their distribution in the metropolitan area from Interborough News Co. to a group of thirteen wholesalers. The Court of Appeals affirmed a judgment dismissing Interborough News Co.'s complaint that it had been the victim of an illegal boycott. The plaintiff was in no position to urge that distributorships which it had enjoyed alone constituted a monopoly when parceled out among thirteen wholesalers. Even if it had done so, however, the answer would have been the finding, approved by the Court of Appeals at page 293, that "Each new wholesaler was in spirited competition with plaintiff and each other".

[*Sufficiency of Indictment—Details Required*]

Defendants William Fello, Rocco Fello, Bi-County News Corp., Gordon and Feldman move to dismiss Count Two of the indictment as to them on the ground that it fails adequately to inform them of the charges against them in violation of the sixth amendment of the Constitution and Rule 7(c) F. R. Crim. P.

This objection is without substance. The conspiracy is described in detail. The moving defendants would have no difficulty in pleading the judgment in this case in bar of a second prosecution. All that the count lacks is a description of the manner in which these defendants joined the conspiracy. That is not required of indictments in conspiracy cases. The Government's claim in that respect is to be discovered, if at all, by means of a motion for a bill of particulars.

[*Interstate Commerce*]

Defendants Lehman and Lawrence move to dismiss as to them Count Two, among others, on the ground that it does not disclose the manner in which the alleged conspiracy affected interstate commerce. It is hard to see what more could be said than that it was a conspiracy to monopolize the distribution at wholesale of publications which were received by the wholesalers from the publishers in interstate commerce. *United States v. Starlite Drive-In,* 7 Cir. [1953 Trade Cases ¶ 67,495], 204 F. 2d 419, cited by defendants, went off on the distinction between the business of exhibiting motion pictures and the business of distributing motion picture films. Here the alleged monopoly is one that completely controls the flow of magazines to wholesalers in Nassau and Suffolk Counties from states outside of New York. The fact, if it be a fact, that all of defendants' operations are intrastate does not give them immunity. *U. S. v. Women's Sportswear Assn.* [1948-

1949 TRADE CASES ¶ 62,390], 336 U. S. 460, 464.

[*Failure to State a Crime*]

Defendant Feldman moves to dismiss Counts Five and Six on the ground that they fail to state a crime.

His motion is based largely on the case of *United States v. Callanan,* D. C. E. D. Mo., 113 F. Supp. 766. There the court dismissed a count of an indictment charging a violation of section 1951 of title 18 U. S. Code, the same section as is here involved.

The language used in the Missouri indictment, as stated by the court, deviated from the words of the statute only to name, by reference, a corporation and to state an amount of money. Counts Five and Six of the instant indictment give much more information than did the one in *Callanan.* Indeed they give much more information than the indictment in *United States v. Palmiotti,* 2 Cir., 254 F. 2d 491, which was upheld as charging a crime under the same section. Defendant Feldman's motion to dismiss Counts Five and Six for failure to state a crime is denied.

[*Repetitious Counts*]

Defendant Feldman moves also to dismiss Count Two and Count Six because they are repetitious of each other and should have been included in one single conspiracy count. It is to be noted that Count Two charges a violation of a statute which makes conspiracy to monopolize commerce a crime while Count Six charges a violation of a different statute which makes conspiracy to obstruct commerce by extortion a crime.

There is nothing inconceivable about there being two separate conspiracies even though it appears likely that proof under the allegations of Count Two would be sufficiently broad to justify a verdict of guilty under Count Six. *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 788. We are at present dealing only with the indictment and it must be accepted as true in alleging that there are two conspiracies. *Braverman v. United States,* 317 U. S. 49, 52; *Schultz v. Hudspeth,* 10 Cir., 123 F. 2d 729, 730.

It is true that the jury might render a verdict of guilty on both counts and an appellate court might be of opinion that only one conspiracy had been proved but the "two counts were permissible to meet the different interpretations which might be placed on the evidence by the jury" and harm could be guarded against by limiting the sentence to the lesser maximum permissible under either statute. *United States v. McKnight,* 2 Cir., 253 F. 2d 817, 819-20. In no event can it be said at this stage of the proceedings that the counts are repetitious.

[*Duplicity*]

Defendants Lehman and Lawrence move to dismiss Count Two as improperly combining two or more conspiracies. It will be recalled that it charges a general conspiracy to monopolize and alleges that it was effectuated by the use of union influence to compel payments of $25,000 and $45,000 which are presumably the same as those which defendants are alleged in Count Six to have conspired to obtain. Defendants cite as authority *Kotteakos v. United States,* 328 U. S. 750. That was not a case, however, where the indictment was dismissed because it combined in one count more than one conspiracy. It was a case where a conviction was reversed because a single conspiracy had been alleged and several proved. To quote the opinion in *Braverman v. United States,* 317 U. S. 49, 54, *supra,*

> "The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' "

Other grounds urged for the dismissal of Counts Two, Five and Six do not warrant discussion. All motions to dismiss those Counts are denied.

[*Other Motions*]

Defendants have made, but not argued, various other motions before me which have been held in abeyance pending decision of the motions to dismiss. In accordance with an arrangement made when the motions to dismiss were argued, counsel will please, within fifteen days from the date of publication of a note of this decision in the New York Law Journal, arrange among themselves and with the court for a time for argument of any undecided motions.

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[¶ 69,550] United States of America v. The Watchmakers of Switzerland Information Center, Inc., et al.

In the United States District Court for the Southern District of New York. Civ. 96-170. Filed November 19, 1959.

Case No. 1207 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suits for Injunctive Relief—Discovery and Production of Evidence—Admissions—Objections.—The Government's request for admissions of fact, in a civil action charging antitrust violations in the watch industry, was apparently made in good faith, and was not, therefore, stricken in its entirety for alleged irrelevance and ambiguity. However, the defendants did not have to admit or deny whether any "rulings" were "binding" on anyone, since legal rather than factual circumstances were involved in that term. Similarly, they did not have to make a judgment as to what were "more important" circular letters and bulletins. The terms "price cutting activities", "excessive quantities", and the like, were clearly objectionable as used in the request.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.200.

For the plaintiff: Richard B. O'Donnell, Chief, New York Office, Antitrust Division, and Mary Gardiner Jones, Attorney, Department of Justice.

For the defendants: Goodwin, Denforth, Savage & Whitehead, New York, N. Y. (James V. Hayes, William F. Clare, Jr., and John A. Manning, of counsel), for Longines-Wittnauer Watch Co., Inc. and Wittnauer et Cie, S. A.

For prior opinions of the U. S. District Court, Southern District of New York, see 1959 Trade Cases ¶ 69,516 and 69,314 and 1955 Trade Cases ¶ 68,096 and 68,145.

[*Admissions of Facts*]

CASHIN, District Judge [*In full text*]: Considered herein are objections to plaintiff's request for admissions of facts noticed by defendants Longines-Wittnauer Watch Co., Inc. and Wittnauer et Cie, S. A., and an informal motion by plaintiff apparently seeking further answers from those defendants to a request for admissions.

[*Motion for Further Answers*]

Plaintiff's informal motion may be quickly disposed of. Rules 36 and 37(c) appear to me to preclude any such motion as made by the plaintiff. A party served with a request for admissions shall be deemed to have admitted the facts unless a sworn statement is served denying the matters of which the admissions were requested or setting forth in detail the reasons why they cannot truthfully be admitted or denied. If a denial of either kind is served, the sole sanction against the party so denying is provided for in Rule 37(c). That sanction is the payment by the denying party to the requesting party of the reasonable expenses incurred in proving the denied facts, including reasonable attorney's fees if the denial was not warranted. (*Rabjohn v. Minute Maid Corporation* (SDNY) Civ. 117-23, Opinion filed July 18, 1958).

[*Objections to the Requests*]

Defendants' objections to plaintiff's requests are on the grounds—

(1) that certain of the requests are improper because they incorporate by reference other documents;

(2) that certain of the requests are "ambiguous and lacking in clarity, thus making it impossible" for them to be answered clearly and unequivocally; and

(3) that certain of the requests cover irrelevant matters not admissible in evidence at the trial.

[*Incorporation by Reference*]

The first category of objections by defendants is generally sustained. Ordinarily the facts admitted in an answer to a request for admissions should be ascertainable merely by examination of the request and of the answer. (cf. *Securities and Exchange Commission v. Micro-Moisture Controls* (SDNY 1957) 21 F. R. D. 164). This rule, however,

is flexible and thus a certain amount of incorporation by reference may in exceptional circumstances be allowed. Plaintiff herein states that a chart, attached as an exhibit to its request, is an example of such incorporation by reference which is warranted by exceptional circumstances. The plaintiff has further offered to revise the chart to clarify the exact facts concerning which it is seeking admissions. In view of this offer I will not, at this time, rule on whether the incorporation is warranted. However, the offer of the plaintiff seeks, as a condition to the revision of its chart, an order at this time that defendants admit or deny the request as it will appear in its final form. As pointed out in disposing of the Government's informal motion, such an order would not be warranted in any event, and certainly could not be warranted here since the request in final form is not before the court.

Defendants' objections to the items of the request numbered 5, 12, 16, 19, 22 and 23 are sustained. Plaintiff may serve a further request for admissions wherein no incorporation by reference is utilized with the exception of Item No. 5 as noted above. However, each item of the further request shall contain a citation to plaintiff's source material for the facts concerning which admissions are sought.

Defendant's objections to the items of the request numbered 5, 12, 16, 19, 22 and 23 on the ground that they are ambiguous will not be ruled upon at this time since those items are to be the subject of a further request in accordance with the previous ruling.

[*Ambiguity*]

The remaining items objected to for ambiguity shall be considered separately.

Defendants' objection to item No. 4 of the request is in general overruled. The documents in the form of Regulations, Memoranda, Bulletins and Circular Letters are certainly documents of whose existence defendants are aware. Any objection on the ground that such documents are not sufficiently identified can be characterized only as captious. However, certain of the objections of defendants to the request have merit. Accordingly, defendants cannot be forced to admit or deny whether any rulings are "binding" on any one since legal, rather than factual, circumstances lurk in that term. Generally, defendants should not be forced to make a judgment as to what the "more important" FH Circular Letters and Bulletins are. Therefore, defendants need not answer the next to the last subparagraph of Item No. 4 of the request and the clause "and the rulings they contain are binding on FH members" is stricken from the preceding subparagraph. In all other respects defendants' objection is overruled.

Defendants' objection to Item No. 13 of the request is overruled. It is obvious that the entities to whom Ebauches S. A. is said to have directed its request that repair parts be not exported from the United States were those entities to whom they are sold and who are listed in the item.

Defendants' objection to Item No. 25 is sustained. Use of the terms "price cutting activities", "excessive quantities" and the like, is clearly objectionable. (*Securities and Exchange Commission v. Micro-Moisture Controls, supra*). Plaintiff may, however, serve a further request covering the same subject matter, susceptible of an unequivocal answer.

Defendants' objection to items numbered 31 and 32 are overruled. A review of these items clearly indicates that they can be answered unequivocally if defendants have the requisite knowledge.

[*Relevancy*]

Defendants' objections on the ground of irrelevancy are overruled in their entirety. I will not at all attempt to review in detail the numerous items objected to and indicate why the facts concerning which admissions are sought are relevant. Suffice it to say that all of the facts concern the existence or operation of the charged conspiracy and thus are relevant. Any question of admissibility will be reserved for the trial of the action.

The overruling of many of the defendants' objections to the request for admissions is not at all to be considered a holding that defendants must unequivocally admit or deny the facts. Rather, as pointed out in a prior part of this opinion, defendants may deny any or all of the facts concerning which admissions are sought at the peril, however, of incurring the sanction provided by Rule 37(c).

[*Coverage of Request*]

Although specific objections were made by the defendants to specific items in the

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request, a further request was made both at the oral argument and in the reply memorandum that the request as a whole be stricken. I am aware, of course, that a request for admissions should not attempt to cover virtually the entire case. It should be confined to facts which are not in substantial dispute. Thus, in a proper case, the entire request may be stricken because it is entirely ill-conceived. (cf. *Syracuse Broadcasting Corporation v. Samuel I. Newhouse, et al.*, [1959 Trade Cases ¶ 69,519], Docket No. 25074, October Term, 1958). However, the request under consideration appears to me to be a good faith attempt by the plaintiff properly to utilize the provisions of Rule 36 and thus will not be stricken in its entirety.

The motions are disposed of as indicated above.

It is so ordered.

[¶ 69,551] Independent Theatres, Inc. v. American Broadcasting-Paramount Theatres Inc., et al.

In the United States District Court for the Southern District of New York. Civil Action No. 142-278. Filed November 19, 1959. Dated November 27, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Pretrial Procedures—Striking Irrelevant or Prejudicial Matters—Complaint.—In a motion picture antitrust treble damage action, all references to a prior government decree entered against some of the present defendants were ordered stricken from the complaint on the ground that they were immaterial and irrelevant in pleading the claim. It was found that these repeated references served no useful purpose as far as the claim was concerned and might have been prejudicial to the defendants. The plaintiff was not entitled to "honeycomb" its complaint with evidential references to various alleged incidents prior, incidental, and subsequent to the entry of the decree and alleged violations of it. However, in serving an amended complaint, the plaintiff would be permitted to allege the entry of the decree and that it intended to rely on the decree as evidence.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.595.

For the plaintiff: William Gold, New York, N. Y.

For the defendant: Royall, Koegel, Harris & Caskey for Twentieth Century-Fox Film Corporation (Delaware); Benjamin Melniker for Loew's Incorporated; Leonard Kaufman for Paramount Pictures Corp.; Howard Levinson for Warner Bros. Pictures, Inc. and Warner Bros. Pictures Distributing Corp.; Jerome Golden for American Broadcasting-Paramount Pictures, Inc. and Wilby-Kincey Service Corp.; Charles F. Young for Citation Films, Inc.; and Adolph Schimel for Universal Pictures Co. and Universal Film Exchanges, Inc., all of New York, N. Y.

For a prior opinion of the U. S. District Court, Southern District of New York, see 1959 Trade Cases ¶ 69,432.

[*Striking Irrelevant Matter*]

Edward Weinfeld, District Judge [*In full text*]: Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief. The liberality of pleading permitted by *Nagler v. Admiral Corp.* [1957 Trade Cases ¶ 68,839], 248 F. 2d 319 (2d Cir. 1957), neither overcomes the Rule nor does it justify the inclusion in the complaint of such matters, for example, as what a defendant proposed for inclusion in the Paramount decree or references to applications which may have been made for modification of the decree.

[*Reference to Prior Decree in Complaint*]

The complaint is interlarded with numerous other allegations of an evidential nature touching upon the decree, alleged violations thereof, and alleged reasons for happenings thereunder. These serve no useful purpose as far as the plaintiff's claim is concerned.

On the other hand, the repeated references to the decree and alleged violations may well be prejudicial to the defendants. Plaintiff's claim must rest upon alleged violation of the antitrust statutes and not upon any claimed violation of the decree.

Plaintiff should plead the ultimate fact claim and not evidentiary details allegedly supporting it. If the defendant achieved, as plaintiff alleges in paragraph 37 of its complaint, a "position of monopoly, dominance and control of the first-run exhibition field in Chattanooga", this can be pleaded simply and directly without an allegation such as that now contained therein starting:

"Thus, in direct violation of its express representation in the decree * * *."

While the plaintiff may be entitled upon the trial to avail itself of the Paramount decree with respect to facts necessarily adjudicated in that action (defendants here challenge plaintiff's right to rely on the decree but this issue need not now be decided), it is not entitled to honeycomb its complaint with evidential references to various alleged incidents prior, incidental, and subsequent, to the entry of the decree and alleged violations thereof. Even the *Nagler* case did not look kindly upon the practice of pleading evidential matter. If plaintiff relies, in support of its claim, upon a fact or circumstance which occurred prior to, contemporaneously with, or subsequent to the entry of the decree, the fact can be stated without reference to the decree itself.

What the precise issues are that were determined against the defendants under the Paramount decree are for the Trial Court to decide as a matter of law, not for the plaintiff's counsel to interpret in a pleading. *Emich Motors Corp. v. General Motors Corp.* [1950-1951 TRADE CASES ¶ 62,778], 340 U. S. 558, 571 (1951).

[*Holding*]

Accordingly, all references to the Paramount decree are ordered stricken under Rule 12(f) of the Federal Rules of Civil Procedure on the ground that they are immaterial and irrelevant in pleading the claim. Paragraphs 37 and 40 are so drawn that it will be necessary to replead them.

Plaintiff in serving an amended complaint may, if so advised, allege the entry of the decree and that it intends to rely thereon pursuant to Title 15 U. S. C. section 16. *Normandie Amusement Corp. v. Loew's Inc.* [1954 TRADE CASES ¶ 67,670], 140 F. Supp. 257 (S. D. N. Y. 1954).

[¶ 69,552] Skouras Theatres Corporation, et al. v. Radio-Keith-Orpheum Corporation, et al.

In the United States District Court for the Southern District of New York. Civ. 85-239. Dated December 3, 1959. Filed December 4, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Proceduce—Civil Damage Action—When Recovery May Be Barred—Statute of Limitations—Applicable Statute—"Borrowing" Provisions—"Forfeitures Upon Penal Statutes".—A Federal District Court sitting in New York, in a treble damage action based on the Federal antitrust laws, applied a New Jersey two-year "forfeiture" statute of limitations to the action on the ground that the cause of action arose in New Jersey and was an action for a "forfeiture upon a penal statute" within the meaning of New Jersey law. Since the federal statute was inapplicable (the action was filed prior to the effective date of the Federal statute), the Federal court looked to the statute of the forum. A New York "borrowing" statute directed the application of New Jersey law, since the cause of action arose in that state. Thus, "The law of the United States adopts the law of New York and the law of New York adopts the law of New Jersey."

See Private Enforcement and Procedure, Vol. 2, ¶ 9010.100.

For the plaintiffs: Weisman, Celler, Allan, Spett & Sheinberg; Milton C. Weisman, Adolph Kaufman, Joseph A. Ruskay, Ralph J. Schwarz, Jr., Daniel A. Cohen, of counsel; all of New York, N. Y.

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For the defendants: Louis Phillips for Paramount Pictures Corp., Paramount Pictures, Inc., and Paramount Film Distributing Corp.; Simpson, Thacher & Bartlett for Paramount Pictures Corp., Paramount Pictures, Inc., Paramount Film Distributing Corp., and American Broadcasting Paramount Theatres, Inc.; Phillips, Nizer, Benjamin, Krim & Ballon for United Artists Corp.; Donovan, Leisure, Newton & Irvine for Radio-Keith-Orpheum Corp., RKO Radio Pictures, Inc., and RKO Pictures Corp.; Myles J. Lane for Stanley Warner Management Corp. and Stanley Warner Corp.; Ferdinand Pecora for Columbia Pictures Corp.; Adolph Schimel for Universal Pictures Corp., Inc. and Universal Film Exchanges, Inc.; and R. W. Perkins for Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corp., and Warner Bros. Pictures Inc. (In Dissolution). Louis Nizer and E. Compton Timberlake, of counsel; all of New York, N. Y.

Opinion

[Motion to Dismiss—Statute of Limitations]

DIMOCK, District Judge *[In full text]*: In this private treble damage antitrust case defendants move for summary judgment dismissing all claims of plaintiffs which accrued with respect to certain theatres in the State of New Jersey more than two years before the commencement of this action. The motion is made on the ground that such claims are classed as forfeitures upon penal statutes and barred by the two-year statute of limitations of the State of New Jersey[1] as made applicable by Section 13 of the New York Civil Practice Act.[2] Plaintiffs are non-residents of New York and thus do not come within the exception expressed in that section.

[Statute of the Forum]

The present federal statute of limitations governing private antitrust causes, 69 Stat. 283, 15 U. S. C. § 15b, is not applicable because it applies only to actions begun after January 7, 1956, and this action was begun in 1953. "In the absence of an applicable federal statute of limitations, federal courts look to the statute of the forum". *Bertha Building Corp. v. National Theatres Corp.*, 2 Cir. [1959 TRADE CASES ¶ 69,444], 269 F. 2d 785, 788, decided August 24, 1959, citing *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 397. The limitation statute of the forum to be looked to includes such borrowing provisions as those of Section 13 of the Civil Practice Act. *Seaboard Terminals Corporation v. Standard Oil Co.* [1932-1939 TRADE CASES ¶ 55,188], D. C. S. D. N. Y., 24 F. Supp. 1018, aff'd on opinion below, 104 F. 2d 659; *Electric Theater Co. v. Twentieth Century-Fox F. Corp.* [1953 TRADE CASES ¶ 67,560], D. C. W. D. Mo. W. D., 113 F. Supp. 937, 939; *Walder v. Paramount Publix Corporation* [1955 TRADE CASES ¶ 68,097], D. C. S. D. N. Y., 132 F. Supp. 912, 919. See also *Cope v. Anderson*, 331 U. S. 461, 465.

[New Jersey Statute]

Since the claims which are the subject of this motion arose in New Jersey, see *Seaboard Terminals Corporation v. Standard Oil Co.* and *Walder v. Paramount Publix Corporation, supra*, they are barred under the New York borrowing statute if they are barred under New Jersey law. Therefore, if we find that they are barred under New Jersey law, we need go no further. Our first task will thus be to determine the New Jersey period of limitation.

It is a New Jersey statute of limitations, not a federal statute, that we are applying. We are trying to find out whether when the New Jersey legislature spoke of an action "for any forfeiture upon any penal statute" * * * "when the benefit of the forfeiture and the action therefor is or shall be limited or given to the party ag-

[1] Title 2A, New Jersey Statutes, § 14-10 provides:

"All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed:

* * *

"b. Within 2 years next after the offense committed or to be committed against the statute, or cause of action accrued, when the benefit of the forfeiture and the action therefor is or shall be limited or given to the party aggrieved * * *."

[2] Section 13 provides:

"Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply."

grieved", it meant to include an action like an antitrust action under the Sherman Act for treble damages. We are seeking the meaning of the quoted words when used in a statute of New Jersey; decisions as to their meaning in a statute of the United States or of some other state are important only for such slight bearing as they may have in the determination of what the legislature of New Jersey meant.

[*Type of Action*]

Even if the Sherman Act had declared that an action thereunder for treble damages should not be deemed to be an action upon a penal statute with the benefit of the forfeiture and the action thereon limited or given to the party aggrieved, the question would still be open whether the action was not in fact, if not in its federal name, one of the actions which the New Jersey legislature intended to be within the bar of the two-year statute. Congress and the decisions of the federal courts are supreme in determining the actual nature of a treble damage action under the Sherman Act but the legislature and the decisions of the courts of the state where the action is brought are (or were before the adoption of the federal statute of limitations) supreme in determining whether an action of a nature so determined is within the bar of that state's statute of limitations. See the reliance on a New York decision interpreting New York statutes of limitation in *Bertha Building Corp. v. National Theatres Corp., supra* [1959 TRADE CASES ¶ 69,444], 269 F. 2d 785, 788.

[*Case Distinguished*]

In *Chattanooga Foundry v. Atlanta,* 203 U. S. 390, the Supreme Court held that a treble damage action under the Sherman Act was not an action "for any penalty or forfeiture" within the meaning of the five-year limitation in section 1047 of the Revised Statutes, 28 U. S. C. § 791 (1940 ed.), that since it was not within any federal statute of limitations the Tennessee statute would apply, and that it was not within a Tennessee statute providing that actions for "statute penalties" must be brought "within one year after cause of action accrued" but rather within a Tennessee statute providing that "all other cases" should be brought within ten years. In holding that the one-year "statute penalty" statute did not apply, the Supreme Court affirmed the Circuit Court of Appeals which had reached that result on the authority of Massachusetts, Federal and Tennessee case law construing the word "penalty". The Court's opinion, 127 F. 23, was written by Judge Lurton who had earlier been Chief Justice of the Supreme Court of Tennessee. In affirming, Mr. Justice Holmes said at page 398:

> "Although the decision is appealed from, as this question involves the construction of local law we cannot but attribute weight to the opinion of the judge who rendered the judgment, in view of his experience upon the Supreme Court of Tennessee."

It is true that Justice Holmes in the *Chattanooga* case referred to federal decisions as well. It must be remembered, however, that he was dealing with the laws of but two sovereignties, the United States and the state of the forum. Here we are concerned with the laws of three, the United States, the State of New York and the State of New Jersey. The law of the United States adopts the law of New York and the law of New York adopts the law of New Jersey. If attention is to be paid to any law other than that of New Jersey we would naturally turn first to that of New York. Under the law of that sovereignty it is settled that, where there is interplay of the laws of two sovereignties, the words of a state statute are to be construed in the way that the law of that state construes them. *Matter of Donegan,* 282 N. Y. 285, 290. We are here concerned only with the name that the New Jersey Legislature would have given an action having the nature of this one.

[*Case Followed*]

The decision of the Third Circuit in *Gordon v. Loew's Incorporated* [1957 TRADE CASES ¶ 68,783 and 68,820], 247 F. 2d 451, is precisely in point. The court there held that a case of this type is barred by the two-year statute of limitations, section 14-10 of title 2A of the New Jersey Statutes, set out in footnote 1 above.

Plaintiffs claim that the Third Circuit not only was wrong in attempting to apply the New Jersey law but failed in the attempt. The New Jersey case on which the court relied was *Addiss v. Logan Corporation,* 23 N. J. 142. There the New Jersey Supreme Court held the two-year statute applicable

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to an action under a statute permitting the recovery of three times the amount of a landlord's overcharge of rent. Plaintiffs argue that the *Addiss* case recognized that an action under the antitrust laws was not barred by the two-year statute of limitations. This argument is based on the following portion of the *Addiss* opinion quoted in *Gordon v. Loew's Incorporated* [1957 Trade Cases ¶ 68,820], 247 F. 2d at 456:

> "The statutory penalty of N. J. S. 2A:42-38, N. J. S. A., is both remedial and penal, a factor inferentially recognized in *Friedman v. Podell, supra* [21 N. J. 100, 121 A. 2d 17.] Cf. *Ryan v. Motor Credit Co., Inc.*, 130 N. J. Eq. 531 (Ch. 1941) affirmed 132 N. J. Eq. 398, 28 A. 2d 181, 142 A. L. R. 640 (E. & A. 1942). * * * A further point why the court below was correct in applying the limitation is the desire to prevent actions such as this, having penal characteristics, from being unlimited. See *Boswell v. Robinson*, 33 N. J. L. 273 (Sup. Ct. 1869); *Borough of Fair Lawn v. Fairlawn Transportation, Inc.*, 25 N. J. Misc. 331, 53 A. 2d 628 (Sup. Ct. 1947). But cf. *Shelton Electric Co. v. Victor Talking Mach. Co.*, 277 F. 433 (D. C. N. J. 1922). We concur in the conclusion that the two-year limitation of N. J. S. 2A:14-10(b), N. J. S. A. was applicable to the plaintiffs' causes of action."

Plaintiffs say:

> "In enunciating one of the very reasons for holding the rent overage proceeding penal—namely that otherwise it would be subject to no limitation period—the court in the *Addiss* case *contrasted* that proceeding with the *Shelton* case, an action under the Clayton Act, thereby clearly indicating that such an action was already subject to a limitation statute, to wit, the six year one as held in the *Shelton* case."

This is an ingenious argument based on the form in which the New Jersey court cited the *Shelton* case, but I reject the conclusion. The expression "but cf." is too cryptic to serve as a basis for a conclusion that the court intended by it to approve an apparently contrary case. The expression precedes the citation of the *Shelton* case and follows a statement that the court below was correct in applying the two-year limitation for the further reason that courts incline toward finding limitations for penal actions and a citation of two cases which are applications of that reason. While the court in the *Shelton* case did not say that it was influenced in refusing to apply the two-year statute by the fact that there would still be some limitation of the time during which the claim could still be asserted, it must be admitted that the *Shelton* case did present a state of facts and law where that argument could have been applied. If we assume, as plaintiff urges, that the court in the *Addiss* case did cite the *Shelton* case as an approved example of the successful application of that argument, it is hard to understand the court's use of the conjunction "But" before the abbreviation "cf.". The court in the *Addiss* case, in the beginning of the same paragraph, used the expression "cf.", without any "But", for its usual function of indicating an example of an application of the same rule to a different state of facts rather than an example of a contrary decision. Though delphic, I take the addition of "But" to the "cf." to be a recognition that the cited decision is contrary to the decision below which, in the first part of the preceding sentence, the court had said was correct. Thus it is an indication of disapproval of the *Shelton* case rather than an indication of its approval as an example of the proper result of the absence of facts which would bring into play the just stated "desire to prevent actions * * *, having penal characteristics from being unlimited." The fact that the expression is contained in the same paragraph with the statement of that desire is evidently without significance. That paragraph is quite as much concerned with the general proposition that the two-year statute applies as with the desire to prevent actions from being unlimited. In its beginning it states the conclusion that the action for recovery of three times the overcharge is both remedial and penal. It then passes to the quoted approval of the decision of the court below and discussion of the policy of leaning toward limitations of penal actions, citing cases on that point. Then, set off by full stops, comes the bone of contention, "But cf. *Shelton Electric Co. v. Victor Talking Mach. Co.*, 277 F. 433 (D. C. N. J. 1922)", followed closely by a return to approval of the decision of the court below.

Incidentally, the *Shelton* case, though contrary to *Gordon v. Loew's*, is distinguishable from that at bar in that the Federal Court was applying the New Jersey limitation directly and not through the medium of a borrowing statute of another state.

Aside from the fact that the Third Circuit's opinion in the *Gordon* case, although not binding on this court, is entitled to weight, see *Hardy v. Rossell,* D. C. S. D. N. Y., 135 F. Supp. 260, 266, I quite agree with the *Gordon* holding. It has been twice reaffirmed. *Carlton Lamp Corporation v. General Electric Company,* 3 Cir., 254 F. 2d 815; *Dean Oil Company v. American Oil Company,* 3 Cir. [1958 TRADE CASES ¶ 69,075], 254 F. 2d 816, cert. denied 358 U. S. 835.

[*Holding*]

My decision is thus that the period of limitation which would be applied by the State of New Jersey is two years. Since it is not claimed that there is a shorter period of limitation applicable under the law of the State of New York, all claims accruing with respect to theatres in the State of New Jersey more than two years before the commencement of this action must be dismissed.

Motion granted. Settle order on notice.

[¶ 69,553] United States of America v. The Hoover Company.

In the United States District Court for the Southern District of New York. Civil Action No. 131-68. Filed December 14, 1959.

Case No. 1373 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Resale Price Fixing—Consent Decree—Practices Enjoined—Price Fixing—Price Lists.—A manufacturer of electric vacuum cleaners was prohibited by a consent decree from entering into any agreement to fix prices for the sale of its products to any third person. The manufacturer was also prohibited from disseminating lists of suggested prices for the sale of its products by retailers.

See Resale Price Fixing, Vol. 1, ¶ 3015.20.

Resale Price Fixing—Consent Decree—Practices Enjoined—Boycotts—Coercion—Refusal to Deal.—A manufacturer of electric vacuum cleaners was prohibited by a consent decree from entering into any agreement to prevent retailers from selling to whomever the retailer pleases. The manufacturer was also prohibited from boycotting or refusing to deal with any of its authorized retailers.

See Resale Price Fixing, Vol. 1, ¶ 3015.70.

Resale Price Fixing—Consent Decree—Permissive Provisions—Fair Trade Agreements.—A manufacturer of electric vacuum cleaners was permitted to enforce its lawful fair trade agreements, after one year, in New York and New Jersey, and, immediately, in other states.

See Resale Price Fixing, Vol. 1, ¶ 3015.80.

For the plaintiff: Robert A. Bicks, W. D. Kilgore, Jr., Baddia J. Rashid, Richard B. O'Donnell, Augustus A. Marchetti, and Paul D. Sapienza, Department of Justice.

For the defendant: Cravath, Swaine & Moore, by Albert R. Connolly.

SIDNEY SUGARMAN, District Judge [*In full text*]: The plaintiff, United States of America, having filed its complaint herein on March 17, 1958, and defendant, The Hoover Company, having appeared herein, and the plaintiff and the defendant by their respective attorneys having severally consented to the entry of this Final Judgment without trial and adjudication of any issue of fact or law herein, and without admission by defendant in respect to any such issue;

Now, Therefore, before any testimony has been taken herein, and without the trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as Follows:

I.

[*Jurisdiction*]

This court has jurisdiction of the subject matter herein and the parties hereto. The

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complaint states a claim for relief against the defendant, The Hoover Company, under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as The Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(a) "New York Metropolitan Area" means the area comprising the City of New York, the New York counties of Westchester, Suffolk and Nassau, and the New Jersey counties of Hudson, Bergen, Essex, Union, Passaic and Middlesex;

(b) "Person" means an individual, partnership, firm, association or corporation, or any other legal entity;

(c) "Hoover" means defendant, The Hoover Company, which, together with its subsidiaries and with its officers, directors, employees and agents when acting in such capacities, shall be considered to be one person;

(d) "Hoover cleaners" means electric vacuum cleaners manufactured and sold by Hoover other than cleaners of the type heretofore manufactured and sold by Hoover only to wholesale distributors;

(e) "Fair trade agreement" means any resale price maintenance contract, or supplement thereto, pursuant to which the resale price of Hoover cleaners is lawfully fixed, established or maintained under the fair trade laws of any state, territory or possession and the act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or the act of Congress of July 14, 1952, commonly called the McGuire Act, or any legislation having a similar purpose that may hereafter be enacted.

III.

[*Applicability*]

The provisions of this Final Judgment shall apply to Hoover, its subsidiaries, successors and assigns, and to each of its officers, directors, agents and employees, and to all other persons in active concert and participation with Hoover who shall have received actual notice of this Final Judgment by personal service or otherwise. The provisions of this Final Judgment are not applicable to activities of Hoover or its successors or assigns conducted outside the United States and not affecting the domestic commerce of the United States.

IV.

[*Price Fixing and Price Lists*]

Hoover is enjoined and restrained from:

(a) Entering into, adhering to, or maintaining any contract, agreement, understanding or combination with any other person to fix, stabilize or maintain prices for the sale of Hoover cleaners to any third person; provided, however, that nothing contained in this Section IV shall be deemed to prohibit or restrict Hoover from entering into, adhering to or enforcing fair trade agreements:

(1) From the date of entry of this Final Judgment with respect to sales of Hoover cleaners outside of the States of New York and New Jersey; or

(2) After the expiration of one year from the date of entry of this Final Judgment with respect to any sales.

(b) Disseminating or circulating in any manner for a period of two years from the date of entry of this Final Judgment to any retail dealer in the New York Metropolitan Area (or to any retail store in the New York Metropolitan Area owned or operated by a retail dealer outside of the New York Metropolitan Area) price lists containing suggested prices for the sale of Hoover cleaners by retail dealers.

V.

[*Refusal to Deal—Coercion*]

Hoover is enjoined and restrained from entering into, adhering to or maintaining, with any other person, any contract, agreement, understanding, plan or program to prevent any retail dealer from selling or shipping Hoover cleaners to whom or wherever the retail dealers desires to sell.

VI.

[*Boycotts—Refusal to Deal*]

Hoover is enjoined and restrained, for a period of five years from the date of entry of this Final Judgment, from

(a) boycotting or otherwise refusing to deal with, or from threatening to boycott or otherwise to refuse to deal with any

retail dealer in the New York Metropolitan Area regularly designated by defendant to act as such dealer for the sale of Hoover cleaners who adequately represents defendant in the sale of Hoover cleaners and who complies with defendant's reasonable standards for such retail dealers not inconsistent with any of the terms of this Final Judgment; and

(b) impeding or restricting, or from attempting to impede or restrict, directly or indirectly, the free choice of any such retail dealer in selecting the latter's customers for Hoover cleaners.

VII.

[*Notice of Judgment*]

Hoover is ordered and directed, within sixty (60) days from the date of entry of this Final Judgment, to mail a copy thereof to each of its franchised retail dealers in the New York Metropolitan Area and to each other person who was a franchised retail dealer in the New York Metropolitan Area on February 1, 1955, at the most recent address of such other person appearing on Hoover's records, and within thirty (30) days after such mailing, to file with this Court, with a copy to the plaintiff herein, a report of compliance with this Section VII.

VIII.

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Hoover at its principal office, be permitted, subject to any legally recognized privilege, (a) reasonable access, during office hours, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Hoover, relating to any of the matters contained in this Final Judgment and (b) subject to the reasonable convenience of Hoover, and without restraint or interference from it, to interview regarding any such matters officers and employees of Hoover, who may have counsel present.

Upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, Hoover shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

IX.

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, the enforcement of compliance therewith and the punishment of violations thereof.

[¶ 69,554] United States of America v. The Procter & Gamble Company, et al.

In the United States District Court for the District of New Jersey. Civil Action No. 1196-52. Dated December 10, 1959.

Case No. 1150 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Suit for Injunctive Relief—Discovery and Production of Evidence—Discovery of Grand Jury Testimony Where Government Decided To Institute Civil Rather Than Criminal Proceedings—Suppression—Disclosure.—Where a grand jury sat for a year and a half and the government decided eleven days before termination of such proceeding to institute a civil rather than a

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criminal action, the court denied defendant's motions for suppression, for impounding, or for full disclosure of all testimony before the jury and leads derived from it. It was held that a wiser method of placing the parties on an equal basis was generally by making the evidence in question available to both sides rather than by making the evidence basic to the cause unavailable to either side by its suppression or impounding. In determining how much disclosure was permissible in the instant case the court looked to *U. S. v. Procter & Gamble Co.*, 1958 Trade Cases ¶ 69,046, and interpreted it as holding that (1) if the Government's use of the grand jury had been completely wrong from the beginning the entire grand jury transcript was discoverable to the defendants without the showing of other cause; (2) but if there was a subversion by the partial unlawful use of the grand jury for a purely civil purpose, then *that portion* of the transcript was to be discovered wholesale without the showing of other particularized cause; and (3) if the testimony was properly taken before the grand jury, then, before the defendants become entitled to any disclosure, they must show particularized cause. The facts of the instant case have placed it within points (2) and (3). Thus, the testimony given in the eleven days prior to termination of the grand jury during which the government had made up its mind to pursue the civil remedy has been fully disclosed to the defendants. As to the remaining testimony the instant opinion held that it was properly taken before the grand jury and that defendants become entitled to it only when they show good cause. Such good cause was shown where a witness had died without making his grand jury testimony available to the defendants.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225, 8225.593.

For the plaintiff: Chester A. Weidenburner, U. S. Attorney, by Charles H. Hoens, Jr., Assistant U. S. Attorney; and Miss Margaret Brass, Antitrust Div., Dept. of Justice.

For the defendants: O'Mara, Schumann, Davis & Lynch; and Cahill, Gordon, Reindel & Ohl, by Mathias Correa, for Colgate-Palmolive Co. Bailey & Schenck; and Arnold, Fortas & Porter, by Abe Fortas, for Lever Brothers Co. Toner, Crowley, Woelper & Vanderbilt; Royall, Koegel, Harris & Caskey, by Kenneth C. Royall; Dinsmore, Shohl, Dinsmore & Todd, by Joseph Dinsmore; and Taft, Stettinius & Hollister, by Charles Sawyer, for Procter & Gamble Co. Davies, Richberg, Tydings, Landa & Duff, by Shelby Fitze; and McCarter & English for Association of American Soap & Glycerine Producers, Inc.

For a prior opinion of the U. S. Supreme Court, see 1958 Trade Cases ¶ 69,046; for prior opinions of the U. S. District Court, District Court of New Jersey, see 1959 Trade Cases ¶ 69,385, 69,333, and 69,260, 1956 Trade Cases ¶ 68,488, 68,457, and 68,335, 1955 Trade Cases ¶ 68,228, 1954 Trade Cases ¶ 67,677, and 1953 Trade Cases ¶ 67,497.

[*Grand Jury Testimony*]

Hartshorne, Judge [*In full text*]: In seeking to implement the opinion of our highest Court in this very case, *U. S. v. Procter & Gamble, et al.* [1958 Trade Cases ¶ 69,046], 356 U. S. 677 (1957), this Court held, in its opinion filed herein on June 9, 1959 [1959 Trade Cases ¶ 69,385], 174 F. Supp. 233 (D. C. N. J.):

> "The critical question thus is, when this case first became only 'a civil case.' From that time on, our highest court has said that using the Grand Jury to elicit evidence in that case * * * would require that any advantage thus obtained improperly by the Government be wiped out, by giving the opposing party the use of so much of the Grand Jury transcript as was thus obtained by a criminal procedure in a purely civil case."

Following this defendants ascertained that while, according to the written instructions given those in charge of the Grand Jury proceedings herein, same were originally to be conducted both for criminal and civil purposes thereafter, as stated by this Court, "on November 14, 1952, the then Attorney General decided not to ask for the return of an indictment by the Grand Jury upon the basis of the evidence previously taken before that body." *U. S. v. Procter & Gamble, et al.* [1959 Trade Cases ¶ 69,458], 175 F. Supp. 198 (D. C. N. J.). Accordingly, defendants asked for, and have received, the transcript of the proceedings of the Grand Jury on and after that date until the termination of such proceedings on November 25, 1952.

However, our highest Court, in its above decision, which reversed the order for complete discovery of the Grand Jury proceedings herein by another branch of this Court, held (1) that such discovery would lie only where the plaintiff Government had used the criminal process of a Grand Jury in a purely civil proceeding; (2) as to particular Grand Jury testimony, that "a much more particularized, more discreet showing of need is necessary to establish 'good cause'" for its discovery in order to overcome the "indispensable secrecy of Grand Jury proceedings"; and (3) that the "delay and substantial costs" caused defendants by taking depositions "fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done." *Procter & Gamble, supra,* p. 682.

[*Particularized Good Cause*]

Thus, so far as defendants may desire any additional transcript of such Grand Jury proceedings, they must show additional particularized good cause. In certain aspects this has apparently been done. Defendants have moved to be shown the transcript of the testimony of one Reilly, a witness since deceased, whose testimony is therefore unavailable to them on deposition. Barring the fact that this witness has made available to defendants a really complete memorandum of all his Grand Jury testimony, which, if subject to question, must be decided impartially, his Grand Jury testimony should therefore be made available to the defendants who desire it, in order that they be placed on a substantial parity with plaintiff.

Not content with the above aid obtained from this Court, defendants further move that (1) the entire Grand Jury transcript should be suppressed from use by plaintiff Government, not only *per se,* but as to any leads therefrom which the Government may have obtained; (2) all the testimony before the Grand Jury should be turned over to it; and (3) all such testimony should be impounded, including any leads which plaintiff Government might have obtained therefrom, permitting disclosure only on special cause shown.

[*Balancing the Equities*]

In deciding if any of this additional relief is to be granted to the defendants, the prime requisite is to determine, bearing in mind the normal secrecy of Grand Jury proceedings, what will do justice to both parties—to the defendants, on the one hand, and, on the other, to the plaintiff Government, representing the public in carrying out the Congressional mandate of enforcing the antitrust acts. The fact is that over seven years ago a Grand Jury sat for a year and a half in this matter and heard some thirty witnesses, who produced literally hundreds of thousands of documents. Such evidence obviously constitutes the essential basis of the case of the plaintiff Government. Either the suppression of all this information and the leads obtained by the Government therefrom, or the impounding of all that information and those leads from the Government, will practically put an end to the Government's case, and will make it impossible for the Department of Justice to attempt to carry out the Congressional will in that regard. The only way conceivable to this Court by which such impounding could fail to prevent the Government from carrying out its duty under Section 4 of the Sherman Act, would be to have plaintiff Government again seek, on deposition, to obtain these same thirty witnesses and these same hundreds of thousands of documents. Since the Government called its first Grand Jury witness upon the basis of a lead obtained other than through the Grand Jury, it is possible that it could take the deposition of such witness and thereafter, step by step pursue this procedure to the bitter end. But this procedure would obviously take much longer than the year and a half it took the Grand Jury over seven years ago. At each step the Government would have to prove, under the proposed impoundment procedure, that its leads as to such step did not come from its Grand Jury information but from other sources. Then, after all this, the utmost that could be expected would be that the Government would be in exactly the same position as it is now. Surely another remedy should be sought rather than any such impracticable technique. That another just remedy is available has been indicated by the Supreme Court itself in *Procter & Gamble, supra,* in holding that disclosure to the defendants, as above indicated, would meet the needs of justice, either partially, on the showing of "particularized * * * good cause" or "wholesale" to the extent that "the criminal procedure is subverted." Thereby the plaintiff, without preventing it from

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doing its official duty, will have been deprived of any undue advantage it has gained by taking this limited amount of evidence for a purely civil purpose before the Grand Jury rather than in public, 15 U. S. C. par. 30, and be compelled to place the defendants on a substantial equality with it.

Surely this is a wiser method of placing the parties on an equal basis—by making the evidence in question available to both sides—rather than by making the evidence basic to the cause unavailable to either side by its suppression or impounding, and thereby defeating the national policy as to the enforcement of the antitrust laws. There are, moreover, additional reasons why either suppression or impounding is not an appropriate remedy.

Suppression

Suppression is generally confined as a remedy to punish the Government's violation of the Fourth Amendment to the United States Constitution, of such basic importance to the public in safeguarding it from unreasonable searches and seizures, or its equivalent in wire tapping. *Silverthorne Lumber Company v. U. S.,* 251 U. S. 385 (1920); *Nardone v. U. S.,* 308 U. S. 338 (1939); *U. S. v. Wallace Company* [1948-1949 Trade Cases ¶ 62,414], 336 U. S. 793 (1949); *U. S. v. Coplon,* 185 F. 2d 627, 636, cert. den. 342 U. S. 920; *U. S. v. Goldstein,* 120 F. 2d 485, 488, affirmed 316 U. S. 114, 120; *Rogers v. U. S.,* 97 F. 2d 691 (1 Cir. 1938); *Schenck v. Ward,* 24 F. Supp. 776 (D. C. Mass. 1938); *Ex Parte Jackson,* 263 F. 110 (D. C. Mont. 1920).

As is stated in *Wallace, supra:*

> "The Silverthorne exclusionary rule, as explained in that case and others, is designed to safeguard the privacy of people, and to prevent seizure of their papers and property, except in compliance with valid judicial process. As tersely stated in the Silverthorne case, the rule's purpose is to prevent the 4th Amendment from being reduced to 'a form of words'."

But here there was neither a "search and seizure", a violation of the Fourth Amendment, nor a wire tapping. Everything that was done by the Government was done under judicial process, the very subpoenas used in these Grand Jury proceedings having been carefully delimited by Judge Forman, sitting in general charge of the Grand Jury. Hence these subpoenas, under *Oklahoma Press Publishing Company v. Walling,* 327 U. S. 186 (1946), do not constitute even "a constructive search and seizure" making the Fourth Amendment applicable. Moreover, in *Wallace, supra,* where the Grand Jury itself was held invalid, our highest Court held that the plaintiff Government could use, in a civil suit, as here, the documents previously produced before this illegally constituted Grand Jury. If such evidence, though used before an illegally constituted Grand Jury, is later usable in a civil suit, *a fortiori* it should be available in this civil suit when used before a legally constituted Grand Jury.

Again, suppression is a peculiarly appropriate remedy in an unlawful search and seizure case, where disclosure of such evidence to defendants in a criminal case would do them no good at all. Here, on the other hand, the remedy of disclosure to the defendants, if due at all, would aid them in this civil suit by placing the parties on the relative equality which civil procedure requires. Thus the defendants' search and seizure argument does not suffice to require a change in the remedy already given them, to put them on a substantial equality with plaintiff.

[*Suppression of Depositions*]

Nor is the defendants' argument by analogy as to the suppression of depositions any more convincing. Of course, since a deposition may itself be used as substantive evidence in a trial, it is necessary that such deposition be taken on notice to the adversary, giving him the right to be heard and to cross-examine thereon. Thus, if such rights are not given, such deposition may be suppressed to prevent its use as such evidence at the trial. F. R. C. P. 32. However, the testimony of a witness before a Grand Jury can never be used as substantive evidence at the trial. It is there usable only to affect the credibility of a witness. The above analogy is thus a false one. In addition, the suppression sought here—to prevent the Government from any access whatever not only to that evidence but to any leads obtained therefrom—is far different and more stringent than the suppression of a deposition from use at the trial as substantive evidence, as referred to in the above Rule. This distinction is alluded to in *Palmer v. Fisher,* 228 F. 2d 603 (7 Cir. 1955), cert. den. 351 U. S. 956 (1956), where the Court

held that the deposition would be suppressed from use as substantive evidence at the trial, but would not be destroyed, since it might thereafter become usable to impeach a trial witness, just as would testimony before a Grand Jury.

In short, the reasons advanced by the defendants for granting the additional relief requested, of suppression of the Grand Jury testimony and all leads obtained by the Government therefrom, would seem unsound, and such suppression, if it occurred, would here render it practically impossible for the plaintiff Government to carry out the Congressional will of effectuating the policy of the antitrust acts. To order such suppression thus would not seem to be the exercise of sound discretion on the part of the trial court, particularly in the light of the fact that the defendants have already received the aid of the Court in placing them on a substantial equality with the plaintiff Government, in accordance with the opinion of our highest Court in this very case.

Impounding

As to the impounding of all the Grand Jury testimony, much the same reasons apply, since the result of such impounding would be substantially the same as its suppression. Thereby plaintiff Government's case would have been stripped bare of its evidence, and this after over seven years of work, including the production of a large number of witnesses and literally hundreds of thousands of documents, and its compliance with the Congressional mandate of the antitrust laws would thereby be prevented.

Of course, that is not to say that the suggestion as to impounding made in the *Procter & Gamble* concurring opinion by a single Justice, might not be a proper exercise of discretion by the trial judge, were plaintiff Government to have wilfully flouted the law from the beginning by using the Grand Jury for purely civil purposes. The possibility that that practice of the Government had been followed in this case doubtless had great weight in the making of the above suggestion. But such are not the facts in this cause as now developed. Thus the prime reason for the impounding suggestion has now been found nonexistent. Moreover, the second reason advanced—because of the finding of a "no true bill" by the Grand Jury—does not accord with the opinion of the Court itself in *Procter & Gamble, supra,* which says:

> "The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case." p. 684

Indeed, there are certain additional reasons why impounding such evidence from the use of the Department of Justice would not be a wise exercise of discretion in this cause.

[*Government's Right to Transcript Copy*]

(a) Plaintiff Government is now rightfully entitled to at least a stenographic copy of the transcript of the Grand Jury evidence, as distinguished from its deliberations and the vote of any juror. The Grand Jury proceedings here have been presently proven to have been started for a criminal as well as a civil purpose, and to have continued in that way until within a week or so from the discharge of the Grand Jury in this case. Thus, previous to that brief terminal period, now cured by disclosure of same to the defendants, we have a situation where "what seemed at the beginning to be a case with a criminal cast apparently took on a different character as the events and transactions were disclosed. The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case." *Procter & Gamble,* p. 684. Such is admittedly the present reason for the holding of this transcript by the Department of Justice.

(b) Not only does this action by the attorneys for the Department of Justice thus accord with this decision by our highest Court in this very case, but it also accords with the very reason why Congress authorized the making of a stenographic transcript of Grand Jury evidence. Under the Federal Rules of Criminal Procedure—and plaintiff was here pursuing criminal procedure with this Grand Jury—"* * * a stenographer may be present while the Grand Jury is in session * * *". F. R. Cr. P. 6(d). However, this had not always been the law, the Federal courts having split on the authority of a stenographer to be present during Grand Jury sessions.[1] Since, admittedly, it would help the prosecuting officer in the preparation of his case

[1] Cf. *Wilson v. U. S.,* 229 F. 334 (2 Cir. 1916); *Latham v. U. S.,* 226 F. 420 (5 Cir. 1915).

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for trial to have the stenographic report of the testimony of the witnesses given before the Grand Jury, see *Latham,* Congress accordingly enacted a statute to that effect, 48 Stat. 58, 18 U. S. C. 556, which amended Section 1025 of the Revised Statutes by providing for the taking of testimony before the Grand Jury by "stenographers employed in a clerical capacity to assist the District Attorney or other counsel for the Government", approved May 18, 1933. That the history of this legislation is to the same effect see Sen. Rep. 64, 73rd Cong. 1st Sess., to which is appended on explanatory letter from the then Attorney General to the Chairman of the Senate Committee on the Judiciary, alluding to the District Attorney's need for this stenographic assistance. In addition, in the notes to the Federal Rules of Criminal Procedure, appearing in Sen. Doc. No. 175, 79th Cong. 2d Sess., it is shown that Rule F. R. Cr. P. 6(d) is intended to cover the above statute. See also *U. S. v. Weathers,* 21 F. Supp. 763 (N. D. Ga. 1937). Since the Government attorney in charge of the Grand Jury has a stenographer to take this evidence to assist him in the preparation of his case for trial, the Department of Justice here clearly has the right to retain at least a copy of this transcript for that very purpose, quite regardless of whether the original transcript should, or should not, be lodged with the Clerk of the Court, since the Grand Jury itself is an arm of the Court. *Cobbledick v. U. S.,* 1940 [1940-1943 Trade Cases ¶ 56,011], 309 U. S. 323, 327.

(c) Further, it is specifically provided by the Federal Rules of Criminal Procedure that "disclosure of matters occurring before the Grand Jury other than its deliberations and the vote of any juror may be made to the attorneys for the Government for use in the performance of their duties" F. R. Cr. P. 6(e). These duties of the Government attorneys include not only pressing indictments found by a Grand Jury, but ascertaining from the evidence presented to a Grand Jury whether criminal violations of the Sherman Act have occurred and are therefore apt to occur in the future, which should therefore be enjoined. 15 U. S. C. A. par. 4.

[*Civil Injunctions under the Sherman Act*]

Note that the Sherman Act is primarily a criminal statute, its first three sections declaring certain acts illegal and prescribing punishment therefor. Furthermore, while Section 4 prescribes an equitable remedy, it does not open wide the door of a court of equity to enjoin all manner of contracts, combinations in the form of trusts, or otherwise, or conspiracies or monopolies in restraint of trade. It specifically invests the Federal courts with jurisdiction "to prevent and restrain violations of Sections 1-7 of this Title." Thus no injunction will lie save to prevent probable criminal violations of the Act. *U. S. v. Swift,* 188 F. 92, 96 (N. D. Ill. 1911); *Standard Sanitary Manufacturing Company v. U. S.,* 226 U. S. 20, 52 (1912); *In re Petroleum Industry Investigation* [1957 Trade Cases ¶ 68,774], 152 F. Supp. 646 (E. D. Va. 1957). Hence in a Grand Jury inquiry under the Sherman Act the prime question always must be either whether criminal violations of such Act have occurred or are apt to occur in the immediate future. Since this inquiry is therefore as to criminal violations, if the use of the Grand Jury is proper at all, the above "duties" of "the attorneys for the Government", as provided by the above Rule, refer to their duties in determining whether criminal violations have occurred or are apt to recur—an inquiry into criminal matters. Accordingly, under the above Rule, the disclosure of matters occurring before the Grand Jury which is to be made to the attorneys for the Government for use in the performance of their duties covers matters bearing on criminal violations, whether in the end such evidence as to such criminal violations is used as a basis for an indictment for such violations or as a basis for an injunction to prevent such violations from recurring in the future. In either event, the attorneys for the Government are entitled to such disclosure, and such disclosure to them for such purpose is no violation of the normal Grand Jury secrecy.

To this effect, see *U. S. v. U. S. District Court* [1956 Trade Cases ¶ 68,540], 238 F. 2d 713 (4 Cir. 1956), cert. den. 77 S. C. 382, and *In re Petroleum Industry Investigation, supra.* In the first of these cases the Circuit Court reversed the District Court order which directed that, if the Grand Jury found no indictment, its transcript was to be returned by the U. S. Attorney to the Court Clerk. Thus this case held that the transcript could be used by the attorneys in charge of the Grand Jury for either civil or criminal

purposes, provided it was rightfully called in the beginning for criminal purposes. To the same effect is the *Petroleum Industry* case, where the Court said:

> "Akin is the anticipated use by the Government of the documents, or the knowledge derived from them, in a civil action should the grand jury not indict. A civil suit predicated on antitrust or similar legislation, when brought by the Government, is in fact and in law a prosecution. Its aim is not compensation but correction. The obligation of the Justice Department to invoke civil remedies in an appropriate situation is just as bounden as its duty to institute requisite criminal proceedings. Consequently, if books and papers coming to the knowledge of the Government's attorneys in a grand jury investigation develop a demand, and an adequacy of proof, for resort to civil litigation in the public interest, it is certainly proper, indeed incumbent upon them, to use for that purpose the information in their hands."

Defendants argue that F. R. Cr. P. 6(e), referring to the right of the U. S. Attorneys to have disclosure of the Grand Jury transcript "in the performance of their duties" only refers to their duties in criminal proceedings, because of the reference of Rule 1 to "criminal proceedings." But this would seem an unduly restrictive construction of Rule 6(e). For instance, both *Procter & Gamble* and *Wallace* have held that the U. S. Attorneys could use this transcript in the conduct of this civil suit. In *Procter & Gamble* the Court expressly said:

> "The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case."

Furthermore, even as to evidence taken for a civil case only, which should thus have been taken publicly and not before a Grand Jury, *Procter & Gamble* recognized that the "attorneys for the Government" should still "use" this evidence "in the performance of their duties," only they should share its use with defendants to create civil equality in that regard. In fact, *Wallace* held that they could do so, even though the Grand Jury, of whose proceedings the transcript was made, was illegal. As *Procter & Gamble, supra,* and *Wallace, supra,* show, Rule 6(e) is not intended to be so narrowly construed.

[*Cases Distinguished*]

Indeed, this situation under the Sherman Act, where civil injunction proceedings are dependent upon past and probable future criminal violations, may well constitute an important difference between the separate civil and criminal proceedings which may be taken by the Government in other situations, such as failure to live up to the tax laws. There, for instance, a criminal violation leading to an indictment is one thing. But the mere failure to pay the tax due, giving rise to a civil liability by suit or a jeopardy assessment, is an entirely different matter, in nowise dependent upon whether or not there has been a criminal violation. Due to this difference, the case of *In re April 1956 Term Grand Jury,* 239 F. 2d 263 (7 Cir. 1956), upon which the defendants much rely, involving such a tax situation, is not helpful to them. In that case there was the strongest evidence indicating that the Grand Jury in question had been called to seek evidence, not for the purpose of indicting those subject to a tax investigation, but to turn this evidence over to the Internal Revenue agents for them to pursue their entirely separate civil remedy against such parties. In that case there was, therefore, not only a disclosure to these third party agents by those in charge of the Grand Jury, contrary to the provisions of the above court rules, but these agents were real outsiders insofar as the criminal investigation by the Grand Jury was concerned. This disclosure to third parties, if it occurred for the above purpose, thus constituted a violation of Grand Jury secrecy, calling for a remedy to be applied by the Court against the Government. But such an unlawful violation of Grand Jury secrecy has not occurred in the case at bar. This, of course, is quite outside of the fact that in this case our highest Court has already held that in this Sherman Act situation, even if there had been a subversion of the Grand Jury by using it for a purely civil purpose, the appropriate remedy was not to impound this basic evidence from the plaintiff Government, but to equalize the position of the parties by turning over so much of such testimony as was a subversion to the other side as well.

Nor do the authorities otherwise relied on by the defendants aid them. This Court has already shown the inapplicability of *In re April 1956 Term Grand Jury, supra.* As to the other cases on which the defendants rely, *U. S. v. Byoir* [1944-1945 TRADE CASES ¶ 57,324], 58 F. Supp. 273 (N. D. Tex. 1945),

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aff'd 147 F. 2d 336 (5 Cir. 1945); *Application of Bendix Aviation Corporation,* 58 F. Supp. 953 (D. C. S. D. N. Y. 1945); *U. S. v. Crolich,* 101 F. Supp. 782 (S. C. Ala. 1952); *In re Bullock,* 103 F. Supp. 639 (D. C. D. C. 1952), not a single one, save *Bendix,* involves the impounding of Grand Jury evidence from the Government, and *Bendix* involves an impounding, not against the Government, such as defendants seek, but for the benefit of the Government. Each of the other cases involves not the impounding of evidence, but the disclosure of evidence. In *Byoir,* the U. S. Attorney in the Texas District disclosed the Grand Jury evidence taken there to the U. S. Attorney in the Illinois District, resulting in Byoir's indictment there. Byoir, because of this discovery to others than those in charge of the Grand Jury, a situation not existing here, was similarly granted discovery of such evidence. In *Crolich,* the U. S. Attorney in charge of the Grand Jury proceedings, involving corrupt election practices, asked the Court to turn over the Grand Jury transcript to the local County officials, not Federal officials, which the Court refused to do. In *Bullock,* the Commissioners of the District of Columbia asked the Court to turn over to them the Federal Grand Jury minutes covering the alleged derelictions in duty on the part of Police Inspector Bullock, and on the part of some third parties. Insofar as these other individuals were concerned, the Court refused to disclose the transcript to these Commissioners, third parties as far as the Grand Jury was concerned. But it did turn over the transcript so far as it affected the Police Inspector, on the theory that the Commissioner's responsibility for his doing his duty was good cause to breach the normal Grand Jury secrecy. Obviously, none of these authorities, dealing with disclosure of Grand Jury transcripts or the Court's refusal so to disclose, supports the impoundment sought in the case at bar. Nor does *Bendix* support the defendants. There a Grand Jury was called in the Southern District of New York to consider whether Bendix had violated the Sherman Act. No indictment having been returned, a similar civil action was instituted in the New Jersey District. When the defendant sought the return of its papers submitted to the Grand Jury, the New York court directed that they be not redelivered to the defendant, in order to "permit the Department of Justice to make prompt application to the District Court in New Jersey for an order impounding the papers which are the subject of the petition." This stay was later effectuated by agreement of the parties and order thereon, so as to safeguard to the Government its use of these papers on the trial of the civil cause in the New Jersey District. This is the equivalent of what plaintiff Government seeks to do here in holding the Grand Jury transcript.

Disclosure

We come now to the defendants' motion, made alternatively, to grant full disclosure of the Grand Jury testimony in lieu of suppression of such testimony.

Defendants argue (1) that they have shown *prima facie* that the Government has abused the Grand Jury process and that this likely occurred at the outset of the Grand Jury proceedings and therefore they are entitled to full disclosure; (2) that even if the abuse did not occur until November 14, 1952, they should be granted full disclosure as the Grand Jury proceedings are an entity, and to give meaning to the testimony subsequent to November 14, 1952 it is necessary to see the prior testimony; (3) that under the Supreme Court's opinion in this case [1958 Trade Cases ¶ 69,046], 356 U. S. 677 (1958) they are entitled to full disclosure whenever an abuse is discovered.

As to the first contention, the simplest answer is that the Government has clearly answered any such inference by its answer to Special Interrogatory No. 1 of July 1, 1959, dated July 20, 1959, by stating that November 14, 1952 was the date when the Attorney General decided not to seek an indictment. Furthermore, the letter of the Attorney General to Walker Smith, set forth in this Court's opinion of June 9, 1959 in the instant case [1959 Trade Cases ¶ 69,385], 174 F. Supp. 233, must be taken to mean what it says, barring evidence to the contrary, of which none has yet been shown.

Since no clear evidence has been introduced by the defendants to rebut the statements described above, this argument must therefore fall. In any event, if it is later shown that the Government's decision to use the Grand Jury for solely civil purposes occurred earlier than presently believed, then, in accordance with this Court's opinions filed herein, as above, defendants will be

entitled to receive the Grand Jury transcript from that day on.

[*Interpretation of Prior Supreme Court Case*]

As to defendants' second argument that the disclosure to them of all the rest of the Grand Jury testimony would make clearer to them the meaning of the testimony subsequent to that of November 14, 1952, this is clearly insubstantial. As the Supreme Court has said, they can obtain this aid by deposition. The situation is not one showing "a particularized need", sufficient to lift the secrecy of Grand Jury proceedings, *Procter & Gamble,* p. 682.

The defendants finally contend that once the Government has been proven to have misused the Grand Jury to take evidence in a solely civil case, as it did here for the last week or so out of the Grand Jury sessions for well over a year, there should be a disclosure to them, not simply of the testimony during the period of this misuse, but of the entire period. They argue that such is the meaning of the final sentence in *Procter & Gamble,* p. 684:

> "It is only when the criminal procedure is subverted that 'good cause' for *wholesale* discovery and production of a Grand Jury transcript would be warranted."

However, the whole Court, including the dissenting Justices, apparently agree that if the Grand Jury proceedings had been *instituted* for a solely civil purpose, then, since the testimony should have been taken publicly and not privately, according to the statutory requirement, the *entire* Grand Jury transcript should be disclosed to the defendants.

> "The Court recognizes that had the Government's grand jury investigation been *instituted* solely in aid of a civil suit —that is without any thought of obtaining an indictment—the appellees would then have been entitled to see the *entire* grand jury transcript." Dissenting opinion, p. 689 (Italics this Court's).

On the other hand, if "the criminal procedure is subverted" at all, then *wholesale,* not *entire,* discovery of the transcript would be warranted. This allusion to *wholesale* discovery, because of the subversion of the criminal procedure, is contradistinguished by the Court in the majority opinion from its immediately preceding allusion to discovery for particularized cause shown. In short, *Procter & Gamble* holds that (a) if the Government's use of the Grand Jury has been completely wrong from the beginning, the "entire Grand Jury transcript" is discoverable to the defendants without the showing of other cause; (b) but if there is a subversion by the partial unlawful use of the Grand Jury for a purely civil purpose, then that portion of the transcript is to be discovered wholesale, without the showing of other particularized cause. Finally, (c) if the testimony is properly taken before the Grand Jury, then, before the defendants are entitled to any disclosure, they must show particularized good cause. As to the defendants' motion for full disclosure of the Grand Jury testimony, this Court therefore adheres to its opinions previously referred to herein.

[*Motion Denied*]

The motions of the defendants for suppression, for impounding, and for full disclosure, of the testimony before the Grand Jury here are therefore denied under the present proofs, save as already disclosed, and as indicated as to the deceased witness.

An order may be entered accordingly.

[¶ 69,555] Morand Bros. Beverage Co. v. National Distillers and Chemical Corporation and Gold Seal Liquors, Inc.

In the United States District Court for the Northern District of Illinois. No. 58 C 1763. Filed November 18, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Counterclaim to Civil Damage Action—Entry of Judgment on One of Several Claims—Appealability—"No Just Reason for Delay"—Certification of Trial Judge.—A summary judgment granting a counterclaim for liquor bought and sold was entered before the final disposition of a civil damage action brought under the antitrust laws. The court found that there was "no just reason for delay"

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because the judgment (1) settled the counterclaim in its entirety, (2) concluded an issue which was completely separable from that raised in the complaint, and (3) would not impede the trial of the principal issue, since there was a stay of the enforcement of the judgment. Thus, entry of summary judgment on the counterclaim would simplify the issues and facilitate the conduct of the trial. Enforcement of the judgment was stayed, however, until judgment was entered on the issues raised by the complaint.

Private Enforcement and Procedure, Vol. 2, ¶ 9015.12.

For the plaintiff: Richard L. Mandel and Marcus Wexman, Chicago, Ill.

For the defendant: Wilson & McIlvaine (by K. F. Montgomery, G. E. Hale, and Peter A. Dammann), Chicago, Ill., for National Distillers and Chemical Corp., and Thomas C. McConnell and Francis J. McConnell, Chicago, Ill., for Gold Seal Liquors, Inc.

Memorandum on Motion of National Distillers and Chemical Corporation on its Motion for Summary Judgment on the Counterclaim

[*Counterclaim—Motion for Judgment*]

EDWIN A. ROBSON, District Judge [*In full text*]: Defendant National Distillers and Chemical Corporation has filed a counterclaim which after allowing a credit is for $192,966.22, and represents the balance due from plaintiff to defendant for liquor purchased. Invoices for the purchases are appended, and disclose none to have been for beer. Defendant has moved for summary judgment on the counterclaim (which was amended to allow a credit on the sum owed).

[*Defenses to Counterclaim*]

Plaintiff's answer to the counterclaim predicates a defense on the ground that a far greater sum is owed to plaintiff because of the defendant's violation of the antitrust acts; that no recovery may be had by defendant of plaintiff for the sums owed because the transactions arose out of defendant's acts in violation of the said statutes, and that a portion of the money sued for is based upon goods sold to the plaintiff more than 30 days after it first received credit and therefore not collectible under the laws of Illinois. It makes no defense, however, as to the accuracy of the amount claimed as owing, or denial of the existence of the debt.

[*"No Just Reason for Delay"*]

Rule 54(b) of the Federal Rules of Civil Procedure provides for partial judgment thus:

> "When more than one claim for relief is presented in an action, . . . [or] as a . . . counterclaim, . . . the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The Court is of the opinion that the decision in *Kelly v. Kosuga* [1959 TRADE CASES ¶ 69,283], 358 U. S. 516, is determinative here of the right of defendant to a judgment upon its counterclaim, holding as it does that the affirmative defense of the buyer should be stricken, which defense to a suit for the unpaid balance due in respect to a lawful sale for a fair consideration, was to the effect that the sale was made pursuant to and as an indivisable part of an agreement which violated the Sherman Antitrust Act. The Court there said: (pp. 518, 520, 521)

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold."
>
> "If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general. . . . Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'"
>
> "Supplying a sanction for the violation of the Act, not in terms provided and

capricious in its operation, . . . is avoided by treating the defense as so confined."

[*Separate Claim*]

The Court is of the opinion that the counterclaim is a completely separate claim in this instance for goods bought and sold. The charges of the complaint pertaining to the alleged violations of the antitrust acts in the relationship between National Distillers and Chemical Corporation, and Gold Seal Liquors, Inc., which gave rise to alleged illegal preference to Gold Seal Liquors, Inc. to the great detriment of plaintiff, do not go to the fact that plaintiff bought and received, and is therefore liable to pay for the products sold to it by defendant, National Distillers and Chemical Corporation.

The Court believes the granting of this judgment on the counterclaim is not violative of the principle enunciated in *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.* [1959 TRADE CASES ¶ 69,488] (No. 12669 decided October 20, 1959 by C. A. 7), wherein the Court of Appeals found an abuse of discretion in the granting of a certification that there was no just reason for delay in the entry of a final judgment on one of the three parts of the counterclaim. The established principle is to preclude piece-meal appeals and avoid delay in the trial of the principal claim or the remaining portions of the counterclaim. The Court found the judgment there did not in any way either simplify or facilitate the conduct of the future litigation. Such partial judgment should not be entered unless there is hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal.

[*Grounds for Granting the Motion*]

The granting of this summary judgment on the counterclaim settles the counterclaim *in its entirety,* and concludes an issue which is completely separable from that raised in the complaint. It is a simplification of the issues and does facilitate the conduct of the trial of the complaint. Nor will the entry of the judgment impede the trial of the principal issue since there will be a stay of the enforcement of the judgment. There is no just reason for a delay in the entry of this summary judgment. The only real defense raised by plaintiff to the counterclaim is that the Illinois statute makes a portion of the amount sought under the counterclaim uncollectible, being based upon goods sold more than 30 days after it first received credit. However, that statute (Chap. 43, Sec. 122) is expressly applicable to persons having a *retailer's license,* whereas plaintiff alleges in its complaint that it is a licensed *wholesale* distributor. There is a further provision in the same statute pertaining to the sale of beer on credit, but the invoices appended to the pleadings reveal that beer sales were not involved here.

[*Stay of Enforcement*]

The Court, however, directs a stay of the enforcement of the judgment upon the counterclaim, until judgment is entered upon the issues raised by the complaint. The stay is pursuant to Rule 62(h) which provides that where the court has ordered a final judgment on some, but not all, of the claims presented in the action, it may stay enforcement of that judgment until the entering of a subsequent judgment and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

[¶ 69,556] Pierre Bourgeois v. Republic Steel Corporation, et al.

In the United States District Court for the Southern District of New York. Civil 144-383. Filed December 1, 1959.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Civil Damage Action—Pretrial Procedures—Dismissal of Complaint.—A complaint which made the following allegation failed to state any cause of action against one defendant since it failed to allege any act of the defendant on which any liability or claim may be predicated: "That the defendants and each of them jointly and severally, *each with the others or some of the others herein mentioned,* . . . did commit certain acts and did enter into certain arrangements, proposals and negotiations which were in direct violation of law, including the establishment and carrying out of certain

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acts which were in direct violation of antitrust laws . . ." However, the plaintiff was permitted to serve an amended complaint which alleges some claim against this defendant.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

For the plaintiff: Jacob Rassner, New York, N. Y.

For the defendants: Sullivan & Cromwell for Robert Garrett & Sons; Lundgren, Lincoln & McDaniel for El Paso Natural Gas Co.; and Richard Brill for Republic Steel Corp.; all of New York, N. Y.

[*Motion to Dismiss*]

LEVET, District Judge [*In full text*]: This is a motion by the defendant Robert Garrett & Sons made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint herein on the ground that it fails to state a claim upon which relief can be granted against such defendant.

[*Charges*]

This action, which if we judge by the addendum clause of the complaint, is for breach of contract and other wrongful acts of the defendants.

[*References to Defendant*]

The only references in the complaint to the defendant Robert Garrett & Sons are contained in Paragraph Eleventh, Twelfth, Forty-first, Forty-third and Forty-fourth. These paragraphs read as follows:

"ELEVENTH: That at all the times hereinafter mentioned, the defendant, ROBERT GARRETT, was domiciled in and a resident of the State of Maryland, and a resident of the State of New York where he also maintained an office at the address of the defendant *ROBERT GARRETT & SONS* in the Borough of Manhattan, City and State of New York." (Italics added.)

"TWELFTH: That at all the times hereinafter mentioned, the defendant *ROBERT GARRETT & SONS* was a partnership duly organized and existing under and by virtue of the laws of the State of Maryland, with offices and principal place of business in the City of Baltimore, State of Maryland, and in the Borough of Manhattan, City and State of New York." (Italic added.)

"FOURTH-FIRST: That the defendants REPUBLIC STEEL CORPORATION, EL PASO NATURAL GAS COMPANY, AMERICAN STEEL & TUBE CORPORATION, GATHMANN ENGINEERING CORPORATION, GATHMANN RESEARCH INC., PAUL KAYSER, MARK H. GATHMANN, EMIL A. GATHMANN, ROBERT GARRETT, *ROBERT GARRETT & SONS,* HARRISON GARRETT, JOSEPH OLIVER, RICHARD M. TAYLOR, ARTHUR BENEKAMPER, jointly and severally, fraudulently, unlawfully, illegally, wilfully and with the intent of preventing the plaintiff from obtaining the benefits of his services, individually and collectively, *one with all or some of the others of the defendants herein mentioned,* conspired to negotiate deals, agreements, purchase and sale orders, and otherwise acted wrongfully and unlawfully, with the result that the benefits of the plaintiff's services were obtained and utilized by the defendants individually and collectively, and the plaintiff's services not paid for nor was the plaintiff compensated in anywise for performing under the terms of the contract or otherwise." (Italics added.)

"FORTY-THIRD: That the defendants and each of them jointly and severally, *each with the others or some of the others herein mentioned,* in their efforts to prevent the plaintiff from obtaining payment for his services did commit certain acts and did enter into certain arrangements, proposals and negotiations which were in direct violation of law, including the establishment and carrying out of certain acts which were in direct violation of antitrust laws of the United States, commonly known as the Clayton-Sherman Acts." (Italics added.)

"FORTY-FOURTH: That the defendants and each of them jointly and severally, each acting in concert *with all or some of the said defendants herein named,* have by subterfuge, creation of dummy corporations, transfer of assets and otherwise, improperly, unlawfully and illegally prevented the plaintiff from collecting for the value of his services the money due him under the contract aforementioned and/or any value for his services and/or collecting the monies due him pursuant to the provisions of the judgment heretofore mentioned in paragraph THIRTY-SEVENTH." (Italics added.)

Obviously, Paragraphs ELEVENTH and TWELFTH do not allege any liability.

[*Holding*]

It is patent that there is no allegation of any act made against Robert Garrett & Sons on which any liability or claim may be predicated. Therefore, insofar as said defendant is concerned, the complaint must be dismissed with leave, however, to the plaintiff, if he sees fit, to serve an amended complaint which alleges some claim against said defendant Robert Garrett & Sons.

Settle order on notice.

[¶ 69,557] Benrus Watch Co. v. Weinstein Wholesale Jewelers, Inc., et al. Bulova Watch Co. v. Weinstein Wholesale Jewelers, Inc., et al. Speidel Corporation v. Weinstein Wholesale Jewelers, Inc., et al.

In the Ohio Court of Appeals for Lucas County. Appeal from Common Pleas Court. Nos. 5133, 5134, 5135. Decided February 9, 1959.

Ohio Fair Trade Act

Fair Trade—Injunctive Relief—Dissolution of Temporary Injunction—Remedy for Defendant—Effect of Unconstitutionality of Nonsigner Clause.—While an Ohio trial court properly vacated a temporary injunction against a nonsigner after the nonsigner provision of the Fair Trade Act had been declared unconstitutional, it erred in failing to accord the defendant wholesaler the opportunity to present evidence at a hearing upon the issue of whether the injunction should or should not have been granted, as a determination of this issue would be a prerequisite to defendant's recovery in an independent action for damages on the injunction bond.

See Fair Trade, Vol. 1, ¶ 3350.

For the appellees: Farber, Cochrane, Green & Schrader; and Edward A. McNeill.

For the appellants: Eliot L. Kaplan and Harland M. Britz.

[*Fair Trade—Dissolution of Injunction*]

Fess, Judge [*In full text*]: These appeals come to this court on questions of law from the following similar orders entered by the Common Pleas Court in each of the three cases:

"This day this cause came on to be considered by the court upon its own motion and it appearing to the court that at the time of the issuance of the temporary order herein, the Ohio Fair Trade Act, Section 133.05 [*sic*], *et seq.* Ohio Revised Code (originally enacted as Section 6402-2, *et seq.*, Ohio Revised [*sic*] Code, effective July 9, 1936) was, by decisions and judgments of courts of record of this state, including the Court of Appeals of Lake County, Ohio, in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc., et al.*, No. 568, constitutional in all respects and that, consequently, the temporary order entered herein on November 18, 1957, was proper in view of the evidence submitted and the authorities cited to the court and should have been granted; that by decision and judgment entered by the Supreme Court of Ohio on January 22, 1958, in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc., et al.*, 167 Ohio St., 182, the nonsigner provisions of said act were declared unconstitutional; and it further appearing to the court that only the nonsigner provisions of said act are in issue herein, the defendants being nonsigners, the court is of the opinion and finds that the temporary order entered herein should be vacated, the injunction bond cancelled and the surety discharged, and this cause dismissed at plaintiff's costs with no final record. It is therefore ordered, adjudged and decreed that the temporary order entered herein on November 18, 1957, be, and it hereby is, vacated; that the injunction bond filed herein by the plaintiff be, and it hereby is, cancelled and the surety discharged; and that this cause be, and it hereby is, dismissed at plaintiff's costs; no final record. To all of which the defendants except."

[*Temporary Injunction*]

In November 1957, temporary injunctions were granted *ex parte* enjoining the defendants from selling at retail any of the products of the several plaintiffs at prices which are less than the minimum retail resale price stipulated by the plaintiffs pursuant to agreements alleged in the petitions. The

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agreements alleged in the petition relate to contracts between the several plaintiffs and retailers (not necessarily the defendants) made pursuant to the provisions of Section 1333.06, Revised Code.

Injunction bonds in the sum of $1,000 each were furnished to secure the payment

> "to the defendant of all damages he may sustain by reason of the injunction in this action, if it be finally decided that the said injunction ought not to have been granted."

In cases Nos. 5133 and 5134, on November 26, 1957, motions to dissolve the injunctions were filed without supporting affidavits as contemplated by the provisions of Section 2727.14, Revised Code.

The motions to dissolve the injunctions and also motions to show cause for contempt in seven similar cases came on for hearing on December 13, 1957. (Pending the appeals, four of the seven cases were settled and the appeals dismissed.) This hearing was only upon arguments of counsel and was continued from time to time until April 1, 1958.

[*Nonsigner Clause Unconstitutional*]

In the meantime, on January 22, 1958, the Supreme Court of Ohio, in *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.* [1958 Trade Cases ¶ 68,920], 167 Ohio St., 182, 147 N. E. (2d), 481, held that the nonsigner provisions of the Fair Trade Act were unconstitutional.

At the hearing on April 1st, counsel for the defendant asserted that, incident to the vacation of the temporary injunction, a finding be made that the order should not have been granted. Again, this hearing was confined to arguments of counsel. Toward the conclusion of the hearing, the court announced that it would dissolve the temporary restraining orders, dismiss the plaintiffs' cases and discharge the bonds and the sureties thereon. At the conclusion of the hearing, counsel for defendants stated that defendants in their claims for damages might be prejudiced by the fact that the order was made on the court's own motion rather than upon the plaintiffs' motion. On July 23, 1958, the cases came on for further hearing upon the settlement of the journal entries. Counsel for defendants objected to that part of the entries submitted by the plaintiffs in effect stating that the temporary restraining order should have been granted in view of the evidence submitted to the court, and stated:

> "If the court is inclined to make that kind of a determination, then it ought to be on the basis of evidence which is submitted not only for the plaintiffs, but also evidence which the defendants would like to submit and, therefore, there ought to be a hearing before the court makes that kind of a finding in the journal entry. Then the defendant ought to be entitled to cross-examine the witnesses who are proposing to have presented the evidence upon which the court is making the finding, and the defendants ought to be entitled to submit their evidence as to whether or not this temporary restraining order should or should not have been granted.
>
> "* * *
>
> "On this question of evidence as to whether it should or should not have been granted, I think it is well to remind the court that all of these restraining orders were granted ex parte without notice and without hearing, so that there was no evidence ever introduced by the defendants.
>
> "* * *
>
> "Now, I think I ought to say, too, that if the court intends to file or approve the plaintiffs' entry, I would like to make several requests. One is I would like to have a hearing at which we could make up a record so that when and if we went to the Court of Appeals, the whole record of what transpired in connection with all matters on the proposed plaintiffs' entry would be supported or not supported by evidence."

After the court indicated that the entries submitted by plaintiffs with several minor modifications would be approved, counsel for defendants further stated:

> "As modified after hearing thereon, the defendants request that this cause be set down for a further hearing for the purpose of giving the defendant an opportunity to introduce evidence in support of their contention that the temporary restraining order should not have been granted.
>
> "And I assume that—are you, or not, going to grant a hearing for that purpose?
>
> "The Court: I don't think I have any authority; the case is closed; the cause is dismissed."

[*Defendant's Remedies*]

Upon the dissolution of a temporary injunction, the defendant has alternative rem-

edies of proceeding by way of a cross-petition in the injunction action or by the filing of an independent action for damages sustained, if it is finally decided that the injunction should not have been granted. A plaintiff, having invoked the jurisdiction of a court of equity by a proceeding in injunction, the court may determine all issues arising in the case, including one on a cross-petition by the defendant for damages by reason of the injunction, or leave the parties to an action at law upon the injunction bond. *Gray v. Gordon,* 12 Ohio App., 428, citing *Roberts v. Dust,* 4 Ohio St., 503, and *Commercial Tribune Building Co. v. Rapid Electrotype Co.,* 13 C. C. (N. S.), 559, 23 C. D., 475. As a prerequisite to recovery, it must have been decided that the injunction ought not to have been granted. *Krug v. Bishop,* 44 Ohio St., 221, 6 N. E., 252; *Columbus, Hocking Valley & Toledo Ry. Co. v. Burke,* 54 Ohio St., 98, 43 N. E., 282. Cf. Section 2727.07, Revised Code. But with respect to an independent action for damages on the bond it has been held that the dismissal of the petition for injunction and the dissolution thereof are conclusive evidence that the injunction ought not to have been granted, and that in absence of fraud or collusion, the defendants are concluded by the judgment in the injunction proceeding and can not re-open the questions which were the subject matter of the injunction proceeding. *Berkey Farmers' Mutual Telephone Co. v. Sylvania Home Telephone Co.,* 97 Ohio St., 67, 119 N. E., 140. Cf. *Gray v. Gordon, supra,* and 29 Ohio Jurisprudence (2d), 465.

[*Jurisdiction of Court*]

It seems clear that the court in the case in which the temporary injunction is issued has jurisdiction, upon its dissolution, in his discretion, to determine whether or not the injunction was properly granted. In the absence of a claim for damages upon the bond, it would appear to be the better practice to dissolve the injunction without prejudice to any claim for damages, and to refrain from cancelling the bond. The procedure incident to seeking dissolution of a temporary injunction is prescribed by Section 2727.14, Revised Code, reading as follows:

"When an injunction has been granted before trial, a party may apply to the court in which the action is pending, or a judge thereof, to vacate or modify such injunction. The party applying for such vacation or modification shall give to the adverse party such notice of the time and place at which the motion will be heard as the court or judge finds reasonable. The application may be made upon the petition and affidavits on which the injunction was granted, or upon affidavits on the part of the party enjoined, with or without answer.

"When, on the part of the defendant, the application is made upon affidavits, but not otherwise, the plaintiff may oppose it by affidavits or other evidence, in addition to the evidence on which the injunction was granted."

The record upon these appeals discloses that affidavits were not filed in support of or contra the motion to dissolve the temporary injunction. Although the statute does not so provide in specific terms, it seems to be apparent that when the question whether the injunction should or should not have been granted is raised, the decision thereon cannot be made without the reception of evidence upon request being made therefor.

[*Hearing Necessary*]

It is conceivable that in support of his application to dissolve the injunction, defendant might show that as a matter of fact he did not violate the provisions of the Fair Trade Act. Therefore, without deciding the question as to whether the subsequent declaration that the act was unconstitutional would support a decision that the injunction should or should not have been granted prior to the declaration of unconstitutionality, we find that the court erred in failing to accord the appellant an opportunity to present evidence at a hearing upon such issue and that the orders should be reversed and the cases be remanded for further proceedings.

Orders reversed.

DEEDS and SMITH, JJ., concur.

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[¶ 69,558] Adolph Hohensee v. Marilyn Ferguson, et al.

In the United States District Court for the Middle District of Pennsylvania. Civil Action No. 5949. Dated November 11, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Civil Damage Action—Pretrial Procedures—Motion to Dismiss—Venue.—In a treble damage action, there was found to be no venue jurisdiction over two individuals and two medical associations under Section 4 of the Clayton Act. Also, service of process on a doctor who was neither an officer of a Medical Association nor an agent authorized to receive service was not proper service on the association.

See Private Enforcement and Procedure, Vol. 2, ¶ 9008.

For the plaintiff: *Pro Se.*

For the defendants: Nogi, O'Malley & Harris, Scranton, Pa., and Moorhead & Knox, Pittsburgh, Pa., for Marilyn Ferguson and J. Alex Zehner; Russell J. O'Malley, Scranton, Pa., and William A. Challener, Jr., Pittsburgh, Pa., for Allegheny County Medical Society; Powell & Powell, Scranton, Pa., for American Medical Association; Maurice Louik, County Solicitor, Arthur L. McLaughlin, III, Assistant County Solicitor, and Philip Baskin, Special Counsel, all of Pittsburgh, Pa., for Gilbert Cloonan.

Memorandum

[*Motion to Dismiss—Venue*]

Frederick V. Follmer, District Judge [*In full text*]: The plaintiff in this action[1] is Adolph Hohensee. The defendants are listed as follows: Marilyn Ferguson; J. Alex Zehner; Hearst Publications Co., Inc.; John J. Kane; John M. Walker; Howard B. Stewart; William N. Nicholls; Nathaniel K. Beck; G. H. Rhorer; Gilbert Cloonan; Board of Managers of the Allegheny Soldiers and Sailors Memorial Hall of Pittsburgh, Pa.; Allegheny County of Pa.; Allegheny County Medical Association, its officers and members, John Doe No. 1, John Doe No. 2, John Doe No. 3; American Medical Association; Better Business Bureau of Pittsburgh, Inc., its officers and members, John Doe No. 1, John Doe No. 2; Affiliated Better Business Bureau, Inc.

[*Complaint*]

The complaint alleges that the action is brought under 15 U. S. C. § 15[2] and in it plaintiff seeks treble damages in the sum of $720,000.00 and injunctive relief. The complaint further alleges

> "The ground upon which the jurisdiction of this court depends is that this is an action to protect trade and commerce against restraints and monopolies."

The complaint also alleges that at all times mentioned plaintiff was engaged in the business of lecturing and selling products in interstate commerce; that the defendants entered into a conspiracy in restraint of trade and commerce between the several states, consisting of cancellation of lecture hall leases, false arrests, abuse of process, unlawful search and seizure, libel, slander, and destruction of plaintiff's personal prop-

[1] This is one of a group of six cases filed in this Court by Adolph Hohensee or Mildred Hohensee, his wife, as follows: No. 5860 on February 25, 1957; No. 5869 on March 4, 1957; No. 5897 on April 10, 1957; No. 5949 on May 17, 1957; No. 5972 on June 24, 1957, and No. 6016 on July 30, 1957. They all stem from, and have a direct relation to, the conviction, sentence and imprisonment in and by this Court of the said Adolph Hohensee of misbranding of drugs in interstate commerce. See *United States of America v. El Rancho Adolphus Products, Inc., et al.*, 1956, D. C. M. D. Pa., 140 F. Supp. 645, aff. 243 F. 2d 367.

[2] The referred to section of the Clayton Act, to wit: 15 U. S. C. § 15, reads as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

erty; that as a result of said conspiracy in restraint of trade plaintiff was directly injured in his business as follows, cancellation of leases for series of lectures in various auditoriums, made to endure false and illegal arrests, exposed to abuse of judicial process, subjected to unlawful search and seizure, frequently libeled, slandered and defamed, suffered destruction of personal property, and other wrongs.

[*Service of Process*]

The Marshal's return indicates service of summons and complaint as follows:

Marilyn Ferguson, personally, Pittsburgh, Pennsylvania, J. Alex. Zehner, personally, Pittsburgh, Pennsylvania, Allegheny County Medical Association by service on its President, David Katz, Pittsburgh, Pennsylvania, Gilbert Cloonan, personally, Pittsburgh, Pennsylvania, American Medical Association by service on Dr. Francis P. Boland, Scranton, Pennsylvania.

No service of any sort was made on any of the other defendants.

[*Venue Motions*]

Defendants Marilyn Ferguson, J. Alex. Zehner, Gilbert Cloonan, Allegheny County Medical Association, and American Medical Association have filed motions to dismiss for improper venue.[3]

Plaintiff, Adolph Hohensee, filed an affidavit of bias and prejudice against Honorable John W. Murphy, Chief Judge of this Court, whereupon the case was transferred to the writer of this Memorandum and Order.

In support of their motions to dismiss, defendants Marilyn Ferguson and J. Alex Zehner filed affidavits under Rule 43(e) of the Federal Rules of Civil Procedure setting forth that they reside in Allegheny County, Western District of Pennsylvania; that they do not reside in, have no agent for purpose of serving process or other purpose, are not engaged in business and have not been served with process in the Middle District of Pennsylvania.

Defendant Allegheny County Medical Society filed affidavit under Rule 43(e) of the Federal Rules of Civil Procedure setting forth that it is a corporation organized under the Nonprofit Corporation Law of Pennsylvania; that its only place of business is within the County of Allegheny in the Western District; that it has no place of business within the Middle District of Pennsylvania.

Defendant American Medical Association filed affidavit under Rule 43(e) of the Federal Rules of Civil Procedure setting forth, *inter alia,* that it is organized as an Illinois corporation under the "General Not for Profit Corporation Act" of that State; that it does not engage in business in Pennsylvania, and has no officer or agent authorized to receive process of service in Pennsylvania; that Dr. Francis P. Boland on whom service was made on behalf of said Association, while a member is not an officer or agent authorized to receive service of process.

[*No Venue*]

In the light of the unanswered affidavits in support of the Ferguson and Zehner motions, it is apparent that there is no venue jurisdiction in this District as to said defendants under the provisions of 15 U. S. C. § 15.

In the light of the unanswered affidavits in support of the Allegheny County Medical Society and the American Medical Association motions, it is apparent that there is no venue jurisdiction in this District under the provisions of 15 U. S. C. § 22.[4] See also *Hohensee v. Akron Beacon Journal Publishing Company et al.,* 1959, D. C. N. D. Ohio, 171 F. Supp. 90. And in addition thereto, in so far as American Medical Association is concerned, the service on Dr. Francis P. Boland was an improper service, completely abortive, and must be set aside.

While no affidavit was filed on behalf of Gilbert Cloonan, the record shows that he

[3] Motion to dismiss was also filed by Board of Managers of Soldiers and Sailors Memorial Hall of Allegheny County. This motion is disregarded for the reason that the Marshal's return does not indicate any service of summons and complaint on this movant.

[4] 15 U. S. C. § 22 provides:
"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

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was served in the Western District of Pennsylvania, and plaintiff has not contended that the said Cloonan was a resident of, or had a place of business, or was found in the Middle District of Pennsylvania.

Normally this might present the problem of whether to dismiss as to Ferguson, Zehner, Cloonan, and Allegheny County Medical Association because of improper venue or to transfer to the Western District of Pennsylvania. However, fully determinative of any such questions, for the reasons stated by this Court in *Hohensee v. Goon Squad et al.*, (March 19, 1959) [1959 Trade Cases ¶ 69,313] 171 F. Supp. 562, the complaint must, in any event, be dismissed as to all parties defendant on the ground that plaintiff has failed to state a claim on which relief can be granted.

Order

NOW, to wit: November 11, 1959, in accordance with Memorandum filed this date, It is Ordered and Decreed that service of process on American Medical Association be and the same is hereby set aside.

It is further Ordered and Decreed that the complaint as to all parties defendant be and the same is hereby dismissed for the reason that it fails to state a claim on which relief can be granted.

[¶ 69,559] Mildred Hohensee v. Albert L. Watson, et al.

In the United States District Court for the Middle District of Pennsylvania. Civil Action No. 6016. Dated November 11, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Civil Damage Action—Pretrial Procedures—Motion to Dismiss.—A complaint alleging that federal judicial and penal officials conspired to destroy and impoverish the plaintiff by wrongfully convicting, doping, drugging, and plotting to murder plaintiff's husband, all in violation of the Clayton Act, was dismissed for failure to state a cause of action. The reasons for granting the motions to dismiss are found in *Hohensee v. Goon Squad, et al.* [1959 Trade Cases ¶ 69,313]. The court also concluded that the complaint should be stricken from the record as scandalous.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

For the plaintiffs: *Pro Se.*

For the defendants: Daniel H. Jenkins, U. S. Attorney, for Albert L. Watson, J. Julius Levy, and Stephen Teller; Warren, Hill, Henkelman & McMenamin for George Clark; all of Scranton, Pa.

Memorandum and Order

[*Motion to Dismiss*]

Frederick V. Follmer, District Judge [*In full text*]: The plaintiffs in this action[1] are Mildred Hohensee, Richard Roe No. 1 and Richard Roe No. 2. The defendants are listed as follows: Albert L. Watson; American Medical Association its officers and members, John Doe No. 1 through No. 4; J. Julius Levy; Stephen Teller; George Clark, and John Doe No. 1 through No. 3.

The complaint alleges that the action is brought under 15 U. S. C. § 15[2] and in it the plaintiffs seek treble damages in the sum

[1] This is one of a group of six cases filed in this Court by Adolph Hohensee or Mildred Hohensee, his wife, as follows: No. 5860 on February 25, 1957; No. 5869 on March 4, 1957; No. 5897 on April 10, 1957; No. 5949 on May 17, 1957; No. 5972 on June 24, 1957, and No. 6016 on July 30, 1957. They all stem from, and have a direct relation to, the conviction, sentence and imprisonment in and by this Court of the said Adolph Hohensee of misbranding of drugs in interstate commerce. See *United States of America v. El Rancho Adolphus Products, Inc., et al.*, 1956, D. C. M. D. Pa., 140 F. Supp. 645, aff. 243 F. 2d 367.

[2] The referred to section of the Clayton Act, to wit: 15 U. S. C. § 15, reads as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

of Ten Million Dollars. The complaint further alleges "The grounds upon which the jurisdiction of this Court depends is that this is an action to protect trade and commerce against restraints and monopolies."

The complaint is captioned "Conspiracy To Murder Adolphus Hohensee and Waiver of Murder Responsibility."

[*Allegations*]

The complaint further alleges that at all times mentioned in the complaint plaintiffs were engaged in the business of lecturing and selling products in interstate commerce. The complaint further alleges that the conspirators named as defendants in order to destroy and impoverish plaintiff, Mildred Hohensee, have done the unlawful acts therein complained of, namely, doping and drugging Adolphus Hohensee, husband of plaintiff Mildred Hohensee, while serving a sentence in Federal Penitentiary,[3] plotting to murder the said Adolphus Hohensee with narcotics; that the conspirators caused the wrongful conviction of said Adolphus Hohensee, resulting in a sentence of one year and one day in a Federal Penitentiary, for sending pure, wholesome and unadulterated food items such as whole wheat from Scranton, Pennsylvania, to Denver, Colorado; that as a result of said conspiracy in restraint of trade, plaintiff was directly injured and damaged in her business, profession, or otherwise, as follows: cancellation of leases for lectures in various auditoriums, was slandered and defamed, suffered destruction of personal property, suffered physical pain and mental anguish and monetary loss resulting from the physical and mental torture and wrongful confinement of her innocent husband, and other wrongs and injuries done to plaintiff.

American Medical Association was not served with process.

[*Grounds for Motions*]

Defendants Albert L. Watson, J. Julius Levy, Stephen Teller and George Clark have filed motions to dismiss on the grounds: (1) lack of jurisdiction of the subject matter; (2) lack of jurisdiction of the persons, and (3) failure to state a claim on which relief can be granted.

[*Scandalous Matter*]

Defendant Clark also filed motion to strike the complaint on the grounds: (1) allegations of complaint are impertinent and scandalous; (2) allegations of complaint are so absurd and preposterous that they constitute an affront to the dignity of this Court and represent a gross abuse of a plaintiff's privilege to bring suit in a court of law.

Plaintiff, Mildred Hohensee, filed an affidavit of bias and prejudice against Honorable John W. Murphy, Chief Judge of this Court, whereupon the case was transferred to the writer of this Memorandum and Order.

[*Motions Granted*]

For the reasons stated by this Court in *Hohensee v. Goon Squad, et al.*, (March 19, 1959) [1959 TRADE CASES ¶ 69,313] 171 F. Supp. 562, the motions to dismiss must be granted on the ground that plaintiffs have failed to state a claim on which relief can be granted.[4]

I further conclude that the complaint should be stricken from the record as scandalous.[5]

Motions to dismiss the complaint and to strike it from the record are granted.

A large number of motions were filed by plaintiffs. In the light of the above mentioned Memorandum, most of the motions, in any event, would be moot.[6]

All motions filed by plaintiffs are denied.

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[3] The facts of the case referred to in which Judge Watson was the sentencing judge and J. Julius Levy and Stephen A. Teller were the United States Attorney and Assistant United States Attorney in charge of the prosecution, respectively, are fully set forth in *United States of America v. El Rancho Adolphus Products, Inc., et al.*, 1956, D. C. M. D. Pa., 140 F. Supp. 645.

[4] The Court takes judicial notice of the fact that at all times pertinent hereto defendants Albert L. Watson, J. Julius Levy and Stephen Teller were respectively United States District Judge, United States Attorney and Assistant United States Attorney for the Middle District of Pennsylvania and would not, in any event, be subject to this action. See *Barr v. Matteo et al.*, 1959, 360 U. S. 564; *Howard v. Lyons et al.*, 1959, 360 U. S. 593.

[5] *A. S. v. C. D.*, 1940, D. C. E. D. Pa., 36 F. Supp. 85.

[6] Some motions asked for injunctive relief with relation to Hohensee's incarceration. A certificate was filed by the Warden of the Medical Center for Federal Prisoners, Springfield, Missouri, to the effect that Hohensee was discharged from the Medical Center by maximum expiration of sentence on April 13, 1958, thus rendering the pertinent motions moot.

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[¶ 69,560] **Adolph Hohensee v. Albert L. Watson and Stephen A. Teller.**

In the United States District Court for the Middle District of Pennsylvania. Civil Action No. 5972. Dated November 11, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Civil Damage Action—Pretrial Procedures—Motion to Dismiss.—A complaint in which a lecturer, writer, and seller of food products alleged that a Federal District Judge and an Assistant United States Attorney conspired to injure his business was dismissed for failure to state a cause of action. The reasons for granting defendants' motion to dismiss were stated in *Hohensee v. Goon Squad et al.* [1959 TRADE CASES ¶ 69,313].

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.475.

For the plaintiff: *Pro Se.*

For the defendants: Daniel H. Jenkins, U. S. Attorney, Scranton, Pa.

Memorandum

[*Motion to Dismiss*]

FREDERICK V. FOLLMER, District Judge [*In full text*]: This complaint[1] alleges that the action is brought under 15 U. S. C. § 15[2] and in it the plaintiff, Adolph Hohensee, seeks of the defendants, Albert L. Watson and Stephen A. Teller, treble damages in the sum of $720,000.00. The complaint further alleges

> "The ground upon which the jurisdiction of this court depends is that this is an action to protect trade and commerce against restraints and monopolies."

The complaint also alleges that at all times mentioned in the complaint plaintiff was engaged in the business of lecturing and selling products in interstate commerce; that defendants entered into a conspiracy in restraint of trade and commerce between the several states consisting of libel, slander and other illegal acts; that as a result of said conspiracy in restraint of trade, plaintiff was directly injured and damaged in his business as follows: cancellations of leases for series of lectures, exposed to abuse of judicial process, frequently libeled, slandered and defamed, suffered destruction of personal property, and other wrongs or injuries done to plaintiff.

[*Grounds for Dismissal*]

Defendants have filed motion to dismiss on the following grounds:

1. Failure to state a claim on which relief can be granted.

2. Lack of jurisdiction of the subject matter and over the persons.

Plaintiff, Adolph Hohensee, filed an affidavit of bias and prejudice against Honorable John W. Murphy, Chief Judge of this Court, whereupon the case was transferred to the writer of this Memorandum and Order.

The Court takes judicial notice of the fact that at all times pertinent hereto defendants, Albert L. Watson and Stephen A. Teller, were respectively United States District Judge and Assistant United States Attorney for the Middle District of Pennsylvania.[3]

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[1] This is one of a group of six cases filed in this Court by Adolph Hohensee or Mildred Hohensee, his wife, as follows: No. 5860 on February 25, 1957; No. 5869 on March 4, 1957; No. 5897 on April 10, 1957; No. 5949 on May 17, 1957; No. 5972 on June 24, 1957, and No. 6016 on July 30, 1957. They all stem from, and have a direct relation to, the conviction, sentence and imprisonment in and by this Court of the said Adolph Hohensee of misbranding of drugs in interstate commerce. See *United States of America v. El Rancho Adolphus Products, Inc., et al.*, 1956, D. C. M. D. Pa., 140 F. Supp. 645, aff. 243 F. 2d 367.

[2] The referred to section of the Clayton Act, to wit: 15 U. S. C. § 15, reads as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[3] *United States of America v. El Rancho Adolphus Products, et al.*, 1956, D. C. M. D. Pa., 140 F. Supp. 645. The complaint is against Albert L. Watson and Stephen A. Teller individually. There is nothing to indicate in what way they may have become identified in any

[*Motion Granted*]

For the reasons stated by this Court in *Hohensee v. Goon Squad et al.*, (March 19, 1959 [1959 TRADE CASES ¶ 69,313] 171 F. Supp. 562, defendants motion to dismiss must be granted.

Order

NOW, to wit., November 11, 1959, in accordance with Memorandum filed this date, motion of defendants is granted and the action is dismissed.

[¶ 69,561] Levine v. R. H. Macy.

In the New York Supreme Court, Bronx County, Special Term, Part I. 142 N. Y. L. J., No. 101, page 12. Dated November 24, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement Action—Injunctive Relief—Withdrawal of Motion for Injunction.—In an action to enforce fair trade prices, plaintiff's application for withdrawal of a motion for an injunction was granted on the condition that plaintiff would not make any other motion for the same or similar relief based on like grounds, even though later sales were claimed.

See Fair Trade, Vol. 1, ¶ 3350.34.

[*Fair Trade Action*]

HOFSTADTER, Justice [*In full text*]: Motion for an injunction in an action brought under the fair trade laws is on the application of the moving plaintiff, over the opposition of the defendant, permitted to be withdrawn, on the condition, however, that the plaintiff shall not make any other motion in this action for the same or similar injunctive relief sought on the present motion based on like grounds, even though later sales are claimed.

[¶ 69,562] Union Carbide Corp. v. Strauss Stores Corp.

In the New York Supreme Court, Queens County, Special Term, Part 1. 142 N. Y. L. J., No. 114, page 14. Dated December 14, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement Action—Allegations and Proof—Preliminary Injunction.—A manufacturer was granted a preliminary injunction restraining a retailer from selling its products below fair trade prices in a particular area where it was established that such sales had not stopped and that the manufacturer had not been derelict in enforcing its fair trade prices in the area involved.

See Fair Trade, Vol. 1, ¶ 3354.34.

[*Fair Trade Action*]

RABIN, Justice [*In full text*]: In an action for an injunction and damages brought pursuant to the provisions of the so-called "Fair Trade Law" (General Business Law, sec. 369-a *et seq.*) plaintiff moves for a temporary injunction. The defendant while admitting a number of violations which it claims took place in an area where price cutting was begun by competitors, takes the position that it has abided by fair trade pricing requirements, and has ordered all sales below fair trade prices to be stopped. The plaintiff, however, has established that such sales have not stopped, and that it, the plaintiff, has not been derelict in taking action to enforce the law in this area whenever its products were sold below fair trade prices. Under these circumstances, the plaintiff is entitled to a temporary injunc-

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conspiracy. This case fully sets forth the facts in connection with the trial and conviction of plaintiff in which the defendants appeared, respectively, as Trial Judge and Assistant United States Attorney who conducted the prosecution. See also, *Barr v. Matteo et al.*, 1959, 360 U. S. 564; *Howard v. Lyons et al.*, 1959, 360 U. S. 593.

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tion, and the motion is, therefore, granted upon the plaintiff's furnishing an undertaking in the sum of $250. If either party desires an early trial, it may place the case upon the calendar upon five days' notice following the joinder of issue and upon the payment of the necessary fees. Settle order.

[¶ 69,563] Bristol-Myers Co. v. Bargain Town U. S. A.

In the New York Supreme Court, New York County, Special Term, Part I. 142 N. Y. L. J., No. 103, page 11. Dated November 27, 1959.

New York Fair Trade (Feld-Crawford) Act

Fair Trade—Enforcement of Fair Trade Prices—Contempt—Motion for Examination of Defendant.—A motion to examine a defendant before proceeding with a contempt action was granted in order to permit plaintiff to attempt to tie defendant to sales which violated a fair trade injunction. Although the defendant had sublet the premises on which the offending sales were made, and the sublessee corporation had in turn sublet to another corporation, the plaintiff alleged, and it was not denied, that the defendant's president was a director of the subleasing company. Since the contempt action would turn on whether the defendant "participated in or controlled" the company that made the sales, and since the relevant facts concerning any such relationship were within the peculiar knowledge of the defendant, a preliminary examination was in order.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Fair Trade Action*]

LEVY, Justice [*In full text*]: The plaintiff duly obtained a final judgment permanently enjoining the defendant "and each and all of its officers, agents, servants and employees and each and every person and instrumentality affiliated with, or subsidiary to, acting in concert with, or subject to the control of the defendant" from "directly, or indirectly advertising, offering for sale or selling within the State of New York" any of the plaintiff's trade marked drug or cosmetic products at less than the prices established therefor by the plaintiff pursuant to statute (General Business Law, sections 369-a *et seq*). Thereafter, the plaintiff secured an order requiring the defendant to show cause why it should not be punished for contempt for violating the judgment by selling plaintiff's fair-traded products below their established retail sales prices. The application thereon has not yet come before the court for argument.

The plaintiff's allegations of contempt are denied by the defendant. It appears that the defendant sublet a part of its premises to Soljac Realty Corporation, which in turn sublet to Shelbac Sales Corporation, the entity which, it is asserted by the defendant, owns and operates the drug business at the defendant's premises, and that it is Shelbac—with which the defendant has no connection whatever—that is responsible for the cut-price sales alleged in the moving papers. The plaintiff alleges (and it is not denied) that the defendant's president is an organizer and director of Soljac, but that is as far as the plaintiff's proof goes at the present time.

The plaintiff has now moved before me to examine the defendant, pursuant to section 293 of the Civil Practice Act, preliminary to proceeding with the contempt application. The plaintiff seeks information, by way of this proposed examination, to tie in the defendant with the alleged sales, and thereby—to use the language of section 293—"to carry the judgment into effect." The contempt proceedings will turn, of course, upon whether or not the defendant participated in or controlled the actions of the concern that sold the product below the fair-trade price. Obviously, the relevant facts concerning such relationship, if any, are within the peculiar knowledge of the defendant.

The defendant contends that the instant application should be denied as unnecessarily duplicative, since the hearing of the issues on the contempt motion will most likely be referred to an official referee, and the examination can then be had at the

same time that the proof is presented. The three cases cited by the defendant in support of its contention are clearly distinguishable. *Greer v. Greer,* 147 N. Y. S. 2d 724* and *Weiss v. Weiss* (58 N. Y. S. 2d 396), were matrimonial controversies, and, moreover, references had already been ordered there, during the course of which proceedings the referee in each case would have the opportunity, in effect, to take the defendant's deposition before him. The case at bar, on the other hand, involves a commercial controversy, and also no hearing or reference has been ordered in the contempt proceeding and there is no assurance that one will be. In *Bissell Carpet Sweeper Company v. Mann* (N. Y. L. J., December 24, 1957, Supreme Court, N. Y. County, Special Term, Part I, Markewich, J.), also cited by the defendant, the court denied the motion for the post-judgment examination of the defendant because the evidence sought was not essential in proving the contempt itself but went only to the wilfulness of the contempt and the nature of the fine to be imposed—which is not the issue here at this time (cf. *Buckley v. Buckley,* 206 Misc. 981, 982-983; *Kirshner v. Kirshner,* 7 App. Div. 2d 202; but see *Hurwitz v. Hurwitz,* 3 App. Div. 2d 744).

The disposition of a motion of this character rests in the sound discretion of the court. In my view, a sufficient showing has been made that the examination will aid in the enforcement of the judgment and permit the plaintiff effectively to prepare for the contempt proceedings (see *Scheffer v. Scheffer,* 183 Misc., 344). It may be that the motion to punish should not have been initiated until after the desired proof had ben procured by the plaintiff; but, in view of the fact that the sales complained of were made in the same premises, it is not surprising that the plaintiff believed that it was the defendant, directly or indirectly, who made the sales. It may be that the facts obtained by the plaintiff on the examination—if they sufficiently support the defendant's denials—will result in the withdrawal of the contempt application.

Accordingly, the motion is granted, and the defendant, by an officer, director or employee having knowledge of the facts, is directed to appear and submit to examination, pursuant to section 293 of the Civil Practice Act, at Special Term, Part II, of this court on November 30, 1959, at 10 A. M., at which time pertinent books and records are to be produced for use pursuant to section 296 of the Civil Practice Act.

[¶ 69,564] Allied Properties v. Department of Alcoholic Beverage Control of the State of California.

In the Supreme Court of the State of California. In Bank. S. F. 20236. Filed November 30, 1959.

California Alcoholic Beverages Fair Trade Act

Fair Trade—Mandatory Fair Trading of Liquor Under California Beverages Act—Constitutionality—Alleged Delegation of Legislative Power.—Constitutionality of the California Alcoholic Beverage Fair Trade Act and Rule 99 of the Alcoholic Beverage Control Department, which provided that all retail sales of distilled spirits and wines must be made pursuant to fair trade contracts filed with the Department, was upheld against charges that they constituted improper exercise of the police power and an unlawful delegation of legislative power. There was no improper exercise of the police power, for the reasons that a state has particularly wide powers with respect to the manufacture of, and traffic in, alcoholic beverages; that the object sought to be attained, the prevention of intemperance, is a proper legislative purpose; and that statutes regulating prices and restricting freedom to bargain bear a reasonable and substantial relation to such an object. The classification made by the legislature in regulating retail prices without regulating wholesale prices was reasonable since the legislature could properly conclude that competition among the large number of retailers, who sell directly to the consumers, was necessary to prevent selling practices tending to increase sales and consumption of alcoholic beverages. There was

* My decision in the *Greer* case has not been followed in the Second Department (*Balmer v. Balmer,* 10 Misc. 2d 880, aff'd 5 App. Div. 2d 839).

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no unlawful delegation of legislative power, as urged, since the acts of private parties entering into such contracts were the facts in contemplation of which the legislature acted. The fact that the Alcoholic Beverage Fair Trade Act differed from the General Fair Trade Act in that it required, rather than permitted, producers and wholesalers to set retail prices did not warrant a different conclusion.

See Fair Trade, Vol. 1, ¶ 3480.05.

Reversing decision of the California District Court of Appeal, 1959 Trade Cases ¶ 69,401.

For the petitioner-respondent: Steinhart, Goldberg, Feigenbaum & Ladar, San Francisco, Calif.

For the defendant-appellant: Stanley Mosk, Attorney General, and Charles A. Barrett, Deputy, San Francisco, Calif.

Gibson, Chief Justice [*In full text*]: Allied Properties was accused of violating sections 55.5, 55.6 and 55.65 of the Alcoholic Beverage Control Act and rule 99 of the State Board of Equalization by advertising and offering to sell at retail distilled spirits and wines at prices less than the minimum resale prices provided for by fair trade contracts filed with the board.[1] (Subsequently the Department of Alcoholic Beverage Control became the constitutional successor of the board with regard to liquor control (Const., art. XX, § 22, as amended in 1954), and it has been substituted as the defendant herein. For convenience we shall refer to the statutes as they appeared before codification, and we shall use the word "department" in referring to the administrative body in charge of liquor control.) Allied's off-sale general license was suspended for 15 days, and in mandamus proceedings to review the suspension order the superior court determined that the provisions of the act and the rule cited above were invalid. This appeal followed. The facts are not disputed, and the sole question raised is whether the provisions are constitutional.

[*Applicable Statutes and Regulation*]

Section 55.5 (Stats. 1937, ch. 758, p. 2173, now Bus. & Prof. Code, §§ 24750-24753) authorizes fair trade contracts prohibiting the buyer from reselling, except at the price stipulated by the seller, alcoholic beverages which bear the trade-mark or name of the producer and are in open competition with others of the same general class. The section further provides that wilfully advertising, offering to sell, or selling, at less than the price stipulated in such contracts, whether or not the actor is a party to the contract, is unfair competition and actionable at the suit of any person damaged thereby. The statute expressly excludes from its operation any agreement between producers, between wholesalers, or between retailers as to sale or resale prices.[2]

Section 55.6 (Stats. 1947, ch. 657, p. 1698, now Bus. & Prof. Code, §§ 24754-24757) provides that all retail sales of distilled spirits shall be made pursuant to fair trade contracts entered into under section 55.5 and prohibits the violation of such contracts. The section also provides that all manufacturers and wholesalers of distilled spirits shall file and maintain with the department a list of the prices at which their product will be sold to retailers and that all their sales to retailers shall be in compliance with those lists.

Section 55.65 (Stats. 1949, ch. 574, p. 1064, now Bus. & Prof. Code, §§ 24850-24881), sets forth numerous provisions applicable to the sales of wine. It includes provisions like those governing the sales of distilled spirits except that the prices at which retailers are required to sell to consumers are to be determined either by fair trade contracts or by resale price lists filed by the manufacturer or wholesaler with the department.[3]

[1] The Alcoholic Beverage Control Act (Stats. 1935, ch. 330, p. 1123, as amended; 2 Deering's Gen. Laws, 1944, Act 3796) is now contained in Division 9 of the Business & Professions Code. The codification did not alter the substantive law in any respect material to this case, and no relevant changes have been made in rule 99, which is now a rule of the Department of Alcoholic Beverage Control.

[2] The provisions of this section correspond exactly with those of the general Fair Trade Act enacted in 1931. (Stats. 1931, ch. 278, p. 583, now Bus. & Prof. Code, §§ 16900-16905.)

[3] No violation of the provision for price lists is involved here.

Rule 99 provides in part that no manufacturer or wholesaler shall sell distilled spirits except pursuant to a fair trade contract as provided for by section 55.5 of the act, that copies of such fair trade contracts shall be filed with the department, and that no licensee shall advertise or offer for sale alcoholic beverages at retail at a price less than the minimum resale price provided for by a fair trade contract filed with the department pursuant to this rule. (Cal. Admin. Code, tit. 4, § 99, subds. (a), (b), (f).)

Under section 22 of article XX of the Constitution the department has power in its discretion to revoke any liquor license if it determines for good cause that the continuance of such license will be contrary to public welfare or morals. The power to revoke includes the lesser power to suspend. (*Reynolds v. State Board of Equalization,* 29 Cal. 2d 137, 140.) In the exercise of its discretion the department can properly consider substantial violations of statutory provisions concerning alcoholic beverages or of rules of the department as good cause for suspension of licenses, and in the present case there is no contention that, if the statutes and rules violated are valid, the suspension constitutes an abuse of discretion. Moreover, with respect to wine, it is provided by statute that the department can suspend licenses in the event of a prohibited sale and can, upon a third violation, revoke them. (Alcoholic Beverage Control Act, § 55.65, subd. (n), now Bus. & Prof. Code, § 24880.) [4] Further, a rule of the department provides that a violation of its rules and regulations by a licensee will be deemed contrary to public welfare and morals and grounds for suspension or revocation of a license. (Cal. Admin. Code, tit. 4, § 1.) Although no criminal prosecution is involved here, it should be noted that the act contains a general provision, applicable to prohibited sales of alcoholic beverages, that violations for which another penalty is not specifically provided in the act constitute misdemeanors punishable by a fine, a jail term, or both. (Alcoholic Beverage Control Act, § 65, now Bus. & Prof. Code, § 25617.)

In passing upon the fair trade provisions we must be guided by the well-settled principles that the presumption is in favor of constitutionality and that the invalidity of an act of the Legislature must be clear before the statute can be declared unconstitutional. It is not our province to weigh the desirability of the social or economic policy underlying the statute or to question its wisdom; they are purely legislative matters.

[*Police Power*]

Where, as here, it is urged that a statute does not constitute a proper exercise of the police power, the inquiry of the court is limited to determining whether the object of the statute is one for which that power may legitimately be invoked and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained. (*Wholesale T. Dealers v. National etc. Co.,* 11 Cal. 2d 634, 643.) Acting under this rule, the courts have upheld statutes regulating prices and restricting the freedom to bargain. (*Wholesale T. Dealers v. National etc. Co.* [1932-1939 TRADE CASES ¶ 55,191] 11 Cal. 2d 634, 651-656; *Max Factor & Co. v. Kunsman,* 5 Cal. 2d 446, 459-462; *Nebbia v. New York,* 291 U. S. 502, 529 et seq.) A state has particularly wide powers with respect to the manufacture of and traffic in alcoholic beverages and may provide for their prohibition or impose such conditions and regulations as it may deem proper. (*Ziffrin, Inc. v. Reeves,* 308 U. S. 132, 138-139; *Crowley v. Christensen,* 137 U. S. 86, 91.) The same broad powers are recognized in section 22 of article XX of the California Constitution.[5] (*Sandelin v. Collins,* 1 Cal. 2d 147, 153.)

[4] There was no comparable provision with respect to distilled spirits in January 1953, when the accusation was filed, but there is now a general suspension and revocation provision which is applicable to prohibited sales of distilled spirits. (Bus. & Prof. Code, § 24200, subd. (b).)

[5] Section 22 of Article XX of the California Constitution reads in part: "The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor. . . . The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of liquor contained in the original packages, where such liquor is not to be consumed on the premises where sold. . . ."

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Many states have adopted price regulating measures intended to prevent retail price cutting and bargain sales of alcoholic beverages and the evils considered to follow from those practices, namely, excessive purchase and use of liquor and disruption of orderly marketing conditions. Where the constitutionality of such measures has been challenged, most courts have upheld them. (*Gipson v. Morley* [Ark.], 233 S. W. 2d 79, 83; *Schwartz v. Kelly* [Conn.], 99 A. 2d 89, 91; *Reeves v. Simons* [Ky.], 160 S. W. 2d 149, 151; *Supreme Malt Prod. Co. v. Alcoholic Beverages Con. Com'n* [Mass.], 133 N. E. 2d 775, 778; *Dundalk Liquor Co. v. Tawes* [Md.], 92 A. 2d 560, 561; *Butler Oak Tavern v. Div. of Alcoholic Bev. Con.* [N. J.], 120 A. 2d 24, 30; *Gaine v. Burnett* [N. J.], 4 A. 2d 37, 39; *Pompei Winery v. Board of Liquor Control* [Ohio], 149 N. E. 2d 733, 748. But cf. *Scarborough v. Webb's Cut Rate Drug Co.* [Fla.], 8 So. 2d 913, 921; *Schwegmann Bros. v. Louisiana Board, etc.* [La.], 43 So. 2d 248, 259.)

The Alcoholic Beverage Control Act states that it was enacted

> "for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages." (Alcoholic Beverage Control Act, § 1, now Bus. & Prof. Code, § 23001.)

The fact that the act provides for fair trade contracts indicates that its purposes include those of the general Fair Trade Act (Stats. 1931, ch. 278, p. 583, now Bus. & Prof. Code, §§ 16900-16905), particularly the prevention of price cutting in retail sales. (*Max Factor & Co. v. Kunsman,* 5 Cal. 2d 446, 455; see *Wholesale T. Dealers v. National etc. Co.* [1932-1939 Trade Cases ¶ 55,191], 11 Cal. 2d 634, 655.) The *Max Factor* and *Wholesale T. Dealers* cases held that the Legislature may take measures against price cutting, and there can be no doubt that the prevention of intemperance is a proper legislative objective.

The means provided in a statute must be accepted as being reasonably designed to accomplish its objective unless it is unquestionable that they are improper. (*Wholesale T. Dealers v. National etc. Co.* [1932-1939 Trade Cases ¶ 55,191], 11 Cal. 2d 634, 646; *Miller v. Board of Public Works,* 195 Cal. 477, 490.) The legislative purpose of preventing price cutting and price wars among retailers is, of course, effectively attained under the fair trade provisions of the Alcoholic Beverage Control Act by having each producer or wholesaler establish the retail price of his own brand, and it was held in the *Max Factor* case (5 Cal. 2d at p. 455) that the Legislature could reasonably proceed on the theory that the public will be adequately protected against excessive prices by the ordinary play of competition between manufacturers.

The statutory provisions also operate to remove some factors which may lead to intemperance because the elimination at the retail level of price cutting, bargain sales, and advertising of low prices tends to reduce excessive purchases of alcoholic beverages. It is true, as Allied points out, that there is nothing in the Alcoholic Beverage Control Act to prevent producers and wholesalers from setting low prices that may induce a large consumption of such beverages. It was not the purpose of the legislation, however, to reduce intemperance by establishing high prices generally but only by preventing the increase of consumption of alcoholic beverages resulting from retail price cutting and bargain sales, and the Legislature may take reasonable measures to eliminate some of the causes of an evil without attacking all of them. (*Railway Express v. New York,* 336 U. S. 106, 110.) The classification made by the Legislature in regulating retail prices without regulating wholesale prices is reasonable since the Legislature could properly conclude that competition among the relatively few producers and wholesalers would not result in disorderly marketing conditions, but that price stabilization with respect to the far larger number of retailers, who sell directly to the consumers, was necessary to prevent selling practices tending to increase sales and consumption of alcoholic beverages.

[*Legislative Powers Not Delegated*]

Allied contends that the fair trade provisions of the Alcoholic Beverage Control Act unlawfully delegate legislative power insofar as they provide that each producer and wholesaler must set the price at which retailers must sell his product. The question of unlawful delegation under the general Fair Trade Act was decided in *Scovill Mfg. Co. v. Skaggs, etc. Drug Stores* [1955

TRADE CASES ¶ 68,234], 45 Cal. 2d 881, where prices set by a fair trade contract were held to be binding on a retailer who had not signed the contract. We there stated:

> "Here the acts of private parties in entering into contracts for the sale of commodities constitute the facts in contemplation of which the Legislature acted, and upon the existence of which the provisions of the enactment were to be applicable. The private contracts are no more legislative in character than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute. The consequence that the statute has become applicable, and conduct in violation thereof has become actionable, is in no way due to the exercise of any assumed legislative power on the part of the contracting parties. [Citation.] We conclude that there is no delegation of the legislative function in violation of constitutional prohibitions." (45 Cal. 2d at p. 888.)

Whether the same conclusion applies to the provisions involved here depends upon whether the function performed by the persons who assertedly exercise delegated legislative powers is the same under the general Fair Trade Act and the Alcoholic Beverage Control Act. Under both statutes the function of such a person is to set the price of his own product on the basis of his personal interest, as affected by free competition in the market, and the result in each case is that all retailers, whether or not they have signed fair trade contracts, are bound by the prices set.

Although there are additional features in sections 55.6 and 55.65 of the Alcoholic Beverage Control Act that are not contained in the general Fair Trade Act, they do not warrant a different conclusion from the one reached in the *Scovill* case [1955 TRADE CASES ¶ 68,234] (45 Cal. 2d 881, 888), namely, that there was no delegation of legislative power. One of the new features is that the Alcoholic Beverage Control Act requires, rather than permits, producers and wholesalers to set retail prices. This fact, however, does not render the function of a producer or wholesaler legislative in character but, to the contrary, decreases his discretion since he is not free to determine whether fair trading should occur. While mandatory fair trading means that retailers cannot obtain merchandise free from price restrictions, this is due to the determination of the Legislature, not the action of the producers and wholesalers.

A second difference is that, in addition to the civil remedies common to both statutes, the Alcoholic Beverage Control Act provides for administrative and criminal sanctions, but this aspect of the act does not involve any delegation of power, the sanctions being prescribed by the Legislature, not by the producers or wholesalers. The Legislature, of course, has power to provide for administrative sanctions with respect to a licensee who violates a regulation deemed to be in the public interest. We need not determine whether the criminal sanctions are proper since such penalties were not imposed in this case, and the provision authorizing them is severable.

The general Fair Trade Act, although designed in part to reduce cutthroat competition, is primarily intended to protect the property rights of producers and wholesalers (*Max Factor & Co. v. Kunsman,* 5 Cal. 2d 446, 462), whereas the primary purpose of the fair trade provisions of the Alcoholic Beverage Control Act is to promote orderly marketing conditions and temperance. This difference in primary purpose, however, has no significant bearing on the question of delegation of legislative power because it does not change the functions of the persons to whom a delegation is assertedly made. The producers and wholesalers of alcoholic beverages are not called upon to set the retail prices for their products on the basis of what will promote temperance and orderly marketing conditions, but, as we have seen, it is contemplated that, in setting prices, they will seek to promote their own business interests in the light of competition, which was also the case under the general Fair Trade Act, and that they will thus indirectly carry out the purposes of the Legislature. Here, as in the *Scovill* case, the determinations to be made by the producers and wholesalers are not legislative in character but merely "the facts in contemplation of which the Legislature acted, and upon the existence of which the provisions of the enactment were to be applicable." (*Scovill Mfg. Co. v. Skaggs etc. Drug Stores,* 45 Cal. 2d at p. 888.)

Upon the same reasoning as was used in the *Scovill* case, the Supreme Court of Connecticut decided that provisions which were

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substantially similar to those before us did not constitute an unlawful delegation of legislative power. (*Schwartz v. Kelly* [Conn.], 99 A. 2d 89, 93.) A similar statute was held invalid in *Scarborough v. Webb's Cut Rate Drug Co.* [Fla.], 8 So. 2d 913, 921, on the ground, among others, that it provided for an improper delegation of power, but the case is not persuasive because it contains no reasoning in support of this conclusion.

State Board v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436, relied on by Allied, is distinguishable from the present case. The court there declared unconstitutional a statute which delegated to the State Board of Dry Cleaners the power to fix minimum price schedules. The principal ground of the decision was that the price-fixing provision could not be upheld as a proper exercise of the police power, but, as we have seen, the statutes involved here come within that power. The court also relied on the ground that there was a delegation of legislative power without ascertainable standards to an administrative board composed mainly of members of the industry who would participate in fixing prices to be charged by their competitors. The *Thrift-D-Lux* case does not hold that all types of price fixing are legislative in character, but that there was a delegation of legislative power under the special facts present in that case. On the other hand it was held in *Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra* [1955 Trade Cases ¶ 68,234], 45 Cal. 2d 881, 887-888, that there was no delegation of legislative power where manufacturers, acting in their private capacity under the general Fair Trade Act, fixed the prices for which their own products were to be sold at retail by persons who were not their competitors. The distinguishing factor is that the dry cleaners' board was directed to fix uniform minimum prices for the services of all dry cleaners in limited areas on the basis of what it believed was required by public health and safety, whereas under the general Fair Trade Act each manufacturer is to fix retail prices for his own products in accord with his personal interest. The functions of the producers and wholesalers under the Alcoholic Beverage Control Act, as we have seen, are the same as those of manufacturers under the general Fair Trade Act, and the controlling decision is *Scovill Mfg. Co. v. Skaggs etc. Drug Stores* rather than *State Board v. Thrift-D-Lux Cleaners.*

The judgment is reversed.

Traynor, Spence, and White, JJ., concur.

Dissenting Opinions

McComb, Justice: I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Hanson in his dissenting opinion when the case was before the District Court of Appeal [1959 Trade Cases ¶ 69,401], 170 A. C. A. 459, 338 P. 2d 1013, 1023.

Peters, Justice: I dissent.

In determining the sole question of law which is presented in this case the majority opinion holds that certain sections of the Alcoholic Beverage Control Act (specifically §§ 24750 through 24757 of the Business and Professions Code) constitute a valid and constitutional exercise of the police power. This determination is based upon the propositions that (a) the statutory provisions comprise a Fair Trade Act applicable to alcoholic beverages, and (b) because the established law of this State hold Fair Trade Acts to be constitutional, this Act is likewise constitutional. This reasoning is based upon the fallacious assumption that the provisions of the Alcoholic Beverage Control Act do, in fact, comprise a Fair Trade Act. I am of the opinion that the rules laid down in the Fair Trade cases (*Max Factor & Co. v. Kunsman,* 5 Cal. 2d 446; *Scovill Mfg. Co. v. Skaggs etc. Drug Stores,* 45 Cal. 2d 881) are inapplicable herein, and that this case must be determined in accordance with the rules set forth in *State Board v. Thrift-D-Lux Cleaners,* 40 Cal. 2d 436.[1]

[1] While this dissent is not intended as an attack upon the rules of the *Factor* and *Scovill* cases, it should be noted that the modern trend is to hold Fair Trade Acts to be an unconstitutional exercise of the police power. When this Court first held the California Fair Trade Act to be valid, it was joining the majority of jurisdictions in a determination made desirable, if not necessary, by reason of the then existing "great depression." This Court, together with the majority of states, held that the respective legislatures had a right to reverse their previously propounded economic theories in favor of a policy necessary to the times. Thus legislation was upheld which was otherwise inimicable to the Federal Anti-trust laws and to our own Cartwright Act (see *Max Factor & Co. v. Kunsman, supra,* at p. 455). In recent years,

There are basic distinctions between Fair Trade Acts and the provisions of the Alcoholic Beverage Control Act. These demonstrate that the constitutionality of one may not be predicated upon the other. Such distinctions are many and varied, and go to the very essence of the statutes. Reference to but four will serve to illustrate the point.

Purpose: Fair Trade Acts were designed to prevent the unsalutory effect of price war on the economy as it existed in a period of depression and low prices (1931). To accomplish this purpose they frankly and openly seek

> "to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name" (*Max Factor & Co. v. Kunsman, supra,* at p. 454).

In other words, the prime purpose of the Fair Trade Acts was to *promote trade.* In order to attain this objective the legislation fostered a system which would provide a floor to prices, and thus insure a profit. The fact that such price regulation also provided protection for the manufacturer's property right in his trade-marked articles was only incidental to the main purpose. On the other hand, the Alcoholic Beverage Control Act provides a system of setting minimum prices for the basic purpose of *reducing trade* in spirituous liquors. Under the heading of "Purposes" the Act states that it is "an exercise of the police powers of the State . . . to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption" thereof (Bus. & Prof. Code, § 23001). While it may be a price regulating statute, and appears to protect the distiller's property right in his trade-marked goods, these matters are incidental to the purpose, which is anti-pathetical to the purpose of the Fair Trade Act. One act seeks to encourage sales, the other seeks to discourage them.

Nature of the Contract: Both the Fair Trade and the Alcoholic Beverage Control Acts are based upon the existence of a contract between producer and retailer, whereby the latter agrees not to sell at less than the price determined by the former. Here the similarity ends. The Fair Trade Acts are voluntary or consentual, in that neither party is required to enter into such a contract.[2] The Alcoholic Beverage Act is mandatory in that no spirits may be sold in California at retail except pursuant to such a contract (Bus. & Prof. Code § 24755).

The Penalty: The penalties for a breach of the Fair Trade Acts are civil, only, giving to the injured party the right to damages or an injunction. The penalty for the breach of the price fixing regulations of the Alcoholic Beverage Act are both civil (Bus. & Prof. Code § 24752) and penal, and the department may suspend or revoke licenses, or institute criminal action (see majority opinion).

The Field Covered: The Fair Trade Acts do not prevent a dealer who is dissatisfied with the prices set by a manufacturer from engaging in competition therewith. If he is unable to find a supplier of a competing article who will enter into a contract at a lower retail price, he may still deal in competing articles which are not fair-traded. Under the Alcoholic Beverage Control Act the retailer has no such alternative. He must deal exclusively in goods the price of

many states which had originally been included in the majority, have concluded that in times of high prices Fair Trade Acts are not a legitimate exercise of police power, and have overruled their previous decisions. In this manner at least one case which was cited and relied on in previous California decisions is no longer the law of the jurisdiction which first propounded it. Thus *Borden & Co. v. Schreuer* [1946-1947 TRADE CASES ¶ 57,641], 182 Ore. 34, cited in *Scovill Mfg. Co. v. Skaggs, supra,* at p. 886, was overruled by *Gen. El. Co. v. Wahle* (1956) [1956 TRADE CASES ¶ 68,333], 207 Ore. 302. Cases from jurisdictions other than Oregon which have reversed their previously announced rule solely on the basis of changed economic conditions are: *Union Carbide & C. Co. v. Bargain Fair Inc.* (1958) [1958 TRADE CASES ¶ 68,920], 167 Oh. St. 182; *Skaggs Drug Center v. Gen. El. Co.* (1957) [1957 TRADE CASES ¶ 68,823], 63 N. Mex. 215; *Tichenor Antiseptic Co. v. Schwegmann Bros.* (1956) [1956 TRADE CASES ¶ 68,400], 231 La. 51; *Olin Mathieson Chem. Corp. v. Francis* (1956) [1956 TRADE CASES ¶ 68,463], 134 Colo. 160; *Gen. El. Co. v. A. Dandy Appl. Co.* (1958) [1958 TRADE CASES ¶ 69,027], 103 S. E. 2d 310 (W. Va.).

[2] The fact that once such a contract is executed other retailers coming into possession of the goods are bound by its terms, does not destroy the voluntary nature, for the conditions of the voluntary contract are deemed to follow the goods. A retailer who obtains goods directly from a producer, without contract, is not bound by any Fair Trade Act provisions.

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which has been set by the distiller, or he must go out of business (Bus. & Prof. Code § 24755).

It is not contended that the foregoing distinctions, of themselves, invalidate the Alcoholic Beverage Control Act. They are intended only to illustrate that there is a wide divergence between purpose, nature, penalty and coverage of the two acts. Because of such variance the Alcoholic Beverage Act must be analyzed individually, and its constitutionality determined without reference to the superficially similar (but basically dissimilar) Fair Trade Acts.

It is to be noted that the Act itself, as quoted above, states that it is an exercise of the police power. No one can doubt that the subject matter (alcoholic beverages) is a proper field for the exercise of that power, even to the extent of legislating away the entire right to deal in intoxicating liquors. Nor can it be doubted that the expressed purpose of the Act is entirely proper, and within the legislative function. I also agree with the majority opinion in its holding that the judiciary has neither the right nor the duty to question the wisdom of the legislative purpose. But at this point the majority opinion leaps a gap which I am unable to negotiate. After announcing that the courts may, and have a duty to, determine "whether the statute bears a reasonable and substantial relation to the object sought to be attained" (majority opinion, pp. 5-6 [76,262]),[3] the opinion merely discusses the authority to legislate. At no point does the opinion analyze the various provisions of this statute as they may be related to "the object sought to be attained." When so analyzed the provisions of the Act which are here under attack must be found to have no reasonable relation to the expressed purpose. This being true, they admittedly fail to comprise a legitimate exercise of the police power.

As shown above, the stated purpose of the Act is to "promote temperance in the use and consumption" of alcoholic beverages. But the sections here involved are restricted solely to a price fixing scheme. The only reason assigned (by both respondent and the majority) for the inclusion of these provisions is an assumed legislative purpose (not expressed in the Act) to prevent "price wars" which would lead to unbridled purchases. While the provisions of sections 24750 *et seq.* may prevent "price wars" in the retail sale of any specific trademarked brand, they do not prevent, or attempt to prevent, "price wars" between competing brands.[4] Neither do these provisions attempt to prevent "dumping" of excess stocks at pre-established low prices. In other words, the Act protects the distiller in keeping his prices high, only if he wants them high. He may, under the Act, set any price he may desire, high or low. He may enter into a price war with all of his competing distillers, so long as he files his wholesale price with the Department and enters into a contract with the retailer. No attempt is made to regulate the wholesale price. The distiller may determine the same so long as he files. Such method of "control" of retail prices may promote one of the purposes of a Fair Trade Act, that is to protect the owner of a trade-mark, but it bears no relationship to the promotion of temperance.

Another example of how the legislative provisions fail to accomplish their stated purpose is to be found in the language of section 24750. That section imposes the price fixing scheme upon all alcoholic beverage "which bears . . . the trade-mark, brand or name of the producer or owner . . . and which *is in fair and open competition with alcoholic beverages of the same general class produced by others.*" (Italics added.) By adding the italics clause, the legislature has exempted any liquor which, although it be labeled with the owner's name, brand or trade-mark, is not in "fair and open competition." The majority has refused to take judicial notice of what goes on under this escape clause, and, for the purposes of this dissent, I will agree to that limited determination. But recourse to judicial notice is unnecessary in order to realize that trade in liquor is not confined to placing distilled liquor in bottles bearing the advertised labels of a well known distillery,

[3] Since the majority opinion cites authority for this proposition it is not necessary to lengthen this dissent with further citation.

[4] The legislature was apparently so disinterested in the ultimate retail price of liquor that requirement of filing price lists with the Board was confined to wholesale prices (Bus. & Prof. Code § 24756). Ostensibly the Department is not required to know the established retail price, which is left to the whim of the distiller, but which binds the retailer to both civil and penal sanctions.

and then shipping the same across a state line. Unlabeled barrels are also accepted by freight carriers, and we have no laws which prohibit their entry into California. Retailers are not prohibited from owning brands and trade-marks, nor are they restrained from bottling on their own behalf. Thus the State may be (and were it not for the restrictions of judicial notice we might say, "is") legally flooded with "off-brands" which are not "in fair and open competition" with other advertised brands, and which may be (are?) sold at very low prices. This may be accomplished under the Act by either retailer, wholesaler or distributor. It would seem that the public might be just as intemperate in the use and consumption of off-brands as it might on any of the better advertised brands.

To assume, as does the majority opinion, that the price regulating provisions may "operate to remove some factors which may led to intemperance" without removing all such factors, is but begging the question. We have not been shown how, or in what manner, these sections can possibly accomplish any result other than increasing the value of a distiller's property right in and to its advertised trade-mark, while allowing him to enter into any and all manner of price wars with his unadvertised brands (or his same product bottled under another name). To hold otherwise is to close our eyes to facts of which we are entitled to take judicial notice; that is that the nationally published statistics show that in spite of the Alcoholic Beverage Control Act the consumption of liquor in California is on the increase, and the per capita consumption exceeds that of most other states.

For these reasons, it is clear that the price control features of the Alcoholic Beverage Control Act bear no reasonable relation to the stated purpose of the Act. While this is a sufficient reason to hold those provisions to be an unjustified exercise of the police power, there is yet another, and perhaps more compelling reason to hold them invalid.

The price control provisions of the Act give to the distiller the exclusive right and obligation of setting the retail price at which his product shall be sold in California (Bus. & Prof. Code § 24750 as affected by § 24755). Nothing in the code gives the Department, or any other official arm of the government, any voice or control in the establishment of such price. The price may be high or low, and need not bear any relationship to supply or demand, or to temperance. In fact, the Department is not even to be advised of the retail price established, since only the wholesale price is required to be posted with that body. The result of this unique piece of legislation is a delegation of the legislative function of establishing price (in order to promote temperance), not to the Department of Alcoholic Beverage Control, but to private persons and to the very persons whose activities the Act proposes to curtail. That such a delegation of legislative authority is contrary to section 1 of Article III and section 1 of Article IV of the California Constitution has long been established.[5] Although the limitation on delegation of authority has been interpreted to authorize legislative delegation to various administrative and civil boards, under certain situations and subject to specific safeguards (*Tarpey v. McClure*, 190 Cal. 593), the attempt to delegate such authority to members of the public has never been condoned. In the case of *State Board v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, this Court had before it for consideration a statute which provided for the creation of a State Board of Dry Cleaners consisting of seven members; one from the general public; two owners of retail plants; two owners of wholesale plants; and two owners of shops. That act further provided that the Board so established might set minimum price schedules for cleaning, dying and pressing services on petition of seventy-five percent of the trade within any specific area, and further provided for injunctive relief for breach of such price schedules when established. This Court held the statute unconstitutional on the ground, among others, that it was an attempt "to confer legislative authority upon those who are directly interested in the operation of the regulatory rule . . ." (*State Board v. Thrift-D-Lux Cleaners, supra*, at p. 448). In that case, the persons to whom

[5] Section 1 of Article III provides for the separation of the Executive, Legislative and Judicial powers of this State, and prohibits any branch from delegating any portion of its authority to one of the other branches. Section 1 of Article IV vests in the State Legislature the exclusive legislative function.

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the legislative authority was conveyed at least had the color of an administrative board, but were held not to be such because of the requirement that the membership be composed of six members of the trade out of a total of seven. In the instant case, there is not even a disguised attempt to delegate to an administrative body. Such a board is created by the Act, but the price fixing authority is given directly to the distiller. Clearly such attempted legislation comes within the rule of the *Thrift-D-Lux* case.

Moreover, the Alcoholic Beverage Control Act sets neither guide nor standard to aid those permitted to fix prices. Even if the legislative authority were delegated to the Department of Alcoholic Beverage Control, without such provision for standards, the price fixing portions of the statute would be unconstitutional (*Tarpey v. McClure,* 190 Cal. 593, *supra; Dominguez Land Corp. v. Daugherty,* 196 Cal. 468; *Agnew v. City of Culver City,* 147 Cal. App. 2d 144, at pp. 153-4; *In re Petersen,* 51 Cal. 2d 177, at p. 184; *State Board v. Thrift-D-Lux Cleaners, supra,* 40 Cal. 2d 436).

In the *Tarpey* case it is said, at page 600, that

> "the legislature may, without violating any rule or principle of the constitution, confer upon an administrative officer a large measure of discretion, *provided the exercise thereof is controlled and guided by rules prescribed therefor.*" (Italics added.)

In the *Dominguez Land* case the court was considering the propriety of a statute delegating authority to the Commissioner of Corporations. At page 484 it said,

> "A familiar illustration is where the legislature enacts a law prescribing that the rates to be charged by a public utility shall be 'reasonable,' and creates a commission with power to investigate and fix the rates. If, however, no standard by which the officer is to be governed be prescribed by the lawmakers, then there is an attempt to entrust a mere administrative officer with the plenary power of the legislature."

Since the act under scrutiny herein offers no guide of any kind to the persons given the obligation of setting prices, the price fixing portion of the statute is invalid. These features thereof are severable, and hence need not require invalidation of the entire Act. The price fixing provisions come squarely within the following language (quoted from *Carter v. Coal Co.,* 298 U. S. 238, 311) relied upon in the *Thrift-D-Lux* case, *supra* (p. 448):

> "a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question."

In my opinion, the judgment should be affirmed.

SCHAUER, J., concurs.

[¶ 69,565] In re: Whitney & Company.

In the United States Court of Appeals for the Ninth Circuit. No. 16,476. Dated November 18, 1959.

On Order to Show Cause in Criminal Contempt.

Robinson-Patman Price Discrimination Act

Price Discrimination—Brokerage Fees—Indirect Discounts in Lieu of Commission—Contempt for Violation of Federal Trade Commission Cease and Desist Order.—The fact that a sea food company bought and sold for its own account, rather than as a broker, when it gave a buyer an indirect grant of a discount in lieu of a commission or brokerage was no defense to a charge of criminal contempt for violating a court-enforced Federal Trade Commission order prohibiting it from giving or granting such discount to a buyer for the buyer's own account. The cease and desist order was not restricted to the company's brokerage activities, so, in effect, it prohibited the giving of such discount in connection with sales on its own account as well as in connection with sales as a broker.

See Price Discrimination, Vol. 1, ¶ 3520.390; FTC Enforcement and Procedure, Vol. 2, ¶ 8801.090.

Price Discrimination—Brokerage Fees—Evidence as to Nature of Allowance.—The facts surrounding an entire sales transaction can establish that a discount was granted in lieu of a commission or brokerage, even though sales documents make no mention of a commission or brokerage or any compensation or allowance in lieu thereof. When a sea food company subject to a court-enforced Federal Trade Commission order prohibiting it from paying brokerage to a buyer for its own account purchased salmon for $15 per case less "5% brokerage" and then sold it to a buyer for $14.50 per case, it gave the buyer an indirect grant of a discount in lieu of a commission or brokerage, and, consequently, violated the cease and desist order. In effect, the company passed along to the buyer fifty cents of the seventy-five-cent discount it had received in lieu of brokerage.

However, three references in invoices to a price "less 5% brokerage" were held to be insufficient to establish a violation of the order when the seller asserted that the references were the clerical errors of a bookkeeper, and that these discounts were the 5% "functional" or "interpacker" discounts customarily allowed to a primary dealer or distributor, such as the buyer.

If so-called "interpacker" discount serves the same purpose as a brokerage discount, has the same effect, and enjoys no economic justification which entitles it to be distinguished, it ought to be regarded as an allowance in lieu of a commission or brokerage —but not otherwise.

See Price Discrimination, Vol. 1, ¶ 3520.390; FTC Enforcement and Procedure, Vol. 2, ¶ 8801.090.

For the petitioner: James E. Corkey, Assistant General Counsel, and Jno. W. Carter, Jr., Attorney FTC, Washington, D. C.

For the respondent: Bogle, Bogle & Gates (by Robert Graham), Seattle, Wash.

Finding respondent guilty of criminal contempt for violating decree enforcing FTC cease and desist order in Dkt. 5279. For a prior opinion of the U. S. Court of Appeals, Ninth Circuit, see 1955 Trade Cases ¶ 68,035.

Statement of Proceedings

HAMLEY, Circuit Judge [*In full text*]: This is a criminal contempt proceeding instituted by this court pursuant to 18 U. S. C. A. § 401(3).[1] The respondent is Whitney & Company, a Washington corporation. This company engages in the business of packing, selling, and distributing canned salmon and other seafood products.

On March 25, 1946, in proceedings before the Federal Trade Commission,[2] an order was entered requiring Whitney to forthwith cease and desist from:

> "Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance or discount in lieu thereof, upon purchases made for such buyer's own account."[3]

The cease and desist order was affirmed by this court. *Federal Trade Commission v. Whitney & Company, et al.*, 9 Cir. [1950-1951 TRADE CASES ¶ 62,948], 192 F. 2d 746. Thereafter, and on April 1, 1955, this court entered a decree commanding Whitney to comply with and obey the above-quoted Commission order [1955 TRADE CASES ¶ 68,035].

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[1] Section 401:
"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
. . .
"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

[2] In the Matter of Carl Rubenstein *et al.*, Docket No. 5279.

[3] This order was intended to invoke and enforce section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. A. § 13(c). Section 2(c) reads as follows:
"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

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On May 22, 1959, the Federal Trade Commission filed a memorandum placing certain facts before this court concerning Whitney's asserted disobedience of the decree of April 1, 1955. On the same day we issued an order requiring the company to show cause why it should not be found guilty of criminal contempt and be punished therefor.

Certified copies of the show cause order and of the memorandum of the Federal Trade Commission were served upon the company by the United States Marshal. The company filed a timely response and a supporting memorandum. A memorandum in reply was filed by the Commission and the matter was argued orally before the court on October 12, 1959.

The described contempt proceedings bring into question two unrelated transactions entered into by Whitney subsequent to our decree of April 1, 1955. These transactions are separately discussed in the next two sections of this opinion.

[*Sale to Nakat Packing Corporation*]

In June 1956 Whitney undertook to act as broker for American Packing Co., of Seattle, in connection with the sale of 810 cases of canned salmon. Whitney advised American that Whitney would undertake to sell this salmon for the account of American at a price to the consuming trade of fifteen dollars per case less usual trade discounts for cash, swell, and label allowances and for a 5% brokerage commission to Whitney. This would result in a net to American of $14.25 per case, less cash, swell, and label allowances. In so advising American, Whitney intended that if it was unable to sell the salmon for the account of American at that price, Whitney would purchase the 810 cases for its own account.

Whitney was of the opinion that it could sell this salmon to Nakat Packing Corporation, of Seattle, or other purchasers in the consuming trade for fifteen dollars per case and endeavored to do so. Nakat, however, was unwilling to pay fifteen dollars per case for this salmon.[4]

Thereafter, Whitney, in its own name and for its own account for resale, purchased these 810 cases of salmon from American. No brokerage services were performed by Whitney in connection with this purchase for its own account. The 810 cases were sold to Whitney by American in two lots, a separate invoice being issued by American for each lot.

On each of these invoices the price of fifteen dollars per case was shown, subject to discounts for cash, swell, and label allowances, and "Less 5% Brokerage." Similarly, the two documents entitled "Account of Sale," issued by Whitney to American covering these two lots, show a price of fifteen dollars a case, with like discounts, "Less 5% Commission."

After purchasing this canned salmon, Whitney, acting in its own name and for its own account, sold the 810 cases to Nakat for $14.50 per case less usual trade discounts for cash, swell, and label allowances.

Whitney asserts that the documents referred to above erroneously reflect that the disposition of the 810 cases was to be handled as a brokerage transaction, but that the transaction as finally consummated was not of that nature.

It is true that Whitney did not act as a broker in acquiring or disposing of the salmon, since it bought and sold for its own account.[5] But the cease and desist order in question is not restricted to Whitney's brokerage activities. If, though Whitney sells for its own account, it grants anything of value as a purported commission or brokerage, or grants any compensation, allowance, or discount in lieu thereof in connection with a sale to one buying for his own account, the order is violated.[6]

[4] A document entitled "Report of Sale No. 408," issued by Whitney on July 5, 1956, records that Whitney sold the 810 cases to Nakat "For Account of American Packing Company," at a price of fifteen dollars per case less usual discounts for cash, swell, and label allowances, and "Less Brokerage 5%." However, the transaction as so recorded was never consummated.

[5] As a matter of fact, the only document which purports to record the disposition of the salmon as a brokerage transaction is the "Report of Sale No. 408," referred to above. The invoices described above, while mentioning a 5% "brokerage," did not purport to record brokerage transactions because they noted outright sales by American to Whitney for the latter's own account. The document entitled "Account of Sale," described above, while mentioning a 5% "commission," did not purport to record brokerage transactions because no buyer other than Whitney was named.

[6] We speak of a "purported" commission or brokerage, since the "commission or brokerage" referred to in the cease and desist order and in section 2(c) of the act would not be a bona fide commission or brokerage. The person who receives such "commission or brokerage" is buying for his own account and renders no brokerage service.

Whitney sold the 810 cases to Nakat for $14.50 per case, less the usual discounts for cash, swell, and label allowances. The documents recording this sale make no mention of a commission or brokerage or any compensation, allowance, or discount in lieu thereof. But the lack of such a notation on these documents is not conclusive. The facts surrounding the entire transaction may establish, despite lack of corroboration in the selling documents, that a discount was granted in lieu of a purported commission or brokerage.

An examination of the surrounding circumstances reveals that this was the case. When Nakat declined to pay fifteen dollars per case, Whitney's plan to act as a broker in the transaction failed. It could not reduce the price to Nakat by giving Nakat part of Whitney's seventy-five-cent brokerage per case, as that would have been a direct grant of a discount in lieu of commission or brokerage. This was forbidden by the cease and desist order.

But in thereafter buying the salmon from American for fifteen dollars less "5% brokerage," and selling it to Nakat for $14.50 a case, Whitney gave Nakat an indirect grant of a discount in lieu of a commission or brokerage. In effect, Whitney passed along to Nakat fifty cents of the seventy-five-cent discount Whitney had received from American in lieu of purported brokerage.

The course followed by Whitney was a transparent attempt to circumvent the cease and desist order here in question. If persons subject to such orders were enabled to escape their effect by following such a course, these orders would be largely ineffective and unenforceable. It was to preclude subterfuges of this kind that the order here in question expressly forbade indirect as well as direct discounts in lieu of a commission or brokerage to persons buying for their own account.

[*Sale to Ivar Wendt*]

On September 19, 1956, Whitney sold to Ivar Wendt, of Seattle, Washington, 8,000 cases of canned salmon. Wendt serves as a primary broker and also as a primary dealer in canned salmon.

The salmon was to be delivered and paid for in 1,600 case lots. Under the terms of the purchase contract Whitney sold the salmon to Wendt at a price of $9.50 per case, less "Regular—5%, 1½%, 1/10%." The 1½% and 1/10% discounts were the usual discounts for cash, swell, and label allowances. The "Regular—5%" discount is not further explained in this instrument. The invoice concerning the first 1,600 cases delivered under this contract notes the same price and usual discounts, "Less 5%." Invoices covering three subsequent lots of 1,600 cases each, however, use the notation "Less 5% Brokerage."

Whitney asserts that the references in these invoices to the discount as "brokerage" were the clerical errors of a bookkeeper. According to Whitney, these discounts were the customary 5% "functional" or "interpacker" discounts allowed to a primary dealer or distributor. Wendt was such a primary dealer and distributor in connection with this transaction, Whitney states.

Whitney also states that Wendt bought the 8,000 cases of salmon as a primary dealer or distributor for his own account and for resale to wholesale outlets and food chains in competition with other primary dealers and distributors. The salmon was thereafter sold by Wendt through field brokers to outlets of this kind.

None of the documents refers to the 5% discount to Wendt as an "interpacker" discount. On the contrary, it was three times noted as "brokerage." But even if the documents had referred to the allowance as an interpacker discount, this would not have been conclusive as to its true character. On the other hand, there is some reason to believe on this record that interpacker discounts are customary under circumstances such as this, and that this particular discount was intended as such.

Assuming this to be the case, we are unable to determine on this record whether such a discount should nevertheless be held to come within the purview of the cease and desist order. If it serves the same purpose, has the same effect, and enjoys no economic justification which entitles it to be distinguished, a so-called "interpacker" discount ought to be regarded as an allowance in lieu of a commission or brokerage—but not otherwise.

It is therefore our view that since the evidence is inconclusive on this branch of the case, a violation of the cease and desist

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order in connection with the Wendt transaction has not been proved.[7]

Findings of Fact

The court finds beyond a reasonable doubt that Whitney & Company is guilty of criminal contempt of this court in that, by buying 810 cases of canned salmon from American Packing Co. and selling the same to Nakat Packing Corporation in the manner and under the circumstances described above, Whitney & Company disobeyed the decree of this court entered herein on April 1, 1955, commanding Whitney & Company to comply with and obey the cease and desist order of the Federal Trade Commission entered on March 25, 1946, in its Docket No. 5279.

The court further finds that it has not been proved beyond a reasonable doubt that Whitney & Company is guilty of criminal contempt of this court with regard to the sale of 8,000 cases of canned salmon to Ivar Wendt in the manner and under the circumstances described above.

Order

It is Ordered by the court that:

1. In so far as the order to show cause charges criminal contempt in connection with the sale of 8,000 cases of canned salmon to Ivar Wendt, it is hereby discharged and dismissed with prejudice.

2. Whitney & Company is hereby adjudged guilty of criminal contempt of this court with regard to its purchase of 810 cases of canned salmon from American Packing Company, and its sale thereof to Nakat Packing Corporation.

3. Whitney & Company, by an authorized officer or attorney, shall appear before this court on the 18th day of January, 1960, at 9:30 a. m., for a hearing to determine the nature and extent of the punishment to be imposed, unless Whitney & Company in writing waives such appearance.

4. A certified copy of the foregoing opinion and findings of fact and of this order be served upon Whitney & Company, at its principal place of business, by the United States Marshal in Seattle, and that due return of such service be made.

[¶ 69,566] Beloit Culligan Soft Water Service, Inc.; Adolph H. Samuels, d.b.a. Culligan Soft Water Service; Merrill R. Fie, d.b.a. Culligan Soft Water Service of Denver; John J. Burnham and Irene Burnham, d.b.a. Culligan Soft Water Service Co. of Ogden, Utah; James W. Fisher and John W. Fisher, d.b.a. Culligan Soft Water Service; L. A. McRae, d.b.a. Culligan Soft Water Service of Palo Alto, California; and George W. Geiger, d.b.a. Culligan Soft Water Service of San Bruno v. Culligan, Inc.

In the United States Court of Appeals for the Seventh Circuit. No. 12613. Dated December 15, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. IGOE, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations As Defenses—Where Alleged Violation of Antitrust Laws Is Collateral to Right Sued Upon—Consent Decrees As Evidence—Requirements Clauses in Franchise Contracts.—In a suit for a declaratory judgment the lower court properly required the defendant to recognize the validity of certain franchise agreements entered into with plaintiff dealers although these agreements contained requirements provisions. The fact that the defendant entered into a consent order to cease and desist making or continuing in effect any contract violative of Section 3 of the Clayton Act was not a defense. While noting that all exclusive dealing contracts were not violative of Section 3, the court followed *Kelly v. Kosuga* [1959 TRADE CASES ¶ 69,283] in holding that such a contract would be enforced unless "the judgment of the court would be the vehicle by which the unlawful conduct is carried out". In thus severing the requirements provision and giving effect to the remainder of the franchise

[7] In a criminal contempt proceeding a finding of guilt is not to be entered if there is a reasonable doubt. *In re Michael,* 3 Cir., 146 F. 2d 627, 628, reversed on other grounds 326 U. S. 224 (1945): *Blim v. United States,* 7 Cir., 68 F. 2d 484, 487.

agreement, the court held that there was no lack of mutuality and that the parties were not *in pari delicto*. While the lower court erred in holding that the consent decree was not a good defense because it was voluntarily entered into, this was a harmless error and was not necessary to the decision.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.475, 9045.20.

For the plaintiffs: A. Leslie Hodson and E. Houston Harsha, both of Chicago, Ill.

For the defendant: B. L. Pollak, Gerald White, Robert A. Sprecher, and Frank A. Karaba, all of Chicago, Ill.

Reversing 1959 Trade Cases ¶ 69,255.

[*Declaratory Judgment*]

DUFFY, Circuit Judge [*In full text*]: This is a suit for a declaratory judgment to require defendant, Culligan, Inc., (hereinafted called "Culligan") to recognize the validity of certain dealership franchise agreements entered into between Culligan and the respective plaintiffs.

[*Franchise Agreements*]

In the period 1945 to 1947, five of the plaintiffs entered into franchise agreements with Culligan, which were substantially identical except for names, territory, termination date and number of service units to be purchased. These contracts are known as "First Post War Contracts." The respective expiration dates are: December 4 and December 21, 1960; November 20, 1970; June 25, 1972 and October 1, 1972.

In 1954 and 1956, respectively, the other two plaintiffs entered into franchise agreements with Culligan which were substantially identical with each other except as to items similar to those noted in the preceding paragraph. These contracts are known as "Second Buff Contracts." The expiration dates are June 1, 1964 and January 26, 1966.

[*Requirements Provisions*]

Each of the First Post War Contracts contained an undertaking by Culligan to sell, and by the respective plaintiffs to purchase, all of the plaintiff's requirements of water softening units, equipment, parts and materials. In the Second Buff Contracts there was the undertaking by the dealers to purchase specified equipment and materials including Culligan's water conditioning minerals and service tanks and other parts, although equipment and material not specified could be purchased from other dealers.

In each of the First Post War Contracts, the dealer undertook "to use his best endeavors in the sale and promotion" of water conditioning services and Culligan's products. In the Second Buff Contracts, the dealer promised "to diligently and loyally promote and foster" the increase of the use and acceptance of Culligan soft water service.

In both types of contract, the dealer agreed that he would provide capital to establish offices, sales rooms and service plants acceptable to Culligan, and that he would maintain sufficient stock and equipment, and would maintain in serviceable and clean condition all service units in accordance with Culligan standards. He also agreed to cooperate with Culligan in formulating sales promotion plans.

In the First Post War Contracts, Culligan granted to each plaintiff a designated territory within which each plaintiff had the exclusive right to distribute Culligan's water conditioning products. In the Second Buff Agreements each plaintiff was given the right to operate exclusively in a designated territory under the Culligan plan which is a comprehensive soft water service plan.

[*Severability Clauses*]

Both types of contract contained severability clauses. The First Post War Agreement contained the following: "If any provision of this agreement is held to be invalid or unenforcible, this contract shall, as to such provisions, be considered divisible, and the balance of the agreement shall be valid and binding." The Second Buff Agreement provides: "Any provision of this Agreement prohibited by law shall be ineffective to the extent of such prohibition without in any way invalidating or affecting the remaining provisions of this Agreement."

Each plaintiff expended substantial sums of money in developing territories granted to him or it by Culligan. Extensive advertising was undertaken, through media such

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as newspapers, billboards, radio and television. This advertising was done under the name of "Culligan Soft Water Service," and often the names of the dealers were not mentioned.

[*Consent Decree*]

On October 31, 1956, the Federal Trade Commission filed a complaint against Culligan charging a violation of Section 3 of the Clayton Act (15 U. S. C. A. § 14), by requiring its dealers not to purchase or deal in water softening products made by competitors of Culligan. Later, Culligan agreed to a consent order which became effective May 23, 1957. Culligan agreed to desist from making any contract or continuing in effect any existing contract for the sale of its products on condition the purchaser shall not use, deal in, or sell similar or related products supplied by any competitor.

The order also provided:

> "* * * nothing in this order shall prohibit respondent from entering into an agreement with its dealers prohibiting them from using or selling for use, in the Culligan plan, parts, equipment or material which would adversely affect respondent's water conditioning service unit."

By letter of July 9, 1957, Culligan notified its dealers including plaintiffs, that the consent order "* * * by its nature invalidated all Culligan franchises." Later, Culligan submitted a new form of franchise agreement to its dealers, including plaintiffs, which terminated any pre-existing franchise, and granted the dealer a non-exclusive territory. Fifty-seven dealers, including plaintiffs, declined to execute the new agreement, although a large majority did so. By letter of December 29, 1958, Culligan wrote to each plaintiff purporting to cancel plaintiff's existing franchise agreement on the sole ground that plaintiff had failed to execute the new form of franchise. Culligan informed plaintiffs it would no longer sell its product to them, and demanded they discontinue the use of the name "Culligan" in their business. There was no claim that any plaintiff had breached his or its franchise agreement.

[*Court Rulings*]

Culligan argues that the contracts sought to be enforced are invalid and unenforceable because they contain provisions which are in violation of section 3 of the Clayton Act. Defendant insists the illegal provisions invalidate the entire contract. The District Court held otherwise, and entered a declaratory judgment in favor of plaintiffs. The Court also issued an injunction restraining Culligan from interfering with the rights of plaintiffs in their franchise agreements.

The District Court concluded that the consent order effective May 23, 1957 did not affect the rights of plaintiffs under their franchise agreements and did not excuse Culligan from performing its contractual obligations under such agreements. The Court was of the view that the severability clauses were valid and effective, and that the agreements were valid in all respects other than the requirements clause.

Section 3 of the Clayton Act, 15 U. S. C. A. § 14, provides, in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * make a * * * contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, * * * on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor * * * of the * * * seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

In arguing that the respective franchise agreements are unenforceable, Culligan has cited a number of court decisions where price-fixing provisions of contracts have been considered. In *United States v. Socony-Vacuum Oil Co., Inc.* [1940-1943 Trade Cases ¶ 56,031], 310 U. S. 150, the Court held price-fixing agreements to be in violation of the Sherman Act and to be illegal *per se*. In *United States v. Line Material Company* [1948-1949 Trade Cases ¶ 62,225], 333 U. S. 287, the Court said, page 307: "In the absence of patent or other statutory authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act." In that case the Court also stated, page 308: "It is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sher-

man Act beyond the limits of the patent monopoly." At a later date the Court held illegal an agreement to hold down prices by limiting maximum prices. *Kiefer-Stewart Co. v. Seagram & Sons, Inc.* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211. Again, in *United States v. McKesson & Robbins, Inc.* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305, 309, 310, the Court emphasized that price fixing is conclusively presumed to be unreasonable.

The Supreme Court has adopted a different approach in considering exclusive dealing provisions or requirement contracts which are prohibited by Section 3 of the Clayton Act. The Court has emphasized the importance of the part of that statute which provides exclusive dealing agreements are illegal "where the effect of such * * * contract * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U. S. C. A. § 14.

In the earlier cases, the Court applied the "Rule of Reason" of the Sherman Act,[1] to Section 3 of the Clayton Act.[2] However, in *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392 (1947) the Court moved away from the "Rule of Reason" in determining the legality of exclusive dealing provisions. Any lurking suspicion that the "Rule of Reason" was applicable to Section 3 Clayton Act violations was dispelled by the decision in *Standard Oil Company of California and Standard Stations, Inc. v. United States* [1948-1949 TRADE CASES ¶ 62,432], 337 U. S. 293 (1949). The Court stated, at page 314: "We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."

[*Price Fixing—Exclusive Dealing*]

It is clear that there is a substantial distinction between the standard to be used in determining the illegality of a price-fixing provision and the standard to be used in passing on the claimed illegality of an exclusive dealing provision. Absent a patent or fair trade agreement, a price-fixing agreement is *per se* illegal. There is no necessity to go outside the contract containing such provision. It is presumptively illegal regardless of the position of the parties in the appropriate market.

Exclusive dealing provisions, on the other hand, are not in and of themselves illegal. It must be determined whether or not the volume of business affected is "insignificant or insubstantial." *International Salt Co. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392, 396. Thus, an exclusive dealing provision might be legal at the time the contract was executed, but due to the growth of the business of the parties and the volume of the business they affect, the provision might become illegal. Also, it was pointed out in the *Standard Stations* case, 337 U. S. at 306: "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public."

The case of *Kelly v. Kosuga* (1959) [1959 TRADE CASES ¶ 69,283], 358 U. S. 516, is enlightening and is the most recent expression we have from the Supreme Court bearing upon the issues we are here considering. In *Kelly,* plaintiff and his associate, in 1955, had 1,000 cars of onions which they could not dispose of through regular channels. They met with a group of mid-western onion growers, and threatened to deliver their onions on the futures exchange which would have resulted in depressed prices. Defendant, a grower, agreed to buy 287 of the 600 cars of onions which plaintiff had stored in the Chicago area. In consideration thereof, plaintiff and his associate agreed not to deliver onions on the futures market for the balance of the current trading season. Defendant and other buyers also agreed not to deliver any of the purchased onions on the futures market during that season. These facts were pleaded as a defense to an action for payment of the price of 50 cars of onions.

In upholding the right of the plaintiff to recover, the Supreme Court recognized the validity of the defense offered but only in a very limited situation where the judgment of the court would be the vehicle by which the unlawful conduct is carried out. In a paper "Recent Antitrust Developments," [3] Professor Milton Handler, in com-

[1] *Standard Oil Company v. United States,* 221 U. S. 1.
[2] *Standard Fashion Company v. Magrane-Houston Company,* 258 U. S. 346, 355.
[3] The Record of the Association of the Bar of the City of New York, Volume 14, No. 7, October, 1959.

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menting on the *Kelly* case, said: "Presumably, unless the Court becomes an accessory after the fact by enforcing the precise conduct made unlawful by the statute, the agreement between the parties will be upheld and payment of the purchase price ordered." We agree with this conclusion.

[*Legal Part of Contract Enforceable*]

We interpret the current view of the Supreme Court to be that a defense based on violation of Section 3 of the Clayton Act is valid if the contract at issue is intrinsically illegal; that is—if the Court, by its judgment, would be enforcing the specific conduct prohibited by the Act. But such is not the case in the franchise agreements we are considering in the case at bar. We note again that all exclusive dealing contracts are not violative of Section 3 of the Clayton Act. Furthermore, plaintiffs are not asking the Court to enforce the exclusive dealing provision of the agreements. As stated in *Kelly v. Kosuga, supra,* page 521, the contract need not be condemned "* * * though it furnished the occasion for a restrictive agreement of the sort here in question."

Culligan strongly argues that to sever the requirement provisions from the franchise agreements would, in each case, leave a void instrument totally lacking in mutuality and failing in consideration. Culligan also insists that plaintiffs are *in pari delicto.*

[*Mutuality*]

Relying upon their franchises, the plaintiffs invested large sums of money in their businesses which were conducted under the Culligan name. In the early years of operation they uniformly operated at a loss. Several of the plaintiffs have commitments to advertise Culligan products for considerable periods in the future. The years of effort and expenditure of funds by plaintiffs have borne fruit, and in recent years, the plaintiffs usually have been operating at a profit. Their businesses under the Culligan name have become well established. Such good faith conduct by plaintiffs might, in itself, be grounds for holding there was no lack of mutuality in the contracts we are considering. *Molitor v. Chicago Title & Trust Co.,* 325 Ill. App. 124, 59 N. E. 2d 695, 698.

The First Post War Agreements required that each dealer purchase a specified number of service units per year for the first five years of the contract. These purchases have long since been made. In the Second Buff Contracts, the dealer was required to purchase a specified number of water softening units. Thus, Samuels promised to purchase 250 units each year for ten years, and Geiger agreed to purchase 50 units per year for the first five years and 25 units per year for the second five-year period. No claim is made that the dealers under the Second Buff Contracts have not fully carried out their commitments.

We hold that under the circumstances of this case, the dealer franchise agreements, after the excision of the requirements provision, are not void for want of mutuality or failure of consideration.

[*In Pari Delicto*]

We next consider Culligan's argument that plaintiffs are *in pari delicto,* and thus the law should leave the parties where it finds them and afford no relief. Each of the plaintiffs did sign the franchise agreement tendered by Culligan. It is without dispute that no plaintiff would have been recognized by Culligan as a Culligan dealer had not the franchise agreement been signed. It was the requirements provision in that contract that was illegal under Section 3 of the Clayton Act. Culligan seeks to use this illegal provision as an excuse for avoiding its own contractual obligations.

In enacting the Clayton Act, Congress had in mind the protection of dealers. The House Report[4] stated the legislation was designed to prevent an unfair trade practice which was "* * * *unfair to the local dealer* and to the community * * *." (Emphasis supplied.)

Courts are reluctant to invoke the doctrine of *in pari delicto* where to do so would manifestly work an injustice. *Allgair v. Glenmore Distilleries Co.* (S. D. N. Y.) [1950-1951 TRADE CASES ¶ 62,659], 91 F. Supp. 93.

Corbin, in his treatise on contracts (6 Corbin, Contracts, § 1540 (1951)) states:

"If a bargain is illegal, not because a performance promised under it is an illegal performance, but only because the

[4] H. R. Rep. No. 627, 63d Cong., 2d Sess., Pg. 11.

party promising it is forbidden by statute or ordinance to do so, the prohibition is aimed at that party only and he is the only wrong doer. * * * The other party, being himself subject to no prohibition or penalty, may even be one of the class of persons for whose protection the prohibitory statute was enacted.

"In these cases the refusal of all remedy against a party to the illegal bargain would penalize the very persons for whose benefit the making of such a bargain is prohibited or declared illegal. In such cases, in order to attain the purposes of the law, the courts have frequently enforced the bargain by one or more of the usual remedies, in favor of a party for whose benefit the law was intended and against a party toward whom the prohibition or penalty was directed. * * * There is no reason why, in a case otherwise proper, a decree for specific performance should not be granted."

We hold the case at bar is not one in which the defense of *in pari delicto* may be used to deny relief to the plaintiffs.

[*Effect of Consent Decree*]

Defendant strongly objects to the conclusion of law of the District Court that Culligan cannot interpose the consent decree as a defense in this action since Culligan voluntarily agreed to the consent order. We think this contention is well taken. Culligan agreed to the order some six months after the filing of the complaint by the Federal Trade Commission. Consent judgments are ordinarily enforceable in the same manner as other judgments. A consent judgment operates as a *res judicata.* However, this erroneous conclusion is a harmless error. It was not necessary to the decision of the District Court. We have given no weight to this conclusion in reaching our decision herein.

Culligan complains of the equitable relief granted in the decree of the District Court. The Court restrained Culligan from "refusing to sell Culligan products to any plaintiff because said plaintiff has declined to accept and execute any other form of agreement as a substitute for its franchise agreement, or because said plaintiff has instituted this action for declaratory judgment."

We think the decree framed by the District Court preserves to plaintiffs their most important asset, the good will represented by their business names. The protection of good will has, in the eyes of the Chancellor, always been of great importance. We hold the equitable relief granted by the District Court was justified by the facts in this case.

Defendant has discussed other points in its briefs. We have considered same and find them to be without merit.

The judgment of the District Court is

AFFIRMED

[¶ 69,567] Arthur R. Weir and Quikbrik Company of Chicago, Inc. v. Chicago Plastering Institute, et al.

In the United States Court of Appeals for the Seventh Circuit. No. 12694. Dated December 23, 1959.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. PERRY, District Judge.

Sherman and Clayton Antitrust Acts and Labor-Management Relations Act

Private Enforcement and Procedure—Civil Damage Action—Necessary Averments—Agreement—Plasterers.—A trial court properly granted a directed verdict dismissing plaintiffs' claim for treble damages due to defendants' alleged boycott. The evidence, viewed in a light most favorable to the plaintiffs, failed to show any combination, agreement, or conspiracy to deprive the plaintiffs of union plasterers. Rather, it was the refusal of a single union to furnish such help, and it was held not to be a violation of the Sherman Act for laborers in combination to refuse to work.

See Combinations and Conspiracies, Vol. 2, ¶ 2101.005.

For the plaintiffs: Kenart M. Rahn, Chicago, Ill.

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For the defendants: William T. Kirby, Thomas M. Thomas, Thomas B. Martineau, Hugh J. McCarthy, John J. Enright, John L. Vette, W. T. McNeil, and John W. McElroy, all of Chicago, Ill.

Before HASTINGS, Chief Judge, CASTLE, Circuit Judge, and PLATT, District Judge.

[*Treble Damage Action—Boycott*]

CASTLE, Circuit Judge [*In full text*]: Plaintiffs-appellants, Arthur R. Weir and Quikbrik Company of Chicago, Inc., brought suit in the District Court to recover for damages alleged to have been suffered by plaintiffs to business and property by reason of a boycott. Defendants-appellees are Chicago Plastering Institute Inc.,[1] Journeymen Plasterers Protective and Benevolent Society, OP & CFIA, Local Union No. 5,[2] Employing Plasterers Contractors Association of Chicago,[3] Byron W. Dalton,[4] J. W. Farr & Co.[5] and J. Woodcock[5];

Plaintiffs predicate liability of defendants for treble damages under 15 U. S. C. A. § 15 on conduct alleged to constitute a violation of the antitrust provisions of 15 U. S. C. A. § 1. In addition Plaintiffs claim a "secondary boycott" by defendants Dalton and Local No. 5 in violation of, and entitling them to damages under, 29 U. S. C. A. § 187.

The district court at the conclusion of plaintiffs' evidence granted the motions of all defendants for a directed verdict and entered judgment for defendants. Plaintiffs appealed and contend that the court erred in not submitting the case to the jury. Subsidiary contentions made by plaintiffs include claims that the court erred (1) in rulings on the admission of evidence and on offers of proof, (2) in refusing to hear oral argument, (3) in failing to certify to the Attorney General that the constitutionality of an Act of Congress affecting the public interest had been put in issue by defendants' pleadings, (4) in failing to make findings of fact, and (5) that the District Court's executive committee erred in reassigning the case to the trial judge.

[*Issue*]

The main contested issue is whether there was evidence which when viewed in the light most favorable to plaintiffs, together with all reasonable inferences that might be drawn therefrom, would, as a matter of law, sustain a verdict for plaintiffs.

It would serve no purpose to attempt to summarize all of the evidence. In so far as it is pertinent to establishing the existence of a boycott in violation of either the Sherman Act (15 U. S. C. A. § 1) or the Labor-Management Relations Act (29 U. S. C. A. § 187), and viewed in the light most favorable to plaintiffs, accepting plaintiffs' version or that most favorable to plaintiffs where there is difference or conflict in the testimony, the record establishes the following facts.

[*Evidence*]

The Institute is a not-for-profit membership corporation the officers and directors of which are representative officers of labor unions, plastering contractors and persons engaged in the plastering business. Its purpose, to promote the use of plaster products, is stated in its charter as follows:

> "The advancement of plaster construction over inferior substitutes, by (1) education of the public, and (2) by sponsoring legislation calculated to preserve the health and safety of the public by the use of plaster construction, and (3) discourage attempts to pass legislation derogatory to plaster construction, and (4) to do those things which are necessary and proper to promote and enhance the plastering industry."

Institute provides retirement pensions, compensation for illness and injuries, and death benefits for those employed in the plastering industry.

The Association is an incorporated not-for-profit, trade association. Its members are approximately 36 Chicago plastering contractors. Local Union No. 5 is an unincorporated trade union composed of approximately 1200 journeymen and apprentice plasterers who engage in their trade as employees of plastering contractors. The Constitution and By-Laws of Local No. 5, provide:

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[1] Herein referred to as Institute.
[2] Herein referred to as Local No. 5.
[3] Herein referred to as Association.
[4] President of Institute and president of Local No. 5, sued individually and as representative of the membership of Local No. 5.
[5] A plastering contractor.

"Sec. 96. Any person or firm desiring to become plastering contractors and employ members of Local No. 5 must qualify according to the following rules: They must be examined by our Examining Board and prove that they know the fundamentals of plastering. They must show sufficient bank account or credit to meet their material bills and pay-rolls, and they must also furnish a surety bond not less than Ten Thousand Dollars ($10,000) to insure the payments of our members at all times. Any member of Local No. 5 desiring to become a plastering contractor must make application in writing and appear before the Examining Board for a hearing. He must also be a member of Local No. 5 in good standing for a period of five years. This does not necessarily apply to honorably discharged men from the armed services. A thirty (30) days notice must be posted for all applicants who are to be examined as Contractors."

A collective bargaining agreement between Local No. 5 and the contractor members of the Association contains provisions under which each makes financial contributions to Institute for the following purposes:

"(a) Educating the public of the superiority of plaster construction over inferior substitutes.

"(b) Sponsoring legislation that is calculated to preserve the health and safety of the public by the use of plaster construction.

"(c) To do those things which are necessary and proper to promote and enhance the plastering industry.

"(d) To provide health and hospital insurance and other benefits for the aforesaid employees."

The Association agrees to assess and collect from its members, and to contribute, a sum equal to 6% of employee's wages (later changed to 16 cents per hour per man employed). Local No. 5 agrees to contribute a sum not to exceed ½ cent per hour for each hour each of its members are employed by contractor members of the Association.

Early in 1952 plaintiff Weir entered into an agreement with American Cement Products Company of Detroit, Michigan under which he became an authorized applicator of its product known as Quikbrik. Quikbrik, as a process, may be described as a method whereby an imitation brick surface may be applied to the interior or exterior surface of a building. A lath-like frame is first affixed to the surface. A coating of cement is then applied. While the cement is still soft the product Quikbrik, a mixture of crushed building material similar to ground brick, is pressed into the cement. When the mixture is partially dried the "joints are struck", that is, by means of a rack and a cutting tool, grooves are formed which show the underlying cement and cause the finished surface to have the appearance of a brick wall.

Weir called on defendant Dalton, President of Local No. 5, and showed him samples of and literature concerning Quikbrik. Dalton was impressed with the product. Weir advised that he wanted to become a plastering contractor and hire union plasterers, members of Local No. 5. Dalton promised full cooperation and telephoned the lathers' union requesting that it cooperate with Weir. Dalton told Weir that "he could hire at that time union help". Weir thought his conversation with Dalton constituted approval of Weir as a plastering contractor by Local Union No. 5. Weir proceeded to purchase contracting equipment and obtained a Quikbrik job. Weir telephoned Albert J. Forst, then business agent of Local No. 5, and told him he wanted a plasterer to work on a job, stating that Dalton said it was O. K. Weir told Forst that his work was cleared through the union. Forst was unable to reach Dalton by telephone to verify Weir's statement. Forst sent a plasterer, member of Local No. 5, to Weir to work on the job he then had. The job was completed in about a week.

At a second interview with Dalton, Weir discussed the matter as to whether or not the "striking of the joints" was to be performed by union plasterers or by ordinary union labor. Dalton insisted that this operation be performed by union plasterers.

Weir organized or caused to be organized the plaintiff Quikbrik Company of Chicago, Inc., and subscribed to 75% of its capital stock.

Upon obtaining two additional contracts for Quikbrik jobs Weir telephoned John Boland, a business agent for Local No. 5, to secure union plasterers. At Weir's request Boland called at Weir's home on a Saturday where he was told that Weir had two jobs to do and wanted union plasterers. Boland said he would have to check with Dalton. Weir suggested that he telephone

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Dalton as he needed the men for Monday morning. After making the telephone call Boland told Weir "I am sorry you did not make an impression on Dalton. I can do nothing for you. You are through." Weir proceeded to perform the work with non-union plasterers.

Weir never did appear before Local No. 5's examining board and obtain approval of himself or the corporation as a plastering contractor eligible to employ its members as required by Sec. 96 of the Union's Constitution and By-Laws. The corporate plaintiff, Quikbrik Company of Chicago proceeded to do twelve or more Quikbrik jobs between July and October 1952.

In February of 1953 plaintiff Weir obtained a distributor's franchise from American Cement Products Company giving him the right to appoint dealer-applicators within a territory consisting of portions of Illinois, Wisconsin and Indiana. Weir solicited and obtained contracts from seven Chicago plastering contractors. Each such dealer was required to purchase an initial order of Quikbrik and to rent various tools at a total cost of $1350.

In April of 1953 one of these Chicago Plastering contractors, defendant J. Woodcock, who was not a member of the Association, told Weir he had turned down an offer of a Quikbrik job, stating

> "You know I can't do it. Dalton is mad at you and I can not proceed. I can not do any more Quikbrik jobs until you get straightened out with Dalton. Go down to the Union hall and make a date to go before their executive board. Maybe that will straighten it out."

Weir called at the union hall where Forst told him that "Dalton is handling that whole deal of yours". Weir tried to reach Dalton by telephone many times and called at his office but Dalton refused to talk to him. Some of the Chicago plastering contractor dealer-applicators of Quikbrik did not reorder after their initial order. American Cement Products Company cancelled its contracts with plaintiff Weir in January of 1954. Following a meeting with Dalton, Sands, manager of American Cement Products had written Dalton in December of 1953 that "we have completely washed our hands of Art Weir as a distributor."

The Sherman Act (15 U. S. C. A. § 1) declares illegal:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations * * *"

A contract, combination or conspiracy is an essential element of a violation.

[*No Evidence of Agreement*]

The record clearly establishes that plaintiffs were unable to secure union plasterers. Whether this was because of Dalton's displeasure with Weir because of the latter's desire to use other than union plasterers for that phase of Quikbrik application described as "striking the joints", Weir's subsequent employment of non-union help, or for some other reason, it is equally apparent that the record is barren of any evidence of a combination, agreement or conspiracy among the defendants either to boycott the product Quikbrik, boycott Weir as a distributor, or boycott Weir or Chicago Quikbrik Company, Inc., as dealer-applicators. Nor, in our opinion, could the jury have properly reached a conclusion that such a conspiracy existed by any reasonable inference from the facts proven. There is a total absence of proof that any restraint of any kind existed as to the flow of Quikbrik materials in interstate commerce or as to its use. Plastering contractors, members of Association, performed Quikbrik jobs with union plasterers and plaintiffs performed Quikbrik jobs with non-union help without interference from Local No. 5 or from any of the defendants. Dalton's or Local No. 5's refusal to furnish union plasterers to plaintiffs was not shown to have been pursuant to any combination, agreement or conspiracy with any of the other defendants. The requirements of Sec. 96 of the Constitution and By-Laws of Local No. 5 were not shown to have been the result of any agreement or conspiracy with the Association, the Institute or the plastering contractor defendants. Sec. 96 is not, as plaintiffs infer, a part of the collective bargaining agreement between Local No. 5 and the Association. And neither the requirements of Sec. 96 nor any refusal of Dalton or Local No. 5 to furnish union plasterers to plaintiffs constituted a violation of 15 U. S. C. A. § 1. In *Hunt v. Crumboch* [1944-1945 Trade Cases ¶ 57,385] 325 U. S. 821, 824 it is pointed out that:

> "It is not a violation of the Sherman Act for laborers in combination to refuse

to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Antitrust laws. *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 502-503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as "a commodity or article of commerce." Clayton Act, 38 Stat. 730, 731; Norris-LaGuardia Act, 47 Stat. 70; see also *American Steel Foundries v. Tri-City Council,* 257 U. S. 184, 209."

There being no evidence of concert with others in either connection, the doctrine of *Allen Bradley Co. v. Local Union No. 3* [1944-1945 TRADE CASES ¶ 57,386], 325 U. S. 797 has no application. That points of contact or relationships for promotion of mutual interests existed among the defendants on other matters, such as support of Institute, does not on the facts here proven give rise to any reasonable inference that plaintiffs' difficulties with Dalton or Local No. 5 were the result of agreement or concert of action between the Local and its president and any one or more of the other defendants.

Plaintiffs claim a violation of that portion of 29 U. S. C. A. § 187 which makes it unlawful for any labor organization:

"* * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any * * * employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *".

In this connection plaintiffs contend that Local No. 5 engaged in a concerted refusal to furnish labor to Weir with the object of compelling him to cease doing business with his supplier of Quikbrik materials and that after Weir became a distributor Local No. 5 engaged in a refusal to supply labor to contractor-dealers of Weir for the purpose of forcing Weir out of business. An examination of the record discloses no evidence that Dalton or Local No. 5 were in any manner opposed to Quikbrik or the supplier, American Cement Products Company. None of the defendants regarded Quikbrik as an inferior substitute for plaster or opposed its use. Plastering contractor members of the Association performed Quikbrik jobs with union labor without interference. The refusal to furnish union plasterers to Weir was not a secondary boycott. We find no merit in plaintiffs' contentions with respect to a violation of 29 U. S. C. A. § 187.

It is our conclusion that the evidence when viewed most favorably to plaintiffs, together with all reasonable inferences that might be drawn therefrom, would not warrant a jury finding that the conduct of defendants or any of them constituted a violation of either the Sherman Act (15 U. S. C. A. § 1) or the Labor-Management Relations Act (29 U. S. C. A. § 187).

We have considered but find no merit in plaintiffs' claims of error in rulings on admission of evidence and offers of proof. Nor was the trial court's refusal to hear oral argument on the motions for a directed verdict reversible error. Cf. *Federal Communications Commission v. WJR,* 337 U. S. 265.

The failure to make findings of fact was not error. The Federal Rules of Civil Procedure do not support plaintiffs' complaint of absence of findings. Findings of fact are not required on the granting of a motion for directed verdict.

The defendants' pleadings did not raise a question as to the constitutionality of 29 U. S. C. A. § 187 on its face and therefore certification to the Attorney General was not required. Cf. *Keyes v. Madsen,* D. C., 179 F. 2d 40. In any event it does not appear that plaintiffs were in any way prejudiced by failure of such certification.

Plaintiffs contend that it was error for the District Court's Executive Committee to make the reassignment of the case to the trial judge who heard it. A case involving similar issues had been heard previously by that judge and the rules of the district court authorized reassignment of a related cause. In any event no prejudice to plaintiff was shown.

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The plaintiff has discussed other points in his brief. We have considered them and find them to be without merit.

The judgment of the District Court is affirmed.

[¶ 69,568] **Marvin Thomason v. Hospital T. V. Rentals, Inc.**

In the United States Court of Appeals for the Eighth Circuit. No. 16,300. Dated December 16, 1959.

Appeal from the United States District Court for the Western District of Missouri.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Civil Damage Action—Pretrial Procedures—Dismissal of Action—Factual Issues.—In a treble damage action, a complaint which charged a lessor of radio and television sets to hospital patients with violating the Sherman Act by entering into contracts with three hospitals whereby only such lessor could deal with patients in their hospitals was improperly dismissed for failure to state a cause of action. The court regarded as factual issues such questions as whether the hospitals were charitable institutions having an unrestricted right to make exclusive contracts, whether plaintiff engaged in interstate commerce, whether the contracts restrained trade and whether the plaintiff was injured by these acts or was entitled to any relief. Before the complaint may be dismissed in this way it must appear beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to any relief.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.440.

For the appellant: Charles V. Garnett (Hammond C. Woods, on brief), Kansas City, Mo.

For the appellee: William W. Cochrane, Jr. (Norman P. Gordon, on brief), Kansas City, Mo.

Before Sanborn, Van Oosterhout and Matthes, Circuit Judges.

Sanborn, Circuit Judge [*In full text*]: This is an appeal from an order of the District Court dismissing the amended complaint of the plaintiff (appellant) upon the ground that it failed to state a claim upon which relief could be granted.

The question for decision is whether it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. *Lada v. Wilkie,* 8 Cir., 250 F. 2d 211, 212-213 and cases cited; *Conley v. Gibson,* 355 U. S. 41, 45-48.

The amended complaint alleged: That the action is based on 15 U. S. C. § 15, which gives to any person "injured in his business or property by reason of anything forbidden in the antitrust laws" the right to sue therefor in a district court of the United States in the district in which the defendant resides or is found or has an agent, regardless of the amount in controversy, and to recover treble damages; that the plaintiff is a resident of the State of Missouri, and maintains a place of business in Kansas City, Kansas; that the defendant (appellee) is a Colorado corporation having a place of business in Kansas City, Missouri; that the plaintiff is and has been engaged in the business of renting, leasing and servicing television and radio receiving sets to persons receiving medical care in hospitals and infirmaries in Kansas City, Missouri, and Wyandotte and Johnson Counties, Kansas; that the defendant is engaged in the same line of business in the same general area; that prior to November 20, 1958, the defendant made a contract with St. Luke's Hospital in Kansas City, Missouri, whereby the defendant and the hospital undertook to agree that none of the patients in the hospital would be permitted to lease a television or radio receiving set except from defendant, and that the hospital would not allow any such sets upon its premises except those owned by the defendant or by the individual patients; that the defendant also, before

November 20, 1958, entered into similar contracts with Bethany Hospital and Kansas University Medical Center, both of which are located in Wyandotte County, Kansas; that the contracts were, and are, an unreasonable restraint of trade within the meaning of the antitrust laws of the United States in that they tend to create and do create a monopoly wherein and whereby the defendant is enabled to exclude the plaintiff and others from renting television and radio receiving sets to patients who are receiving hospital care; that plaintiff's television and radio receiving sets move in interstate commerce in fulfilling rental contracts with hospital patients in Missouri; that more than 75% of plaintiff's rental business, at the time of the acts complained of, was transacted with patients confined in Missouri hospitals, and that such business moved in interstate commerce from Kansas to Missouri; that defendant, prior to November 20, 1958, entered into a conspiracy with others to monopolize the business of renting television and radio receiving sets to members of the public confined in St. Luke's Hospital, Bethany Hospital, and Kansas University Medical Center, and thereby unduly and unreasonably to restrain trade or commerce in the distribution and rental of such instruments to all such members of the general public, in violation of the antitrust laws of the United States; that the defendant, in furtherance of its design and purpose, caused St. Luke's Hospital to notify the plaintiff of its contract with the defendant and to cease renting television or radio sets to patients; that Bethany Hospital and Kansas University Medical Center have each refused to permit plaintiff to contract with patients for the rental of such sets; that the acts of the defendant and its contracts with the hospitals are in restraint of trade and constitute a monopoly and an attempt to monopolize, depriving plaintiff of a substantial part of his market for his television and radio receiving sets, rendering his business unprofitable, and depriving him of profits, to his damage in the total sum of $25,000.

The amended complaint, in Count One, prays for treble damages, and, in Count Two, for injunctive relief to prevent the defendant from carrying out, or continuing in force, the contracts already made with St. Luke's Hospital, Bethany Hospital, and Kansas University Medical Center, and from entering into or carrying out any other contracts or conspiracies intended to monopolize the rental market for television or radio receiving sets or to exclude the plaintiff therefrom.

The defendant, in its motion to dismiss the amended complaint, asserted:

> "1. The complaint fails to state a claim against defendant upon which relief can be granted.
>
> "2. The complaint fails to allege facts showing involvement of interstate commerce or any effect thereon.
>
> "3. The complaint fails to allege facts showing either restraint of trade in interstate commerce or injury to the public."

The District Court, in sustaining the motion, said:

> "It is the opinion of the court that the court must sustain said motion for two reasons. First, that the hospitals mentioned in the complaint have a right to make such contracts as they desire for the supplying of materials to the institutions or the patients located therein. Second, that the allegations of the complaint do not constitute a restraint of trade within the meaning of the statute."

We are of the opinion that the District Court erred in attempting to dispose of this litigation by dismissing plaintiff's amended complaint.

Whether the hospitals referred to in the amended complaint are charitable institutions having an unrestricted right to enter into exclusive contracts with the defendant, whether the plaintiff in the carrying on of its business is engaged in interstate commerce, whether the contracts complained of are in restraint of trade or commerce within the meaning of the antitrust laws of the United States, and whether the plaintiff has been injured by the acts of the defendant or is entitled to any relief, we regard as factual issues.

The attitude of this Court toward attempts to terminate litigation, believed to be without merit, by dismissing a complaint for insufficiency of statement has been adequately stated in *Publicity Building Realty Corp. v. Hannegan*, 8 Cir., 139 F. 2d 583, 586-587, and restated in *Lada v. Wilkie, supra*, pages 212-213 of 250 F. 2d. No matter how reasonably it may be surmised or predicted that a plaintiff will be unable to establish on a trial the claim stated in his complaint or to obtain any relief, he is, nevertheless,

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entitled to make the attempt unless it appears beyond doubt that he can prove no set of facts in support of his claim which would entitle him to any relief. *Conley v. Gibson, supra,* pages 45-48 of 355 U. S.

As this Court said in *Lada v. Wilkie, supra,* page 215 of 250 F. 2d:

"The plaintiffs' claim may, at a trial on the merits, prove to be groundless, but, as was said by Mr. Justice Brandeis in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52, 58 S. Ct. 459, 464, 82 L. Ed. 638, 'Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.'"

The order appealed from is reversed and the case is remanded with directions to reinstate the plaintiff's amended complaint and to try the case on the merits.

[¶ 69,569] United States of America v. Owens-Corning Fiberglas Corporation, Owens-Illinois Glass Company, and Corning Glass Works.

In the United States District Court for the Northern District of Ohio, Western Division. No. 5778 Civil. Filed November 19, 1959.

Case No. 904 in the Antitrust Division of the Department of Justice.

Sherman and Clayton Antitrust Acts

Monopolies—Modification of Consent Decree—Acquisition of Stock or Assets—Conglomerate Integration.—A manufacturer of glass fiber products was denied modification of a consent decree to permit it to acquire the business and assets of a group of companies that manufacture plastic construction panels containing fiber glass mats. The decree, which prohibited defendants from acquiring ownership interest in any glass fiber manufacturer, covers the proposed acquisition. Even though a competitor, not limited by a decree, has done what defendant wishes to do, "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed . . . with the consent of all concerned" (*U. S. v. Swift & Co.*, 286 U. S. 106). Change in the industry is continuous and desirable, and conditions have not changed sufficiently to justify the modification. To modify the decree for this one purpose would "go to the very heart of the prohibitions." If the applicant wishes to enter the new field, let him do so without treading on the decree.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8361.37.

For the plaintiff: Donald F. Melchior, Dept. of Justice.

For the defendants: Marshall, Melhorn, Bloch & Belt (by William A. Belt), Toledo, Ohio; Higgs, Fletcher & Mack, San Diego, Calif.; William Carroll, New York, N. Y.

For the consent decree (U. S. District Court, Northern District of Ohio) see 1948-1949 Trade Cases ¶ 62,442.

KLOEB, Judge [*In full text*]: On June 23, 1949, an entry of final judgment was filed in the above numbered case [1948-1949 TRADE CASES ¶ 62,442]. The complaint in the case stated a cause against the defendants under Section 2 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act, as amended.

The entry of final judgment reads in part as follows:

"The Plaintiff, United States of America, having filed its amended complaint herein on July 16, 1948; the defendants Owens-Corning Fiberglas Corporation, Owens-Illinois Glass Company, and Corning Glass Works, having appeared and filed their consolidated answer to the amended complaint denying the violation of law charged therein; and the plaintiff and said defendants by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without admission of any party defendant in respect of any such issue;

"Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto, it is hereby Ordered, Adjudged and Decreed as follows:

"* * *

"II.

"* * *

"(N) 'Glass fiber products' means articles which are manufactured by or for producers of glass fibers and which are made from or contain glass fibers in the usual commercial forms, including glass wool, glass textiles, and glass fiber mat.

"* * *

"XI.

"Each of the defendants Owens-Illinois and Corning, so long as it owns or controls any shares of stock or other financial interest in Owens-Corning, and defendant Owens-Corning, is hereby enjoined and restrained from acquiring, directly or indirectly, any ownership interest, by purchase or acquisition of assets or of securities or otherwise, in any person engaged in whole or in part in the manufacture, sale or distribution of glass fibers or glass fiber products in the United States, or from leasing, or from acquiring any control over, any such person.

"* * *

"XVI.

"Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment or for the modification or termination of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof."

On September 21, 1959, ten years and three months after the entry of the final judgment, defendant Owens-Corning Fiberglas Corporation filed its application pursuant to the above article XVI for an order construing or modifying article XI of the judgment, in furtherance of a proposed acquisition by applicant of the business and assets of a number of companies collectively referred to as "Alsynite".

The application recites that the proposed acquisition is sought in order to enable applicant to commence the manufacture of plastic construction panels which are reinforced with glass fiber mat, and in order to commence the manufacture of these panels applicant proposes to acquire the assets and business of Alsynite, which is one of six of the leading manufacturers of plastic construction panels. The fiber glass mat used as the basis or reinforcement of the plastic construction panels is manufactured by applicant and, from the record, applicant appears to be the chief manufacturer of fiber glass mat that is furnished to approximately sixty companies that are engaged in the manufacture of plastic construction panels, which are a rigid, structurally stable, building material made by subjecting plastic, containing glass fiber mat as a reinforcing agent, simultaneously to heat and pressure to form a dense, tough slab of predetermined shape and size. These panels are in competition, in the construction market, with steel, aluminum, plywood and glass. They have the advantage of being translucent.

In furtherance of the consent judgment entered on June 23, 1949, applicant herein licensed Pittsburgh Plate Glass Company and Johns-Manville Corporation to use its patents and, subsequent thereto, the Johns-Manville Corporation acquired Glass Fibers Company from the Libbey-Owens-Ford Glass Company and is now engaged in the manufacture of fiber glass mats which it supplies to its subsidiary, Corrulux, for the manufacture of plastic construction panels. Its offering of fiber glass mats to any of the sixty manufacturers of such panels is exceedingly limited. Pittsburgh Plate Glass Company is not now engaged in the manufacture of fiber glass roving or mats. It thus appears that applicant is looked to by the trade for substantially all of their supply of fiber glass mats and, through the acquisition of Alsynite, applicant desires to enter the field of processing and manufacturing these plastic contruction panels.

Applicant takes the position, and properly so, that the only questions for determination under its application are, first, whether the judgment as written covers the proposed acquisition, and, second, if it does so cover, whether the judgment should be modified so as not to prohibit by its terms such acquisition of Alsynite in view of changes of circumstances that are alleged to have occurred since 1949. It is the position of applicant that the judgment should be construed as not including plastic construction panels within the definition of glass fiber products, but as including only those products which were glass fiber products at the time the judgment was entered.

It is conceded that at the time the judgment was entered the glass fiber industry was then in its infancy, and that, while there are thousands of uses that have developed for glass fiber products, many of these uses have been developed since 1949, and in-

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cluded in these new uses is the employment of glass fiber mats in the manufacture of plastic construction panels.

Applicant desires the acquisition of Alsynite because it will provide applicant with manufacturing facilities and know-how respecting plastic construction panels and will enable applicant to intensify its marketing efforts for such panels because the Alsynite distribution system will provide applicant with access to ultimate customers for such panels. It is frankly conceded that it is the acquisition of the customers of Alsynite that is the prime consideration in desiring to purchase Alsynite in its entirety.

On October 5, 1959, the Government filed its memorandum in opposition to the application filed herein. It opposes the application on the grounds that, first, the proposal is prohibited by the clear language of articles XI and II(N) of the final judgment, and second, modification of the final judgment is not warranted on the basis of the facts set forth in the application, and third, the proposal, if consummated, would be contrary to the public interest and the spirit of the antitrust laws and would raise serious questions under Section 7 of the Clayton Act.

In its memorandum, the Government takes the position that the plastic construction panels are a "glass fiber product" within the meaning of article II(N) and that, therefore, the proposal of applicant comes squarely within article XI of the final judgment and is prohibited by it. With this position we agree and, in view of the provisions of these articles, we are of the opinion that the proposed acquisition does come within the prohibition of the final judgment and is forbidden by it.

On the question of the proposed modification of the final judgment, the Government takes the position, as heretofore stated, that such modification is not warranted on the basis of the facts set forth in the application.

On October 20, applicant filed a memorandum in reply to the memorandum of the Government and, after the filing of numerous affidavits and letters which were later admitted in evidence, the application was set for hearing and was heard on October 22, 1959. On that date, a number of witnesses were offered by the Government and a number of exhibits were offered by both parties and admitted by the Court.

We come, therefore, to the question of whether or not, under the state of the record, modification of the final judgment would be warranted on the ground that the manufacture of plastic construction panels through the use of fiber glass mats is a new use not contemplated at the time of the entry of the final judgment; that to forbid the acquisition of Alsynite would work a hardship upon applicant in view of the fact that at least one of applicant's competitors, to wit, the Johns-Manville Corporation, is free to proceed with the manufacture of the plastic construction panels through the acquisition of Glass Fibers Company, unfettered by the restrictions of a consent judgment such as binds the applicant; that applicant is, therefore, placed at a competitive disadvantage with the Johns-Manville Corporation and perhaps others, including Pittsburgh Plate Glass, that may in the future desire to enter the field of the manufacture of plastic construction panels. Applicant concedes that it intends to enter this field of activity whether the acquisition of Alsynite is permitted or not, and that to set up facilities for the manufacture of the plastic construction panels would not be an intricate or expensive procedure, but that the know-how and customers of Alsynite would be of great benefit to applicant when it does enter the field.

We find the case of *United States v. Swift & Co., et al.* [1932-1939 TRADE CASES ¶ 55,005], 286 U. S. 106, to be very helpful in our search for guiding precedents.

In this case, which was a Sherman Act case brought by the Government against the leading meat packers in the country, a consent decree was entered on February 27, 1920, and, on April 12, 1930, approximately ten years and two months after the entry of the decree, two of the defendants, Swift & Co. and Armour & Co., and their subsidiaries, filed a petition to modify the consent decree and to adapt its restraints to the needs of a new day. On January 31, 1931, the decree was modified by a lower Court and such modification became the subject of appeal.

Mr. Justice Cardozo delivered the opinion of the Court on May 2, 1932, and, on page 115, we find the following:

> "Power to modify existing, we are brought to the question whether enough has been shown to justify its exercise.
>
> "The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in

concert or independently, and did this with their eyes open. * * *",

and, on page 119, we find the following:

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The decree modifying the injunction was accordingly reversed.

We are of the opinion that, in view of the tight requirements laid down in the *Swift and Company* case, and in view of the record that is before us under this application, this Court would not be warranted in decreeing a modification of the judgment so as to permit the acquisition of Alsynite. Despite the fact that applicant stresses that it would limit the effects of a modification to the particular new use of the glass fiber product that is in mind here, we feel that this could not be done in view of the fact that it is conceded that thousands of new uses have not only been introduced in very recent years but that undoubtedly it is anticipated and hoped for that many new uses will be employed in the years to come. A modification that would relinquish the requirements of the decree for this one purpose would, therefore, go to the very heart of the prohibitions that were consented to in the final judgment and would, in effect, virtually nullify a great portion of it.

We believe that, if applicant desires to enter the field of manufacture of plastic construction panels, it would be better to do so without treading upon or attempting to modify the restrictions of the consent judgment. The application is denied. An order may be drawn accordingly.

[¶ 69,570] United States of America v. Vulcanized Rubber and Plastics Company.

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 26184. Filed December 3, 1959.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Violation of Cease and Desist Order—Civil Penalty Suit—Interpretation of FTC Order Found Proper.—Civil penalties in the amount of $30,000 have been imposed against a company for violation of a Federal Trade Commission cease and desist order prohibiting the company from representing that combs manufactured with a synthetic are "'rubber' or 'hard rubber' or are made of 'rubber' or 'hard rubber' unless such combs are in fact made of vulcanized hard rubber." The Commission in subsequently construing its order, prohibited the use of the legend "rubber-resin", even though the materials of which the combs were then made were rubber and resin. The company's contention that the terms "rubber" and "hard rubber" when applied to combs, have acquired a secondary meaning broad enough to include plastics and containing a minuscule portion of synthetic rubber, even though vulcanization had no part in its manufacture, was properly rejected by the Commission on appropriate evidence. The cease and desist order did not exceed the bounds of the complaint and the Commission's interpretation of the order was proper.

See Unfair Practices, Vol. 2, ¶ 5081.680, 5201.668; FTC Enforcement and Procedure, Vol. 2, ¶ 8611.93, 8661.50.

For the plaintiff: Joseph L. McGlynn, Jr., U. S. Attorney, and Richard Reifsnyder, Assistant U. S. Attorney, U. S. Court House, Philadelphia, Pa.

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For the defendant: W. Wilson White, Philadelphia, Pa., and Donald E. Van Koughnet, Washington, D. C.

Judgment affixing penalties for violations of Federal Trade Commission cease and desist order in Dkt. 6222. For a prior opinion of the U. S. Court of Appeals, District of Columbia Circuit, see 1958 TRADE CASES ¶ 69,050.

Opinion

[*FTC Action—Misrepresentation of Combs*]

EGAN, District Judge [*In full text*]: This matter was certified to the Attorney General by the Federal Trade Commission pursuant to Section 16 of the Federal Trade Commission Act as amended (15 U. S. C. § 56) for the purpose of recovering civil penalties as provided in Section 5(1) of the said Act as amended (15 U. S. C. § 45(1), Supp. V, 1952), in the amount of $30,000 from the defendant, Vulcanized Rubber and Plastics Company, a Maine corporation, whose general offices and factory are located at Morrisville, Bucks County, Pennsylvania.

[*Imposition of Fines*]

The penalties are claimed to be due because it is alleged that defendant, a manufacturer of combs for use in human hair, violated a cease and desist order issued by the Commission. Six separate violations are charged for which a penalty of $5,000 each has been imposed by the Commission.

[*Jurisdiction*]

Under Section 28 U. S. C. 1345, the several District Courts of the United States are vested with original jurisdiction of all civil action suits or proceedings commenced by the United States, including suits for the recovery or enforcement of any fine, penalty or forfeiture incurred under any Act of Congress; and under 28 U. S. C. 1395(a), which provides that any civil proceeding for the recovery of pecuniary fines, penalties and forfeitures may be prosecuted in the district where a defendant is found.

[*Combs Labeled as "Rubber"*]

The Commission's complaint in 1954 was directed against the labeling of defendant's combs as "rubber" and "hard rubber".

The Commission's order issued in 1957 after extensive hearings[1] and was to the effect that defendant

> "cease and desist from representing * * * that (defendant's) combs are 'rubber' or 'hard rubber' or are made of 'rubber' or 'hard rubber' unless such combs are in fact made of vulcanized hard rubber."

Pursuant to the order of the Commission, the defendant terminated any branding or advertising of its product as "rubber" or "hard rubber." Thereafter it labeled the combs "rubber-resin" and so advised the Commission in a compliance affidavit.

[*Labeling Combs as "Rubber-Resin" Disapproved*]

About six months after the Commission's order issued, the Commission wrote to defendant construing its order to mean that the use of the legend "rubber-resin" was also prohibited within the meaning of its order, even though the materials of which the combs were then made were rubber and resin.

[*Petition for Review*]

A timely petition for review of this construction by the Commission was filed by defendant in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals, noting that "this interpretation may be changed or it may never be enforced," held that "there is no controversy calling for judicial review of the interpretation at the present time." Accordingly, the petition for review was dismissed. No petition for certiorari was filed.

Thereafter the dispute between the parties persisted. The Commission continued to insist upon its disapproval of the use of the legend "rubber-resin" and defendant continued to contend for its right to use it.

[*Civil Penalty Suit*]

The Commission issued no new complaint and held no further or additional hearings but commenced this suit to recover penalties.

[1] The lengthy record consists of 3720 pages with approximately 200 exhibits, both documentary and physical. A total of 19 expert witnesses were called, 11 by the Commission and 8 by the defendant.

Defendant filed an answer wherein it admitted all the material allegations of fact charged in the complaint. Both sides moved for summary judgment.

[*Scope of FTC Order To Be Determined*]

The precise issue before the Court is whether the use of the legend "rubber-resin," which defendant is now using upon the combs of its manufacture, is prohibited by an order directing it to cease representing that its combs are "rubber" or "hard rubber" or are made of rubber or hard rubber manufactured by the vulcanized hard rubber process. To a large extent, the answer depends on whether this is a new issue not heretofore litigated.

[*Methods Used for Comb Manufacture*]

For many years defendant has been engaged in the manufacture of combs for use in human hair. Until 1950 it made all such combs by the sulphur vulcanized method. Under this process rubber and sulphur are vulcanized under heat, the result of the process being a distinct and definite product known in the industry as "hard rubber." *Oliver-Sherwood Co. v. Patterson-Ballagh Corp.*, 95 F. 2d 70, 77 (9th Cir. 1938).

Late in 1950 defendant commenced making the combs from a patented product manufactured by the United States Rubber Company under patents owned by it and sold by it under its trade name "Kralastic." The patented product is made up of 13% rubber, 85% resin and 2% coloring and other ingredients.

[*Litigation Issue*]

Defendant indicates that the issue litigated before the Commission concerns itself with combs made by the sulphur vulcanized method and not to the new method which defendant adopted in late 1950; that therefore there was no adjudication and that the defendant is not in violation of the Commission's order.

[*Hearing Examiner's Finding*]

It is difficult to see how the defendant can maintain this position in view of the following finding of the Hearing Examiner which was adopted by the Commission:

> "The gist of this proceeding is whether or not the representations of respondent in its advertising and labeling or branding of combs that are made of Kralastic D as 'Hard Rubber' or 'Rubber' are false, misleading and deceptive. It is found that they are false, misleading and deceptive as these combs are not made or composed of rubber or hard rubber but are made or composed in large part of materials other than rubber or hard rubber and do not contain any sulphur and are not made by the vulcanization process but are admittedly made by the injection mold or extrusion process."

The newer method used by defendant is faster and cheaper.

[*First Defense*]

The defendant stated, for a first defense, in its answer filed with the Commission:

> "10. The respondent's combs are made or composed of a synthetic rubber which is as equally embraced within the meaning of the terms 'rubber' and 'hard rubber' as 'tree rubber.' The synthetic rubber used in respondent's combs possesses qualities and properties which render it as equally suited for use in combs as 'tree rubber': * * *."

[*Second Defense*]

Defendant also stated, for its second defense, in part, as follows:

> "12. The purchasing public understands the terms 'rubber' and 'hard rubber' to include synthetic rubber as well as 'tree rubber' and the public is not misled by the use of such terms to describe combs made of synthetic rubber. The purchasing public does not distinguish between or prefer 'hard rubber' combs made of 'tree rubber' to 'hard rubber' combs made of synthetic rubber. * * *"

[*Secondary Meaning for "Rubber" Presented*]

At the hearings before the Hearing Examiner, defendant conceded that it was not using vulcanized rubber in the manufacture of its combs. Rather it contended that the terms "rubber" and "hard rubber," when applied to combs, had acquired a secondary meaning broad enough to include plastics and containing a minuscule portion of synthetic rubber even though vulcanization had no part in its manufacture.

[*Rejection of Defenses Proper*]

On a full and complete record, the Hearing Examiner, as well as the Commission, rejected defendant's novel defense. We think properly so.

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[*Scope of FTC Order Questioned*]

After the defendant lost its case before the Commission, it started to brand its combs "rubber-resin" and indicated that they were made of "rubber-resin." Defendant now takes the position that its combs marked "rubber-resin" are, in fact, made of such substances and that there is no misrepresentation or intention to represent to the purchasers thereof that the same are, in fact, made of "rubber" or "hard rubber;" that the issuance of such a cease and desist order is a condition precedent to an action for the civil penalty provided for in the Federal Trade Commission Act; that this requires a proceeding *de novo* and that this action is fatally defective by reason thereof.

[*Trade Name Controversy*]

If this were a simple problem in semantics, there might be some merit to defendant's contention. But it is not. It is a substantive controversy as to trade terms which have gained a special meaning by their use and acceptance in the comb making industry over a period of years. By the device of giving them a secondary meaning, which was rejected by the Commission on appropriate evidence, defendant would have us frustrate the Commission's order which defendant says is not broad enough to bar its present maneuver. With this we cannot agree.

No question has been raised as to the application of the maximum penalty to each breach of the Commission's order and we do not discuss it.

[*Inapplicability of Estoppel and Laches Defenses*]

Defendant insinuates that the Commission has been guilty of laches and is estopped from proceeding because it was informed in February 1951 by one of the Commission's staff that the Commission would not issue a complaint against it because of the use of the new process. These defenses are not available to the defendant and the Commission properly so found. The equitable defenses of estoppel and laches do not apply against the Government in a suit by it in the public interest. *F. T. C. v. Algoma Lumber Co., et al.*, 291 U. S. 67, 80; *F. T. C. v. Bunte Bros. Inc.* [1940-1943 Trade Cases ¶ 56,098], 312 U. S. 349, 352; *Utah Power & Light Co. v. U. S.*, 243 U. S. 389, 409. The same rule applies to the hearings of a public agency when it is acting in its administrative or judicial capacity. *Wallace Corp. v. N. L. R. B.*, 323 U. S. 248, 253; *P. Lorillard Co. v. F. T. C.*, 186 F. 2d 52, 55-56.

[*FTC Order Appropriate*]

In the case before us, we find that the Commission's order does not go beyond the bounds of the complaint and that its interpretation of its order is a proper one. See *Masland Duraleather Co. et al. v. F. T. C.*, 34 F. 2d 733, 736 (3rd Cir. 1929); *Arrow Metal Products Corporation, et al. v. F. T. C.* [1957 Trade Cases ¶ 68,847], 249 F. 2d 83 (3rd Cir. 1957); *Jacob Siegel v. F. T. C.*, 150 F. 2d 751 (3rd Cir. 1944); *Marietta Mfg. Co. v. F. T. C.*, 50 F. 2d 641 (7th Cir. 1931).

[*Cited Cases Inapplicable*]

We have examined *Milk and Ice Cream Can Institute v. F. T. C.* [1946-1947 Trade Cases ¶ 57,429], 152 F. 2d 478 (7th Cir. 1946) and *Arrow Metal Products Corporation v. F. T. C., supra,* on which defendant so heavily relies and find them inapplicable. The former was a proceeding against an unincorporated trade association, the members of which manufactured practically all of the milk and ice cream cans sold and distributed in the United States. The cans were shipped f. o. b. their various plants and an adjustment was made in freight rates so that the delivered price was the same to all purchasers regardless of who sold and the distance shipped. It did not involve the use of trade names or the names of manufactured products. The latter case really supports the position of the plaintiff. There the Commission found that the use of the term "porcenamel" to describe appellant's awning products carried with it a representation that the awning products were coated with porcelain enamel, when they were actually coated with an organic plastic resin. The Commission entered a cease and desist order and approved the Hearing Examiner's findings. As indicated, this was approved by the District Court and by our Court of Appeals.

[*Summary Judgment*]

Summary judgment will be entered for the plaintiff. Counsel will submit an appropriate Order.

[¶ 69,571] United States of America v. The Watchmakers of Switzerland Information Center, Inc., et al.

In the United States District Court for the Southern District of New York. Civ. 96-170. Filed December 16, 1959.

Case No. 1207 in the Antitrust Division of the Department of Justice.

Department of Justice Enforcement and Procedure—Suits for Injunctive Relief—Discovery and Production of Evidence—Admissions—Authenticity of Documents.—Objections to plaintiff's request for admission of genuineness of documents as being "improper" were overruled. The defendants had answered a prior request for admission concerning the same documents by serving a sworn statement setting forth reasons why they could not truthfully admit or deny genuineness and the plaintiff subsequently took depositions which it contended gave the defendants sufficient information to admit genuineness. Under these circumstances a second request for admission was proper.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8225.200.

For the plaintiff: Richard B. O'Donnell, Mary Gardiner Jones, W. Louise Florencourt, and Carl L. Steinhouse, U. S. Attorneys, New York, N. Y.

For the defendants: Robert Perret for The Watchmakers of Switzerland Information Center, Inc.; Eterna, A. G. Uhrenfabrik; Federation Suisse des Associations de Fabricants d'Horlogerie; Ebauches, S. A.; and Eterna Watch Company of America. Goodwin, Danforth, Savage & Whitehead, for Longines-Wittnauer Watch Co.; Wittnauer et Cie, S. A.; and Diethelm & Keller (USA) Ltd. Albert Lee Singer for Concord Watch Company and Movado Watch Agency, Inc. Lipper, Shinn & Keeley, for Jean R. Graef, Inc., and The Henri Stern Watch Agency, Inc. Royall, Koegel, Harris & Caskey, for Foote, Cone & Belding. William H. Fox for American Watch Assn., Inc. Laporte & Meyers for Bulova Watch Co., Inc. Nestor S. Foley and Covington & Burling, for Benrus Watch Co. Manning, Hollinger & Shea for Gruen Watch Co. and Gruen Watch Mfg. Co., S. A. Murray Sprung for Wyler Watch Agency, Inc. Milton W. Levy for Rodania Watch Co., Inc. David Baumgarten for Norman M. Morris Corp. Guggenheimer & Untermyer for Cyma Watch Co., Inc.

For prior opinions of the U. S. District Court, Southern District of New York, see 1959 Trade Cases ¶ 69,314, 69,516 and 69,550 and 1955 Trade Cases ¶ 68,096 and 68,145.

[*Requests for Admission*]

CASHIN, District Judge [*In full text*]: Defendants, Longines-Wittnauer Watch Co., Inc. and Wittnauer et Cie, S. A., object to plaintiff's request for admission of genuineness of documents dated November 24, 1959. Presumably the objection is on the ground that the request is "improper". (Rule 36, Federal Rules of Civil Procedure). The plaintiff had previously served a request concerning the same documents in issue now. The moving defendants, in response to the request, served a sworn statement setting forth reasons why they could not truthfully admit or deny the genuineness of the documents. Subsequently, the plaintiff took depositions which, it contends, give sufficient information for the moving defendants to admit the genuineness of the documents.

[*Objections*]

Defendants apparently base their objections on the following grounds:—

1. Only one request for admission concerning the genuineness of any particular document is authorized by the rules;

2. My prior opinion of October 26, 1959 has put the plaintiff irrevocably to its proof; and

3. There is still not sufficient information for the moving defendants either to admit or deny the genuineness of the documents truthfully.

[*Second Request Proper*]

Both sides concede that there is no case law concerning the first basis for objection. Plaintiff, however, contends that Professor Moore in the 2nd Edition of his treatise on

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Federal Practice, Volume 4, § 36.05, supports the service of successive requests. It is also argued that because the use of written interrogatories or of oral depositions does not preclude a subsequent use of the other form of discovery, subsequent requests for admissions are also authorized.

I do not believe that either of these arguments controls the present question. As I read Professor Moore, he is speaking of successive requests concerning different facts or documents. Successive use of interrogatories and oral depositions, at least insofar as parties are concerned, is specifically provided for in Rule 33. Nevertheless, because these two arguments are not controlling, I am still not impelled to hold in favor of the defendants. We have long since abandoned the theory of a trial as a contest of tactics between counsel. (Cf. *Hickman v. Taylor*, 329 U. S. 495 (1947).) To interpret Rule 36 in accordance with the moving defendants' contention would be to return to that theory. This is an antitrust suit which must be tried, to a great extent, on documents. Perhaps plaintiff was somewhat premature in serving its first request.[1] Unequivocal answers by defendants would tend to expedite the trial of the action. The mere fact that they have already denied sufficient knowledge will not preclude present answers if the circumstances so warrant.

[*Prior Opinion*]

Defendants' second argument is equally without merit. In their "Statement of Objections to Notice of Request for Admission" defendants quoted that portion of my Opinion of October 26, 1959 [1959 TRADE CASES ¶ 69,516], which reads as follows:—

> "On the basis of information presently before the court, except for certain oversights which defendants Longines and Wittnauer have agreed to correct, all documents, whose authenticity is reasonably susceptible of knowledge on the part of Longines and Wittnauer, have been admitted.
>
> "Thus, the government must prepare for trial by the ordinary methods, and must prove the authenticity of the documents it intends to rely upon under the usual rules of evidence."

From this quotation defendants conclude that answers to the present request are not warranted. However, it is clear that the ruling that the Government must prepare for trial by the ordinary methods was grounded "On the basis of information presently before the court * * *." There is now further information before the court which indicates that further answers might well materially aid the expeditious disposition of the lawsuit. Accordingly, the second basis of objections by defendants is without merit.

[*Sufficient Information*]

The third ground of objection urged by defendants can also be overruled. The operation of requests for admissions and answers thereto is essentially extra-judicial. Therefore, it is not incumbent upon the court to rule, pre-trial, whether the parties served with the request have sufficient information upon which to base an unequivocal answer. Rather, the parties upon whom the request is served must either affirm or deny unequivocally, or deny knowledge or information upon which to base an unequivocal answer at the peril of incurring the sanction provided by Rule 37(c). (See my Opinion in this case dated November 19, 1959 [1959 TRADE CASES ¶ 69,550]).

I do not intend by this Opinion to hold that a party, even in a protracted case, can serve numerous successive requests where the serving party had or should have had enough information to serve one request which would resolve all factual issues which could be the subject of admission. I merely hold that in the instant case the defendants have not shown that the plaintiff did have or should have had enough information to serve an all-inclusive request for admissions in the first instance. I do not now state what conditions must be present before a subsequent request for admissions on the same facts or documents which were the subject of a previous request might be so onerous or burdensome as to warrant its striking.

[*Objections Overruled*]

The defendants' objections are overruled in their entirety.

It is so ordered.

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[1] I do not mean to imply by this statement a holding that the plaintiff was premature. As pointed out in my prior Opinion of October 26, 1959 I will not consider the propriety of any answer given by defendants but will reserve such question until after the trial of the action.

[¶ 69,572] Sinclair Refining Company v. Russell Gentzsch.

In the Pennsylvania Court of Common Pleas for Philadelphia County. No. 3343. In Equity. Certified December 4, 1959.

Pennsylvania Fair Trade Act

Fair Trade—Noncontracting Dealer—Application of Fair Trade Law to Retailer Where No Mention of It in Sales Contract.—A retail gasoline dealer was permanently enjoined from selling plaintiff's gasoline below the fair trade price. Although the sales contract between the parties made no mention of the Fair Trade Act and it expressly provided for modification only by agreement of the parties, it was subject to the subsequent application of the Act which was in existence when the contract was entered into.

See Fair Trade, Vol. 1, ¶ 3258.40.

Fair Trade—Enforcement Action—Defenses—Antitrust Violation By the Enforcing Party.—In a fair trade enforcement action a gasoline retailer did not succeed in establishing the defense that the plaintiff gasoline producer engaged in a price fixing conspiracy. Parallel pricing among competitive gasoline producers and their simultaneous invocation of the benefits of the Fair Trade Act did not establish a conspiracy in restraint of trade. Similarly, arguments and evidence of other alleged inequitable conduct of the plaintiff were not sufficient to nullify the right to enforce its fair trade prices.

See Fair Trade, Vol. 1, ¶ 3428.40.

Fair Trade—Commodities Which May Be Fair Traded—Gasoline.—In a fair trade enforcement action an argument of the defendant gasoline retailer that gasoline sold by him was not within the purview of the Miller-Tydings and McGuire Acts was rejected. The tank which provided a continuous flow of gasoline to the pump when needed, where the pump bore the label of the producer or distributor, was considered a container within the meaning of the McGuire Act.

See Fair Trade, Vol. 1, ¶ 3145.

For the plaintiff: R. W. Sayre, Philadelphia, Pa.

For the defendant: Verlin & Goldberg, Philadelphia, Pa.

Statement of the Pleadings

GLEESON, Judge [*In full text*]: Plaintiff is the owner of the trademarks and brands, "Sinclair H-C" and "Sinclair Power X" Gasoline, under which its gasolines are sold in competition with other gasolines within the Commonwealth. Defendant is a retail dealer in Sinclair Gasolines who maintains a service station in Philadelphia pursuant to various written agreements between the parties. Plaintiff seeks to restrain defendant from selling gasoline under plaintiff's trademarks and brands at prices below those stipulated in a Fair Trade Agreement executed by plaintiff and another of its retail dealers pursuant to the provisions of the Act of June 5, 1935, P. L. 266, as amended, 73 P. S. 7-11, commonly known as the Fair Trade Act.

Defendant, by way of defense, argues mainly that plaintiff is not entitled to relief because its gasolines are not sold in free and open competition with gasolines of the same general class produced by others and also raises certain other defenses.

The parties have agreed that the hearing and application for preliminary injunction should be considered as the final hearing on the merits of the controversy.

Findings of Fact

1. Plaintiff, Sinclair Refining Company, is a corporation organized and existing under the law of the State of Maine and is transacting business within the Commonwealth of Pennsylvania.

2. Defendant, Russell Gentzsch, is an individual who maintains and operates a gasoline service station at the northeast corner of Windrim and Wyoming Avenue, Philadelphia, Pa., where he sells gasolines produced by plaintiff.

3. Plaintiff's gasolines are marketed and sold under the trademarks, brands and names, "Sinclair H-C Gasoline" and "Sinclair Power X Gasoline", within the Commonwealth of Pennsylvania.

4. The pumps from which Sinclair gasolines are dispensed by Sinclair dealers, in-

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cluding defendant, bear these trademarks, brands and names.

5. Plaintiff has expended and is expending large sums of money in advertising and promoting the sale of its gasolines under its trademarks, brands and names, Sinclair H-C Gasoline and Sinclair Power X Gasoline, in the Commonwealth of Pennsylvania and nationally, and has established a valuable and unique reputation and good will for its gasolines under their respective trademarks, brands and names. (In 1958 plaintiff expended approximately $225,000 for advertising its gasolines in the Philadelphia area.)

6. On October 18, 1957 plaintiff and defendant executed a refined oil sales agreement (Form 731-D) whereby plaintiff agreed to sell and defendant agreed to buy certain quantities of plaintiff's gasolines during each yearly period the agreement should be in effect.

7. Pursuant to the provisions of the Pennsylvania Fair Trade Act, plaintiff entered into a Fair Trade Agreement with one of its retail dealers in Philadelphia, Pa., on October 30, 1958, whereby the dealer agreed not to resell Sinclair H-C Gasoline and Sinclair Power X Gasoline at less than the applicable Dealer Minimum Resale Prices stipulated by plaintiff. Since October 30, 1958, plaintiff has entered into similar Fair Trade Agreements with many of its retail dealers in the Commonwealth of Pennsylvania, including approximately 112 out of 145 dealers in the City of Philadelphia.

8. On October 31, 1958, plaintiff gave written notice to defendant of the existence of its Fair Trade Agreements with other retailers and of the Dealer Minimum Resale Prices stipulated thereunder for Sinclair H-C Gasoline and Sinclair Power X Gasoline. The prices so stipulated continued without change up to the time of trial.

9. On January 13, 1959, plaintiff, by registered mail, notified defendant to cease selling plaintiff's gasolines at prices below the Fair Trade prices and defendant received this notice on January 17, 1959.

10. Notwithstanding the registered mail notice, defendant has advertised, offered for sale and sold plaintiff's gasolines at prices less than the stipulated Fair Trade prices, and continues to do so.

11. By means of personal visits, warning letters and Court proceedings, plaintiff has been enforcing its Fair Trade prices among its dealers.

12. Richfield Oil Corporation of New York is a wholly owned subsidiary of the plaintiff, and distributes and markets under its own brand names regular and premium gasoline within the Commonwealth of Pennsylvania.

13. All of the gasoline sold in the Philadelphia area by the Richfield retail service stations under the Richfield brand names are produced by the plaintiff.

14. The California Oil Company distributes and markets under its own brand names regular and premium gasolines within the Commonwealth of Pennsylvania.

15. All of the gasoline sold in the Philadelphia area by retail service stations under the California Oil Company's brand names are produced by the plaintiff.

16. In 1958 plaintiff produced gasoline for Tidewater Oil Company, and Tidewater Oil Company distributed and marketed said gasoline within the Commonwealth of Pennsylvania under its own brand names. However, since 1958 plaintiff has produced no gasoline for Tidewater Oil Company.

17. By virtue of their contracts with plaintiff three retail dealers in Pennsylvania have or had the right to cancel their agreements with plaintiff if plaintiff elected to establish a minimum resale price for its gasolines. The defendant has no such right.

18. Plaintiff has not permitted any of its dealers to sell under its minimum dealer resale prices since plaintiff instituted them in October, 1958. However, by the use of certain leasing agreements plaintiff pays more of a rental fee to some of its dealers for the use of their properties than it pays to its other dealers.

19. Plaintiff fixed minimum resale prices for its gasolines under the Pennsylvania Fair Trade Act for the first time in August, 1956.

20. Other oil companies for the first time fixed minimum resale prices under the Pennsylvania Fair Trade Act at or about the same time.

21. Plaintiff discontinued establishing minimum dealer resale prices in March, 1957.

22. Other oil companies who were then fixing minimum dealer resale prices discontinued fixing such prices at or about the same time.

23. On or about October 30, 1958, plaintiff began to fix minimum dealer resale prices again.

24. At or about the same time the other oil companies whose testimony was adduced which had discontinued fixing minimum dealer resale prices began to fix minimum dealer resale prices again.

25. Immediately prior to the fixing of the minimum dealer resale prices in October, 1958 by the plaintiff and other oil companies, the prices at which the different brands of gasoline were sold varied.

26. Since October, 1958 the minimum dealer resale prices fixed by the plaintiff and other oil companies in the Philadelphia area are identical regardless of brand name.

27. Upon the institution of this action defendant immediately offered to terminate all existing agreements between plaintiff and defendant wherein and whereby the defendant was obliged to buy and resell plaintiff's gasolines at defendant's retail service station but plaintiff refused to accept such offer.

28. Plaintiff's gasolines are marketed and sold in fair and open competition within the Commonwealth of Pennsylvania with gasolines of the same general class produced by others.

Discussion

The question presented in this case has been passed upon at least twice recently in the Common Pleas Courts of this county and as we read the adjudications they are contrary to each other. *Sinclair Refining Company v. Yanni,* C. P. 1, July 30, 1959; *Sinclair Refining Company v. Waxler,* C. P. 6, April 21, 1959.

In the case at bar the plaintiff and defendant entered into a contract whereby plaintiff sold to the defendant gasoline in bulk and the defendant (a gasoline station operator) in turn sold it at retail to the motorist. The contract made no provision for compliance with the Fair Trade Act of the Commonwealth. Thereafter while the contract was in force the plaintiff invoked the Fair Trade Act of the Commonwealth (by executing Fair Trade contracts with other gasoline station operators) and requested the defendant to comply with it. The defendant refused. The question before us therefore is, can the plaintiff require compliance by the defendant under the foregoing circumstances. We decide that the plaintiff can.

[*Subject to Fair Trade Act*]

Even though the contract by the plaintiff and defendant mentions nothing about the Fair Trade Act and provides by its terms that it can be ". . . altered, amended or modified only in writing signed by defendant and by a representative of plaintiff authorized to sign this agreement . . .", nevertheless the contract is not beyond the purview of the statute law of this Commonwealth. The statute law in question had been in effect for some years before the contract had ever been executed. The plaintiff did not provide in the contract that it would never invoke the Fair Trade Act; the contract was silent on the whole subject of Fair Trade. The contract was made under and subject to existing law. The statutorily declared public policy of the Commonwealth in effect at the time of the contract was in favor of Fair Trade. The contracting parties did not waive the application of the Fair Trade Act.

It is our view that the case at bar is governed by the case of *Olin Mathieson Chemical Corporation v. L. & H. Stores, Inc.* [1958 Trade Cases ¶ 68,981], 392 Pa. 225.

[*Defense of Antitrust Violation*]

If the plaintiff engaged in a price fixing conspiracy with the competitive gasoline producers, the plaintiff could not invoke the benefit of the Fair Trade Act. *Act of June 5, 1935,* P. L. 266, § 1, as amended, 73 P. S. 7. At the trial defendant made an effort to establish such price fixing conspiracy but it is our view that the effort did not succeed. Parallel pricing among competitive gasoline producers was established. It was likewise established that most competitive gasoline producers invoked the benefit of Fair Trade at the same time. We are speaking, of course, of parallel pricing and invocation of Fair Trade as it relates to the conduct of competitive gasoline producers in the Philadelphia area. But parallel pricing in and of itself does not establish a conspiracy in restraint of trade. See: *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.* [1954 Trade Cases ¶ 67,640], 346 U. S. 537. Nor does simultaneous invocation of the benefits of the Fair Trade Act of the Commonwealth. Sales of gasoline from the gas pump to the automobile tank of the motorist

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appears to this court to be a truly competitive business in a large metropolitan area like Philadelphia. It is understandable that the gasoline producers who put the gas in the pump watch each other's prices very carefully. No one of them wants to be priced out of the market. We disagree with defendant's argument that gasoline sold to the motorist under the circumstances set forth in the case at bar is not within the purview of the Miller-Tydings and McGuire Acts. In the case of *United States v. Socony Mobil Oil Company, Inc.* [1957 TRADE CASES ¶68,679], 150 F. Supp. 202, 203-204, Judge Sweeney said:

> "The government contends that gasoline stored in a tank, which is buried underground at the filling station and from which a pipe conveys the stored gasoline to a pump which has a label designating the brand or name of the producer or distributor, is not a container bearing a trade-mark within the meaning of the McGuire Act. In short it alleges that the tank which contains the gasoline prior to being pumped is not a container. I cannot follow this reasoning and find as a matter of fact and law that such a tank which provides a continuous flow of gasoline to the pump when needed where the pump bears the label of the producer or distributor is a container within the meaning of the McGuire Act."

[*Defense of Other Inequitable Conduct*]

Defendant makes two arguments, supported by the evidence, to the following effect: (1) That after its current invocation of the Fair Trade Act the plaintiff permitted one dealer who did not wish to comply to rescind his contract with the plaintiff. In addition, two other dealers, by virtue of their contracts with plaintiff, have the right to cancel their contracts if plaintiff fair trades its gasolines. Hence it is inequitable to require the defendant to honor his contract. (2) That plaintiff by the use of certain leasing agreements which it executes with its dealers does not, in fact, charge the same tank wagon price to all its dealers. These leasing agreements allow for differentials in the wholesale price of gasoline paid by the retail gasoline dealers to the plaintiff. Continuing this practice is inequitable.

We do not consider these arguments or the evidence which supports them to be of sufficient weight to nullify the plaintiff's right to have its gasoline sold to the public (the motorist) at a fair trade price.

Conclusions of Law

1. The Court has jurisdiction of the parties and of the subject matter.

2. Plaintiff's gasolines are marketed and sold in fair and open competition within the Commonwealth of Pennsylvania and the Philadelphia area with gasolines of the same general class produced by others.

3. Plaintiff has entered into Fair Trade contracts under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania of June 5, 1935, P. L. 266, as amended, 73 P. S. 7-11, which contracts are valid, effective and binding.

4. Plaintiff has given notice to defendant of the existence of its Fair Trade Agreements and of the dealer minimum resale prices stipulated thereunder and accordingly, under the Act of Assembly, defendant is legally obligated not to sell plaintiff's gasolines at prices less than the dealer minimum resale prices stipulated by plaintiff.

5. By wilfully and knowingly advertising, offering for sale and selling plaintiff's gasolines at prices less than the dealer minimum resale prices stipulated by plaintiff, defendant has engaged in unfair competition.

6. The sales by defendant of plaintiff's gasolines at less than the dealer minimum resale prices stipulated by plaintiff have caused and are causing irreparable damage to plaintiff by impairing and tending to destroy the value of its good will, its brands and names.

7. Plaintiff has no adequate remedy at law.

8. Plaintiff is entitled to a permanent injunction restraining defendant from advertising, offering for sale, and selling plaintiff's gasolines at prices less than the dealer minimum resale prices stipulated by plaintiff when any such gasoline is dispensed from a gasoline dispensing pump bearing the trademark, brand or name of plaintiff.

Decree Nisi

And Now, this 30th day of September, A. D., 1959, a final hearing having been held,

It is Ordered, Adjudged and Decreed, that the defendant, Russell Gentzsch, be and he hereby is perpetually enjoined and restrained from advertising, offering for sale

and/or selling, either personally or by his agents, servants or employes any gasoline supplied by plaintiff Sinclair Refining Company at prices less than the minimum retail prices now or hereafter established for such gasolines by plaintiff pursuant to contract with any retailer in the Commonwealth of Pennsylvania when any such gasoline is delivered from a gasoline dispensing pump bearing the trademark, brand or name of Sinclair Refining Company directly into the fuel supply tank of a motor vehicle.

[Direction to Prothonotary]

The Prothonotary is directed to enter this decree nisi and to give notice thereof to the parties or their counsel of record, and unless exceptions are filed within twenty (20) days thereafter, the decree nisi shall become the final decree as of course.

[¶ 69,573] Sinclair Refining Company v. Pasquale Fiumara.

In the Pennsylvania Court of Common Pleas for Philadelphia County. No. 1988. In Equity. Certified December 4, 1959.

Pennsylvania Fair Trade Act

Fair Trade—Enforcement Action—Injunctive Relief—Commodity Defined—Gasoline. —A retail gasoline dealer was permanently enjoined from selling plaintiff's gasoline at prices below the minimum retail prices established by the plaintiff. Gasoline was considered to be a commodity within the meaning of the Pennsylvania Fair Trade Act.

See Fair Trade, Vol. 1, ¶ 3145.

For the plaintiff: R. W. Sayre, Philadelphia, Pa.

For the defendant: (No appearance entered.)

Adjudication

Reimel, Judge *[In full text]*: This is an action in equity instituted by plaintiff corporation, which markets and sells gasolines under trademarks, brands and names, to restrain defendant from violating the Dealer Minimum Resale Prices of plaintiff's products. Defendant filed an answer which denies that plaintiff's gasolines are in fair and open competition within the commonwealth with gasolines manufactured, refined and sold by others or that gasoline is a unique or special commodity of merchandise that would come under the Fair Trade Laws. Defendant further contends that there is no other competitive dealer in the immediate vicinity of defendant's place of business whose own business would be destroyed and thereby give defendant an ultimate monopoly nor has any competitive dealer complained to defendant concerning the prices charged by defendant for plaintiff's products. A hearing was subsequently held to determine the issues. Upon consideration of the pleadings and the evidence offered in support thereof, the Court makes the following:

Findings of Fact

1. Plaintiff, Sinclair Refining Company, is a corporation organized and existing under the laws of the State of Maine and is transacting business within the Commonwealth of Pennsylvania.

2. Defendant, Pasquale Fiumara, is an individual who maintains and operates a gasoline service station at 6008 Haverford Avenue, Philadelphia, Pennsylvania, where he sells gasolines produced by plaintiff.

3. Plaintiff's gasolines are marketed and sold under the trade-marks, brands and names, "Sinclair H-C Gasoline" and "Sinclair Power X Gasoline", within the Commonwealth of Pennsylvania. The pumps from which Sinclair gasolines are dispensed by Sinclair dealers, including defendant, bear these trade-marks, brands and names.

4. Plaintiff's gasolines are marketed and sold in fair and open competition within the Commonwealth of Pennsylvania with gasolines of the same general class produced by others.

5. Plaintiff has expended and is expending large sums of money in advertising and promoting the sale of its gasolines under its trade-marks, brands and names, Sinclair H-C Gasoline and Sinclair Power X Gasoline, in the Commonwealth of Pennsylvania and nationally, and has established a valuable and unique reputation and good will

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for these gasolines under their respective trade-marks, brands and names.

6. Pursuant to the provisions of the Pennsylvania Fair Trade Act, plaintiff entered into a Fair Trade Agreement with one of its retail dealers in Philadelphia, Pennsylvania, on October 30, 1958, whereby the dealer agreed not to resell Sinclair H-C Gasoline and Sinclair Power-X Gasoline at less than the applicable Dealer Minimum Resale Prices stipulated by plaintiff. Since October 30, 1958, plaintiff has entered into similar Fair Trade Agreements with many of its retail dealers in the Commonwealth of Pennsylvania, including approximately 112 out of 145 dealers in the City of Philadelphia.

7. On October 31, 1958, plaintiff gave written notice to defendant of the existence of its Fair Trade Agreements with other retailers and of the Dealer Minimum Resale Prices stipulated thereunder for Sinclair H-C Gasoline and Sinclair Power-X Gasoline. The prices so stipulated have continued without change up to the present time.

8. On January 13, 1959, plaintiff, by registered mail, notified defendant to cease selling plaintiff's gasolines at prices below the Fair Trade prices and defendant received this notice on January 15, 1959.

9. Notwithstanding the registered mail notice, defendant has advertised, offered for sale and sold plaintiff's gasolines at prices less than the stipulated Fair Trade prices, and continued to do so until this Court entered a preliminary injunction in this case on February 9, 1959.

10. By means of personal visits, warning letters and Court proceedings, plaintiff has been vigorously and uniformly enforcing its Fair Trade prices among its dealers.

11. The sales by defendant of plaintiff's gasolines at less than the Fair Trade prices caused irreparable damage to plaintiff by impairing and tending to destroy the value of its good will, its brands and its names.

12. Plaintiff's requests for Findings of Fact Nos. 1-11, inclusive are affirmed.

13. Defendant's requests for Findings of Fact Nos. 1-11, inclusive are refused.

Discussion

The Act of June 5, 1935, P. L. 266, as amended, 73 PS Section 7 *et seq.*, commonly known as the Fair Trade Act, was held to be a valid exercise of the police power and constitutionally applicable to a vendor of a trade-marked commodity who has not signed a minimum retail price maintenance agreement with the manufacturer: *Burche Co. v. General Electric Co.* [1955 TRADE CASES ¶ 68,078], 382 Pa. 370. The purpose of the Act is to prevent the cutting by any dealer of the established price of any commodity identified by the trade-mark, brand or name of the producer: *Olin Mathieson Chemical Corp. v. L. & H. Stores, Inc.* [1958 TRADE CASES ¶ 68,981], 392 Pa. 225. The Fair Trade Act provides protection for the public as well as the producer of trade-marked products: *Bristol-Myers Co. v. Lit Brothers, Inc.* [1932-1939 TRADE CASES ¶ 55,227], 336 Pa. 81; *Casco Products Corp. v. Hess Brothers, Inc.* [1957 TRADE CASES ¶ 68,738], 184 Pa. Superior Ct. 47.

On October 30, 1958, the Sinclair Refining Company, which markets and sells gasolines under the trade-mark and brand names of "Sinclair H-C Gasoline" and of "Sinclair Power X Gasoline", entered into a Fair Trade Agreement with a retail dealer in Philadelphia, Pennsylvania, whereby the dealer agreed to sell plaintiff's products only at stipulated prices. Since October 30, 1958, plaintiff has entered into similar Fair Trade Agreements with approximately 112 of 145 dealers in Philadelphia. On October 31, 1958, defendant, who had been selling plaintiff's products in Philadelphia and who did not sign such a contract, was informed by the plaintiff that he was nevertheless bound by the terms of the contract. Defendant ignored this notice and advertised, offered for sale and sold plaintiff's products at prices less than the stipulated Fair Trade prices. Plaintiff notified defendant to discontinue said practices. Since this notice was also ignored by defendant, plaintiff instituted this action to restrain such violations by defendant. After hearing, a preliminary injunction was granted and subsequently a final hearing was held.

The evidence reveals prohibited conduct by the defendant. Gasoline is a commodity within the scope of the Fair Trade Act: *Sinclair Refining Co. v. Swartz*, C. C. P. No. 5, Philadelphia County, September Term, 1956, No. 3216. Moreover, the procedures utilized by plaintiff to establish its dealerships are such that plaintiff's products are in fair and open competition and within the protection of the Fair Trade Acts. Defendant's last two contentions are with-

out merit: *Olin Mathieson Chemical Corp. v. L. & H. Stores, Inc.* [1958 TRADE CASES ¶ 68,981], 392 Pa. 225.

Accordingly, plaintiff's request for an injunction is granted.

Conclusions of Law

1. Plaintiff has entered into Fair Trade contracts under the provisions of the Act of Assembly of the Commonwealth of Pennsylvania of June 5, 1935, P. L. 266, as amended, which contracts are valid, effective and binding.

2. Plaintiff has given notice to defendant of the existence of its Fair Trade Agreements and of the Dealer Minimum Resale Prices stipulated thereunder and accordingly, under the provisions of the Act of Assembly, defendant is legally obligated not to sell plaintiff's gasolines at prices less than the Dealer Minimum Resale Prices stipulated by plaintiff.

3. By wilfully and knowingly advertising, offering for sale and selling plaintiff's gasolines at prices less than the Dealer Minimum Resale Prices stipulated by plaintiff, defendant has engaged in unfair competition.

4. Plaintiff has no adequate remedy at law.

5. Plaintiff is entitled to a permanent injunction restraining defendant from advertising, offering for sale, and selling plaintiff's gasolines at prices less than the Dealer Minimum Resale Prices stipulated by plaintiff when any such gasoline is delivered from a gasoline dispensing pump bearing the trade-mark, brand or name of plaintiff directly into the fuel supply tank of a motor vehicle.

6. Plaintiff's requests for Conclusions of Law Nos. 1-5, inclusive are affirmed.

7. Defendant's requests for Conclusions of Law Nos. 1-17, inclusive are refused.

Decree Nisi

And Now, to wit, this 7th day of October, 1959, it is Ordered, Adjudged and Decreed that

1. Defendant, Pasquale Fiumara, be and is hereby perpetually Enjoined and Restrained from advertising, offering for sale and/or selling, either personally or by his agents, servants or employees any gasoline supplied by plaintiff, Sinclair Refining Company, at prices less than the minimum retail prices now or hereafter established for such gasolines by plaintiff pursuant to contract with any retailer within the Commonwealth of Pennsylvania when any such gasoline is delivered from a gasoline dispensing pump bearing the trade-mark, brand or name of Sinclair Refining Company directly into the fuel supply tank of a motor vehicle.

2. Costs shall be paid by defendant.

The Prothonotary is directed to give notice to the parties hereto or to their respective counsel of the filing of this Decree Nisi and that unless exceptions thereto are filed within twenty (20) days from the date hereof, this Decree shall become final.

[¶ 69,574] Revlon, Inc. v. Court Cut Rate, Inc.

In the New York Supreme Court for New York County, Special Term, Part 1. 142 N. Y. L. J. No. 107, p. 13. Dated December 3, 1959.

New York Fair Trade Act

Fair Trade—Enforcement of Fair Trade Prices—Contempt.—A motion to punish defendant for contempt for violating an injunction against selling plaintiff's goods below the fair trade price was denied where it was based on an affidavit of plaintiff's employee containing insufficient information about the alleged sale.

See Fair Trade, Vol. 1, ¶ 3380.34.

[*Fair Trade Action*]

KLEIN, Justice [*In full text*]: This is a motion to punish the defendant for contempt for violating the injunction in a consent judgment. Defendant emphatically denies the violation or the sale stated in the affidavit of an employee of the plaintiff. This affidavit of the employee as to the sale is but a stereotype form containing little information as to the sale, and insufficient information to place the burden on defendant to refute the allegations by affidavits or otherwise (*General Electric Company v. Golden Rule Appliance Co., Inc.*,

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3 App. Div. 2d 436). The record does not warrant the court, in the exercise of its discretion, to adjudge the defendant in contempt (*Sun Electric Corp'n v. Gushlaw*, 4 App. Div. 2d 1030, 168 N. Y. S. 2d 631). The motion is accordingly denied.

[¶ 69,575] Wood-Island Pharmacy, Inc. v. Shel Bac Sales Corporation.

In the New York Supreme Court for Nassau County. 142 N. Y. L. J. No. 120, p. 13. Dated December 22, 1959.

New York Fair Trade Act

Fair Trade—Defenses to Enforcement Action—Price Violation by Enforcing Party.—A motion for a temporary injunction restraining defendant from allegedly selling drug articles below the fair trade price was denied where the defendant's affidavits indicated that the plaintiff was carrying on similar activity.

See Fair Trade, Vol. 1, ¶ 3452.34.

[*Fair Trade Action*]

ROBINSON, Justice [*In full text*]: This is an action seeking to enjoin alleged violations of the Fair Trade Act, General Business Law, article XXIV-A. The plaintiff, the owner of a retail pharmacy in the vicinity of a similar business operated by the defendant, moves for a temporary injunction pending trial. Affidavits in support of the motion are submitted to indicate purchases of drug articles at various times in the defendant store at prices below the fair trade selling price. The opposing affidavits indicate similar activity being carried on in the plaintiff store. It is well settled that under such circumstances, the court must deny the relief requested by the plaintiff (*Fordes v. Lythe*, 137 N. Y. S. 2d 422; *Frasca v. Wilson*, 2 App. Div. 2d 762). Motion denied. Submit order.

[¶ 69,576] Ex parte Ralph E. Angle v. Arvid Owsley, Sheriff.

In the Kansas City [Missouri] Court of Appeals. No. 23,112. Filed December 7, 1959.

Missouri Restraint of Trade Law

Combinations and Conspiracies—State Laws—Application to Labor Unions—Picketing.—Picketing to require one grocery store to employ union labor was found not to be in restraint of trade or contrary to the declared policy of Missouri. In so holding the court distinguished a case involving the coercion of all ice dealers in Kansas City to sell to one group and refuse to sell to other groups.

See Combinations and Conspiracies, Vol. 1, ¶ 2445.27.

For the petitioner: John J. Manning, Kansas City, Mo.

For the respondent: Richard K. Phelps and Rogers, Field & Gentry, Kansas City, Mo.

Original Proceeding in Habeas Corpus

PER CURIAM [*In full text*]: This is an original habeas corpus proceeding. Petitioner, Ralph E. Angle, was found guilty of contempt by the Circuit Court of Jackson County, Missouri, for having violated the terms of an injunction issued by that court. Punishment was fixed at a fine of $1,000 and imprisonment in the county jail for a term of 30 days. Upon issuance of our writ, he was released from custody of the sheriff under bail of $1,000, which was fixed by this court. We now consider whether to discharge the writ or make it permanent.

[*Original Injunction*]

Since May, 1951, Mr. Harold W. Hinson has been owner and operator of a large grocery business located at 8239 Wornall Road, Kansas City, Missouri, commonly known as "The Henhouse". The evidence clearly shows that he has been at all times engaged in interstate commerce. Apparently in May, 1951, and prior thereto there had been some labor troubles at his place of business. He filed a petition in the Jackson County Circuit Court asking for an injunction and restraining order against Ray Thomas, president, Howard P. Root, busi-

ness agent, and Carl Nothnagle, assistant business agent of Local Union No. 576, Amalgamated Meat Cutters and Butchers Workmen, an affiliate of the American Federation of Labor. Therein it was alleged that the defendants, in combination with others whose names were unknown, had entered into an unlawful combination to control and limit the trade in articles and things which were regularly bought and sold by the plaintiff, and had boycotted and were threatening to boycott any person buying from or selling products to plaintiff, all in violation of Sections 8301 and 8303, R. S. Mo., 1949 (now Secs. 416.010 and 416.030, V. A. M. S.). Therein it was asserted that another purpose of defendants was to coerce plaintiff's employees into becoming members of defendants' union, and to compel and coerce the plaintiff to discharge all his butchers and meat cutters who were not members of said union; that defendants interfered with and prevented the regular purchase of merchandise by plaintiff and by his customers, prevented and interfered with regular and orderly deliveries of merchandise, all in derogation of the laws of Missouri, and particularly of Section 2, Article I, Missouri Constitution, and that defendants had placed a picket line in front of plaintiff's place of business; that these pickets stopped vehicles carrying merchandise; that they prevented Brink's Inc. from picking up and carrying plaintiff's cash receipts to a bank and place of safekeeping; that said pickets shouted threatening remarks to customers who crossed the picket lines and subjected them to violent remarks and epithets; that defendants secretly and at night, scattered roofing nails in the drive and open area in front of plaintiff's place of business, causing damage to automobiles and the tires of plaintiff and his customers, and that defendants unlawfully and feloniously broke into and forced an entrance into plaintiff's place of business in the nighttime.

There was served upon defendants a notice and order to show cause why the injunction prayed for should not be granted. On the return day evidence was heard and in May, 1951, an injunction styled "Order for Temporary Injunction" was granted and issued. In May, 1951, motion was filed to dissolve the restraining order. It was overruled. In 1959, counsel representing the labor union filed a motion to modify the restraining order, limiting it to restraint of force and violence. This motion was overruled. No further action was taken prior to the issuance of citation for contempt. Petitioner's basic position is that the court was without jurisdiction to issue the 1951 injunction because the Federal Government has preempted the field. Jurisdiction is a question that may be raised at any time. A judgment entered without jurisdiction is void and may be attacked collaterally. 21 C. J. S. page 177. But where, as here, the court has general jurisdiction of the subject matter and the person, the onus rests on petitioner to show lack of jurisdiction. This may appear from the record itself or it may be shown in any other way that is both proper and convincing.

The record does not contain a transcript of the evidence heard in 1951. The trial court, however, made written findings of fact, which were filed with and made a part of the order for the injunction. These findings of fact recited in part: that defendants established a picket line at plaintiff's place of business from 8:00 a. m. to 4:30 p. m. except on Sundays; that union truck drivers would not deliver merchandise to plaintiff's place of business nor would Brink's, Inc. cross the picket line to pick up cash receipts for deposit in the bank; that about 3:00 a. m. on May 4, 1951, while plaintiff was in the yard of his residence next door to the business and while he had his shotgun and revolver on his person, he saw defendants Root and Nothnagle drive into the parking lot at The Henhouse; that defendant Root got out of the automobile, went to plaintiff's processing house, had a bottle of gasoline in his hand and entered the processing house; that thereupon plaintiff yelled to defendant Root to come out or he would kill him, and Root did come out with his hands held above his head, and left the place of business; that both defendants Root and Nothnagle admitted they were at the processing house on said date; that they had a bottle of gasoline, and that they were shot at two or three times. The court stated that while the picketing itself may have been peaceful, the acts of coercion, compulsion, force, duress and violence to compel plaintiff to employ union meat cutters and butchers are unlawful and these defendants cannot commit an unlawful act in connection with lawful picketing, and that defendants should not be permitted to threaten with coercion, force, violence or injury any citizen for the sake of com-

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pelling him to buy his peace. The injunction itself specifically enjoined defendants from (a) committing damage or injury to plaintiff's building; (b) from all manner of coercion, compulsion, force, violence and duress to compel plaintiff to employ only members of Local Union No. 576, as meat cutters and butchers; (c) from establishing, placing or maintaining any picket line or lines in and about plaintiff's store which would affect, destroy, injure, impede, hinder or interfere with the regular receipt or delivery of goods, merchandise and receipts to and from plaintiff's store or place of business in the usual and ordinary course of business. In the findings of fact this statement is made: "Temporary injunction is granted until the further order of this court".

This injunction, denominated "temporary", was never dissolved and was never formally declared to be permanent. Apparently, there were no serious difficulties, or at least any which brought the parties into court from May, 1951 until June, 1959, when picketing was resumed by one Clifton Stufflebeam, who had been an employee of The Henhouse until a few days before he began picketing. Some time during the years between 1951 and 1959, two of the original defendants, namely Ray Thomas, president, and Howard P. Root, business agent, died. The defendant Ralph E. Angle succeeded Thomas as president of the local union, and one Ted Wolff succeeded Root as business agent.

[*Contempt*]

On June 25, 1959, Mr. Hinson filed his amended petition, praying that an order issue requiring Angle, Wolff and Stufflebeam to show cause why they should not be held in contempt of the 1951 injunction. Stufflebeam was never actually brought in as a defendant or if he was, the issues as to him were disposed of in the circuit court. The trial court granted the order to show cause and Angle and Wolff, as defendants, were served with notice, and in July, 1959, the court heard evidence. We have a transcript of that testimony. On October 2, 1959, the court entered its order and judgment, finding defendant Angle (and Wolff) guilty of contempt and fixed the punishment of each at a fine of $1,000 and imprisonment in the county jail for a term of 30 days. A commitment thereunder was duly issued to the Sheriff of Jackson County, who took the defendant and Wolff into custody. Resultant thereto is the present proceeding.

In its order and judgment the court found: (1) That these defendants, although not parties at the time the original injunction was issued, nevertheless, had full knowledge of its existence and of the fact that said temporary injunction directed

> "that there should be no picketing of plaintiff's premises which would affect or interfere with the regular receipt and delivery of goods, merchandise and receipts to and from plaintiff's store or place of business in the usual and ordinary course of business",

and that said defendants (2)

> "openly, actively and in concert, confederation and conspiracy with each other and with divers other persons to interfere with, obstruct, divide, defeat and violate the injunction order of this court theretofore made by actively participating in picketing of the store of the said plaintiff herein and by conspiring to so picket, intending and actually affecting, hindering and interfering with, obstructing and defiantly attempting to defeat the order of the court",

and (3) defendants are guilty of contempt.

The evidence adduced at the 1959 hearing shows, we think, (a) that defendants actively participated in the picketing, sometimes in conjunction with Stufflebeam, and sometimes relieving him on the picket line when he went to meals; that defendants mostly sat in their automobile and "waved delivery trucks on by"; (b) that defendants furnished or caused to be furnished to Clifton Stufflebeam a union umbrella with the wording "Unfair", written thereon, which he carried while walking the picket line; (c) that on one occasion the defendants and Stufflebeam and two or three other persons congregated on the sidewalk or driveway in front of plaintiff's place of business; that plaintiff called the police and then advised defendants that they were not permitted to "mass picket". Thereupon defendants got in their cars and left. To summarize, as we read the 1959 record, we find no proof of violence or threats of violence, nor did the trial court declare that it found any.

[*Jurisdiction*]

It is petitioner's contention that first, the court was without jurisdiction to enter the original injunction for the reason that under the National Labor Relations Act, Con-

gress has pre-empted the field, leaving to the state courts only the authority to restrain violence and keep the peace, and that in this case there was no evidence of force and violence. Generally speaking, and subject to at least two limitations, we think this statement of the law is correct. *Graybar Electric Co. v. Automotive Union,* 287 S. W. 2d 794; *Garner v. Teamsters Union,* 346 U. S. 485, 74 S. Ct. 161; *Guss v. Utah Labor Board,* 353 U. S. 1, 77 S. Ct. 598. But from the findings of fact and the injunction decree as detailed *supra,* we are of the opinion that there was sufficient evidence to support the court's order enjoining violence and threats of violence. The parties agree that a state court does have authority to restrain acts of violence. There can be no question but that this is the law.

Counsel for Mr. Hinson, movant below, contend that a state court has authority to enjoin all picketing where the evidence shows the picketing is enmeshed with force and violence, and calls to our attention the case of *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552. In that case the evidence showed a long series of occurrences involving force and violence. There was proof of more than 50 instances of window-smashing, explosive bombs placed in the store, stench bombs dropped on five stores, three trucks wrecked, one set afire, another driven into the river, severe beatings of truck drivers, and shootings. The Supreme Court of Illinois ordered an injunction not only restraining force and violence but forbidding all picketing. The Supreme Court of the United States approved on the theory that these grave incidents of violence were so closely intermingled with the picketing that the court was justified in concluding that the only way it could stop the violence and maintain the peace would be to not only enjoin acts of violence, but to stop the picketing, also. It is true that passage of the National Labor Relations Act in 1947, came after this decision. However, the rule and reason of it has not been, so far as we have been able to learn, overturned. We believe there was sufficient evidence in 1951 of violence and threatened violence to justify and authorize the state circuit court to enjoin acts and threats of force and violence. To that extent we find the injunction to be valid. However, we find no substantial evidence of violence or threatened violence in 1959, and therefore no violation in this respect of the injunction. Hence there could be no contempt on that ground.

[*No Violence*]

We do not believe that the violence, or force, or threats thereof, as such appears to have existed in 1951, establishes a pattern of violence so intermingled with the picketing, as to lead to the reasonable conclusion that the only way to stop such violence and preserve the peace would be to stop all picketing. We cannot conclude that resumption of picketing seven years later and by different defendants would likely cause violence to recur so as to bring this case within the rule declared in the *Meadowmoor* case. Under the facts here, the case is more nearly akin to *Youngdahl v. Rainfair, Inc.,* 78 S. Ct. 206, 355 U. S. 131, where the Supreme Court struck down an Arkansas injunction against both violence and picketing, limiting it to violence alone.

In *Giboney v. Empire Storage & Ice Co* [1948-1949 Trade Cases ¶ 62,391], 336 U. S. 490, 69 S. Ct. 684, a 1949 decision, which involved the Missouri statute against restraint of trade (now 416.010 and 416.030, V. A. M. S.) it was stated on page 691:

> "* * * * it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. * * *. We hold that the state's power to govern in this field is paramount, and that nothing in the Constitutional guaranties of speech or press compels a state to apply or not to apply its antitrade restraint law to groups of workers, businessmen or others".

The court approved the judgment of the Missouri court issuing an order restraining defendants from picketing plaintiff's plant.

[*No Restraint of Trade*]

However, in the *Giboney* case the purpose of the union was to force and coerce all wholesale ice dealers to refuse sales to independent ice peddlers and sell only to those who were union members. To hold that coercing all ice dealers in Kansas City to sell to one group and refuse sale to other groups, is in restraint of trade and contrary to the declared policy of Missouri is quite

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different from holding that picketing to require one grocery store to employ union labor is likewise in restraint of trade and such declared policy. We cannot apply the *Giboney* ruling to our case.

In its findings of fact and order, the court did not set forth or find the existence of forceful or violent acts, either so numerous or to such an extent as would justify application of the rule as laid down in the *Meadowmoor* case, nor is there any statement by the court that it found violence in such a degree as to require restraint of even peaceful picketing in order to stop violence and preserve the peace. To the contrary, the findings and order indicate that the court considered that it had power to enjoin peaceful picketing and such was its basis for entering its temporary injunction. It seems to follow that on this point the injunction can be held to be valid only insofar as it restrains force and violence. Such conclusion is, we think, in accord with both the *Meadowmoor* and *Youngdahl* cases.

Based upon their pronouncements, it might be said that in 1951 and for many years thereafter, many courts, including numerous State Supreme Courts, inclined to the view that under many circumstances even peaceful picketing might be restrained, not only if necessary to prevent violence, but if the purpose was unlawful under the state statutes and precedents. However, the Supreme Court of the United States has declared otherwise and as late as April 20, 1959, in *San Diego Building Trades Council, etc. v. Garmon,* 359 U. S. 236, 79 S. Ct. 773.

[*Holding*]

We must, therefore, and do hold (a) the 1951 injunction is valid only insofar as it restrains force and violence; (b) petitioner, under the evidence, is not in violation of the injunction as so restricted; and (c) petitioner is not guilty of contempt.

The Writ of Habeas Corpus is made permanent. Defendant is discharged from custody and his bail bond is released.

[¶ 69,577] Pinney & Topliff v. Chrysler Corporation.

In the United States District Court for the Southern District of California, Central Division. Civil Action No. 850-58-Y. Filed September 17, 1959.

Automobile Dealer Franchise Act

Suit for Damages Under Automobile Dealer Franchise Act—Construction of Act.—The Automobile Dealer Franchise Act, which created a right of action where none existed at common law, is what is known as a "statute of creation." For this reason, its limitations as to the conditions of recovery and the remedy are to be treated as "limitations of the right."

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.

Suit for Damages Under Automobile Dealer Franchise Act—Elements of Violation—Coercion or Intimidation.—There was no coercion or intimidation of an auto dealer when the desire to terminate the agency originated with the dealer, and it voluntarily terminated the agency after the manufacturer's representatives had tried, unsuccessfully, to find a buyer.

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.60.

Suit for Damages Under Automobile Dealer Franchise Act—Applicability to Past Activities—Time Limitation of Action.—An automobile dealer could not recover damages under the Automobile Dealer Franchise Act where there was no promise or representation made or consequent loss or damage incurred subsequent to the effective date of the Act, August 8, 1956. Since the cause of action accrued more than three years before the date of this suit, it was also barred by the statute of limitations in the statute.

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.35, 9070.80.

For the plaintiff: Gold, Needleman & Fain (by Harry M. Fain and J. Howard Sturman) of Beverly Hills, Cal.

For the defendant: McCutchen, Black, Harnagel & Shea (by G. Wm. Shea, John Lawrence Leary, and Keith A. Jenkins) of Los Angeles, Cal.

[*Damages—Automobile Dealers Act*]

YANKWICH, District Judge [*In full text except for omissions indicated by asterisks*]: In this case we are to determine whether the plaintiff is entitled to recover under a Complaint seeking damages for fraud, either actual or constructive, or deceit,[1] or, in the alternative, on the theory of promissory estoppel,[2] or under the federal Automobile Dealers Act.[3]

At the request of the parties the Court has agreed to try the separate "issue" of liability first.[4] So the question of damages is not at present before the Court.

As is evident, two [of] the remaining causes of action are brought under State law, the third under Federal law. While the same amount of damages is sought under all the remaining claims, treble damages are also asked under the Clayton Act,[5] as well as costs and attorneys fees.

I

Fraud and Coercion

In essence, the proof in the case was directed to an attempt to show that the defendant, who will be referred to as "Chrysler", made certain promises and undertakings to the plaintiff, who will be referred to as "Pinney", with relation to the termination of a dealership at El Centro, California, which were false and fraudulent under California law and constituted coercion and intimidation or threats of coercion or intimidation under the federal statute.[6] Before considering the facts it is well to set down certain fundamental principles which govern the quantum of proof in cases of this character.

Pinney is a California corporation, Chrysler a Delaware corporation. Two of the claims being based on diversity of citizenship are governed by State law.[7] And under California law there is a presumption of fair dealing which is tantamount to the presumption of innocence in criminal cases.[8] However, the statutory definitions of fraud and deceit are very broad. The relevant sections are printed in the margin.[9] Because of the broad scope of these provisions which have been in the California Codes

[1] California Civil Code, §§ 1571, 1572, 1573, 1709, 1710.

[2] *Carpy v. Dowdell*, 1897, 115 C. 677, 687; *Hunter v. Sparling*, 1948, 87 C. A. 2d 711, 725-726; *Wade v. Markwell and Company*, 1953, 118 C. A. 2d 410, 420.

[3] 15 U. S. C. A., §§ 1221-1223.

[4] Rule 42(b), Federal Rules of Civil Procedure.

[5] 15 U. S. C. A., § 15.

[6] 15 U. S. C. A., § 1221.

[7] *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 78; *Guaranty Trust Co. v. York*, 1945, 326 U. S. 99, 108; *Angel v. Bullington*, 1947, 330 U. S. 183, 186-187; *Woods v. Interstate Realty Co.*, 1949, 337 U. S. 535, 537-538; *Bernhardt v. Polygraphic Company of America, Inc.*, 1956, 350 U. S. 198, 202-203.

[8] *Levy v. Scott*, 1896, 115 C. 39, 42; *Hall v. Susskind*, 1898, 120 C. 559, 563; *Truett v. Onderdonk*, 1898, 120 C. 581, 588; *Goodrich v. Tulare Ice Co.*, 1956, 140 C. A. 2d 224, 226-227.

[9] Actual fraud is defined

"§ 1572. Actual fraud

"ACTUAL FRAUD, WHAT. Actual fraud, within the meaning of this Chapter, consists of any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

"2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

"3. The suppression of that which is true, by one having knowledge or belief of the fact;

"4. A promise made without any intention of performing it; or

"5. Any other act fitted to deceive." (California Civil Code, § 1572)

Constructive fraud is defined:

"§ 1573. Constructive fraud

"CONSTRUCTIVE FRAUD. Constructive fraud consists:

"1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

"2. In any such act or omission as the law specifically declares to be fraudulent, without respect to actual fraud." (California Civil Code, § 1573)

The sections concerning deceit, defining it, and the conditions of recovery are:

"§ 1709. Deceit; damages

"FRAUDULENT DECEIT. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." (California Civil Code, § 1709)

"§ 1710. Deceit defined.

"DECEIT, WHAT. A deceit, within the meaning of the last section is either:

"1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

"2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

"3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

"4. A promise, made without any intention of performing it." (California Civil Code, § 1710)

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since their enactment in 1872, the courts have laid down the rule that the evidence in proof of fraud must be clear and convincing.[10] This is also the general and the federal rule.[11] And whether we are dealing with actual or constructive fraud there must be a false representation or promise as to a material fact, knowledge of its falsity when made, or lack of reasonable ground to believe in its truth, intent to deceive, or suppression, and reliance with resulting damages.[12]

II

The Basic Issues in the Case

We are of the view that there is no clear and convincing evidence of fraud or deceit, actual or constructive, which would warrant a judgment in favor of Pinney on the question of liability.

A. Pinney's Contentions

The chief basis for the claim of fraud, as alleged in the Complaint, is that Pinney, beginning in 1954 and continuing a long time thereafter, informed Chrysler, through its district and regional managers, that they desired to sell the Agency Agreement, entered into August 20, 1952, whereby Pinney became the Dodge direct dealer for Dodge automobiles and trucks and Plymouth automobiles for the El Centro territory. The Complaint also averred that Pinney stated that, in the event a buyer could not be secured, they would be compelled to terminate the agency, as their President desired to enter law school. In response to these statements it was alleged that Chrysler agreed to secure a buyer within a reasonable time and, in the event the buyer was not secured, Pinney would be immediately notified so that they could terminate the agency.

In the light of these allegations the main problems presented by the proof, are, *as correctly stated by counsel for Pinney:*

(1) Whether Chrysler, through any duly authorized representative, promised or represented to Pinney that if they would continue their operations, Chrysler would produce a satisfactory buyer for their dealership within a reasonable time;

(2) Whether Pinney reasonably relied on such promises or representations to their detriment;

(3) Whether Chrysler, through its representatives either (a) made such promises or representations without intention of performing or fulfilling them or knowing them to be untrue or having no basis for believing them to be true, or (b) suppressed material facts which suppression was likely to mislead Pinney, or (c) misled or took advantage of Pinney in breach of a duty imposed by the relationship of the parties.

In essence, Pinney asserts that Chrysler, through its district and regional managers, Jack A. Wixom and Harold Erskine Wyatt, agreed, in consideration of Pinney's continuing in business, to secure a buyer for the dealership.

* * *

IV

Conclusions and Inferences on the Facts

So the upshot of the matter is this: At most Chrysler's district and regional managers *agreed to recommend* the acceptance of a satisfactory buyer by Chrysler when one was found. They sought such buyers, as did Pinney. In their answers to interrogatories, Chrysler listed at least eight prospective buyers, in addition to the "Burton-Battenfield-Measures" group who were "contracted" for the dealership "either on Chrysler's own initiative or by reference from Pinney & Topliff". (Answer to Plaintiff's Interrogatory No. 8) When a "promising" one was found, they recommended to the Chrysler main office approval of the transfer of the dealership with the waiver of the requirement as to single dealership. As was their right, Chrysler *did not* consent to the waiver. So the deal fell through, because the prospective buyers would not accept a single dealership. Thereafter, Pinney, by letter dated October 8, 1956, voluntarily terminated the dealership under the

[10] *Ryder v. Bamberger*, 1916, 172 C. 791, 799-800; *Noll v. Baida*, 1927, 202 C. 98, 101-102; *Mills v. Hellinger*, 1950, 100 C. A. 2d 486, 487; *Maslow v. Maslow*, 1953, 117 C. A. 2d 237, 242-243.

[11] 37 C. J. S., Fraud, § 114; *Pacific Royalty Company v. Williams*, 10 Cir., 1955, 227 F. 2d 49, 55.

[12] *Southern Development Co. v. Silva*, 1888, 125 U. S. 247, 250; *Restatement, Contracts*, §§ 470-471; California Civil Code, § 1572, subd. 2 and 4, § 1709, § 1710, subd. 4; *Pacific Royalty Co. v. Williams, supra* Note 11; *Wishnick v. Frye*, 1952, 111 C. A. 2d 926, 930-931; *Gonsalves v. Hodgson*, 1951, 38 C. 2d 91, 100; *Berkey v. Halm*, 1950, 101 C. A. 2d 62, 69; *Gagne v. Bertran*, 1954, 43 C. 2d 481, 487-489.

ninety-day clause in the Contract of August 20, 1952. This they had a right to do.

It is to be noted that prior to this date meetings of the directors and shareholders of the plaintiff corporation were held on September 19, 1956, at which Resolutions were adopted to dissolve the corporation. The directors' Resolution also authorized the immediate payment of $10,000 in corporate funds to Charles A. Pinney, Jr. on account of his distributive share of the assets, in accordance with an agreement of the same date entered into by him and Topliff. Under this agreement Topliff was to draw from the corporate funds $500 a month during the liquidation. As Pinney owned 75 per cent of the stock and the company was solvent and had assets, under other circumstances the advance to Pinney would be an unimportant event. But the circumstances under which it was made, and the fact that even while in law school Pinney, as President, drew a salary of $900 a month, lend support to the conclusion that the determination to liquidate the business, in some manner, was not brought about by any unfulfilled promises of Chrysler's but by the conditions which confronted the Pinney corporation. Although the meeting was held after the abandonment of the "Burton-Battenfield-Measures" deal, the minutes do not reflect any statement by anyone attributing the desire to dissolve to any alleged failure on the part of Chrysler to assist in the disposal of the agency as a going business. So, in answer to the questions propounded at the beginning of the opinion, I find:

(1) Chrysler did not promise or represent to Pinney that if they would continue operations they would procure a buyer within a reasonable or definite time, or at all. Whatever promises were made as to assistance in disposition of the dealership were intended to be performed and were actually performed by Chrysler's agents;

(2) Pinney did not rely on any such representations. To the contrary, they continued efforts to conduct the business in the absence of its President. They attempted to reorganize their management and they themselves interested persons who might purchase the business. So there was no such change of position to their detriment as is necessary to warrant a finding of constructive fraud[16] or to give rise to a promissory estoppel, even if the representations had been made.[17] However, I am also of the view that:

(3) Chrysler did not (a) make any promises or representations without intention of performing them or knowing them to be untrue or having no basis for believing them to be true, (b) or suppress any material facts which suppression was likely to mislead or (c) misled or took advantage of Pinney in breach of a duty imposed by the relationship of the parties.[18]

In sum, I find that there was no actual or constructive fraud or deceit committed by Chrysler, as these terms are understood in California law. I am also of the view that the claims under State law are barred by the three-year statute of limitations.[19] And that Pinney has not shown any concealment on the part of Chrysler which excused delay in discovery, or any acts by Chrysler "lulling" them into a sense of security, which excused the failure to act.[20]

V

The Claim Under the Automobile Dealers Act

What has just been said disposes also of the asserted claim under what is known as the Automobile Dealers Act.[21] This act, which creates a right of action where none existed at common law, is what is known as a "statute of creation". For this reason, the limitations as to the conditions of recovery, and the remedy are to be treated as "limitations of the right".[22]

The object of the statute was to give a right of action to automobile dealers when the automobile company fails to act in good faith

"in performing or complying with any of the terms or provisions of the franchise,

[16] California Civil Code, § 1709.
[17] *Restatement, Contracts,* § 90; *Bard v. Kent,* 1942, 19 C. 2d 499, 452-453; *Edmonds v. County of Los Angeles,* 1953, 40 C. 2d 642, 653; *Drennan v. Star Paving Company,* 1958, 51 C. 2d 409, 412; *West v. Hunt Foods, Inc.,* 1951, 101 C. A. 2d 597, 605; *Hunter v. Sparling,* 1948, 87 C. A. 2d 711, 725-726.
[18] California Civil Code, §§ 1571, 1573, 1710.
[19] California Code of Civil Procedure, § 338(4).
[20] *Noll v. Baida,* 1927, 202 C. 98, 106-109; *Bainbridge v. Stoner,* 1940, 16 C. 2d 423, 430; *Hobart v. Hobart Estate Co.,* 1945, 26 C. 2d 412, 437-439; *Sidebotham v. Robison,* 9 Cir., 1954, 216 F. 2d 816, 823-824.
[21] 15 U. S. C. A., § 1221 et seq.
[22] See the writer's opinion in *Adams v. Albany,* 1948, 80 F. Supp. 876, 880.

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or in terminating, cancelling, or not renewing the franchise with said dealer." [22]

However, the term "good faith" merely means the duty to act

"in a fair and equitable manner towards each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." [24]

The right of recovery depends upon the existence of such acts.[25]

[*No Coercion*]

I find that there was no coercion, intimidation or threat of coercion or intimidation in the case on the part of Chrysler. As amply appears from the discussion of the facts which precede, the desire to terminate the agency, either by sale or otherwise, originated with Pinney who were dissatisfied with the arrangement first in 1954 and whose President and controlling stockholder, in 1955, determined to go to law school, an act in which he was not encouraged by the representatives of Chrysler, who, on the contrary, advised against it. The final notice of termination was given by Pinney on October 8, 1956.

At no time did Pinney tell any of the district or regional managers of Chrysler that *if a buyer was not secured at a definite time they would terminate the dealership or liquidate.* So, even assuming that an automobile company might "force" a termination by a dealer under circumstances which would warrant a court in concluding that, although the termination was, *in appearances,* a voluntary one on the part of the dealer, *in reality,* it was coerced by the automobile company, this is not the situation before us. Chrysler's representatives tried to assist in disposing of the business. After Pinney's President was admitted to law school he decided to remain there, sought to reorganize the management of the business and chose to run it at a loss rather than return to its management. He, no doubt, believed that he could run it *in absentia.* For he drew a salary while at law school. The termination was Pinney's voluntary act, not forced by any coercion or intimidation by Chrysler.

[*Applicability to Past Acts—Statute of Limitations*]

Consequently, the conditions for the application of this salutary statute do not exist in this case. In addition to this, there is absent another condition for the application of the Act: There was no promise or representation made or consequent loss or damage incurred subsequent to the effective date of the Act. And the statute restricts recovery to the damages sustained by the dealer by reason of the failure of the automobile manufacturer to act in good faith "from and after August 8, 1956".[26] For the same reason, the claim is also barred by the three-year limitation in the statute.[27]

To conclude: Pinney is seeking to recover, in tort, for a voluntary act on their own part which ultimately resulted in the liquidation of their automobile agency. The Civil Code of California declares: "He who consents to an act is not wronged by it." [28] This is a codification of the maxim *volenti non fit injuria,* which is a basic tenet of our jurisprudence. It precludes the maintenance of an action for a wrong by one who has " 'consented to the act which has occasioned his loss' ".[29] Its application to the facts in this case would, of itself, call for denial of recovery.[30] However, the prior discussion sets forth other grounds, legal and factual, for the conclusion that there is no legal liability on the part of Chrysler for any of the acts complained of.[31]

Judgment will, therefore, be for the defendant on the issue of liability, that it is not liable to the plaintiff under any of the remaining causes of action, 1, 2 or 4.[32] The Third cause of action has already been dismissed and judgment of dismissal ordered entered. Findings and Judgment, in

[22] 15 U. S. C. A., § 1222.
[24] 15 U. S. C. A., § 1221(e).
[25] See, *Staten Island Motors, Inc. v. American Motors Sales Corp.,* D. C. N. J., 1959, [1959 TRADE CASES ¶ 69,262] 169 F. Supp. 378, 382.
[26] 15 U. S. C. A., § 1222.
[27] 15 U. S. C. A., § 1223.
[28] California Civil Code, § 3515.
[29] *Edward Brown & Sons v. City and County of San Francisco,* 1950, 36 C. 2d 272, 279.
[30] 92 C. J. S., pp. 1027-1028; *Restatement, Torts,* § 892; *Surface v. Safeway Stores, Inc.,* 8 Cir., 1948, 169 F. 2d 937, 942.
[31] In view of the conclusion reached that, under the facts, no claim has been proved under the Automobile Dealers Act (15 U. S. C. A., § 1221) it is unnecessary to pass upon the constitutionality of the Act which has been challenged by the defendant.
[32] Rule 42(b), Federal Rules of Civil Procedure.

accordance with the views expressed herein, to be prepared by counsel for the defendant under Local Rule 7. Costs to the defendant.

No attorneys' fees. Dated this 17th day of September, 1959.

[¶ 69,578] **John Taxin and Bernard Taxin, trading as John Taxin Co. v. Food Fair Stores, Inc., et al.**

In the United States District Court for the Eastern District of Pennsylvania. Civil Action No. 26967. Filed December 14, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Civil Damage Action—Pretrial Procedures—Separate Trials—Right to Jury Trial.—In a private antitrust suit, a separate trial was ordered for the purpose of determining whether the action was barred by the statute of limitations and whether a general release executed by the plaintiffs was valid. It was held that if the statute of limitations or the release were found to bar or cut down the scope of the action, the arduous and expensive preparations for the main trial would be avoided, and that even if they were not found to have such an effect, a preliminary trial of these issues would prejudice neither party. The court also held that any question of fact involved in these issues should be resolved by a jury. The basis for this award of a jury trial was that the court had discretion as a court of equity to submit any questions of fact to a jury.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.565, 9014.

For the plaintiffs: Lester J. Schaffer, Philadelphia, Pa.

For the defendants: Shapiro, Rosenfeld, Stalberg & Cook and Harold E. Kohn, both of Philadelphia, Pa.

Memorandum Opinion and Order

[*Treble Damage Action—Separate Trial*]

Harold K. Wood, District Judge [*In full text*]: The issues presently before the Court are (1) whether the defendants' request for a separate trial on certain issues, preliminary to the trial of the main case, should be granted, and (2) if a separate trial is ordered, whether factual questions presented therein should be determined by the Court or by a jury.

This is a private antitrust suit. Plaintiffs complain that defendants have conspired to restrain trade in and monopolize the distribution and sale of fresh fruits and vegetables in the Philadelphia area, and that as a result, the defendants have destroyed plaintiffs' wholesale fruit and vegetable business.

Defendants deny plaintiffs' allegations. In addition, defendants contend (1) that the statute of limitations bars recovery based upon anything occurring before September, 1954, and (2) that a general release executed by plaintiffs on March 28, 1958 bars recovery based upon any liability which defendants theretofore might have had to plaintiffs.

Plaintiffs' reply that the statute of limitations should not be applied in this case in the way defendants contend, and that the release is invalid.

[*Release*]

The validity of the release is at present the major issue in this case.

Plaintiffs attack the validity of the release on two grounds. First, plaintiffs allege that the release was obtained by fraud. According to plaintiffs, the defendants orally promised to give plaintiffs $500,000 worth of business per year if plaintiffs would execute the release, but defendants never intended to carry out that promise, and have consistently refused to carry it out. Due to this fraud, plaintiffs argue that the release may be avoided. Second, plaintiffs allege that the release was obtained as "part and parcel of the conspiracy," and that the release is void on this ground alone.

The defendants demand that the question of the validity of the release be tried sep-

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arately, in advance of the main case, and by the Court without a jury. The plaintiffs do not want a separate trial; but if one is granted, they demand a trial by jury of the factual questions therein. Plaintiffs resist the separate trial, arguing that the evidence necessary to prove the release invalid is the same as the evidence necessary to prove their case in general. This argument is based solely on the second ground of attack on the validity of the release. In other words, plaintiffs say, that in order to prove the release was obtained as "part and parcel of the conspiracy," they would have to prove the conspiracy, which is the very backbone of their main case.

[*Separate Trial Granted*]

We think that a separate trial of these issues would serve the convenience of all parties to this suit and also the convenience of the Court.

Clearly the evidence necessary to determine the issue of fraud is different from the evidence necessary to determine the issues in the main case. With regard to the evidence necessary to determine the issue of whether the release was obtained as "part and parcel of the conspiracy," plaintiffs will not be limited in their presentation of evidence to support this argument. However, we observe preliminarily that if it is determined that the release was not obtained by fraud, then we think its validity will have been established. We do not understand how proof of the allegation that the release is "part and parcel of the conspiracy" could detract from its validity. Nevertheless, as we pointed out above, plaintiffs will be free to develop this argument at the separate trial.

Rule 42(b) of the Federal Rules of Civil Procedure gives us discretion to order a separate trial of any issue in a case "in furtherance of convenience or to avoid prejudice." If the release, or the statute of limitations, or both, are found to bar or to cut down the scope of plaintiffs' action, the arduous and expensive preparations necessary for trying the main case will have been avoided. On the other hand, if the separate trial does not cut down or bar plaintiffs' case, none of the parties will have been prejudiced by having had these issues determined in advance of the main case.

[*Jury Trial Granted*]

The attorneys have prepared excellent briefs for our guidance in deciding whether or not factual questions as to whether there was fraud in obtaining this release should be decided by the Court or a jury. After considering the arguments of counsel, we have concluded that these questions should be determined by a jury.

The attorneys have directed their arguments on this point to the question of whether or not the plaintiffs have a constitutional guarantee of a trial by jury on the question of procurement of a release by fraud. Rule 38 of the Federal Rules of Civil Procedure provides: "The right of trial by jury as declared by the 7th Amendment to the Constitution * * * shall be preserved to the parties inviolate." The legal question to be decided, therefore, is whether the issue of fraud involved here is an issue which was traditionally triable by a jury at the time of the 7th Amendment. The authorities are not in agreement on the answer to this question. The cases are collected in Volume 43 A. L. R. 2d at page 786 et seq. We observe briefly that the trend is toward granting a jury trial on this kind of issue.[1] However, we do not rest our decision to grant a jury trial in this case on the plaintiffs' constitutional rights.

We base our decision to award a jury trial in this case on our discretion as a Court of equity to submit any questions of fact to a jury.[2] There is no principle of law, nor any constitutional guarantee, which re-

[1] The Third Circuit has, to some extent, taken the position that the issue of fraud in the procurement of a contract is an issue for the jury. See *Ettelson v. Metropolitan Life Insurance Company*, 137 F. 2d 62. See also an excellant opinion, in which all the legal intricacies of this problem are fully explored by Chief Judge Leahy of the Delaware District Court. *Canning v. Star Publishing Company*, 138 F. Supp. 843 (D. C. Del. 1956).

[2] "* * * A court of equity has power to frame issues and to submit them to a jury * * *. The court may send any portion of the issues of fact to a jury, submitting such issues as it desires to be advised on * * *. Whether or not a court of equity will exercise its power to submit issues in a particular case is a matter of discretion." 30 Corpus Juris Secundum, Section 495. "While issues of fact may be submitted to a jury in response to a motion or demand by a party to the cause * * * the court may direct a submission of its own motion." Id. Section 498.

quires us to try an issue without a jury.[3] We base the exercise of our discretion in this matter on our belief that the questions of fact to be determined in the separate trial are best answered by a jury. In other words, answering them may involve the resolving of conflicting testimony. The facts to be established or disaffirmed are uncomplicated and few in number.

Order

Now, therefore, this 14th day of December, 1959, it is ordered that a jury be empaneled to serve on February 15, 1960. On that date, a separate trial will be held in which the parties may present evidence and arguments on the following questions: (1) The effect of the statute of limitations on the plaintiffs' action; (2) whether the release is void because it was obtained as "part and parcel of the conspiracy"; (3) whether the release is voidable because it was procured by fraud. With regard to the third question, the jury will determine (a) whether or not the defendants orally promised to give plaintiffs $500,000 worth of business a year in exchange for the release; (b) whether the defendants at the time of making the alleged promise intended to carry it out; and (c) whether the plaintiffs reasonably relied upon the alleged promise in signing the release.

All discovery necessary for preparation of trial on these issues shall be completed before February 8, 1960.

[¶ 69,579] People of the State of New York v. Constantine D'Amato.

In the New York Court of Special Sessions, New York County, Part 3. 142 N. Y. L. J. No. 121, p. 8. Dated December 23, 1959.

New York Antitrust (Donnelly) Act

Combinations and Conspiracies—State Laws—Procedure—Investigations—Failure to Obey a Subpoena—Information.—A demurrer to an information charging that the defendant failed to obey a subpoena issued in the course of an antitrust investigation was overruled. In so ruling the court held that the information need not allege that the person subpoenaed failed to obey it without good cause since this question of good cause was a matter of defense. It was also held that such an information need not allege that it was filed pursuant to the direction of the grand jury and on the order of the Court of General Sessions where there were certified copies of the direction and order attached to the information.

See Combinations and Conspiracies, Vol. 1, ¶ 2419.34.

[*Demurrer to Information*]

GASSMAN, P. J. [*In full text*]: The defendant demurs to the information on the ground that (1) the facts stated in the information do not constitute a crime, and (2) that the information is defective "in that it does not set forth the jurisdiction of the court." The information charges the defendant with a violation of section 343 of the General Business Law in that he failed to obey the command of a subpoena issued by the attorney general in the course of an anti-trust investigation conducted by the attorney general under the "Donnelly Act" (sections 340-347, General Business Law). It is the defendant's contention that in view of the fact that section 343 provides that "if a person subpoenaed to attend such inquiry fails to obey the command of the subpoena *without good cause,* * * * he shall be guilty of a misdemeanor" (emphasis supplied) that the information should have contained an allegation to the effect that the defendant's failure to obey the subpoena was without good cause. We hold that the question of whether the failure to obey a subpoena was "with good cause" is a matter of defense (*People v. Rehn,* 10 Misc. 2d 482) and that the information does not have to contain such an allegation. Defendant's second contention is based on the fact that the information does not

[3] See *Hurwitz v. Hurwitz,* 136 F. 2d 796 (C. A. D. C. 1943) at page 798, where the court said: "A defendant has no constitutional right to a trial by the court without a jury. The jury may render a verdict on equitable issues which the court may use as an advisory aid in making findings of fact."

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allege that is was filed pursuant to the direction of the grand jury and the order of the Court of General Sessions. Section 742 of the Code of Criminal Procedure provides that all criminal actions in this court must be prosecuted by information made by the district attorney, (1) on returns filed pursuant to section 221 of the code, or (2) filed by the district attorney by direction of a grand jury approved, upon order, by the court for which the grand jury was drawn. The papers before us indicate that there is attached to the information a certified copy of the grand jury's direction as well as a certified copy of the order of the Court of General Sessions approving the direction. The information need not allege the facts respecting the direction nor the order approving it, any more than it need allege that the information was filed pursuant to a magistrate's return. The demurrer is therefore disallowed.

[¶ 69,580] Goldlawr, Inc., Plaintiff-Appellant, v. Marcus Heiman, Select Operating Corporation and United Booking Office, Inc., Defendants-Appellees, and Milton Shubert, William Klein and Sylvia W. Golde, Defendants.

In the United States Court of Appeals for the Second Circuit. Nos. 25964, 25965. Decided December 29, 1959.

Appeals from United States District Court for the Southern District of New York. EDMUND L. PALMIERI, District Judge.

Clayton Antitrust Act

Private Enforcement and Procedure—Civil Damage Action—Jurisdiction of Appellate Court—Final Orders.—Where there was one claim against several defendants and it was dismissed as to some but not all of them, this dismissal could not be made final and thus appealable before the disposition of the remainder of the case. In so ruling the Court of Appeals for the Second Circuit held that amended rule 54(b) of the Federal Rules of Civil Procedure, which provides for such finalization when there is no just cause for delay, expressly dealt with multiple claims and did not allow a finding of finality where a single claim against multiple parties was dismissed as against some but not all.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.12.

For the plaintiff-appellant: Curtis, Mallet-Prevost, Colt & Mosle (Harold E. Kohn and Dolores Korman of Dilworth, Paxson, Kalish, Kohn & Dilks, Philadelphia, Pa., of counsel).

For the defendants-appellees: Gerald Schoenfeld & Bernard B. Jacobs, New York, N. Y. for Select Operating Corporation; Gerald Schoenfeld & Bernard B. Jacobs, and Lipper, Shinn & Keeley, New York, N. Y.; for United Booking Office, Inc.; (C. Russell Phillips and Hugh G. Moulton of Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., of counsel for Select and United). Lipper, Shinn & Keeley, New York, N. Y., for Morgan Guaranty Trust Co. and Asher Levy, Executors of the Estate of Marcus Heiman, deceased.

Dismissing an appeal from the U. S. District Court, Southern District of New York, 1959 Trade Cases ¶ 69,436; for prior opinion of the U. S. District Court, Eastern District of Pennsylvania, see 1958 Trade Cases ¶ 69,227.

Before LUMBARD, Chief Justice, and SWAN and FRIENDLY, Circuit Judges.

[Motion to Dismiss—Appellate Jurisdiction]

PER CURIAM *[In full text]*: The amended complaint against six defendants alleges a conspiracy to violate the anti-trust laws and damage caused thereby to the plaintiff in the operation of the Erlanger Theatre in Philadelphia. It prays for a judgment against all the defendants in the amount of $1,050,000 to be trebled in accordance with the Clayton Act, 15 U. S. C. § 15, together with costs and an attorney's fee, and for an injunction. As against three of the defendants, the appellees, the action was dismissed for lack of personal jurisdiction. The action remained pending against the others. The judgment of dismissal contained a direction, such as is provided for by amended Rule 54(b) of the Federal Rules of Civil Procedure, that there was no just reason for delay and that judgment be entered in favor of the three defendants. Thereupon plaintiff filed timely notice of appeal. Amended Rule 54(b) expressly deals with multiple claims; consequently the weight of authority has held that in

situations involving multiple parties but only a single claim, a 54(b) certificate is ineffective to make appealable a judgment dismissing the action against some parties but leaving it pending against others.[1] Some decisions in the Second Circuit appear to have taken a contrary view. *Lopinsky v. Hertz Drive-Ur-Self Systems, Inc.*, 194 F. 2d 422 (1951), *Colonial Airlines v. Janas*, 202 F. 2d 914 (1953), *Rao v. Port of New York Authority*, 222 F. 2d 362 (1955), and *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F. 2d 213 (1955). On further consideration we have concluded that the Fifth, the Eighth, the Ninth and, as we read its opinions, the Seventh Circuit have been correct in thinking that amended Rule 54(b) does not allow a finding of finality in the case here presented where a single claim against multiple parties is dismissed as against some but not all. In consequence we must dismiss the appeals for want of appellate jurisdiction.

Appeals dismissed.

[Concurring Opinion]

SWAN, Circuit Judge (concurring) [*In full text*]: I agree, but wish to add that in my opinion dismissal of the appeal accords with our recent decisions. *Cott Beverage Corporation v. Canada Dry Ginger Ale, Inc.* [1957 TRADE CASES ¶ 68,699], 243 F. 2d 795, 796; *Schwartz v. Eaton*, 264 F. 2d 195, 197; *Seaboard Machinery Corp. v. Seaboard Machinery Corp.*, 267 F. 2d 178, 179. See also *Gauvreau v. United States Pictures*, 267 F. 2d 861; *John and Sal's Automotive Service, Inc. v. Jones Beach State Parkway Authority*, 267 F. 2d 862.

[¶ 69,581] Barney Motor Sales v. Cal Sales, Inc.

In the United States District Court for the Southern District of California, Central Division. Civil No. 54-59-TC. Filed November 3, 1959.

Automobile Dealer Franchise Act

Private Enforcement and Procedure—Suits for Damages Under Automobile Dealer Franchise Act—Persons Liable—Definition of "Manufacturer"—Domestic Distributor "Acting for" and "Under Control of" Foreign Manufacturer.—A domestic retail dealer in foreign automobiles, in an action charging a "bad faith" termination of its franchise in violation of the Automobile Dealer's Day in Court Act of 1956, was permitted to introduce what evidence it could to demonstrate that a domestic distributor was "controlled by" and "acted for" a foreign manufacturer, and was, therefore, a "manufacturer" within the meaning of the Act. The manufacturer, an English corporation, had no ownership interest in the domestic distributor. However, the Act's definition of "manufacturer" must be read in connection with (1) the fact that Congress, in enacting the statute, was directing itself to the basic evil of the disparity in bargaining power between manufacturers and dealers, and (2) the reflection that, so long as the economic conditions giving rise to the manufacturers' inordinate bargaining power could be maintained with respect to intermediary distributors, that power could itself be used to compel the "middle man" to pass on the manufacturer's terms to the retailer. The essence of the Act was to break that "chain of domination," whether it was "forged of one link or of many." Hence, an instrumentality employed by a manufacturer to bring about the condition of subservience aimed at in the Act "is itself a part of the manufacturer" and is bound by the Act's requirement of good faith in terminating dealer franchises.

See Private Enforcement and Procedure, Vol. 2, ¶ 9070.15.

For the plaintiff: H. Spencer St. Clair, Los Angeles, Cal.

For the defendant: Potruch & Lerten, Los Angeles, Cal.

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[1] *Steiner v. 20th Century Fox Film Corp.* [1955 TRADE CASES ¶ 67,971], 220 F. 2d 105 (9th Cir. 1955); *Nettles v. General Accident Fire and Life Assurance Corp.*, 234 F. 2d 243 (5th Cir. 1956); *Brandt v. Renfield Importers, Ltd.* [1959 TRADE CASES ¶ 69,405], 269 F. 2d 14 (8th Cir. 1959). The Seventh Circuit indicated its agreement with this view in *Hardy v. Bankers Life & Casualty Co.*, 222 F. 2d 827 (7th Cir. 1955), although in that case no Rule 54(b) certificate had in fact been made; we do not read *Morgan Drive Away, Inc. v. International Brotherhood of Teamsters*, 268 F. 2d 871 (7th Cir. 1959), as taking a different view. See also 6 Moore, Federal Practice § 54.34[2].

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[*Motion for summary judgment*]

CLARKE, District Judge [*In full text*]: This suit is brought by a dealer in Triumph motor cars for failure to renew his franchise contrary to the provisions of the Automobile Dealer's Day in Court Act of 1956, 15 U. S. C. A. secs. 1221-1225. Defendant has moved for summary judgment on the grounds that it is not a "manufacturer" as contemplated by the terms of the Act.

In substance, the affidavits and pleadings before the court show that defendant is a California corporation engaged in the distribution of Standard-Triumph Motor Cars in the State of California and in certain other western states. The stock ownership of the corporation is in the hands of Walter G. Danielson, Dorothy Deen, and Paul Bernhardt, citizens of the State of California. The manufacturer of Standard-Triumph motor cars, an English corporation, has no ownership interest whatever in the defendant distributing company. Defendant contends that its arrangement with the Standard-Triumph Motor Co. of Coventry, England, is precisely the sort of franchise agreement which would give the defendant a cause of action under the Day in Court Act in appropriate circumstances against the English manufacturer. It follows from this, according to the defendant, that its own franchising arrangements with the ultimate retail dealers in Standard-Triumph motor cars are exempt from the coverage of the Act in question, which in pertinent part reads:

> "(a) The term "automobile manufacturer" shall mean any . . . form of business enterprise engaged in the manufacturing or assembling of passenger cars . . . including any . . . corporation which *acts for* and is under the *control* of such manufacturer . . . in connection with the distribution of said automotive vehicles." (emphasis supplied.)

If this section were reasonably read to require only ownership control in order for an automobile distributor to be charged with manufacturer's liability under the Act, the granting of defendant's motion would be a matter of course. Plaintiff contends, however, that the agency and control intended by the statute are *de facto* subordination to the wishes and interests of the automobile manufacturer, whether expressed in a written contractual form, or in a course of dealing. This being a case of first impression on the question of law at hand, the court has had recourse to the legislative history of the statute, and to the learned commentary of Prof. Friedrich Kessler in "Automobile Dealer Franchises", 66 *Yale L. J.* 1135, for which grateful acknowledgment is hereby given.

[*Purposes of Automobile Dealer Franchise Act*]

Without going into the details of the history of franchise bargaining in the automobile industry, it may be said that Congress has recognized that the bargaining power of the manufacturer vis-a-vis the dealer is so great that the terms of any franchise agreement can be dictated virtually in their entirety by the manufacturer;[1] the resulting "contract of adhesion" could be designed to include exculpatory clauses immunizing the manufacturer from suits based upon bad faith termination of the agency relationship,[2] or it could be framed so vaguely as to be unenforceable in the courts because of indefiniteness of terms.[3] In short, any recognized legal device which would obviate dealer's suits upon the franchise against the grantor of the franchise could be exacted by the latter. The history of the devices used to effectuate this single end of immunization of the manufacturer from dealers' suits is an interesting commentary on the evolution of the law of contract;[4] suffice it to say here, however, that Congress in enacting the legislation at hand was directing itself to the basic evil—the disparity in bargaining power between the parties to the franchise arrangement—in requiring that the termination of franchises, whether by non-

[1] S. Rep. #3791, 84th Cong., 2d Sess. 1956, 1939 FTC Rep. on Motor Vehicle Industry (1939) 139-146 Kessler, *op. cit.* p. 1147, and cases cited.
[2] Kessler, *op. cit.* p. 1147, and cases cited.
[3] *Moon Motor Car Co. v. Moon Motor Car Co.*, 29 Fed. 2d 3 (2d Cir., 1928), opinion of Learned Hand, J.; Kessler, *op. cit.* p. 1150.
[4] Kessler, *op. cit.* p. 1149 *et seq.*

renewal or otherwise, be done only in good faith for sufficient reasons.[5] The dealer was to be given his day in court on an allegation of bad faith termination regardless of the legal import of the words used in the "contract" which he had signed. The extreme vagueness of the concept of good faith or bad faith used by the legislature in the provision at hand is testimony to the fact that the intention was to control the dealer-manufacturer relationship in its essential premises (by allowing the trial court wide discretion in giving specific formulation to the immensely vague term "good faith") and to disregard the traditional legal implications of words which purported to, but in fact could not, signify the mutual intentions of the parties.

It is our opinion that the Act's definition of "manufacturer" must be read with the above analysis in mind; and with the obvious reflection that a simple device to perpetuate the bargaining domination enjoyed by manufacturers without the risk of legal recourse as contemplated by the Act would be to multiply the intermediary agencies through which the will of the manufacturer is expressed. So long as the economic conditions giving rise to the inordinate bargaining power could be maintained with respect to subordinate and intermediary distributors, the power to exact any terms could itself be used to compel the middle man to pass on the terms and conditions desired by the manufacturer to the ultimate retailer. And the essence of the Act, as we read it, was to provide that this chain of domination, whether forged of one link or of many, was to be broken. When the instrumentality used to exact onerous conditions of continuing in the automobile retailing business is "acting for" the manufacturer in the sense that he is employed by the manufacturer willingly or unwillingly to bring about the condition of subservience aimed at in the Act, we are of the view that the instrumentality is itself a part of the manufacturer bound by the Act's requirement of good faith. We are mindful of course that holding intermediary parties liable under the pseudo-*respondeat superior* doctrine which we believe the Act's definition of manufacturer imports is apt in some cases to impose a very considerable hardship upon the defendant party. It is not for us to criticize the policy of the Day in Court Act for so completely redressing the balance between franchiser and franchisee, if such is the case; neither can we suggest better legal devices to insure that economic responsibility is coupled with economic power than that of counterbalancing the power which may be exerted by manufacturers upon distributors with an equal and opposite judicial force in favor of dealers against distributors, and thence, by necessity to manufacturers. It is apparent that as soon as the purpose of exploiting the distributor—to wit, to relay the exploitation on to the dealer—is thwarted by the operation of the Day in Court Act, the unfortunate squeeze upon the distributor will cease, and his function will be confined to whatever legitimate purposes are served by the concentration of merchandising authority in a separate enterprise from the manufacturer.

[*Denial of Motion*]

With the above understanding of the Day in Court Act we believe it is necessary to deny defendant's motion for summary judgment, and to permit the plaintiff to introduce what evidence he can to demonstrate that Cal Sales, Inc., is dominated by and acts for Standard-Triumph of Coventry, England, and that the non-renewal of the franchise agreement was in bad faith. Due consideration will be given by the court to defendant's allegation that the arrangement with Barney Motor Sales was meant by the parties to be a tentative one, as is recited in the instrument alleged in this suit. But this recital will not be conclusive against a showing by convincing evidence that the commitment of the parties was understood as a long term arrangement terminable only for good cause. In short, we are convinced that the Day in Court Act instructs us to view the recitations of parties to franchise agreements with a grain of salt, and to measure such recitals against the operative facts in the particular situation, including the degree of reliance evinced by both parties on the proposition that the arrangement at hand is to be a lasting one.

It Is Therefore Now Ordered that defendant's motion for summary judgment is denied.

It Is Further Ordered that the Clerk shall this day serve copies of this Opinion and Order by United States mail upon the attorneys for the parties appearing in this cause.

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[5] S. Rep. #2073, 84th Cong., 2d Sess. 4 (1956).

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[¶ 69,582] **Luckenbach Steamship Company, Inc. v. United States of America and The Baltimore and Ohio Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; The Pennsylvania Railroad Company; Reading Company; Southern Pacific Company; and Toledo, Peoria & Western Railroad Company.**

In the United States District Court for the District of Delaware. Civil Action No. 2144. Dated December 14, 1959.

Sherman and Clayton Antitrust Acts and Administrative Procedure Act

Combinations and Conspiracies—Monopolies—Common Carriers Under Antitrust Laws—Antitrust Legality of Railroads' Alleged "Below Cost" Rates—Antitrust Immunity Conferred by Interstate Commerce Act—Doctrine of "Primary Jurisdiction."—A steamship company's action charging railroads with violating Sections 1 and 2 of the Sherman Act by concertedly reducing their rates "below cost" for the purpose of monopolizing the transportation of canned goods from Pacific coast origins to Atlantic coast destinations, and for the further purpose of driving the steamship company from the business, was dismissed on the ground that, under the doctrine of "primary jurisdiction," the antitrust charges should first be addressed to the Interstate Commerce Commission. The company contended that the power to enforce Sherman Act standards had not been delegated to the Commission. However, the test of referral is not whether some parts of the case are within the exclusive jurisdiction of the *courts,* but whether some parts of the case are within the exclusive jurisdiction of the *agency.* Here, the railroads were "operating pursuant to § 5(a) [of the Interstate Commerce Act] antitrust exemption agreements." That section supersedes the Sherman Act to the extent that concerted rate agreements—otherwise illegal under the antitrust laws—are immunized from Sherman Act proscriptions if approved by the Commission. Since that section is administered by the Commission, it was incumbent upon the court to seek the observations of the Commission with respect to the extent and scope of the exemption. While such an exemption does not "sterilize" all forms of conspiratorial action, an orderly administration of that immunization provision requires, at the minimum, primary construction by the Commission.

See Combinations and Conspiracies, Vol. 1, ¶ 2039.70.

For the plaintiff: S. Samuel Arsht and Andrew B. Kirkpatrick, Jr. (of Morris, Nichols, Arsht & Tunnell), Wilmington, Del.; and Mark P. Schlefer, John Cunningham, and Israel Convisser (of Kominers & Fort), Washington, D. C.

For the defendants: Leonard G. Hagner, U. S. District Attorney, Wilmington, Del.; and Robert A. Bicks, Acting Assistant Attorney General, and John H. D. Wigger, Attorney, Dept. of Justice, Washington, D. C. for United States of America. Robert W. Ginnane, General Counsel I.C.C., and H. Neil Garson, Associate General Counsel I. C. C. for the Interstate Commerce Commission. William S. Potter and Henry R. Horsey (of Berl, Potter and Anderson), Wilmington, Del.; Jeremiah C. Waterman and Edward M. Reidy, Washington, D. C.; Andrew C. Armstrong, Baltimore, Md.; and Charles Burkett, San Francisco, Calif.; for defendant railroads. Charles McD. Gillan, Jr., Baltimore, Md., for Intervenor, North Atlantic Ports Conference. Aaron Finger and E. Norman Veasey (of Richards, Layton & Finger) Wilmington, Del.; and Alvin J. Rockwell and Willis R. Deming (of Brobeck, Phleger & Harrison), San Francisco, Calif., and Washington, D. C., for Intervenor, Pacific American Steamship Association. John P. Daley, Wilmington, Del., and Raymond A. Negus (of Cake and Negus), Washington, D. C., for Intervenors, The Northwest Canners and Freezers Association, Inc., and Canners League of California. William Prickett, Sr., and William Prickett, Jr., (of Prickett & Prickett), Wilmington, Del., for defendants, Baltimore & Ohio Railroad Co., and Reading Company.

Before Biggs, Circuit Judge, and Wright and Rodney, District Judges.

Wright, District Judge [*In full text*]: This injunction action initiated by plaintiff, Luckenbach Steamship Company, Inc. (Luckenbach) against the United States and certain railroads, seeks: "(1) to enjoin, set aside, annul, suspend or rescind the

action and order of the Interstate Commerce Commission, an agency of said defendant [United States], denying plaintiff's petition for suspension * * * of certain railroad rates published to become effective October 23, 1959", and "(2) to direct the said defendant [United States] through its agency the Commission, to suspend the operation of said rates;" and to direct the defendant railroads, "parties to such rates, to refrain from doing and/or continuing the actions and things herein complained of, designed (1) to monopolize the transportation of canned goods from Pacific coast origins to Atlantic coast destinations and (2) to drive plaintiff from the business." [1]

On October 22, 1959 the District Court issued a temporary restraining order staying the action of the Interstate Commerce Commission (Commission) denying plaintiff's petition for suspension and ordering the Commission to suspend the proposed rail rate. Thereafter, a three-judge statutory court was convened pursuant to 28 U. S. C. A. §§ 2325 and 2284.

Jurisdiction is alleged under the provisions of 28 U. S. C. A. §§ 1336-1337, 1398, 2284 and 2321-2325; Section 10 of the Administrative Procedure Act (5 U. S. C. A. § 1009); Sections 1, 2 and 3 of the Sherman Act (15 U. S. C. A. §§ 1, 2, 3); and Sections 12 and 16 of the Clayton Act (15 U. S. C. A. §§ 22, 26).

The matters now before the court are plaintiff's motion for an interlocutory injunction and defendants' motion to dismiss the complaint and dissolve the temporary restraining order.

The essential allegations of plaintiff's complaint and amendment thereof to which defendants' dismissal motion is addressed may be summarized as follows: [2]

Luckenbach, the only general cargo carrier in the intercoastal trade, is the low cost carrier of canned goods. Its rate on this traffic, without which it cannot exist, fully covers cost plus a return. The proposed rail rate is below cost. Apart from its effect on Luckenbach, it will substantially reduce present railroad revenues now being earned on the large volume of canned goods moving by rail. The reduced rail rate will either deprive Luckenbach of its backbone traffic or force its rate to a point below cost, and drive the more efficient carrier out of the trade, exposing the public to later rail rate increases. The railroads have expressly limited the rate reduction to a term of one year at the end of which the present rate will automatically be restored. The Commission ordered an investigation, thus placing upon the railroads the burden of sustaining it. But the investigation could be, and in the light of the injury to Luckenbach, probably would be nullified by the failure to suspend the rate. For if, upon conclusion of the investigation, the Commission should find that the rate was unlawful, the elimination of Luckenbach from the trade might make permanent and irremediable the interim violation of the National Transportation Policy and the Sherman Anti-Trust Act. The Commission's failure to suspend was inconsistent with its order of investigation. This was compounded by its silence as to its reasons.

Plaintiff asserts that the immediate consequences in permitting the proposed rail rate to become effective would be: "(1) to violate and frustrate the mandate of the National Transportation Policy, 49 U. S. C. preceding § 1; (2) to violate the Sherman Anti-Trust Act under the doctrine of *Georgia v. Pennsylvania R. R.* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439 (1945); and (3) to subject Luckenbach, a major water carrier under the Commission's jurisdiction, to immediate, incalculable and irreparable injury." [3]

The defendants have moved for dismissal on the ground that this court is without jurisdiction to review a Commission decision not to suspend the operation of new rate tariffs.

Plaintiff urges that Section 10(e) of the Administrative Procedure Act [4] plainly confers jurisdiction on the court to review the Commission's failure to suspend as it is authorized to do under Section 15(7) of the Interstate Commerce Act,[5] the material portion of which reads as follows:

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare,

[1] Complaint.
[2] Luckenbach's Brief in Support of Motion for Interlocutory Injunction and In Opposition to Motion to Dismiss Complaint and Dissolve Restraining Order at pages 2-4.
[3] Ibid, p. 3.
[4] 5 U. S. C. A. § 1009(e).
[5] 49 U. S. C. A. § 15(7).

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or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period then seven months beyond the time when it would otherwise go into effect; * * *."

Section 10 of the Administrative Procedure Act[6] provides in part:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * * (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *."

The wording of the Administrative Procedure Act apparently makes no change in the law of reviewability. Section 10 is so worded that it is obvious that the introductory clause modifies each of the subsections. Thus agency action is left unreviewable if the statute precludes review or to the extent agency action is by law committed to agency discretion. These two reasons were the only ones precluding review of administrative action by the court before the Administrative Procedure Act was enacted and the wording of the Act has brought about no change.[7]

Whatever the scope of review of subsection (e)[8] is when read alone, the scope of review is certainly narrowed by that portion of the introductory clause, "Except so far as * * * (2) agency action is by law committed to agency discretion." Thus, although subsection (e) provides that the reviewing court shall set aside agency action[9] found to be "arbitrary [or] capricious", it may not set aside arbitrary or capricious action so far as agency action is by law committed to agency discretion. So far as the action is by law committed to agency discretion it is not reviewable—even for arbitrariness or abuse of discretion. Whether or not agency action is reviewable, for a limited purpose or otherwise, depends upon what is committed by the statutes and common law to agency discretion.[10]

The Supreme Court in discussing the legislative history of the Act and how extensively, if at all, Section 10 changed the prior law on judicial review said:[11]

"* * * No easy answer is found in our decisions on the subject. Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it."

Section 15(7) of the present Transportation Act[12] authorizing the Commission to suspend rates, pending a hearing to determine the lawfulness of the filed rate was added to the original Interstate Commerce Act of February 4, 1887 by Act of June 18, 1910.[13]

Prior to the passage of the amendment several bills in equity had been filed in Federal courts seeking injunctive relief

[6] 5 U. S. C. A. § 1009.

[7] See 4 Davis, *Administrative Law Treatise*, § 28.08 (1958).

[8] Subsection (e) [5 U. S. C. A. § 1009] in part reads as follows: "Scope of review (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *."

[9] Agency action is defined in the Administrative Procedure Act as including: "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." See 5 U. S. C. A. § 1001(g).

[10] 4 Davis, *Administrative Law Treatise*, § 28.16 (1958).

[11] *Heikkila v. Barber*, 345 U. S. 229, 233 (1953).

[12] 49 U. S. C. A. § 15(7).

[13] See historical note following 49 U. S. C. A. § 15(7).

against the carriers to preclude the collection of the newly published rates, pending a full hearing before the Commission. Some courts held that a court of equity had the power to enjoin the collection of the new rates [14] and others held to the contrary.[15]

The reviewability of action of the Commission under the amendment in refusing to suspend rates pending hearing seems to have been raised for the first time in *M. C. Kiser Co. v. Central of Georgia Ry. Co.*[16] There the court stated:

> "* * * The point here involved is whether this remedy is exclusive or not —whether it ousts the United States courts of their general equity jurisdiction on that particular subject. The court is inclined to think the intention of Congress was to make the remedy provided by the amendment exclusive. * * *"

Since then, a span of approximately forty-three years, whenever the reviewability of denial of a rate suspension by the Commission has been the issue, the courts have refused review.[17] Not always have the reasons for unreviewability been the same,[18] but in every case review has been denied. The background against which the amendment was adopted and the wording of the amendment indicates Congress did not intend to bestow upon the court authority to review the denial of a suspension order. Prior to the amendment, the right to promulgate rates in the first instance rested with the carrier. The Interstate Commerce Act does not deprive the carrier of this initiative which was theirs at common law.[19] The Act generally contemplates the filing of new tariffs with the Commission prior to a hearing. The grant or denial of a suspension order is an interlocutory step preceding a hearing and decision as to the lawfulness of the proposed rate. It may be made pending a hearing on the merits and without the introduction of testimony.[20] The Act does provide that if a suspension order is granted reasons must be stated, but if denied no reason whatever need be stated.[21] Since the Act contemplates Commission action without a hearing the basis for decision, whether written reasons are required or not, is the expertise of the Commission in the field of transportation. The Act clearly contemplates no hearing by the Commission before decision and requires no reason be given if it denies suspension. Review in this posture would, in effect, supersede agency functioning. The court is constrained, therefore, to hold that the denial of a suspension of a rate by the Commission is by law committed to agency discretion and therefore not reviewable.

There remains for disposition plaintiff's antitrust claim. Defendants' conduct cited as evidencing Sherman Act §§ 1 and 2 violations is set forth below: [22]

> "The railroads know, from Luckenbach's filed reports, the financial condition of the company and the fact that canned goods are vital to Luckenbach's business. Having already diverted a major part of this traffic to themselves by a previous rate cut, they now propose a further cut which will confront Luckenbach with two alternatives, both ruinous—to cut its rates below cost or to see all its canned goods traffic taken by the railroads. In either case Luckenbach cannot long remain in business, a result which the railroads have professed a determination to bring about. The proposed reduced rate terminates at the end of the year, when the

[14] *M. C. Kiser Co. v. Central of Georgia Ry. Co.*, 158 F. 193 (Cir. Ct., N. D., Ga., 1907); *Jewett Bros. v. Chicago, M. & St. P. Ry. Co.*, 156 F. 160 (Cir. Ct. D., So. Dakota 1907); *Northern Pacific Ry. Co. v. Pacific Lumber Mfgrs. Ass'n*, 165 F. 1 (9 Cir. 1908).

[15] *Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co.*, 178 F. 261 (4 Cir. 1910); *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, 166 F. 206 (5 Cir. 1909).

[16] 236 F. 573, 576 (D. C., S. D., Ga., 1916), affirmed 239 F. 718 (5 Cir. 1917).

[17] *Coastwise Line v. U. S.*, 157 F. Supp. 305 (D. C., N. D., Cal., 1957); *National Water Carriers Ass'n. v. U. S.*, 126 F. Supp. 87 (D. C., S. D., N. Y., 1954); *Carlsen v. U. S.*, 107 F. Supp. 398 (D. C., S. D., N. Y., 1952); *Merchant Truckmen's Bureau v. U. S.*, 16 F. Supp. 998 (D. C., S. D., N. Y., 1936); *Algoma Coal & Coke Co. v. U. S.*, 11 F. Supp. 487 (D. C., E. D., Va., 1935).

[18] Note 17, *supra*, and cases cited therein.

[19] *Algoma Coal & Coke Co. v. U. S.*, 11 F. Supp. 487, 493 (D. C., E. D., Va., 1935).

[20] *Long Island Railroad Company v. U. S.*, 140 F. Supp. 823 (D. C., E. D., N. Y., 1956).

[21] "* * * While a suspension order must state reasons, the basis for the reasons we assume to be the expert knowledge of the members of the Suspension Board or the Division of the Commission, acting as an appellate division. This is not to be found however in the record of the proceeding before the Commission. Concededly it need not be recorded when suspension is denied, for then no reason whatever need be stated." *Long Island Railroad Company v. United States*, 140 F. Supp. 823, 827 (D. C., E. D., N. Y., 1956).

[22] Plaintiff's Memorandum of Law, p. 38.

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present rate automatically again becomes effective. The reduced rate is below cost and will substantially reduce the revenue from the 62 percent of the canned goods traffic the railroads are carrying at the higher present rate."

Judicial cognizance of the above action is predicated upon two factors:[23]

(1) The independent applicability of the Sherman Act provision to regulate railroads remains unimpaired, for the I. C. C. has not been delegated power to enforce Sherman standards; and

(2) The provisions of the Interstate Commerce Act, authorizing the Commission to relieve carriers from antitrust responsibility for collective rate-making procedures, does not immunize the so-called predatory practices alleged.

Conceding plaintiff's proffer for the purpose of discussion it does not resolve the fundamental issue presented, namely, the applicability of the primary jurisdiction doctrine.[24] Plaintiff misconceives the modern import of the concept.[25] The recent decisional law, in conjunction with the legal literature strongly urges where an administrative board, particularly knowledgeable in a specialized area, has been established, preliminary resort to the body should be had if some phase of the matter in litigation is within its exclusive jurisdiction.[26]

As observed by Mr. Justice Frankfurter in *Far East Conference v. United States:* [27]

"* * * Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The requirement of preliminary resort to administrative boards is imperative to achieve maximum effectiveness from our judicial process. To bypass an agency peculiarly adapted in a particular field would be a complete economic and judicial waste. An integrated system necessitates that agency action precede court review where machinery has been created for this procedure. Especially is this true in the area of national transportation and other fully regulated industries.[28]

Application of the foregoing principles to the allegations of the complaint conclusively demonstrates the antitrust charges should be initially considered by the Commission. That the precise facts forming the basis of plaintiff's antitrust action are cognizable by the Commission is amply supported by plaintiff's showing before the Commission in the suspension proceeding. There, in an application designated "Protest and Petition for Suspension" at pages 9-10 plaintiff stated:[29]

"IV. *Violation of the Antitrust Laws*

"The proposed reduction is thus designed to eliminate the competition of Luckenbach—and is well calculated to that effect. When such a purpose is effected through collective rate-making procedures and action—otherwise exempt—they violate sections 1 and 2 of the Sherman Antitrust Act."

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[23] *Ibid,* p. 39.

[24] "The doctrine of primary jurisdiction, or exclusive primary jurisdiction, or primary decision, or preliminary resort, or prior resort, is not a doctrine that governs judicial review of administrative action. In this important respect, it is altogether different from the doctrines of exhaustion and of ripeness, which govern the timing of judicial review of administrative action. The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.

* * *

"The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue. * * *" 3 Davis, *Administrative Law Treatise,* § 19.01, pp. 1-3 (1958).

[25] "The holding that the Board had primary jurisdiction, in short, was a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances. * * *" Citing *Federal Maritime Board v. Isbrandtsen Co.,* 356 U. S. 481, 498-499 (1958).

[26] Note 35, *infra,* and accompanying text.

[27] [1952 TRADE CASES ¶ 67,241], 342 U. S. 570, 574-575 (1952).

[28] "* * * Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance." *United States v. R. C. A.* 358 U. S. 334, 348 (1959).

[29] Document styled "Protest and Petition for Suspension" attached to the complaint.

The National Transportation Policy required to be considered by the Commission provides in part:[30]

> "'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, * * *
>
> * * *
>
> "'to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competition practices; * * *
>
> * * *
>
> "'All of the provisions of this Act * * * shall be administered and enforced with a view to carrying out the above declaration of policy.'"

Plaintiff's assertion that the railroads' predatory practices violate, *inter alia*, the aforementioned provision, additionally forms the basis for its charge that defendants wrongfully attempt to monopolize "a part of the trade or commerce among the several States".[31]

Plaintiff seeks not only antitrust relief against defendant railroads but also against the Commission for it is the final action of the Commission in permitting the rates to become effective that is injurious to plaintiff.[32] Thus, if the rates be finally declared contrary to the National Transportation policy, then the purported conspiratorial action will have been thwarted.

Paramount in this determination inviting the Commission to initially rule on the instant claims is the fact that defendant railroads are operating pursuant to § 5(a) antitrust exemption agreements.[33] Section 5(a) supersedes the Sherman Act to the extent that the Approved agreement is immunized from Sherman Act proscriptions;[34]

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[30] 49 U. S. C. A. Historical Note preceding § 1.

[31] Complaint, allegation 19.

[32] Plaintiff's Reply Brief at page 3 states:

"Insofar as relief is sought the Interstate Commerce Commission on anti-trust grounds, the basis for jurisdiction in this panel is clear. Commission action is the *sine qua non* for effectuating the anti-trust violation. The Commission's imprimatur is an essential prerequisite to the proposed reduction by which the roads seek plaintiff's destruction. Fully informed that its action will have this effect, the Commission has, nevertheless, persisted in its position. When, as here, an agency of the government permits its sanctions to be used to consummate a violation of the anti-trust laws, it is not beyond the judicial reach."

And on pages 86-87 of the Transcript of the Oral Argument the following colloquy between court and counsel for plaintiff appears:

"JUDGE WRIGHT: Suppose you just wanted to restrain the Railroads from exercising the right given them by the Commission, I. C. C. law, to make these rates effective, would that not have been a one-judge matter which would come up under the Clayton Act, anti-trust laws?

"MR. KIRKPATRICK: If our relief were sought solely against the Railroads, then I would have thought that a one-judge court could have heard the matter.

"JUDGE WRIGHT: It is your position, under the anti-trust theory, that you are entitled to any relief at all against the I. C. C.?

"MR. KIRKPATRICK: Yes, sir, very definitely.

"JUDGE BIGGS: Do you assert that the I. C. C. is in an illegal combination with the Railroads?

"MR. KIRKPATRICK: Our theory is that the action of the I. C. C. here is really the last link in the chain by which this anti-trust violation will be consummated. Here is the point: As I understand it, the rate, which the Railroads propose, cannot be made effective except by a filing with the Commission and Commission action permitting it to become effective. Unless that is done the rate cannot be charged. When the rate is filed with the Commission, the Commission permits it to become effective, then that becomes the only legal rate. It acquires statutory force, and it is the only rate which the carriers can lawfully collect or the shippers can properly pay. Consequently, Commission action is really the last step in this whole thing. If the rate did not go into effect by virtue of Commission processes, then we would not be hurt and not not be before your Honors this afternoon."

Chief Judge Biggs and I construe the broad allegations of the complaint, together with counsel for plaintiff's aforementioned remarks as enunciating an antitrust cause of action against the Commission. We find it unnecessary in view of the final determination to pass on whether an agency of the United States can be made a party defendant in a private antitrust action.

[33] "The railroad defendants engage, together with virtually all other United States and some Canadian railroads, in collective ratemaking under agreements approved by the Interstate Commerce Commission under section 5a of the Interstate Commerce Act (49 U. S. C., 5b)." Complaint, allegation 6.

[34] 49 U. S. C. A. § 5(b) provides in relevant part:

[¶ 2] "Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5),

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and since Section 5(a) is administered by the Commission it is incumbent upon the court to seek the observations of the Commission with respect to the extent and scope of the exemption. The exemption certainly does not sterilize all forms of conspiratorial action; however, to foster an orderly administration of the immunization provision requires, at the minimum, primary construction by the Commission.

Professor Davis in his *Administrative Law Treatise* suggests that under the circumstances presented, initial resort to the administrative agency is indicated:[35]

> "(1) On the question whether the doctrine applies to problems or relief which are beyond administrative jurisdiction, the theory seems reasonably clear. The test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the case are within the exclusive jurisdiction of the agency. Because of the purpose of the doctrine—to assure that the agency will not be by-passed on what is especially committed to it—and because resort to the courts is still open after the agency has acted, the doctrine applies even if the agency has no jurisdiction to grant the relief sought."

The principle enunciated by Professor Davis is eminently sound. Accordingly, plaintiff is required to address these antitrust charges in the first instance to the Commission.

The sole question remaining is whether to dismiss or retain jurisdiction of the antitrust charges. The preferred procedure is to dismiss. As observed by the Supreme Court:[36]

> "We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government's complaint should now be dismissed, * * *."

Defendants have questioned the jurisdiction and propriety of the statutory three-judge court acting upon the antitrust claim. The antitrust cause and the action to review are so inextricably enmeshed that it would be unwarranted to truncate the litigation at this juncture. To refer the antitrust phase to the district court would require different reviewing tribunals to initially rule on the respective phases of this determination.[37]

Against this background, and in view of the ancillary nature of the antitrust charges, Chief Judge Biggs and I are in accord that the presently constituted court has jurisdiction in the premises.

The complaint will be dismissed. An order to such effect is filed concurrently with this opinion.

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or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph."

[¶ 9] "Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission."

[35] 3 Davis, *Administrative Law Treatise*, § 19.07, p. 39 (1958).

[36] *Far East Conference v. United States* [1952 TRADE CASES ¶ 67,241], 342 U. S. 570, 577 (1952).

[37] 28 U. S. C. A. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This section applies wherein either an interlocutory or permanent injunction is sought to restrain the enforcement, operation or execution, in whole or in part of any order of the Interstate Commerce Commission "other than for the payment of money or the collection of fines, penalties and forfeitures." 28 U. S. C. A. §§ 2321, 2325.

Appeal from the decision of the United States District Court for the District of Delaware sitting as a one judge court dismissing an antitrust claim as herein alleged would be pursuant to 28 U. S. C. A. § 1291 which states:

"The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[Concurring and Dissenting Opinion]

RODNEY, District Judge, concurring in part, dissenting in part [*In full text*]: I am in entire accord with most of the conclusions herein reached. I agree that, under existing provisions of law and procedure, where change of rate of transportation is considered by the carrier, it is the duty of the carrier, intending such change, to file the proposed new rates with the Interstate Commerce Commission. Upon a protest being filed, it becomes the duty of the Interstate Commerce Commission to determine the lawfulness of the new rates. In doing this the Commission may, but need not, order a suspension of the new rates until final hearing. If suspension is ordered, reasons for the action by the Commission must be assigned. If no suspension of the new rates is ordered by the Commission, no order is signed and, under the weight of authority, no reasons need be assigned for such refusal.

The failure or refusal of the Interstate Commerce Commission to suspend the operation of the new rates as in this case until final hearing is, I agree, an exercise of discretion vested in such Commission and since the discretion has been exercised then under the provisions of the Administrative Procedure Act (5 U. S. C. § 1009(e)) it is excluded as to reviewability. So much for the relief sought against the Interstate Commerce Commission by injunction.

The complaint also states a claim against the defendant railroads and others acting in combination with them under the antitrust laws. The majority opinion finds that the doctrine of Primary Jurisdiction requires that this matter be first considered by the Interstate Commerce Commission and dismisses the plaintiff's claim as arising from the violation of the antitrust laws upon that basis. It is not the conclusion that the Primary Jurisdiction with reference to some features of the antitrust laws rests with the Interstate Commerce Commission to which I object for I do not reach that question. I question whether the special three-judge court should determine this matter or whether it should be determined by the district court as normally constituted, and with which this case was originally filed.

The three-judge court is somewhat of an anomaly. It is a federal district court consisting at times of three judges instead of one. It is of purely statutory origin and intended for distinct and limited purposes.

Starting as an expediting provision in 1903 with reference to certain antitrust cases and as insuring direct review by the Supreme Court (32 Stat. 823) the three-judge court has been made applicable to several situations. Among these were suits to annul, set aside or restrain orders of the Interstate Commerce Commission and matters concerning the constitutionality of the state statutes or administrative orders. In these latter instances the requirement of a three-judge court is inextricably and almost universally interwoven with the matter of injunction and the disinclination to allow the issuance or refusal of an injunction in certain cases to be determined by one judge. So it is that by 28 U. S. C. § 2325 any injunction restraining the enforcement operation or execution, in whole or in part, of any order of the Interstate Commerce Commission will be determined by a three-judge court under 28 U. S. C. § 2284.

It will be borne in mind that it is not every proceeding to review an order or action of the Interstate Commerce Commission that requires a three-judge court. While every action to enforce, annul or set aside an order of the Interstate Commerce Commission is required by 28 U. S. C. § 2321 to be taken under the provision of Chapter 157 of Title 28, yet the bringing of such action does not operate of itself to require a three-judge court or to operate as a stay or suspend the order of the Interstate Commerce Commission and if no request is made for a stay or suspension of the order of the Interstate Commerce Commission the case would remain in the district court as normally constituted.

It is only under Section 2325 the three-judge court comes into existence. If an interlocutory or permanent injunction restraining the enforcement of the order of the Interstate Commerce Commission is requested, then and only then does the three-judge court come into existence.

In the present proceedings and insofar as the antitrust claim is concerned, no injunction against the Interstate Commerce Commission with reference to the antitrust claim is suggested in the complaint nor mentioned in the relief sought. It is true that in the briefs the plaintiff seeks to consider the action of the Commission in re-

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fusing to suspend the proposed rates as constituting an effective step in the antitrust claim, but no injunction is considered in the complaint with reference to that claim.

Although neither the complaint in this case nor the prayers for relief mention the Interstate Commerce Commission with reference to the antitrust claim, yet the majority of this Court considers that the Interstate Commerce Commission is claimed by the plaintiff with participating in some way in the antitrust violation. Whether the Commission be considered an active participant in the antitrust claim and therefore essentially as a defendant, or whether the nonaction of the Commission merely furnished the means by which the railroads may be charged with violation of the antitrust laws, then in neither case do I see any jurisdiction in a three-judge court since no injunctive relief is involved in any way.

I am of the opinion that the three-judge court as such has only such jurisdiction as is expressly given to it by statute and does not have jurisdiction to determine either the merits of the antitrust claim nor to dismiss the antitrust claim under the Primary Jurisdiction principle. I think that all questions as to the antitrust claim should be considered by the district court as normally constituted and as embracing the residuum of the claim of the plaintiff not cognizable by the three-judge court. A portion of the complaint not cognizable by a three-judge court may, I think, be segregated from that part coming within the jurisdiction of such three-judge court.[1]

[¶ 69,583] United States of America v. Pittsburgh Plate Glass Company; Carolina Mirror Corporation; Galax Mirror Company, Incorporated; Mount Airy Mirror Company; Stroupe Mirror Company; Virginia Mirror Company, Incorporated; and Weaver Mirror Company, Incorporated.

In the United States District Court for the Western District of Virginia at Roanoke. Civil Action No. 838. Filed December 29, 1959.

Case No. 1332 in the Antitrust Division of the Department of Justice.

Sherman Antitrust Act

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Dissemination of Price Information.—Manufacturers of plate glass mirrors were enjoined by a consent decree from combining to use the same or similar list prices or to disseminate any formula for determining list prices. They were ordered to replace current price lists with new lists to be compiled independently.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.218; and Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8421.

Combinations and Conspiracies—Consent Decree—Practices Enjoined—Price Fixing.—Manufacturers of plate glass mirrors were enjoined by a consent decree from combining to fix prices.

See Combinations and Conspiracies, Vol. 1, ¶ 2011.181.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General, and W. D. Kilgore, Jr., Charles L. Whittinghill, Samuel Karp, and Raymond M. Carlson, Attorneys, Dept. of Justice.

For the defendants: Cyrus V. Anderson for Pittsburgh Plate Glass Co.; Howard C. Gilmer, Jr., for Carolina Mirror Corp.; H. G. Morison for Galax Mirror Co., Inc., and Mount Airy Mirror Co.; W. P. Sandridge for Stroupe Mirror Co.; H. N. Joyce for Virginia Mirror Co., Inc.; and N. B. Hutchenson, Jr., for Weaver Mirror Co., Inc.

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[1] *Shippers' Car Supply Com. v. Interstate Commerce Comm.*, 160 F. Supp. 939, 943 (D. C. D. Oreg. 1958).

Final Judgment

PAUL, District Judge [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on April 3, 1957, defendants having appeared and filed their answers to said complaint, and the parties hereto, by their respective attorneys, having consented to the entry of this Final Judgment, and without said Judgment constituting evidence or an admission by any party hereto with respect to any issue herein,

Now, Therefore, upon consent of all parties hereto, it is hereby Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a claim against the defendants upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Plate glass mirrors" shall mean mirrors made from polished plate glass, including such mirrors with or without polished edges, bevelled edges, surface engravings, decorations or other or further fabrication;

(B) "Person" shall mean any indvidual, partnership, firm, corporation, association or other business or legal entity;

(C) "Prediscount list prices" shall mean list prices used as a base for the application of a discount or discounts in the quotation of prices for plate glass mirrors.

III

[*Applicability*]

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant and to its officers, directors, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with any defendant who receive actual notice of this Final Judgment by personal service or otherwise.

IV

[*Dissemination of Price Lists*]

(A) Each of the defendants is ordered and directed to discontinue on and after April 15, 1960 any and all use of the following: List Prices of Plain Mirrors, April 1, 1950, Mirror Manufacturers Association; Plain Mirrors, List Prices, April 25, 1950, Pittsburgh Plate Glass Company; Official List Prices of Plain Mirror Plates, December 1, 1936, Copyrighted by Mirror Manufacturers Association and National Glass Distributors Association; and any other prediscount list prices used prior to or at the date of the entry of this Final Judgment, except prediscount list prices not used for the sale of plate glass mirrors to furniture or other manufacturers, distributors or jobbers. Nothing contained in this subsection (A) shall prohibit the defendants from issuing invoices on and after April 15, 1960, covering the pricing of plate glass mirrors on the basis of any discount from any of the aforementioned prediscount list prices for firm orders taken prior to said date.

(B) Each of the defendants is enjoined and restrained from requesting, assisting or facilitating the use by any other mirror manufacturer of any of the lists covered by subsection (A) of this Section IV.

(C) Each of the defendants is ordered and directed, on or before April 15, 1960, to notify in writing each of its furniture manufacturer customers that, in accordance with the terms of this Final Judgment, it is discontinuing the use of the prediscount list prices for plate glass mirrors then in effect, designating precisely in such notice the list or lists being discontinued.

(D) Each defendant is ordered and directed on or about April 15, 1960 to compile new prediscount list prices or other price lists, replacing those prediscount list prices covered by subsection (A) of this Section IV, such prediscount list prices or price lists to be independently determined by such defendant on the basis of its individual costs, profits and other lawful considerations. Copies of such prediscount list prices or price lists shall be promptly furnished to the Assistant Attorney General in charge of the Antitrust Division.

For the purpose of determination by this Court of compliance with this subsection (D) by any defendant, in the event that plaintiff institutes any proceeding with re-

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spect to such compliance, the defendant shall initially introduce its evidence to show the manner of its compliance with this subsection (D).

V

[*Price Fixing*]

The defendants are jointly and severally enjoined and restrained from entering into, adhering to, participating in, maintaining, renewing or furthering any contract, combination, conspiracy, agreement, understanding, plan, program, or concerted course of action among themselves or with any other person engaged in the manufacture of plate glass mirrors or any association, organization or agency whose membership includes mirror manufacturers:

(A) To determine, fix, establish, adopt or maintain prices, price systems, discounts, or any other terms or conditions of sale for plate glass mirrors with respect to any sale to any other person;

(B) To use the same or similar prediscount list prices or any price lists for the sale of plate glass mirrors;

(C) To establish, print, publish, exchange, circulate or use any price lists (including any prediscount list prices) for plate glass mirrors or to establish, exchange or use any formulae or any other means of determining such price lists, price quotations, or any other terms or conditions of sale of plate glass mirrors.

VI

[*Pricing Procedure*]

(A) Each defendant is enjoined and restrained from using (except as permitted under subsection (A) of Section IV herein) as a basis for the sale of plate glass mirrors to furniture manufacturers any prediscount list prices which are compiled or which are disseminated by any person other than such defendant.

(B) Each defendant is ordered and directed, if it uses any prediscount list prices for the sale of plate glass mirrors to furniture manufacturers, to determine any such list prices independently and on the basis of its individual costs, profits and other lawful considerations.

VII

[*Reporting Compliance*]

Each of the defendants, nine months after the date of the entry of this Final Judgment, shall serve, by mailing a copy to the Assistant Attorney General in charge of the Antitrust Division, a report stating whether such defendant, since the discontinuance of the lists designated in subsection (A) of Section IV of this Final Judgment, has established or used any prediscount list prices or other price lists for the sale of plate glass mirrors to furniture and other manufacturers, distributors or jobbers, together with a copy of each such list and a statement as to the date when, and manner in which, each such list was established.

VIII

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant which relate to any matter contained in this Final Judgment;

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers and employees of such defendant who may have counsel present, regarding such matters;

(C) To require such defendant to submit reports in writing with respect to the matters contained in this Final Judgment.

No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States Government, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment.

IX

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final

Judgment to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and the punishment of violations thereof.

[¶ 69,584] United States of America v. The E. F. MacDonald Company.

In the United States District Court for the Southern District of Ohio, Western Division. Civil No. 2429. Dated December 30, 1959.

Case No. 1489 in the Antitrust Division of the Department of Justice.

Combinations and Conspiracies—Sherman Antitrust Act—Consent Decree—Boycotts —Contracts to Refrain from Selling.—A corporation engaged in incentive planning was ordered by a consent decree to cancel all existing contracts that require its suppliers to refrain from selling to any incentive planner other than the corporation. The corporation was also prohibited from entering into any such contracts.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533; and Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8421.

For the plaintiff: Robert A. Bicks, Acting Assistant Attorney General, Hugh K. Martin, United States Attorney, and George D. Reycraft, William D. Kilgore, Jr., Robert B. Hummel, Norman H. Seidler, Robert M. Dixon, and Stewart J. Miller, Attorneys, Dept. of Justice.

For the defendant: Shaman, Winer, Shulman & Ziegler; Dow, Lohnes & Albertson; and Hollabaugh & Jacobs.

Final Judgment

Lester L. Cecil, Circuit Judge, sitting by designation [*In full text*]: Plaintiff, United States of America, having filed its complaint herein on December 30, 1959, and defendant, The E. F. MacDonald Company, by its attorneys, having appeared and denied the substantive allegations thereof, and plaintiff and defendant having severally consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein without admission in respect to any issue:

Now, Therefore, before any testimony has been taken and without trial or adjudication of any issue of fact or law herein and upon consent of the parties hereto, it is hereby

Ordered, Adjudged and Decreed as Follows:

I.

[*Jurisdiction*]

The Court has jurisdiction of the subject matter herein and the parties hereto. The complaint states a claim upon which relief may be granted against the defendant, The E. F. MacDonald Company, under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

[*Definitions*]

As used in this Final Judgment:

(a) "MacDonald" means the defendant, The E. F. MacDonald Company, an Ohio corporation;

(b) "Incentive planner" means a person, corporation or other concern engaged in devising, installing and administering incentive programs for business concerns, which programs, utilizing merchandise prizes as rewards, are generally designed and conducted for the purpose of increasing sales, production or achieving other desirable business objectives for the benefit of the subscribing company by stimulating and encouraging employees and/or distributors of the subscribing company to greater effort;

(c) "Supplier of merchandise for prizes" means a manufacturer, distributor, or any other person or concern which sells merchandise to incentive planners for use as rewards in incentive programs.

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III.

[*Applicability*]

The provisions of this Final Judgment shall apply to MacDonald, its domestic subsidiaries, successors and assigns, and to each of its officers, directors, agents and employees, and to all other persons in active concert or participation with MacDonald who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV.

[*Boycotts*]

(A) MacDonald is ordered and directed to cancel and terminate, within sixty (60) days after entry of this Final Judgment, any provisions of all existing contracts, agreements or understandings between it and any suppliers of merchandise for prizes, whereby any of such suppliers has agreed to refrain from selling merchandise for prizes to any incentive planner other than MacDonald.

(B) MacDonald is enjoined and restrained from entering into, enforcing or claiming any rights under any contract, agreement or understanding with any supplier of merchandise for prizes, which has the purpose or effect of requiring said supplier to refrain from selling any merchandise for prizes to any other incentive planners.

(C) MacDonald is ordered and directed to give, within sixty (60) days after the entry of this Final Judgment, written notice of the terms of subsection (B) above to all suppliers from whom it has regularly purchased merchandise for prizes within the past year.

V.

[*Enforcement and Compliance*]

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to MacDonald at its principal office, be permitted, subject to any legally recognized privilege, (a) reasonable access, during office hours, to all books, ledgers, correspondence, memoranda and other records and documents in the possession or under the control of MacDonald, relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of MacDonald, and without restraint or interference from it, to interview regarding any such matters officers and employees of MacDonald, who may have counsel present.

Upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, MacDonald shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment. No information obtained by the means provided in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VI.

[*Jurisdiction Retained*]

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment.

[¶ 69,585] Budget Dress Corp. v. Joint Board of Dress and Waistmakers' Union of Greater New York and its Constituent Locals, and Charles S. Zimmerman, Nathaniel M. Minkoff and Leon Namenwirth, individually and as General Manager, Secretary-Treasurer and President, respectively, of the Joint Board of Dress and Waistmakers' Union of Greater New York; The International Ladies' Garment Workers' Union, AFL-CIO; and The Popular Priced Dress Manufacturers' Group, Inc.

In the United States District Court for the Southern District of New York. Civil Nos. 149-141 and 149-140. Filed December 29, 1959.

Sherman Antitrust Act

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Subpoenas *duces tecum*.—A corporation which had alleged that it had suffered a substantial loss in sales as a result of antitrust law violations by an employers' association, contracting unions, and certain officers and agents, was ordered to produce copies of federal and state income tax returns and city business and tax returns, and cash books, check books, cancelled checks, and bank statements. However, the plaintiff's notice to produce "all of the documents . . . and all other writings made by each of the defendants . . ." was held to be patently impossible of compliance.

See Private Enforcement and Procedure, Vol. 1, ¶ 9013.975.

Private Enforcement and Procedure—Suit for Civil Damages—Pretrial Procedures—Depositions.—Defendants were entitled to priority of examination, in the absence of some special and good reason, when they had served their notices to take depositions prior to plaintiff. Plaintiff's notice calling for an examination of defendant organizations "by each of their officers and persons affiliated with said named defendants who have knowledge of the facts set forth in the pleadings herein" did not describe the persons with sufficient particularity.

See Private Enforcement and Procedure, Vol. 1, ¶ 9013.775.

For the plaintiff: Fellner & Rovins (Morris J. Fellner and Leonard W. Wagman, of counsel), New York, N. Y.

For the defendants: Schlesinger & Bloom (Emil Schlesinger and Max Bloom, of counsel), New York, N. Y., for Joint Board of Dress and Waistmakers' Union, Zimmerman, Minkoff, and Namenwirth; Morris P. Glushien, New York, N. Y., for International Ladies' Garment Workers' Union; and Phillips, Nizer, Benjamin, Krim & Ballon (Charles Ballon, Eugene Kline, and Raoul Gersten, of counsel), New York, N. Y., for The Popular Priced Dress Manufacturers' Group, Inc.

RYAN, Ch. J. [*In full text*]: Plaintiff moves (1) to vacate defendants' notices to take testimony; (2) to quash defendants' subpoenas *duces tecum;* (3) for an order granting plaintiff priority in the taking of depositions; and (4) "to appoint and designate a Federal Judge to supervise the taking of depositions and to establish a schedule therefor."

In addition, plaintiff moves to vacate and set aside defendants' notices to produce for use in connection with the taking of plaintiff's deposition books and records enumerated in the subpoena *duces tecum.* In turn, defendants move to vacate plaintiff's notice to take testimony; to set aside the notice to produce; and to stay the taking of any depositions by plaintiff until the completion of the taking of plaintiff's deposition by defendants.

In action No. 149-140, plaintiff seeks to recover treble damages for alleged violation of the Sherman Act and in action No. 149-141 to recover payments allegedly made in violation of Section 302 of the Labor Management Relations Act of 1947 (29 U. S. C. 186) and for an injunction to restrain future violations thereof. The rulings in this decision apply to both actions.

On October 7th and 14th, conferences were held at which counsel for all parties were present. At these conferences the problems of schedule, site and payment for the taking of all depositions were resolved. At the same time, plaintiff withdrew its objection to the subpoena *duces tecum* in the § 302 action and excepted to five demands in those in the antitrust action.

Plaintiff's Notice to Take Depositions

The plaintiff's notice calls for an examination of defendant organizations "by each of their officers and persons affiliated with said named defendants who have knowledge of the facts set forth in the pleadings herein." Such a description fails to comply with the requirements of Rule 30 of the Federal Rules of Civil Procedure (*Morrison Export Co. v. Goldstone,* 12 F. R. D. 258 at 260; *Shankman v. Northwest Airlines,* 18 F. R. D. 436).

Accordingly, we order that the notice of the plaintiff is vacated as to all defendants except Messrs. Zimmerman, Minkoff and

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Namenwirth and Joint Board to the extent that it will be examined through these three individuals. Although not named in the body of the notice with the particularity required by Rule 30, they are expressly included in the caption on the face of the said notice.

Plaintiff's Notice to Produce

However, even as to those defendants, plaintiff's notice to produce must be vacated. That notice is as follows:

> "Please take further notice, upon the taking of the depositions of each of the defendants, their officers, agents and employees, each of the defendants will be required to produce at the times and places specified above, for use in connection therewith, all of the documents, books, papers, records, agreements, memoranda, correspondence and all other writings made by each of the defendants or on behalf of each of the defendants, their agents, servants, employees, representatives or designees."

Such a description is of no value in enabling the most willing of adversaries to comply with the notice. Indeed, this notice is patently impossible of compliance.

Priority

It is undisputed that all defendants had served their notices to take depositions prior to plaintiff. Therefore, defendants are entitled to priority of examination in accordance with the prevailing rule that, in the absence of some special and good reason, examinations should proceed in the order in which they are demanded (*Commercio E Industria Continental S. A. v. Dresser Industries Inc.*, 19 F. R. D. 265). Plaintiff has failed to establish such a special reason as would incline us to depart from the normal rule of priority. The examination sought is not unreasonable.

Designation of a Federal Judge

We come now to plaintiff's application "to appoint and designate a Federal Judge to supervise the taking of depositions and to establish a schedule therefor." This application is opposed by certain of the defendants. Part of it has been rendered moot by reason of the cooperation of counsel in establishing a schedule. We see no reason why this flow of cooperation cannot be further tapped for the benefit of the actual taking of all depositions. As Members of the Bar of this Court, counsel for defendants are entitled to an opportunity to show their good faith by cooperating with their adversary for the orderly completion of this stage of the instant action.

Furthermore, the time of the Bench of this Court has been so completely mortgaged for the disposition of the large number of long and protracted cases filed in this District that an assignment of a Judge to supervise the taking of depositions in the case at bar would serve only to postpone such proceedings.

Accordingly, plaintiff's motion is denied with leave to apply for appointment of a master in the event that counsel cannot achieve the desired cooperation after the initiation of the taking of depositions.

Plaintiff's Exceptions to Subpoenae

The items demanded by defendants' subpoenae to which plaintiff has excepted are: (1) cash books showing disbursements made by plaintiff; (2) all check books, including check stubs, showing all deposits and withdrawals made by plaintiff; (3) all cancelled checks of plaintiff; (4) all bank statements of plaintiff; and (5) copies of all federal and state income tax returns and New York City general business and financial tax returns filed by plaintiff.

The first four items are clearly relevant on the issue of plaintiff's damages and the alleged illegality of the payments sought to be recovered. The cases cited by the defendants in support of the proposition that the tax returns are important on the question of damages, deal with loss of earnings or lost profits. Neither of these is involved in the Section 302 action and the defendant does not demand tax returns in that action.

As to Item 5 in the antitrust action, plaintiff alleges that it:

> "suffered a substantial loss in sales by reason of the fact that retailers were intimidated and coerced by the defendants, and by reason of all the unlawful conduct on the part of the defendants hereinbefore described, the plaintiff has suffered damages since February, 1958 in the amount of $200,000.00;".

This allegation provides defendants' demands for tax returns with sufficient materiality.

Accordingly, all of plaintiff's exceptions to the subpoenæ *duces tecum* are overruled and its motion to quash is denied. However, plaintiff shall not be required to produce tax returns for those years prior to 1956.

So ordered.

[¶ 69,586] **Sinclair Refining Company v. Philip Schwartz, Appellant.**

In the Supreme Court of Pennsylvania, Eastern District. No. 239. January Term 1959. Filed December 30, 1959.

Appeal from the order of the Court of Common Pleas No. 4 of the County of Philadelphia as of March Term 1959 No. 611.

Pennsylvania Fair Trade Act

Fair Trade Enforcement and Procedure—Suit for Injunctive Relief—Allegations and Proof—Competition—Irreparable Harm.—A preliminary injunction, granted to a refiner of petroleum products against one of its dealers who had not signed a fair trade agreement, was dissolved because the refiner had not proved that its products were in fair and open competition and that it, a national distributor, had suffered irreparable harm through the actions of a single dealer. The refiner relied on an averment, denied by the dealer, that its gasoline was competitive. However, competition "may not necessarily exist merely because one says it does," and the trial court foreclosed the dealer from attempting to disprove the contention. Differences between color and advertising slogans of two brands of gasoline are not sufficient grounds to justify taking judicial notice that competition exists.

See Fair Trade, Vol. 1, ¶ 3354.40.

For the appellant: Martin Silvert, Philadelphia, Pa.

For the appellee: Robert W. Sayre, Philadelphia, Pa., and Henry S. Ruth, Jr., of Saul, Ewing, Remick & Saul, Philadelphia, Pa.

Opinion of the Court

Bok, Justice [*In full text*]: The court below, at plaintiff's behest, entered a preliminary injunction.

This confronts us with the familiar rule of review, that on appeal from the refusal, grant, or continuance of a preliminary injunction we will seek only apparent reasonable grounds for the action and will not consider the merits or the reasons unless it is plain that no grounds for it exist or that the rules of law relied on are palpably wrong or clearly inapplicable: *Lindenfelser v. Lindenfelser,* 385 Pa. 342 (1956), 123 A. 2d 626.

Plaintiff manufactures, refines, and sells petroleum products, including gasoline known as H-C and Power-X. It advertises widely and its product is known and used throughout the country.

Defendant is a dealer who owns and operates his gasoline service station in Philadelphia. He leased his property to plaintiff for a cent and three-quarters per gallon sold and plaintiff leased or licensed it back to him for a quarter cent. This is not a uniform rate, but varies with the locality of the station and its value to plaintiff.

Acting under what is commonly called the Fair Trade Act (June 5, 1935, P. L. 266; June 12, 1941, P. L. 128, No. 66; 73 P. S. §§ 7-11; Act of May 29, 1956, P. L. (1955) 1855; 73 P. S. §§ 7-26, pocket), plaintiff entered into agreements with 112 of its 146 retail dealers in the area, by which the dealers agreed not to sell plaintiff's gasoline at less than stated minimum prices. Defendant was not one of those that signed such an agreement, but Section 2 of the Act makes it unfair competition to sell at less than the price stipulated in any such contract, and this has been upheld: *Burche Co. v. General Electric Co.* [1955 Trade Cases ¶ 68,078], 382 Pa. 370 (1955), 115 A. 2d 361; *Mathieson Chemical Corp. v. L. & H. Stores, Inc.* [1958 Trade Cases ¶ 68,981], 392 Pa. 225 (1958), 139 A. 2d 897.

The purpose of the Act is to prevent predatory price-cutting and cutthroat competition, and to protect owners and public

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alike against unfair practices in the distribution of articles of standard quality under a distinguished brand or mark: *Bristol-Myers v. Lit Brothers* [1932-1939 Trade Cases ¶ 55,227], 336 Pa. 81 (1939), 6 A. 2d 843; *Lentheric Inc. v. F. W. Woolworth Co.* [1940-1943 Trade Cases ¶ 56,033], 338 Pa. 523 (1940), 13 A. 2d 12.

We are told that gasoline has not yet been before our courts, and that appears to be so. There is no difficulty about accepting it within the protection of the Act, since Section 4 defines "commodity" as "any subject of commerce", and the subject of the Act is "any commodity".

The injunction issued by the court below enjoins defendant from selling plaintiff's gasoline at less than the minimum retail prices which formed the subject of plaintiff's dealer agreements and of which defendant had been duly notified. Defendant undersold, alleging that he couldn't stay in business otherwise, and this caused the instant suit.

We think the court's action ill-founded. It is a bit unrealistic to believe that a national gasoline distributor would suffer such irreparable harm as to warrant summary relief from one dealer's selling under the price level. At final hearing it may well be able to show larger harm.

More basic, however, is the notion of competition. In the closely related field of fair sales, the Act of July 1, 1937, P. L. 2672, 73 P. S. §§ 201-207 was held unconstitutional in *Commonwealth v. Zasloff* [1940-1943 Trade Cases ¶ 56,034], 338 Pa. 457 (1940), 13 A. 2d 67, Mr. Justice Stern saying: "If the Act confined itself to prohibiting sales below cost when intended to destroy competition, it would undoubtedly be valid . . .". The instant Fair Trade Act of 1935 refers to products which are "in fair and open competition with commodities of the same general class produced by others." Plaintiff's complaint avers that its gasoline is thus competitive in Pennsylvania, but the only evidence adduced in support is the bare statement by plaintiff's single witness: "We are in competition with the major companies in this market . . . [in Philadelphia]." Defendant's answer expressly denies this averment.

We incline to the view that competition may be a self-serving and conclusionary word and that it may not necessarily exist merely because one says it does. Defendant sought to offer evidence to show that it did not exist in fact, but was foreclosed. He also offered unsuccessfully to prove a modification of the price arrangement in plaintiff's telling him that he could sell at any price he wanted. Plaintiff suggests that from observation we could take judicial notice of competition, but it occurs to us that one company's gasoline may not differ in content or quality from that of another merely because they differ in color or advertising slogans, at least in the regular gasolines, which seem to be uniform in price. And observation might reveal only that one man keeps his station neater than the next.

Since competition is the nexus of the Act and has been asserted and denied, the need of proof is obvious.

There are substantial issues that should await development at a full hearing. The current injunction, whose imposition we regard as without basis, should be dissolved.

Decree reversed *cum procedendo*.

Mr. Justice Bell dissents.

[¶ 69,587] American Greetings Corporation v. United States of America.

In the United States Court of Appeals for the Sixth Circuit. No. 13,893. Filed December 31, 1959.

Appeal from the United States District Court for the Northern District of Ohio. Weick, District Judge.

Federal Trade Commission Act

Federal Trade Commission Enforcement and Procedure—Violation of Cease and Desist Order—Civil Penalty Suit—Appeal.—A judgment imposing penalties of $10,600 on a manufacturer of greeting cards, which violated a cease and desist order when it removed competitors' greeting cards from mounts which bore their trade-marks or trade names and placed the competitors' cards on blank mounts, was affirmed. While

the order did not make illegal the practice of remounting competitors' cards, which was common in the industry, it was illegal to remove trade-marked mounts, remount the cards on blank mounts, and display them in the same cabinet with a mount bearing the trade-mark of the manufacturer. However, the remounting of a competitors' card on a blank mount could not be considered a violation of the order where the competitors' previous mount was blank. The trial court assessed only a nominal penalty where the Commission's failure to speak out against the questioned practice, while fully cognizant of it for a period of approximately four years, might have led the manufacturer to believe that the Commission was not objecting to the practice. The penalty imposed was $200 on each of three counts; on another three counts, the penalties were $5,000, $2,500, and $2,500.

See Unfair Practices, Vol. 2, ¶ 5075.12, and FTC Enforcement and Procedure, Vol. 2, ¶ 8661, 8661.50.

Federal Trade Commission Enforcement and Procedure—Civil Penalties for Violation of FTC Order—Motions for New Trial Denied—Appeal.—A judgment imposing penalties of $10,600 against a manufacturer of greeting cards, previously denied a motion for a new trial, was affirmed. The motion was ostensibly on the ground that the judgment was contrary to the weight of the evidence, but the manufacturer's brief disclosed that it was not so much the weight of the evidence that was questioned, but rather the court's interpretation of the scope of the Federal Trade Commission order. It had been found that the manufacturer violated a cease and desist order when it removed competitors' greeting cards from mounts which bore their trade-marks or trade names and placed the competitors' cards on blank mounts. The manufacturer contended that such precise activity was not prohibited by the order, and that the Commission's investigation related to remounting of competitors' trade-marked cards in mounts which bore the manufacturer's trade name or to the stamping of the manufacturer's trade names over the competitors' trade names on the cards themselves. The court held that the Commission is not restricted to prohibiting the illegal practice in the precise form in which it was engaged, but it can go further and inhibit variations of the same practice which it considers necessary to achieve the desired result.

See Unfair Practices, Vol. 2, ¶ 5201.481.

For the appellant: Jones, Day, Cockley & Reavis, Cleveland, Ohio (argued by Robert W. Poore).

For the appellee: Russell E. Ake, Cleveland, Ohio; and Frank C. McAleer, Federal Trade Commission.

Before McAllister, Chief Judge; Simons, Circuit Judge; and Brooks, District Judge.

Affirming a judgment affixing penalties for violation of a cease and desist order in Dkt. 5982. For prior opinions of the U. S. District Court, Northern District of Ohio, see 1959 Trade Cases ¶ 69,258, 69,289.

[*Appeal*]

Brooks, District Judge [*In full text*]: This is an appeal of a civil action brought under Section 5(1) of the Federal Trade Commission Act, Title 15, U. S. C. A. Section 45(1) in which penalties were awarded for violations of a cease and desist order of the Federal Trade Commission. It has been heard upon the record, the briefs and arguments of counsel, and the Court being duly advised:

[*Affirmed*]

Now, Therefore, It Is Ordered and Adjudged that the judgment of the District Court be and it is affirmed for the reasons contained in the opinion of the Court reported in [1959 Trade Cases ¶ 69,258] 168 F. Supp. 45, also memorandum opinion denying motion for new trial [1959 Trade Cases ¶ 69,289].

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[¶ 69,588] Union Leader Corporation v. Newspapers of New England, Inc., et al.

In the United States District Court for the District of Massachusetts. Civil Action No. 59-23-W. Dated December 28, 1959; amended by an Order of the Court dated January 4, 1960.

Sherman and Clayton Antitrust Acts

Combinations and Conspiracies—Monopolies—"Unfair" Practices as Evidence of Intent to Monopolize—Group Boycotts—Using Labor Union's Aid in Boycotting Rival Newspaper—Paying Secret Commissions to Advertisers for Their Aid in Promoting Boycott.—A newspaper publisher's organization of a group boycott against a competing newspaper, and the publisher's unfair practices in organizing that boycott, constituted a *per se* violation of Section 1 of the Sherman Act, conclusive evidence of the publisher's "exclusionary" intent, and proof of its attempt to monopolize in violation of Section 2 of the Sherman Act. A representative of the publisher, calling upon a local merchant in the company of a representative of a printers' labor union, requested the merchant to advertise in its publication. The union representative asked the merchant to boycott the other newspaper. Those acts were, in effect, a joint appeal by the publisher and the union, to the merchant, to boycott the other paper.

Further, the publisher's payment of a sum of money weekly to each of eight individuals associated with local purchasers of newspaper advertising, in consideration of those individuals' services in inducing their own and other organizations to advertise exclusively in the publisher's newspaper and refrain from advertising in the competing newspaper, was an encouragement to a group boycott. Also, the failure to disclose to outsiders that those individuals were not disinterested fellow advertisers, as they purported to be, but were, instead, paid employees of the newspaper, was an unfair practice that was "not honestly industrial."

See Combinations and Conspiracies, Vol. 1, ¶ 2005.533, 2005.660; Monopolies, Vol. 1, ¶ 2515.40, 2610.

Combinations and Conspiracies—Labor Unions Under Antitrust Laws—Exemptions—Union Activities Which Are Not Exempt—Combining With Non-labor Groups—Publisher's Use of Labor Union's Aid in Boycotting Rival Newspaper—Legality.—A joint appeal by representatives of a newspaper publisher and a labor union requesting a merchant to boycott a newspaper that competed with the publisher was not excusable merely because labor union representatives were among those participating in the boycott. In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers,* 1944-1945 Trade Cases ¶ 57,386, the United States Supreme Court held that labor unions are not entitled to the antitrust exemptions of the Norris-LaGuardia and Clayton Acts when they aid and abet non-labor groups in creating monopolies.

See Combinations and Conspiracies, Vol. 1, ¶ 2101.063, 2111.

Monopolies—Practices as Evidence of Unlawful Intent to Monopolize—Newspapers' Discrimination Among Their Advertisers—Departure from Publicly Announced Rates.—When an enterprise having substantial market power engages in a discrimination not justified by normal economic considerations, it is *prima facie* seeking to achieve control of the market by an objectionable method. Thus, where two newspapers were struggling for survival in a market where only one could succeed, and both publicly announced the advertising rates they would follow, a departure from those rates by the giving of secret discriminatory benefits to some advertisers constituted *prima facie* evidence that both newspapers had an "exclusionary" intent and had attempted to monopolize in violation of Section 2 of the Sherman Act. Every discrimination which is not based upon some explicable economic difference, such as an economy traceable to quantity purchases, is dictated by some ulterior motive. One of the newspapers allowed the largest local advertiser a rate 30 per cent lower than the rate it offered others; failed to inform all of its advertisers that they could, without extra charge, have one try at a color page; and failed to inform all of its advertisers that, if they advertised in a specific issue, they could have an additional reprint in a Christmas supplement without additional charge.

The competing newspaper sought to excuse its own giving of discriminatory benefits to some advertisers by contending that it was merely retaliating in self-defense. While the provocation was great, the total number of discriminations was not large, and the period of time of such discriminations was short, nevertheless, there were capricious and secret discriminations which belied the newspaper's public rate card. It could not be excused because comparable practices were engaged in by its competitor, nor could the discrimination be regarded merely as a "restraint of trade of doubtful validity" instead of an attempt to monopolize. That distinction was unacceptable because the paper had about 50 per cent of the market and knew that the market would not permit two contestants to survive. Thus, its resort to any unfair practice, and its failure to confine itself to the exercise of "skill, foresight, and industry," compelled the conclusion that it had an "exclusionary" intent and had attempted to monopolize in violation of Section 2.

See Monopolies, Vol. 1, ¶ 2515.40, 2610.280.

Monopolies—Exclusion of Competitor from Market Capable of Supporting Only One—Intent—"Predatory" or "Unfair" Practices as Evidence of Unlawful Intent to Monopolize.—A person does not necessarily have an unlawful intent to monopolize merely because he foresees that a market is only large enough to permit one successful enterprise, and intends that his shall be that one. However, two rival newspaper publishers, in their use of predatory and unfair practices, did show an unlawful intent to monopolize in violation of Section 2 of the Sherman Act. There is no unlawful intent where a person utilizes only superior skill, foresight, and industry. But the antitrust cases condemn the intent to use, or the actual use of, unfair weapons. Thus, there is no sharp distinction between the existence of an intent to exclude and the use of unfair means. In a situation where it is inevitable that only one competitor can survive, the evidence which shows the use, or contemplated use, of unfair means is the very same evidence which shows the existence of an exclusionary intent.

See Monopolies, Vol. 1, ¶ 2515.40.

Monopolies—Offer to Buy Out Sole Competitor as Evidence of Attempt to Monopolize—Two Competing Newspapers in City Capable of Supporting Only One—Effect of Purchase on Competition.—A newspaper publisher's offer to buy all of the stock of its sole competitor, in a city capable of supporting only one such paper, was not evidence of an intent to monopolize. Such an offer would have been unlawful if the city had been capable of economically accommodating both, since the purchase would not have been a victory won by "skill, foresight, and industry." But where two roughly equal companies are competing for the single prize that is available, "skill, foresight, and industry," by themselves, will not give either the victory. In such a situation, the capacity to withstand losses is required. Since only one could successfully survive, the purchase of one by the other would not have substantially lessened competition, but would have only shortened the time in which competition could have continued. It made no difference whether the victory was won by paying a large price in one lump sum payment to take over the competitor, or by paying a large price in installments of monthly losses.

See Monopolies, Vol. 1, ¶ 2515.40, 2610.120.

Monopolies—Attempts to Monopolize—Practices as Evidence of Attempt to Monopolize—Newspaper's Reduction of Advertising Rates When It Was Already Losing Money—Profit Motive or Intent to Destroy Competitor.—Where two competitors are each struggling at a loss in a market that will permit only one to succeed, it is not unlawful for one of them to reduce its prices, at least in the absence of a showing that the reduction "results in such terrific losses that it is beyond reasonable hope that they can be recovered even in the long future." Thus, a newspaper's reduction of its advertising rates at a time when it was already losing money was not unlawful where the effect of that reduction was to diminish its losses rather than to increase them. Had the losses been so extravagant as to be unrecoverable, it might have been persuasively argued that the object of the reduction was not to capture the market for its possible profit value, but, rather, to inflict injury on a rival regardless of the expectation of ultimate profit.

See Monopolies, Vol. 1, ¶ 2515.40.

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Monopolies—Lawful Monopolies—Monopoly Acquired "By Virtue of Superior Skill, Foresight, and Industry"—Absence of Antitrust Violations in Achieving Non-competitive Position—Publisher of City's Only Newspaper.—Two newspaper publishers, each of which published the only local daily newspaper in its own particular city, were not monopolizing or attempting to monopolize in violation of Section 2 of the Sherman Act merely because they had no competitors in their own cities. To be sure, each had what a layman would call a monopoly, but neither had violated the Sherman Act, since each had achieved its non-competitive position by methods "honestly industrial" or, as it is sometimes phrased, "by virtue of superior skill, foresight, and industry."

See Monopolies, Vol. 1, ¶ 2510.300.

Combinations and Conspiracies—Monopolies—Practices—Use of Lawfully Acquired Monopoly to Gain Unlawful Monopoly in Another Market—Newspaper Industry.—One who enjoys a lawful monopoly in one market is free to enter another market, but is prohibited from using, in that other market, what is technically called the "market power" (power to control prices or production) which he enjoys in the first market. However, a publisher of a city's only newspaper (a lawfully acquired monopoly) did not violate Section 2 of the Sherman Act by using its "monopoly city" printing plant and profits to publish a newspaper in a second market, a city in which another publisher had theretofore enjoyed a lawful monopoly as the publisher of that city's only newspaper. Where all that is involved is the use of money, and if the money is invested with relation to a reasonable expectation of ultimate profit or to promote some legitimate purpose, and not "*primarily* for the purpose of causing loss of business to another," the investment is not a restraint of trade or attempt to monopolize. Here, there were no combination contracts, between the publisher's "monopoly city" paper and its "competitive city" paper, covering advertising, circulation, news, or features. Both papers were published in the same plant but it did not appear that, as a result of that combined operation, the publisher was able to procure goods or services (newsprint, printers, etc.) for its "competitive city" paper at lower rates than its competitor in that city could procure them. Thus, there was no substantial use of the publisher's "monopoly city" market power in the "competitive city," and no evidence that the publisher's "competitive city" operations substantially increased its "monopoly city" market power.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.660; Monopolies, Vol. 1, ¶ 2610.

Combinations and Conspiracies—Monopolies—Acquisition of Assets Under Sherman Act, Sections 1 and 2, and Clayton Act, Section 7—Combination of Newspaper Publishers to Buy One of Two Competing Papers—"Mutual Defense Association."—A number of publishing companies, each of which owned the only newspaper published in its own particular town in New England, did not violate Section 1 or 2 of the Sherman Act or Section 7 of the Clayton Act by purchasing the stock of a newspaper that was engaged in a "life-and-death" struggle with a rival paper. The acquisition was not rendered illegal by the fact that each of the investing publishers enjoyed a so-called monopoly position in its own home market. There was no "interlacing" of policies, practices, or operations among the acquiring publishers or with the acquired newspaper; none of them used their "home" market power in the "new" town; and none of them used the "new" town investment to increase its outside market power. Since the town was capable of supporting only one successful paper, it made no difference that the publishers acquired the newspaper with the awareness that the rival paper could probably be forced out of the market.

Further, it made no difference that the acquisition had the effect of precluding the rival newspaper from purchasing the "acquired" company, or that the publishers acted with the motive of thwarting the rival's tactics. Each of the publishers reasonably believed that the investment was commercially justified. Further, a contestant is not to be condemned for his anticipated pleasure in seeing the tactics of his opponent thwarted.

Finally, the court rejected the rival's claim that the publishers, each fearing that it might some day be the victim of a "similar distress," had formed a "mutual defense association" to exclude the rival from buying any newspaper in the area. There were no

agreements among the publishers to join in similar ventures in the future, and the amount of the cash contributions did not warrant the conclusion of a conspiracy to act elsewhere.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.460; Monopolies, Vol. 1, ¶ 2610.120; Acquisitions of Stock or Assets, Vol. 1, ¶ 4205.410, 4207.800.

Private Enforcement and Procedure—Suit for Injunctive Relief—Practice Enjoined—Newspaper's Rate Discriminations Among Its Advertisers—Termination of Practice After Commencement of Suit as Bar to Injunctive Relief.—A newspaper which departed from its publicly announced advertising rates by giving discriminatory benefits to some of its advertisers could not escape an adverse injunctive decree on the ground that its new management had ended the discrimination. Since the reform came after the commencement of the suit, the competitor who brought that action was entitled to assurance that the reform was not merely temporary.

See Private Enforcement and Procedure, Vol. 2, ¶ 9024.08.

Private Enforcement and Procedure—Suit for Injunctive Relief—Practices Prohibited—Newspapers' Discriminations in Advertising Rates—Secret Payments to Advertisers' Employees for Their Services in Soliciting Advertising—Attempting to Monopolize.—Two newspaper publishers, each of which charged the other (by way of a complaint and counterclaim) with various antitrust violations, were found to have engaged in, and were each enjoined from continuing, the practices of (1) making any charge for advertising in its newspaper except in strict conformity with a publicly announced rate schedule setting forth every aspect of its rates, and (2) attempting, in any way, to monopolize the newspaper market in a specific New England town. Also, the plaintiff, on the defendant's counterclaim, was prohibited from paying officers or employees of advertisers for the services of those individuals as newspaper consultants or advertising solicitors, unless such person is shown to be qualified for such a position and is instructed to declare his employment with the plaintiff newspaper when soliciting advertising for that paper.

See Private Enforcement and Procedure, Vol. 2, ¶ 9024.40.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Separate Trial on Issue of Damages.—A separate trial was ordered on the damage issues raised by an antitrust complaint and counterclaim involving the legality of various practices in the newspaper industry.

See Private Enforcement and Procedure, Vol. 2, ¶ 9013.565.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Pretrial Procedures—Damages—Order Requiring Precise Statement of Claimed Damages After Trial of Liability Issues.—A trial court, after trying the liability issues raised by a newspaper publisher's antitrust complaint and a rival newspaper's antitrust counterclaim, ordered each of the papers to prepare a detailed schedule showing the precise damages it claimed to have suffered from the illegal practices which the court found the other had engaged in. Items of damages not clearly revealed by such schedules would be barred.

See Private Enforcement and Procedure, Vol. 2, ¶ 9011, 9013.

Private Enforcement and Procedure—Suit for Civil Damages and Injunctive Relief—Appeals—Appealability of Judgment Disposing of Claim for Injunctive Relief—"Certification" by Trial Court.—A trial court, having found that both the plaintiff and the counter claimant engaged in unlawful practices in attempting to monopolize the newspaper publication market in a New England town, and having enjoined the parties from the further commission of such practices, "certified" its judgment for appeal in accordance with 28 United States Code § 1292(b) on the ground that the order involved a controlling question of law as to which there was substantial ground for a difference of opinion, and that an immediate appeal might materially advance the ultimate termination of the litigation. Thus, the court, while reserving the damage claims, determined that there was no just reason for delay in entering final judgment on the claim for injunctive relief.

See Private Enforcement and Procedure, Vol. 2, ¶ 9015.12.

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For the plaintiff: Arthur Howard Bloomberg (Phister and Judge), Boston, Mass.

For the defendants: John F. Groden and John S. McCann (Withington, Cross, Park & McCann) Boston, Mass.; Davenport, Millane & Oldershaw, Holyoke, Mass.; John J. Ryan, Jr., Haverhill, Mass.; Joseph F. Bacigalupo, Lawrence, Mass.; Frank and Robert H. Goldman, Lowell, Mass.; Charles R. Crimmin, Pittsfield, Mass.; James R. Crowe, Springfield, Mass.; and Warren C. Lane, Jr. (Thayer, Smith & Gaskell), Worcester, Mass.

Findings of Fact, Conclusions of Law, and Opinion

I.

Introduction

[*Antitrust Complaint and Counterclaim*]

WYZANSKI, District Judge [*In full text*]: 1. This is a suit in which the complaint and the counterclaim each allege violations of §§ 1 and 2 of the Sherman Act [15 U. S. C. §§ 1 and 2] and the complaint also alleges violations of § 7 of the Clayton Act, as amended, [15 U. S. C. § 18].

[*Parties*]

2. The complainant, Union Leader Corporation, (ULC), is the owner of both *The Manchester Union Leader,* a daily newspaper in Manchester, New Hampshire, and *The Haverhill Journal,* a daily newspaper in Haverhill, Massachusetts. William Loeb is the president, majority stockholder, and dominant figure in the corporation.

3. As amended, ULC's complaint claims it has been and is being caused injury in violation of §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act, as amended, by 10 corporations and 11 individuals. During the pre-trial or trial of this case 4 corporations and 4 individuals were dismissed as defendants. There now remain the following 6 corporate and 7 individual defendants:

(a) The Haverhill Gazette Co., the owner of *The Haverhill Gazette,* a daily newspaper published in Haverhill, Massachusetts.

(b) Lowell Sun Publishing Co., the owner of *The Lowell Sun,* a daily newspaper published in Lowell, Massachusetts.

(c) John H. Costello, president of that corporation.

(d) Frank A. Lawlor, general manager of that corporation.

(e) Eagle Tribune Publishing Co., the owner of *The Lawrence Eagle-Tribune,* a daily newspaper published in Lawrence, Massachusetts.

(f) Irving E. Rogers, president of that corporation.

(g) William F. Lucey, business manager of that corporation.

(h) Holyoke Transcript-Telegram Pub. Co., the owner of *The Holyoke Transcript-Telegram,* a daily newspaper published in Holyoke, Massachusetts.

(i) William Dwight, president of that corporation.

(j) Enterprise Publishing Co., the owner of *The Brockton Enterprise & Times.*

(k) Philip S. Weld, president of Essex County Newspapers Inc., which owns *The Newburyport News* and *The Gloucester Times.*

(l) Sidney R. Cook, comptroller of Republican Publishing Company, which with the Springfield Union Publishing Company publishes *The Springfield Union* and *The Springfield Daily News.*

(m) Newspapers of New England, Inc. (NNE), a holding corporation which owns the stock of The Haverhill Gazette Co. [see paragraph (a) above]. The directors of NNE are 6 of the above-named 7 individuals, Rogers, Lucey, Costello, Lawlor, Weld, and Cook (not Dwight) together with McClure, Fuller, and Howe who are no longer defendants herein. The said Lawlor, Lucey, and Weld are, respectively, president, treasurer, and clerk of NNE.

[*Counterclaim*]

4. Of defendants only The Haverhill Gazette Co. has filed a counterclaim. That corporation claims it has been and is being injured, in violation of § 1 and 2 of the Sherman Act, by ULC.

[*Separate Trial of Damage Issues*]

5. Both ULC and the counterclaimant seek injunctive relief and damages. Pursuant to Rule 42(c) of the Federal Rules of Civil Procedure, this Court ordered a separate trial of all issues other than issues of damages raised by the pleadings.

II.

Findings of Fact

A. Background of the Controversy

[*Struggle Between Rival Newspapers*]

6. Before a detailed statement of the facts in this case, it is appropriate broadly to sketch the background of the controversy before this Court.

7. Currently there is being waged in Haverhill, Massachusetts a life-and-death struggle between two rival daily newspapers. One is *The Haverhill Gazette* which, without apparent violation of law, had become in 1957, after more than a century of publication, the only daily local newspaper in Haverhill. The other is *The Haverhill Journal,* which entered the market in December 1957. This suit is an outgrowth of that bitter rivalry.

[*City Capable of Supporting Only One Newspaper*]

8. Haverhill is a city with a population of somewhat over 47,000, and its newspapers reach a surrounding area of an additional 5,000. On any one day not many more than 20,000 local daily newspapers have ever been sold in the total Haverhill area.

9. Undoubtedly it is possible to run at a profit in Haverhill two or more daily newspapers of limited news coverage and of inferior general quality. But the type of newspaper which *The Haverhill Gazette* has been for many years, which *The Haverhill Journal* has been since it began publication, and which is exemplified by other daily newspapers in Lawrence, Lowell, Holyoke, and most New England cities with a population of 20,000 to 100,000 could not succeed financially as a *wholly independent* enterprise unless either it had no rivals or had in the face of rivalry a circulation of over 15,000. This is the judgment of virtually all persons expert in the newspaper business. And this judgment is now amply supported by the last year's experience of both the *Gazette* and the *Journal.* In competition both have sustained stupendous losses. And while those losses might have been less had the rivals pursued less aggressive competitive tactics, there is every reason to believe that no matter what policies they had adopted the market could not have brought them both financial success unless one or both had reduced its quality or one or both had been operationally combined with a newspaper outside of Haverhill. In short, for what may be called the New England type of local newspaper familiar in middle-sized cities Haverhill is economically a one newspaper city. Put more technically, this means that using the joint measure of product and area we are dealing with a market so narrow that only one successful occupant is economically possible. The Haverhill market is not broad enough permanently to sustain the competition of two high grade local daily newspapers.

[*Labor Union—Strike*]

10. The long-time prosperity of *The Haverhill Gazette* was interrupted on November 20, 1957 by a strike of those of its printers who were members of Local 38 of the International Typographical Union. The *Gazette* managed to continue publication by employing substitutes. But, Haverhill being a community with many sympathizers with the union, the circulation promptly fell by about 50 per cent.

[*Merchants—Seeking New Publisher*]

11. Responding either to conviction or to pressure, some merchants who had advertised in the *Gazette* hesitated to continue to patronize a newspaper which was having a labor dispute. They desired another medium to reach the public. And they sought out William Loeb the president and dominant figure in The Union Leader Corporation, the company which published the prosperous *Manchester Union Leader* — a newspaper which enjoys in its home town a non-competitive position not shown to have been acquired by any violation of law.

12. Then followed the events which are described in the following findings. A strictly chronological order is abandoned in favor of a topical account of developments. Such topical presentation may make it easier to deal with the legal contentions of the parties. There are reviewed first, the relations between certain Haverhill merchants and the ULC; second, the relations between some union members and the ULC; third, advertising rates of the two newspapers; and fourth, the formation and functioning of Newspapers of New England, Inc.

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B. Relations Between Certain Haverhill Merchants and ULC

[*New Paper Supported by Local Merchants*]

13. It has already been noted that when Local 38 of the ITU struck against The Haverhill Gazette Co. (HG Co.) certain advertisers in *The Haverhill Gazette* decided not to continue advertising in that paper. Some of these advertisers formed a group. Originally the group consisted of Sidney Katz and Eli Shoreman both from Elrich Shoes, Inc., Martin Bendetson, a director of Boston Furniture Company, Vincent W. Grad of Grad's Specialty Shop, Irving P. Karelis, a partner in Karelis Jewelers, and Jerome Fishbein then an employee of his father David Fishbein doing business as Hudson's Fur Shop, but since January 1, 1959 treasurer and director of Hudson's Apparel of Haverhill, Inc., the successor enterprise.

14. Katz arranged with Loeb that the group should go to Loeb's home in Beverly, Massachusetts on Saturday evening, November 30, 1957. The group asked Loeb to arrange for Union Leader Corporation to publish for Haverhill a free throwaway shopper which would carry paid advertisements of the group and others who wished to avoid patronizing the *Gazette* during the strike. Loeb reserved his decision. The next day he decided to publish such a shopper.

15. ULC published for Haverhill a throwaway shopper on Thursday, December 5, and Thursday, December 12, 1957. Both issues received a favorable response. On that basis Loeb decided to begin the publication of a daily called *The Haverhill Journal,* of which the first issue appeared Monday, December 16, 1959.

16. Meanwhile on December 8, 1957 there was held at Loeb's Beverly home a second meeting of the group of merchants. Then or later the original six participants were joined by Norris Bendetson, general manager and assistant treasurer of Boston Furniture Company as well as an owner of half the stock of Brest Buick Company, and by David M. Gordon, president of Haverhill Hardware and Plumbing Supply Co. All of the eight in the group were Haverhill residents, familiar with local conditions, but inexperienced in any aspect of the newspaper business except that they were all in responsible positions in retail enterprises that advertised in the daily press of Haverhill. In 1956 and 1957, that is before the strike, the concerns with which these eight were associated had placed with *The Haverhill Gazette* advertising for which they paid as indicated in the following table:

	1956	1957
Boston Furniture Co.	$ 4,291.22	$ 3,838.96
Elrich Shoes, Inc.	734.10	952.18
Grad's Specialty Shop	6,406.49	6,101.44
Haverhill Hardware & Plumbing Supply Co.	11,325.75	11,677.79
Hudson's Fur Shop	4,205.00	4,433.81
Karelis Jewelers	7,691.63	5,438.16

The total advertising of these six companies was at least 5% of the total local newspaper advertising of Haverhill merchants.

17. The eight individuals met with Loeb at first three times a week. After a while, the meetings were reduced to once a week. Meetings continue to this day with that frequency.

[*Solicitation of Advertising for New Paper*]

18. Loeb discussed at these meetings advertising and general newspaper policy. From the outset the eight assured Loeb that they would support the *Journal* with their advertising. Katz, the moving spirit, admitted, what undoubtedly must have been generally realized by all his associates, that "as a practical matter, if you gave your advertising to the *Journal,* you would not be advertising in the *Gazette*". Moreover, the group, in Fishbein's words, "assured Mr. Loeb that we would aid in securing others to use the daily" *Journal.* Consistent with that assurance, the group did constantly solicit advertisers for the *Journal.* Moreover, as Martin Bendetson acknowledged, "the meetings studied records of advertising in different categories . . . clothing, radio, automobiles . . . the different people that advertise with the *Journal* and the different ones that advertise with the *Gazette.*"

19. When Brest Buick Co. decided to place part of its advertising in the *Gazette,* Norris Bendetson, who owned half of the company's stock, told the group that this was going to be done. When another member of the group, Grad, failed to inform the group in advance that his store was going to advertise in the *Gazette,* members of the group were surprised and criticized Grad.

Indeed, Gordon testified in his deposition with respect to Grad's advertisement "We all felt he should not have put the ad in the *Gazette*."

20. At the group meetings there were also discussions of the desirability of the *Journal* having news items about labor, women, and veterans.

[*Secret Payments to Local Merchants*]

21. As long as the strike at the *Gazette* flourished, the ULC did not make any payments to the eight members of the group. But on May 22, 1958 Loeb "detected . . . slackening of enthusiasm" in the group. Thereupon he initiated a payment to each of the eight of $50 a week. These payments have continued up to the present. These payments were not publicly disclosed until depositions were taken in the case at bar. Those from whom the group solicited advertising for the *Journal* did not know or have reason to know that each member of the group was a paid consultant of the *Journal*. The payments have always been made on an individual basis—that is, even though the two Bendetson brothers are from one company and Katz and Shoreman are from the same company each receives the weekly stipend. Some but not all of the recipients keep these payments for themselves; others turn them over to their firms. Payments have no relation percentage-wise to the amounts paid for advertising by any firm. However, with the two exceptions of the one already-mentioned Grad advertisement and of $15 worth of advertising by Elrich Shoes, Inc., none of the six firms with which the eight members of the group are associated has advertised in the *Gazette* at any time since the *Journal* began publication. The *Journal* received in advertising during the period from December 5, 1957 to September 15, 1959 advertising in the following amounts:

Boston Furniture Company	$11,907.00
Elrich Shoes, Inc.	4,673.11
Grad's Specialty Shop	14,768.71
Haverhill Hardware & Plumbing Supply Co.	38,834.11
Hudson's Fur Shop	11,159.30
Karelis Jewelers	11,022.71

22. It is not clear whether when Loeb began making the $50 payments he wrote a letter or memorandum with respect to these payments. At the time depositions were taken before trial the members of the group testified in considerable detail about the existence of such memoranda and their subsequent destruction. On the first day of the trial in court Loeb testified that "I think I wrote them a rather informal letter that we would pay them $50 a week." But later in the trial Loeb and each member of the group denied that there ever was a letter or memorandum specifically referring to the $50 payments, and asserted that the destroyed documents were copies of a letter referring to other promised sums.

23. On this state of the evidence, this Court does not find that there were any documents covering the $50 payments, or that there were any *written* promises by any of the group, or that the ULC made it a *written* condition of the payments that they were in consideration of any obligation or action of any advertiser. However, the Court does find that the ULC made payment each week to each individual in consideration of his individual services in inducing the enterprise with which he was connected and such other enterprises as he could influence to advertise exclusively in the *Journal* and to refrain from advertising in the *Gazette*. In reaching this finding of fact, the Court has considered the whole tenor of the group meetings, the pledges of support the eight gave to the *Journal*, and the watchful attention the group gave to *Gazette* advertisements by their own enterprises and other enterprises. While there may not have been in a technical sense a series of unilateral oral contracts in which ULC offered to pay $50 each week to each of the eight who had in the previous week successfully induced his enterprise and other enterprises not to advertise in the *Gazette*, the $50 weekly payment was intended by Loeb to have, and did have, an effect indistinguishable from such a series of unilateral oral contracts.

[*Promise of Future Payments*]

24. In addition to providing the $50 weekly payments, Loeb on July 31, 1958 made to each of the eight merchants a written promise to give each a percentage of profits of the *Journal* under certain circumstances. But this agreement need not be detailed as it was superseded by the more formal agreement of December 15, 1958. Under that contract each of the eight was promised $5,000 a year for 10 years followed

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by $10,000 a year for the succeeding 10 years together with an overriding bonus of 3⅛% of the profits of the newspaper, the whole agreement "to be effective if and when the *Haverhill Journal,* under my [Loeb's] ownership or control, becomes the only newspaper published in Haverhill." In view of the effective date of these massive payments, the members of the group of eight knew it was to their "economic profit to do everything" they "could to see that Mr. Loeb did own the only paper in Haverhill." The purpose and the effect of the contract was to intensify the zeal of the eight members of the group both to support the *Journal* by securing advertising for it and to discourage advertising in the *Gazette* by their enterprises and other enterprises subject to their influence.

C. Relation Between Some Union Members and ULC

[*Union's Aid to New Paper*]

25. As has already been noted Local 38 of the International Typographical Union struck HG Co. on November 20, 1957. Representatives of the International and of the Local considered the possibility of either establishing or giving support to a new newspaper to rival the *Gazette.* Some of the striking printers approached a ULC employee in the hope of interesting Loeb in entering the Haverhill market. But Loeb did not confer with these printers. Nor was it in response to the printers' suggestion that ULC entered Haverhill. However, having decided to enter Haverhill, ULC cooperated with the strikers in various ways, of which only two seem worth reciting.

26. One way was that ULC paid some of the strikers to distribute ULC's shopper direct to householders. At the time they rendered these services the strikers were, within the contemplation of the National Labor Relations Act, employees of HG Co. And they, being printers, were not particularly qualified to act as distributors. It is fairly inferable that the purpose which ULC had in hiring these printers was to let the public know that the union was supporting ULC's new paper.

[*Solicitation of Advertising for New Paper*]

27. The other significant way that ULC sought the cooperation of the union was in the solicitation of advertising for the shoppers' edition of the *Journal.* Representatives of the union went with representatives of the *Journal* to call upon prospective advertisers. The union representatives asked merchants not to advertise in the *Gazette,* and simultaneously advertising solicitors of the ULC asked these merchants to advertise in the *Journal.*

D. Advertising Rates

[*Discrimination by Both Papers*]

28. There is in the record of this case a substantial amount of information with respect to the advertising rates charged by the *Gazette* and the *Journal.* To recite all of it would serve no useful purpose now, for here we are not concerned with the assessment of damages, if any, but with questions of equitable relief. A few broad strokes will cover the ground adequately.

29. When the strike began at its plant, the *Gazette* had in effect advertising rates which it had published September 1, 1957.

30. At the outset, the *Journal* publicly announced somewhat higher rates. For example, the *Gazette* had a basic local display rate of $1.40; the *Journal* began with a local display rate of $2.10 but in January of 1958 it retroactively changed the rate to $1.47 by application of credit to future bills.

31. Aggressively competitive, the *Journal* then introduced special rates for shoppers' nights, combination rates, free repeat advertising, and color advertising free of extra charge for one trial. Instead of making public announcement of the availability of these privileges, the *Journal* resorted to private concessions. For example, it allowed some but not all advertisers to have without extra charge a free trial of a color page. It gave to some but not to all advertisers who had paid for advertisements in the November 28, 1958 issue the privilege of having the same advertisement run free in a Christmas 1958 supplement. Most important, the *Journal* gave to the largest local advertiser in Haverhill, J. M. Fields, a special rate not expressly or impliedly made available to any other advertiser.

32. The *Gazette* likewise resorted to secret discriminatory practices. The clearest instances occurred from September through December 1958. Instead of revising rates publicly, the *Gazette* entered into separate agreements with local display advertisers.

Exhibit C-10 shows that the rates varied without any discernible rational basis. Also in November 1958 the *Gazette* reduced its classified advertising rates for some but not all automobile dealers. However, these discriminations between advertisers of the same class and volume were not continued after February 1, 1959. The *Gazette* then put into effect publicly the rates it thereafter charged. It would serve no useful purpose to recite the new rates, or their relationship to the older rates. It will be quite sufficient to say that the evidence shows that as a whole the new rates bear a rational relation to circulation and that there is not any basis for finding that there is some improper discrimination between different types of publicly announced rates in the February 1, 1959 schedule.

E. The Formation and Functioning of Newspapers of New England, Inc.

[*Aid Sought by Established Paper*]

33. When the ITU threatened to strike, J. Wesley Russ, then president of The Haverhill Gazette Co., (HG Co.) sent for William B. Parry, then associate manager of The New England Daily Newspaper Association. HG Co. is one of 80 New England daily newspapers which belong to that non-discriminatory Association, and, until it resigned in 1956, UCL also was a member. The chief function of the Association is to circulate news bulletins; but on occasion it gives advice on labor negotiations. There is no evidence that the Association has sought to establish or could establish common practices with respect to price, production, circulation, advertising, or like operational matters.

34. From the time Parry was called into the labor dispute he was in general touch with the *Gazette's* problems. Indeed in April 1958 Parry was asked by Russ whether money could be raised from other publishers to help the *Gazette*. Nothing came of this inquiry, nor of inquiries which Russ addressed to William Dwight, publisher of *The Holyoke Transcript* and president of The American Newspaper Publishers Association, nor of other inquiries put to various other persons in the industry. The publishers were long on advice but short on cash offers. And HG Co. had to rely on what it could borrow from local banks.

[*New Paper's Offer to Buy Established Paper*]

35. In the meanwhile brokers and principals inquired whether the *Gazette* was for sale. Among those inquiring was Manno, an agent for Loeb of the ULC, who first broached the subject in February 1958. Loeb himself, Manno, still acting for Loeb, and Cymrot, also acting for Loeb, made further approaches in the summer of 1958 by talking respectively with Russ, Ryan (HG Co.'s lawyer), and Shepherd (HG Co.'s comptroller). Finally, on October 21, 1958 Loeb made a written offer to pay $164,800 (that is, par) for HG Co.'s bonds, $308,500 (or $750 a share) for HG Co.'s 411 shares of Class A stock, and $510,000 (or $500 a share) for HG Co.'s 1020 shares of Class B stock, but payments were to be deferred in a way that made the present value of the offer nearer $500,000 than $1,000,000.

[*Other Buyer Sought*]

36. Not wanting to sell to Loeb, Russ promptly informed Parry and, in effect, said that the stockholders would be forced to sell to Loeb unless other financing was available. Parry explored the financial situation of HG Co. with its comptroller, Shepherd, who expressed the opinion that if the company could get $200,000 it "could perhaps succeed in getting into the black." Promptly Parry informed Lucey of *The Lawrence Eagle Tribune* and Lucey repeated the information to Lawlor of The Lowell Sun. As a consequence of these preliminary explorations Parry invited some New England publishers or their representatives to meet at the Lanam Club in Andover on October 31, 1958.

37. At this first meeting were Parry, Shepherd, Lucey, Lawlor, Bacigalupo, attorney for Eagle Tribune Publishing Co., Dwight of *The Holyoke Transcript-Telegram*, Weld of Essex County Newspapers Inc., and Wright of Milford Daily News Co. Either in inviting persons to the meeting or at the meeting Parry told of the Loeb offer and of HG Co.'s wish to borrow money on mortgages. Parry did not say much, if anything, about the history of the rivalry between the *Journal* and the *Gazette*, as every invitee knew the story and the principal *dramatis personae*. Lawlor expressed, what was perhaps not a unique opinion in the group, the view that Loeb

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was "an able publisher" and a "resourceful rogue".

38. This first meeting began with Shepherd's financial analysis of HG Co. and with talk about a secured loan to HG Co. However, the discussion of a loan was abandoned after the arrival of Ryan, who, as attorney for Mrs. Muriel Russ, HG Co's principal stockholder, stated that she would not favor HG Co.'s borrowing further sums but that she wanted to sell her HG Co. stock. At this point Parry, Shepherd, and Ryan withdrew from the meeting. Then Bacigalupo came from the meeting with a proposal that the group would pay $50,000 at once as a down payment. Ryan promptly rejected that offer, and the meeting broke up when "everything was completely up in the air."

39. Subsequently Ryan indicated "that if the offer from the group were to match approximately the offer from plaintiff . . . it would be satisfactory." Lucey estimated that any purchasing group would have to make a down payment of $400,000 to buy all the stock of HG Co. With this figure in mind, $60,000 each was tentatively pledged by the publishers of *The Lawrence Eagle Tribune, The Lowell Sun,* and *The Burlington Free Press;* $10,000 by the publisher of *The Holyoke Transcript-Telegram,* and $6,000 by Weld whose company published *The Gloucester Times* and *The Newburyport News.* Parry then prepared a list of about 50 publishers and the amounts he hoped each would subscribe to a joint venture to purchase HG Co. stock.

40. When Parry called these 50 prospects, he told them in substance, that he "was investigating the possibility of a group getting together and investing money to purchase *The Haverhill Gazette;* that the *Gazette* was for sale; . . . that the *Gazette* owners had an offer from Loeb, and they were not particularly interested in selling to Loeb, and it certainly would be as a last resort; . . . [he] probably discussed the possibilities . . . for experimental training, experimental purposes for training junior executives." Parry told most persons he called details of the finances of HG Co. or at least the names of other publishers who had examined HG Co.'s finances and had then decided to invest. Parry told some persons that "if Loeb succeeded in Haverhill, that then he and the union might get together and come into their territories."

41. Those who responded favorably to Parry's call assembled at a second meeting at the Lanam Club in Andover, this time probably on Monday, November 10, 1958. At the second meeting were all, except Bacigalupo, who had attended the first meeting: that is, Parry, Shepherd, Lucey, Lawlor, Dwight, Weld, Wright, and Ryan. Also present were John H. Costello, president of Lowell Sun Publishing Co., that company's attorneys Frank H. Goldman and Robert H. Goldman, Sidney R. Cook, the comptroller of the Republican Publishing Co. of Springfield, Massachusetts, James D. Ewing, publisher of *The Keene* (N. H.) *Evening Sentinel,* Charles A. Fuller, president of Enterprise Publishing Co. of Brockton, Massachusetts, Mrs. Margaret Hartford, vice president of Herald Publishing Co. which publishes *The Portsmouth* (N. H.) *Herald,* and Walter C. Paine, publisher of *The Valley News of Lebanon* (N. H.).

42. There was no chairman of this second meeting. Inasmuch as before the meeting began approximately $377,000 had been tentatively subscribed by those present. It was hardly necessary to retell the entire story of the Haverhill situation. In the open meeting Shepherd did review the financial, advertising, and circulation figures; there was discussion of the Loeb offer which by then had expired; there were varying estimates as to how long it would be before the *Gazette* would reach a break-even point, which some thought would happen when its circulation topped 15,000; there were loose estimates as to how long the *Journal* would be able to survive if the *Gazette* held out and increased in circulation; and there was scrutiny of the general financial prospects. Unquestionably the general atmosphere reflected the participants' unanimous opinion that in the Haverhill situation only one quality newspaper could make a profit, and also reflected the participants' unanimous hope that the *Gazette* would be that one quality newspaper which would be profitable. Also it is clear that in asides during the course of the meeting, and probably in casual talk across the conference table, some persons expressed strong distaste for what they regarded as the predatory, unfair, and unethical competitive methods of Loeb. Reference was certainly made to Loeb's relations with unions, to the timing of ULC's entry into Haverhill, to the throwaways published by ULC, to the *Journal's* adver-

tising rates, and to the possibility "that if he was successful here he could use the same tactics in other places," as Parry observed.

43. It having become apparent that so large and loosely conducted a meeting could not make a firm contract, the group delegated the making of the contract to a committee of Costello, Cook, Fuller, Weld, and Irving E. Rogers, president of the company that published *The Lawrence Eagle Tribune.*

[*Publishers' Formation of Holding Company*]

44. That committee caused the organization of NNE as a Massachusetts corporation about December 10, 1958. Stock in that corporation was purchased at $25 per share by the following subscribers:

Name of Stockholder	No. of Shares
1. Bangor Publishing Company	250
2. Eagle Publishing Company	400
3. The Bristol Press Publishing Co.	250
4. Enterprise Publishing Company	500
5. Blair Clark	250
6. Monitor-Patrior Company	400
7. Danbury Publishing Company, Inc.	140
8. Sentinel Printing Company	250
9. William E. Foster	800
10. News Publishing Co. of Framingham, Inc.	200
11. Franklin County Publishing Corp.	100
12. Holyoke Transcript-Telegram Pub. Co., Inc.	400
13. Keene Publishing Corporation	125
14. Walter C. Paine	125
15. Eagle-Tribune Publishing Company	2400
16. Malden Publications, Inc.	80
17. Medford Publications, Inc.	80
18. The Meriden Record Company	100
19. The Middletown Press Publishing Co.	120
20. Telegraph Publishing Company	200
21. Transcript Publishing Association	120
22. Herald Association, Inc.	200
23. Mary E. Gallagher and Sidney R. Cook as joint tenants with rights of survivorship and not as tenants in common	1000
24. The Torrington Printing Co.	250
25. Ward-Griffith Company, Inc.	400
26 Philip S. Weld	250
27. Paul L. Haggerty and J. D. Haggerty, Jr.	100
28. J. Warren McClure	2400
29. H. S. Gere & Sons, Inc.	200
30. Hastings & Sons Publishing Co.	100
31. Lowell Sun Publishing Company	2400
32. Claremont Publishing Company, Inc.	100
33. Muriel Russ	200

With the exception of Claremont Publishing Company, Inc. which bought its shares on December 16, 1958 and Muriel Russ who bought her shares on August 28, 1959, all of the stockholders bought their shares on December 10, 1958.

45. It will be noted that among those who became NNE shareholders were Lowell Sun Publishing Company which publishes the only daily newspaper in Lowell, Eagle-Tribune Publishing Company which publishes the only daily newspaper in Lawrence, Enterprise Publishing Company which publishes the only daily newspaper in Brockton, Sentinel Printing Company which publishes the only daily newspaper in Fitchburg, Eagle Publishing Company which publishes the only daily newspaper in Pittsfield, Holyoke Transcript-Telegram Publishing Co. Inc. which publishes the only daily newspaper in Holyoke, and Philip S. Weld who controls Essex County Newspapers Inc. which publishes the only daily newspapers in Newburyport and Gloucester. Among the other NNE subscribers are many other publishing companies each of which publishes in its own town the only local daily newspaper published there.

[*Purchase of Established Paper*]

46. After December 10, 1958 NNE bought all of the outstanding capital stock of HG Co. for $835,200 subject to unpaid and outstanding debentures of Haverhill Gazette Company amounting to $164,800.

47. After NNE became sole shareholder of HG Co., NNE made loans and received repayments of loans as shown in the following table:

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Name	Amount	Date
Newspapers of New England, Inc.	$ 60,000.00	12/17/58
Newspapers of New England, Inc.	15,000.00	1/ 2/59
Newspapers of New England, Inc.	10,000.00	3/ 7/59
Newspapers of New England, Inc.	10,000.00	4/27/59
Newspapers of New England, Inc.	10,000.00	5/27/59
	$105,000.00	
Repaid	85,000.00	3/17/59
Outstanding	$ 20,000.00	3/17/59
Newspapers of New England, Inc.	10,000.00	6/ 4/59
Newspapers of New England, Inc.	10,000.00	6/26/59
Newspapers of New England, Inc.	10,000.00	7/ 7/59
Newspapers of New England, Inc.	10,000.00	7/27/59
Newspapers of New England, Inc.	5,000.00	8/ 5/59
Newspapers of New England, Inc.	14,000.00	8/27/59
Newspapers of New England, Inc.	10,000.00	8/28/59
Newspapers of New England, Inc.	20,000.00	9/29/59
Total	$109,000.00	

48. At all relevant times in both NNE and HG Co. the president has been Lawlor, the treasurer Lucey, the clerk Weld, and the directors Lawlor, Lucey, Weld, Costello, McClure, Fuller, Rogers, Cook, and Howe. Neither the officers or directors have received compensation from either NNE or HG Co.

[*Summary*]

49. In summary of both what has been already recited and what appears in the record as a whole but has not been expressly recited, the following factual aspects of NNE's purchase of HG Co. shares deserve emphasis:

[*First Offer*]

(a) ULC or Loeb was the first to make an oral proposal and the first to make a firm written offer to buy the HG Co. shares.

[*Invitation to Publishers*]

(b) Those who became NNE shareholders were in effect invited by HG Co. to make a bid for its stock so that shareholders of HG Co. would not be forced to make a sale they did not want to make to Loeb.

[*Purchasers' Motives—Commercial*]

(c) Every NNE shareholder before investing either examined the financial prospects of HG Co. or relied upon the business judgment of newspaper experts who had so examined.

(d) Every NNE shareholder believed that an investment in NNE and thus in HG Co. was a commercially justified investment.

(e) The belief of NNE shareholders that the investment was commercially justified was a reasonable belief. HG Co. had been earning upwards of $100,000 a year; if it secured new funds and new management and if it was not faced with unfair competition it was as of December 1958 reasonable to believe that within a year HG Co. would reach a break-even point and that ultimately it would regain its earlier profitability.

(f) Every NNE shareholder in purchasing acted in part because he believed that the investment was commercially justified.

[*Disapproval of "New" Publisher*]

(g) Many NNE shareholders in purchasing acted in part because, individually, they did not approve of Loeb's tactics in Haverhill which they regarded as predatory, unfair, or unethical. In Lawlor's words, Loeb's "comeuppance" was not an unwelcome prospect.

[*Sympathy with Established Paper*]

(h) Some NNE shareholders in purchasing acted in part because, individually, they

sympathized with the owners of HG Co. and feared lest, as Weld phrased it, they "might at some time be victims of a distress similar or akin to that experienced by the *Gazette.*" But, in acting in Haverhill, each publisher acted strictly *ad hoc.* He did not make or receive, an express or implied, a legal or a moral, commitment with respect to any newspaper situation arising in the future whether the situation was caused by labor unions, competitors, or other circumstances.

[*Acquisition—No Linking with "Hometown" Monopoly Power*]

(i) No NNE shareholder either sought to accomplish, or did accomplish, any general unification of policy or operations between his business and the business of The Haverhill Gazette Co. or between his business and the business of any other NNE shareholder. Indeed the only operational connections between the business of *The Haverhill Gazette* and the business of any NNE shareholder are: first, that individuals may be trained at the *Gazette* as apprentices and thereafter may work for a shareholder in NNE; and second, that at meetings of directors or at meetings of shareholders there may be between NNE shareholders an interchange of information as to newspaper practices and policies. These types of relationship would not exist if the shareholders of NNE were all widows and orphans, or other persons who lacked an occupational connection with the newspaper industry. But while these types of relationship are related to the industry position of NNE shareholders, none of these relationships substantially enhances or affects what is technically known as "the market power" of any NNE shareholder. This may be illustrated by the example of the Lowell Sun Publishing Co. Whatever was its power to control prices and production before NNE was formed has not been appreciably augmented or affected by NNE. Before 1958 *The Lowell Sun* never had any market power in middle-sized cities other than Lowell such as Lawrence or Brockton or Gloucester, and it has acquired none now by investing in NNE. To be sure, it has acquired in Haverhill, and only in Haverhill, some power over prices and production which it did not have before 1958, but such power as it has over prices and production in Haverhill has not been operationally linked with its own power over prices and production in Lowell or with the power of, let us say, Weld in Gloucester. There is no linkage of subscriptions, advertisements, contracts, manufacturing processes, news gathering, or editorial policy. Nor is any such linkage contemplated.

[*No Monopolization*]

50. Thus factually the NNE combination does not operate as a restraint of trade, or a monopolization, or an attempt to monopolize the daily local newspaper market in Haverhill, or the daily local newspaper market in a group of New England cities taken as a whole.

III.

Conclusions of Law and Opinion

[*Charges*]

1. The complaint charges defendants with contracts and combinations in restraint of trade (in violation of § 1 of the Sherman Act), attempts to monopolize and monopolization (in violation of § 2 of the Sherman Act), and acquisition of stock which tends substantially to lessen competition and to create a monopoly (in violation of § 7 of the Clayton Act). The counterclaim charges plaintiff with participation in contracts and combinations in restraint of trade (in violation of § 1 of the Sherman Act), and attempts to monopolize and monopolization (in violation of § 2 of the Sherman Act.)

2. It will be convenient to deal with these charges by considering chronologically developments in Haverhill and by ruling upon the lawfulness of the actions in the order in which they occurred.

[*"Legal Monopoly"*]

3. Before December 1958 ULC published the only local daily newspaper in Manchester and HG Co. published the only local daily newspaper in Haverhill. Yet neither corporation was *then* monopolizing or attempting to monopolize in violation of § 2 of the Sherman Act. To be sure each had what a layman would call a monopoly, but neither had violated the Sherman Act for each had achieved its non-competitive position by methods "honestly industrial" or, as it is sometimes phrased, "by virtue of superior skill, foresight and industry." *United States v. Aluminum Co. of America,* 2nd Cir. [1944-1945 Trade Cases ¶ 57,342], 148 F. (2d) 416, 430; *United States v. United Shoe Machinery Corp.* D. Mass. [1953 Trade

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CASES ¶ 67,436], 110 F. Supp. 295, 297, 341. Cf. *United States v. Du Pont Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 391.

[*Plaintiff's Conduct—Using Legal Monopoly in Second Market*]

4. When ULC entered the Haverhill market it went from a market in which it enjoyed a monopoly into a competitive market. And the first problem which arises is whether it was free to use in the second market the profits it had made in the monopoly market and the printing plant it had established in that market.

5. The governing principle is that one who enjoys a lawful monopoly in one market is free to enter another market but is prohibited from using in that other market what is technically called the "market power" he enjoys in the first market. "Market power" means the power to control prices or production. The principle just stated may be illustrated by two cases: an owner of the only theatre (that is, the so-called monopoly theatre) in a city is permitted to own theatres in other cities where there is competition, but he is not free to make contracts offering in combination the exhibiting facilities of the non-competitive and the competitive theatres, *United States v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100, 106, 107-108; and an owner of a machinery patent (that is, the owner of a monopoly) is permitted to manufacture and supply both the machines covered by the patent and the materials they use, but he is not free to require licensees of his machines to use materials he supplies. *International Salt Co. Inc. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392.

6. In accordance with the principle just stated, one who, like ULC, owns the only newspaper (that is, a so-called monopoly newspaper) in a city is not merely on that account prohibited from using its funds to start a newspaper in another city where there is competition. If all that is involved is the use of money, and if the money is invested with relation to a reasonable expectation of ultimate profit, or, let us say, to promote some political end, or to accomplish some other legitimate purpose and not "*primarily* for the purpose of causing loss of business to another" (Restatement, Torts § 709), the investment is not a tort and ordinarily is not a restraint of trade nor an attempt to monopolize.

[*No Combination Contracts*]

7. But when more than investment is involved, and there is between the monopoly newspaper and the competitive newspaper a combination of operations or contracts a fresh problem arises. In the case of ULC there is no evidence that between its Manchester newspapers and its Haverhill newspaper there were combination contracts covering advertising (cf. *Indiana Farmer's Guide Co. v. Prairie Co.* [1932-1939 TRADE CASES ¶ 55,064], 293 U. S. 268, 273), circulation, news, or features. But it does appear that the Manchester and Haverhill newspapers were printed in the same plant. However, it does not appear that as a result of such combined operations ULC was able to procure for its *Haverhill Journal* newsprint, or other supplies, or printers, or other services at rates lower than HG Co. was able to procure those goods and services for its *Haverhill Gazette.* There is, therefore, no basis for concluding that ULC used to any substantial extent its Manchester market power in Haverhill, or that by operating in Haverhill ULC substantially increased its Manchester market power.

[*Predatory Practices*]

8. Even though there was no substantial increase in ULC's market power by its mere use of its Manchester profits and its Manchester plant to publish in Haverhill the shoppers' throwaway and the daily *Journal,* it does not follow that ULC has not in other ways attempted to monopolize in violation of § 2 of the Sherman Act. In particular, we must consider whether ULC has come within that interpretation of § 2 which prohibits a person (a) who has an intent to exclude competition (b) from using not merely technical restraints of trade, but even predatory practices, unfair methods of competition, or business patterns not honestly industrial—in short, what may loosely be called unfair means. *United States v. Griffith, United States v. United Shoe Machinery Corp.,* both *supra.*

[*Unlawful "Intent"*]

9. While the phrase "intent to exclude", or its equivalent "exclusionary intent", is reiterated in anti-trust cases, it is not easy to define its precise meaning. Contrary to what a layman might suppose, a person does not necessarily have an exclusionary intent merely because he foresees that a

market is only large enough to permit one successful enterprise, and intends that his enterprise shall be that one and that all other enterprises shall fail. If the evidence shows that in laying his plans and executing them he contemplates and utilizes only superior skill, foresight, and industry, he has not an intent which is contrary to law. To prove that a person has that type of exclusionary intent which is condemned in anti-trust cases there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons. Putting the same idea in another way, we may say that there is no sharp distinction between (a) the existence of an intent to exclude and (b) the use of unfair means. In a situation where it is inevitable that only one competitor can survive, the evidence which shows the use, or contemplated use, of unfair means is the very same evidence which shows the existence of an exclusionary intent.

[*Unlawful Group Boycott—Labor Union*]

10. In the case at bar there is in ULC's relations with the union some evidence of ULC's exclusionary intent and of its resort to forbidden restraints of trade. When union representatives and ULC representatives together called upon a merchant, and the union man asked the merchant to boycott the *Gazette* and the ULC man asked the merchant to advertise in the ULC shopper, this was in effect a joint appeal by the union and the ULC to boycott the *Gazette*. Such a group boycott organized by one of two competitors in a market was a *per se* violation of § 1 of the Sherman Act, was conclusive evidence of an intent to exclude competition unlawfully, and proved that ULC attempted to monopolize the market in violation of § 2 of the Sherman Act. *Klor's Inc. v. Broadway-Hale Stores, Inc.* [1959 Trade Cases ¶ 69,316], 359 U. S. 207; *Lorain Journal v. United States* [1950-1951 Trade Cases ¶ 62,957], 342 U. S. 143. Nor was resort to such a group boycott excusable merely because among those participating were union representatives. Cf. *Allen Bradley Co. v. Local No. 3* [1944-1945 Trade Cases ¶ 57,386], 325 U. S. 797.

[*Payment to Local Merchants Unlawful*]

11. More extensive evidence of ULC's exclusionary intent and its resort to forbidden restraints of trade is to be found in ULC's relations with the eight merchants. All of these so-called consultants of ULC held responsible positions with advertisers. None of them had newspaper experience. They were in no sense a cross-section of informed Haverhill opinion. It stretches credulity to suppose that Loeb ever looked upon these eight as the best procurable advisers respecting the running of a newspaper in Haverhill. But whatever was the situation at the outset, later when, following the "slackening" of interest in the eight consultants, Loeb started to pay each of them $50 weekly, and to make the extravagant promises in the July 1958 letter and December 15, 1958 letter, Loeb was making payments and promises in consideration of each individual's services in inducing the enterprise with which he was connected and such other enterprises as he could influence to advertise exclusively in the *Journal* and to refrain from advertising in the *Gazette*.

12. This conduct of Loeb was an encouragement to a group boycott in which each one of the eight consultants acted as a watch-dog with respect to his seven fellows and other advertisers in Haverhill. As has already been noted, such a group boycott by one of two competitors in a narrow market was a restraint of trade in violation of § 1 of the Sherman Act, was conclusive evidence of ULC's exclusionary intent, and was proof of ULC's attempt to monopolize in violation of § 2 of the Sherman Act. *Lorain Journal v. United States, supra.*

13. Moreover, another path of reasoning leads to the same conclusion. ULC's payment to the eight for their solicitation of outsiders to advertise in the *Journal* without disclosing to those outsiders that the eight were not disinterested fellow advertisers as they purported to be, but were paid employees of the *Journal*, was an unfair practice not honestly industrial. It is misleading and immoral for a producer to pay a secret commission to an allegedly disinterested person for boosting the sale of a product which that person recommends under the purported guise of a friend or skilled neutral adviser. The use of such an unfair practice by one of two competitors in a narrow market was not honestly industrial, was evidence of ULC's exclusionary intent, and was proof of ULC's attempt to monopolize in violation of § 2 of the Sherman Act.

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[*Plaintiff's Discriminatory Advertising Rates Unlawful*]

14. Other examples of ULC's exclusionary intent and its use of unfair means are to be found in its discriminatory advertising rates. The most serious discrimination was the allowance to J. M. Fields, the largest local advertiser, of a rate 30 per cent lower than others have been offered. Less serious was the failure to inform every advertiser that it could without extra charge have one try at a color page, or that if it advertised in the November 28, 1958 issue of the *Journal* it could have without additional charge a reprint in a Christmas supplement in December. All these discriminatory rate practices demand condemnation. Every discrimination which is not based upon some explicable economic difference, such as economy traceable to quantity purchases, is *ex hypothesi* dictated by some ulterior motive. Where the party giving the discriminatory benefit is in a very narrow market and has in other aspects revealed a monopolistic intent it is necessary to conclude that the discrimination was given with an exclusionary intent, even though the beneficiary of the discrimination did not promise to reduce or eliminate such business as it was doing with a competitor of the donor of the discrimination. Where rate cards have been published, the very giving of a special unpublicized benefit literally means that the newspaper is not playing above board though it purports to do so. Its competitor and the public are both being told half truths. It cannot be claimed that to use against a competitor a rate which is omitted from a publicly announced rate schedule and which is not universally available to customers is to seek success solely by ability, foresight, and industry.

[*Discrimination as Attempt to Monopolize*]

15. In short, where two newspapers are struggling for survival in a market where only one can succeed, and both publicly announce the advertising rates they will follow, if either party departs from the publicly announced rate by giving secret discriminatory benefits to some advertisers, *prima facie* that party has evinced an exclusionary intent, has resorted to a practice not honestly industrial, and has attempted to monopolize in violation of § 2 of the Sherman Act. If there is anything to the contrary in *United States v. Kansas City Star Co.*, W. D. Mo., 1954 Trade Cases ¶ 67,683 or *Scott Publishing Co. v. Columbia Basin Pub. Inc.* [1959 Trade Cases ¶ 69,589], W. D. Wash., Dec. 4, 1959, this Court respectfully declines to follow those authorities. For this Court takes the view that when an enterprise having substantial market power engages in a discrimination not justified by normal economic considerations it is *prima facie* seeking to achieve control of the market by a method at least as objectionable as those condemned in *U. S. v. United Shoe Machinery Corp., supra.*

[*Attempt to Buy Sole Competitor Not Unlawful*]

16. Another set of activities which require scrutiny are Loeb's attempts to buy all the stock of HG Co. In view of Loeb's control, through ownership or otherwise, of all the ULC stock, Loeb's offers to purchase may be attributed to ULC. Thus we have in effect a situation where one of the only two competing newspapers in a city offers to buy out the stock of the other. If this were a city in which at least two newspapers could economically survive, the offer to purchase would be an attempt to monopolize. Cf. *U. S. v. Aluminum Corp.* [*supra*]. It would not be a victory won by skill, foresight, and industry. But the situation is different where a city can accommodate only one successful newspaper, and two roughly equally able companies are competing for the single prize that is available. Skill, foresight, and industry by themselves will not give either company the victory. In addition what is required is the capacity to withstand losses. There is nothing more noble, nor more reflective of superior ability, in winning the victory by paying a large price in installments of monthly losses than by paying a large price in one lump sum payment to take over the competitor. Under the very extraordinary circumstances of this case it would have been permissible for ULC or Loeb to pay a reasonable price for the stock of HG Co. because though it would have appeared to lessen competition it would not have done so substantially; it merely would have somewhat shortened the time within which competition could continue.

[*Defendant's Illegal Discrimination—Intent to Monopolize*]

17. Having discussed ULC's conduct, we now turn to defendants' conduct. The first matter to be reviewed is the activities of HG Co. during the fall of 1958 in departing from its publicly announced advertising rates by giving secret discriminatory benefits to some advertisers. Undoubtedly in giving these discriminatory benefits, HG Co. was acting only after it had been put in peril of insolvency in the equity sense as a result of ULC's attempt to monopolize. HG Co., therefore argues in the language of Justice Clark in *Times-Picayune v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, 623 that ULC's conduct serves to "illuminate" HG Co.'s intent. HG Co. contends that it had no intent to monopolize; it merely was trying to survive in the face of an unlawful attack. The claim is that even if secret discrimination is *prima facie* a badge of an attempt to monopolize, here the *prima facie* case has been overcome when one recognizes the setting and the necessity of retaliation as self-defense.

18. The foregoing argument is not without appeal. Admittedly the provocation to retaliate was great, the total number of discriminations was not shown to be large, the period of the discrimination was short, and paragraph 16 of plaintiff's complaint does not point a finger with praiseworthy clarity at this evil practice. Yet there can be no question that there was discrimination, that it was capricious, that it was secret, that it belied the public rate card, and that it cannot be excused on the plea that the discriminatory offers made by HG Co. merely matched offers made by ULC. Such a practice was certainly not honestly industrial. (See conclusions 14 and 15, above.) Moreover, it is a practice which is not to be excused because comparable practices were indulged in by plaintiff. See *Moore v. Mead Service Co.*, 10th Cir. [1950-1951 TRADE CASES ¶ 62,876], 190 F. (2d) 540, 541 approved in footnote 1 of *Moore v. Mead's Fine Bread Co.* [1954 TRADE CASES ¶ 67,906], 348 U. S. 115, 116. Cf. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211. Nor, on the ground that the motive was to retaliate or defend against ULC's illegal conduct, can the practice be regarded as merely a restraint of trade of doubtful validity rather than as an attempt to monopolize. This distinction is unacceptable because having about fifty per cent of the market, and knowing that the market would not permit two contestants to survive, HG Co.'s resort to any unfair practice, and its failure to confine itself to exercise of skill, foresight, and industry, compels a conclusion that HG Co. had an exclusionary intent and had attempted to monopolize the market in violation of § 2 of the Sherman Act. (See conclusion 9, above.) Nor can HG Co. escape an adverse decree on the ground that on February 1, 1959 its new management ended the discrimination. This reform came after this suit was brought on January 13, 1959. Plaintiff is entitled to be sure that the reform is not merely temporary.

[*Rate Reductions Not Unlawful*]

19. The next question is whether it was indicative of an attempt to monopolize for HG Co. publicly to reduce its rates on February 1, 1959 at a time when it was losing money. Plaintiff's position seems to be either that no reduction was proper, or that the over-all reduction was too substantial, or that reduction in some categories was so much greater than in others that the rate reduction was discriminatory as between publicly announced classes of rates. Nothing in the record supports the last branch of this contention, that is, the suggestion that there was an invidious discrimination between two or more publicly announced rates. And as to the first branches of the contention, a sufficient answer is that it is not unlawful in a market which permits of only one successful competitor, but where two competitors are each struggling at a loss, for one of the competitors to reduce its prices, at least in the absence of a showing that such reduction results in such terrific losses that it is beyond reasonable hope that they can be recovered even in the long future. Had the losses been so extravagant as to be unrecoverable it might be persuasively argued that the object of the reduction was not to capture the market for its possible profit value to the one foreseeable successful competitor, but was rather to inflict injury on a rival regardless of the expectation of ultimate profit. But those are not the facts in the case at bar. Here the effect of the reduction of February 1, 1959 has not been to increase but to diminish HG Co.'s losses.

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[*Stock Acquisition—Sherman and Clayton Acts*]

20. We now come to what is the most important issue in this case—the lawfulness of the defendants' action in organizing NNE and purchasing stock in it so that NNE could buy stock in, and make advances to, HG Co.

[*Motives—Commercial Justification*]

21. The findings of fact have explicitly recited (a) that each of those who invested in NNE "acted in part because he believed that . . . investment in NNE was . . . commercially justified", and "the belief . . . was a reasonable belief"; (b) that there is not between any newspaper owned by any NNE shareholder and the newspaper owned (indirectly) by NNE, or between any newspaper owned by any NNE shareholder and any newspaper owned by another NNE shareholder any "linkage of subscriptions, advertisements, contracts, manufacturing processes, news gathering or editorial policy. Nor is any such linkage contemplated"; and (c) none of the relationships which NNE created "substantially affects what is technically known as 'the market power' of any NNE shareholder."

[*Effect on Competition*]

22. The very principle which permitted ULC to use its funds and its Manchester plant to establish *The Haverhill Journal* (see conclusions 5 to 7 above) would seem to permit the NNE shareholders to use their funds to buy indirectly *The Haverhill Gazette*. Both ULC and the NNE investors had a commercial basis for their decisions. Both avoided substantial operational agreements between their Haverhill and their non-Haverhill enterprises. Neither ULC nor any NNE investor in any substantial way (a) used its non-Haverhill market power within Haverhill or (b) used its Haverhill investment to increase its market power outside of Haverhill. Thus the case at bar seems to be precisely the one envisaged by Professors Carl Kaysen and David F. Turner, in *Anti-Trust Policy, An Economic and Legal Analysis*, Harvard University Press, 1959 pp. 138-139

> "We would deem the following joint ventures to be presumptively lawful . . . (b) any case in which there is no close relation between the product of the venture and any of the products of the participants . . . Jointness creates no additional risk of market power spreading from one market to another, apart from the pooling of financial resources; and there would be no risk of interrelated price and output decisions as between the venture and the joint venturers."

[*Desire to "Thwart" Competitor*]

23. But plaintiff suggests that it makes a difference that many NNE shareholders acted because they did not approve of Loeb's tactics. There is no basis for concluding that this motive was primary in any shareholder's decision to subscribe to NNE. And it does not constitute a violation of § 1 or § 2 of the Sherman Act for a person to make a commercially justified investment in an enterprise in a way that does not substantially increase his market power if he has both a purpose to make money and a purpose to preclude another from capturing a market. As has already been explained in conclusion 9, the Sherman Act permits a person to have an intent to exclude another from the market if this intent is accomplished without resort to predatory or unfair practices. In a commercial competition, fairly fought, with the making of money a principal object, a contestant is not to be condemned for his anticipated pleasure in seeing the tactics of his opponent thwarted.

> "One who engages in a business does so for the purpose, broadly, of deriving personal satisfactions of some kind from his conduct. If he engages in the business in good faith, intending to remain in it indefinitely or until a more profitable course presents itself, he is not subject to liability even though one of the satisfactions which it is his purpose to derive in the causing of harm to the business of another."

Restatement, Torts, § 709, comment c. The law allows other joys in business life beside making money.

[*"Hometown" Monopolies Immaterial*]

24. Plaintiff also suggests that it makes a difference that here we have an investment made by a combination of persons most of whom have in their home markets a so-called monopoly position. But, as the quotation from Professors Kaysen and Turner recited in conclusion 22 emphasizes, the question is not whether in some market somewhere each of a group of persons has a monopoly or other substantial market power, the question is whether they have in

some way combined that market power. Here there is no evidence of interlacing of policies, practices or operations of NNE stockholders *inter se* or with HG Co. Each runs a wholly separate enterprise. Each is king in its own city. None has joined an imperial federation holding sway in New England.

[*"Mutual Defense Association"*]

25. Finally plaintiff contends that defendants have formed a combination to exclude it and perhaps others from buying any local daily newspaper in any of the cities in which NNE has stockholders. The claim is that what we have here in an incipient mutual defense association. The argument is that those who solicited investment in NNE gave as one of the reasons for investment that "if Loeb succeeded in Haverhill . . . then he . . . might . . . come into their territories"; and that some of those who invested feared lest they "might at some time be victims of a distress similar or akin to that experienced by The Gazette". But the answer to the argument is that there is no express agreement and, as the findings indicate, there is no adequate basis for inferring an implied agreement, either that some or all of the NNE investors will join in similar ventures in the future if help is needed, or that they will join to preclude plaintiff from buying any New England newspaper except *The Haverhill Gazette*. There is no large capital to purchase newspapers or to serve as a defense fund. In the common pot there is hardly enough to carry on the Haverhill venture. There is at most a corporate shell NNE Inc., with no formidable weapons concealed behind the imposing facade of its name. If disaster strikes some NNE shareholder, there is no basis for predicting what will happen. Perhaps if there is a victim he will cite the Haverhill precedent. But a precedent is not a promise. Cash contributions to invest in Haverhill do not warrant a conclusion of a combination or conspiracy to act elsewhere.

[*Acquisition Not Unlawful*]

26. From what has been said it follows that the formation and organization of NNE, the subscription to the stock of NNE, the NNE purchase of HG Co. stock, and the advances by NNE to HG Co. (even though such actions were taken with an awareness that ULC could probably be forced out of the Haverhill market, with the motive of thwarting Loeb's tactics, and with the effect of precluding him from acquiring the stock of HG Co.) did not involve (a) a combination or contract in restraint of trade, nor (b) a monopolization or attempt to monopolize the Haverhill market, nor (c) a monopolization or attempt to monopolize some supposed regional market composed of local daily newspapers in a number of New England cities looked at as though they were in some sense a unity, nor (1) any acquisition which had the effect of substantially lessening competition or had the tendency to create a monopoly. The formation, organization, and functioning of NNE did not involve NNE or those who became officers or stockholders in any violation of § 1 or § 2 of the Sherman Act, or § 7 of the Clayton Act.

Partial Final Decree

[*Practices Enjoined*]

This cause having come on to be heard, and the Court having fully considered the evidence and the arguments, and having filed its Findings of Fact, Conclusions of Law, and Opinion, it is hereby:

Ordered, Adjudged, and Decreed that:

1. The complaint is dismissed on the merits againsts Newspapers of New England, Inc., Lowell Sun Publishing Co., Eagle Tribune Publishing Co., Enterprise Publishing Co., Essex County Newspapers Inc., Sentinel Printing Co., Eagle Publishing Co., Holyoke Transcript-Telegram Pub. Co., Inc., Republican Publishing Co., John H. Costello, Irving E. Rogers, J. Warren McClure, William F. Lucey, Frank A. Lawlor, Philip S. Weld, David W. Howe, Sidney R. Cook, William Dwight, Donald B. Miller, and George H. Goodbeer.

[*Discriminatory Advertising Rates Enjoined —Both Papers*]

2. The Haverhill Gazette Co. shall not make or collect any charge for advertising in *The Haverhill Gazette* except in strict conformity with a publicly announced rate schedule. The corporation shall be free to vary the schedule from time to time. But to be effective an advertising schedule shall set forth *every* aspect of the rates, including, for example, the classification of types of advertising and of advertisers, the basic charges, discounts for volume, discounts

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for prompt payment, discounts for repetitions of an advertisement, and all types of special benefit available. For the purposes of this paragraph a rate schedule shall be regarded as publicly announced when, alternatively, it is published in *The Haverhill Gazette, or* it is posted in a conspicuous place in the offices of The Haverhill Gazette Co. and is available upon demand by any person who indicates the possibility that he will advertise in or compete with The Haverhill Gazette Co.

3. Union Leader Corporation shall not make or collect any charge for advertising in *The Haverhill Journal* except in strict conformity with a publicly announced rate schedule. The corporation shall be free to vary the schedule from time to time. But to be effective an advertising schedule shall set forth *every* aspect of the rates, including, for example, the classification of types of advertising and of advertisers, the basic charges, discounts for volume, discounts for prompt payment, discounts for repetitions of an advertisement, and all types of special benefit available. For the purposes of this paragraph a rate schedule shall be regarded as publicly announced when, alternatively, it is published in *The Haverhill Journal, or* it is posted in a conspicuous place in the offices of *The Haverhill Journal* and is available upon demand by any person who indicates the possibility that he will advertise in or compete with *The Haverhill Journal.*

[*Plaintiff's Use of Secret Advertising Solicitors Enjoined*]

4. Union Leader Corporation shall not make to any person whose principal occupation is that of officer, director, partner, employee, or associate of an enterprise that does advertise in *The Haverhill Journal* any payment for that person's services as a newspaper consultant, or advertising solicitor, or their equivalent unless the person so paid is shown to be by experience and like qualifications a bona fide newspaper consultant, advertising solicitor, or their equivalent, and unless the Union Leader Corporation instructs that person to declare his employment by Union Leader Corporation when that person directly or indirectly solicits advertising for *The Haverhill Journal.*

5. Union Leader Corporation is ordered not to perform any contract it now has with Martin Bendetson, Norris Bendetson, Jerome Fishbein, David M. Gordon, Vincent W. Grad, Irving P. Karelis, Sidney Katz, and Eli Shoreman. Union Leader Corporation is directed not to retain as an officer William Loeb if hereafter he makes to any of the persons listed any payments similar to the payments of $50 weekly made to each of those persons since May 1958, or if hereafter he performs the contracts of December 15, 1958 which he made with each of those persons, or if hereafter he makes to any person whose principal occupation is that of officer, director, partner, employee, or associate of an enterprise that does advertise in *The Haverhill Journal* any payment for that person's services as a newspaper consultant, or advertising solicitor, or their equivalent. The phrasing of this paragraph is due solely to the facts that neither Loeb nor any of the other individuals named is a party to this case, and that therefore this Court must direct its order to Union Leader Corporation which is a party. There is no implied suggestion that Loeb and the others will not voluntarily abandon their relationship once the invalidity of their agreements has been judicially declared.

[*Order for Detailed Statement of Claimed Damages—Both Parties*]

6. Union Leader shall prepare as promptly as possible a detailed schedule (with appropriate references to the transcript of this case, the exhibits introduced, those records of its own affairs and of The Haverhill Gazette Co. which were examined before trial in this case, and other relevant sources) showing the precise damages which it claims it suffered from such discriminations in advertising charges as have been practiced by The Haverhill Gazette Co. If, in the light of the opinion in this case, any other types of damages are recoverable they may also be listed on the schedule. Items of damage not clearly revealed by the schedule shall be regarded as barred in the same manner as claims not made at a pre-trial are frequently barred.

7. The Haverhill Gazette Company shall prepare as promptly as possible a detailed schedule (with appropriate references to the transcript of this case, the exhibits introduced, those records of its own affairs and of Union Leader Corporation which were examined before trial in this case and other relevant sources) showing the precise damages which it claims it suffered from (a) the Union Leader Corporation's actions

in inducing advertisers to boycott *The Haverhill Gazette,* (b) the illegal employment by Union Leader Corporation of Martin Bendetson, Norris Bendetson, Jerome Fishbein, David M. Gordon, Vincent W. Grad, Irving P. Karelis, Sidney Katz, and Eli Shoreman, and (c) such discriminations in advertising charges as have been practiced by Union Leader Corporation in the operation of *The Haverhill Journal.* If in the light of the opinion in this case, any other types of damages are recoverable they may also be listed on the schedule. Items of damage not clearly revealed by the schedule shall be regarded as barred in the same manner as claims not made at a pre-trial are frequently barred.

[*Attempts to Monopolize Enjoined*]

8. The Haverhill Gazette Company shall refrain from attempting in any way to monopolize the market in Haverhill for daily local newspapers of high quality.

9. Union Leader Corporation shall refrain from attempting in any way to monopolize the market in Haverhill for daily local newspapers of high quality.

[*Certain Other Relief Denied*]

10. Except for (1) the possible recovery of damages to be claimed by the schedules in paragraphs 6 and 7, (2) the trebling of such damages, and (3) attorneys' fees, all other relief sought by either the complaint or the counterclaim is denied.

[*"Certification" for Appeal*]

11. Pursuant to Rule 54 of the Federal Rules of Civil Procedure, this Court expressly determines that there is no just reason for delay in entering final judgments on the following claims:

(a) The claims against all defendants specified in paragraph 1 of this Order;

(b) all claims for injunctive and declaratory relief against The Haverhill Gazette Co.;

(c) all claims for injunctive and declaratory relief against Union Leader Corporation.

Pursuant to those determinations, this Court enters final judgments with respect to paragraphs 1, 2, 3, 4, 5, 8, 9, 10, and 11 of this Order, but reserves the damage claims referred to in paragraphs 6 and 7. However, if an appellate court should regard these orders not as final but as interlocutory, and if the parties would not have the benefit of the appeals available under 28 U. S. C. § 1292(a)(1), this Court, in accordance with 28 U. S. C. § 1292(b), is of the opinion that the orders in paragraphs 1, 2, 3, 4, 5, 8, 9, 10, and 11 involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

[*Jurisdiction Retained*]

12. Jurisdiction of this cause is retained for the purpose of enabling any party to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this decree.

[*Effective Date*]

13. This decree shall take effect one week after its entry unless before then its enforcement is superseded by an appellate court.

[¶ 69,589] Scott Publishing Co., Inc. v. Columbia Basin Publishers, Inc.; Howard Parish and Associates, Inc.; Howard W. Parish; James M. Bryce; Kennewick-Pasco Typographical Union No. 831; Unitypo, Inc.; International Typographical Union; Woodruff Randolph; Don Hurd; Walter D. Marvick; Charles M. Lyon; Harold H. Clark; Joe Bailey; Francis E. McGlothlin; A. L. Wilie; Seattle Typographical Union No. 202; and Allied Printing Trades Council of Seattle.

In the United States District Court for the Western District of Washington, Northern Division. No. 4030. Filed December 4, 1959.

Sherman and Clayton Antitrust Acts and Robinson-Patman Act

Combinations and Conspiracies—Monopolies—Newspaper's Alleged Conspiracy to Drive Rival Out of Business—Cooperation and Aid of Printers' Union—Unlawful Intent Required in Absence of Actual Restraint or Monopolization.—While "intent" is immaterial or may be inferred where there is an actual restraint of trade or an actual monopoly, a

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specific intent to restrain or monopolize trade must accompany the acts complained of if no actual restraint or monopoly has resulted from those acts. Thus, there was no violation of Section 1 or 2 of the Sherman Act where an established newspaper, in an action charging a rival paper and a printers' union with conspiring to monopolize the market on behalf of the rival paper, failed to show an actual restraint or monopoly and, further, failed to show the requisite unlawful intent to restrain or monopolize the local newspaper business. The established paper relied upon a number of circumstances to establish the existence of a conspiracy and an unlawful intent on the part of the defendants, including the fact that (1) a strike or lockout was in progress at its paper, (2) the rival paper started daily publication at the beginning of the strike or lockout, (3) the rival paper came to terms with the union and contracted to pay higher wages at a time when it was losing money, and (4) the union urged local merchants not to advertise in the established paper, "cooperated" with the rival paper, assisted that paper financially, and later actually took over the publication of that paper. The rival paper and the union cooperated, however, "not with the common objective of eliminating [the established paper] from the field, but each with its own separate purpose."

Further, there were other circumstances that were inconsistent with any intent to monopolize, namely, the fact that (1) the rival paper attempted to "sell out" to the established paper, (2) the union periodically offered to resume negotiations with the established paper, (3) the union, in giving financial support to the rival paper, merely made up that paper's deficits over a period of nearly nine years, instead of financing immediate rate cuts by the rival paper that would have made it impossible for the established paper to compete, and (4) the union never offered to finance the outright purchase of the established paper.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.660; Monopolies, Vol. 1, ¶ 2515.40, 2610.

Monopolies—Attempt to Monopolize—Practices as Evidence of Unlawful Purpose—Newspapers' Reduction of Advertising Rates to Larger Advertisers—Price Discrimination Under Robinson-Patman Act, Section 2(a)—Exclusive Dealing Under Clayton Act, Section 3.—A newspaper publisher, in its rivalry with a local established paper, did not use its advertising rates as a means of achieving a monopoly, did not engage in any price discrimination that injured competition in violation of Section 2(a) of the Robinson-Patman Act, and did not sell advertising or fix rates under an agreement that the purchaser would refrain from advertising in the established paper ("exclusive dealing" under Section 3 of the Clayton Act). The practices complained of included (1) sales below published rates; (2) combining sales in a daily paper with sales in a weekly advertising edition, (3) agreements giving the area's largest advertiser free advertising in that weekly advertising edition, and (4) "double billing" in connection with "national cooperative" advertising (issuing a second and larger bill which local advertisers used to secure more reimbursement from national manufacturers or distributors of the advertised product). However, none of the rates were unreasonably low as compared with the rates charged by the established paper. Further, after revising its initially unrealistic rates, the rival paper's only sales at lower rates were made to advertisers using more than the maximum space shown on the "rate card," and those reductions were "relatively the same based on inches used" (the use of more inches of advertising space reduces the rate per inch).

Almost all of those devices, including the giving of more favorable rates to larger advertisers, were also used by the established paper. In addition, the latter gave rebates to advertisers and paid commissions to local advertising agencies on display advertising. The court noted that it was mentioning the established paper's own practices "not because these practices would constitute a defense to [the rival's] practices if they constituted a violation of law, but merely to point up the fact that . . . whatever was done by either party in that struggle was done for the purpose of competing and not pursuant to a conspiracy to monopolize."

See Monopolies, Vol. 1, ¶ 2515.40, 2610.280; Price Discrimination, Vol. 1, ¶ 3506.660, 3508; Exclusive Dealing, Vol. 1, ¶ 4009.235.

Monopolies—Conspiracy to Monopolize—Newspaper's Entry into "Monopoly Newspaper's" Market—Knowledge That Success Might Drive Out Established Paper as Evidence of Unlawful Intent.—The establishment of a newspaper in an area where a "monopoly" paper is being published is not evidence of a conspiracy to violate the antitrust laws. A holding to that effect would thwart the very purpose of those laws and turn them into instruments for the protection of monopolies. Thus, a newspaper publisher did not violate the antitrust laws by starting a paper in an area where another paper was already established. It must have occurred to the new publisher that, if he was successful in establishing his paper in the area, the result might be that the established paper would be forced out of business. However, that is a natural, everyday occurrence. Thus, the new publisher's statement that the established publishers would end up by having to sell their paper to him "at 5 cents on the dollar" did not indicate a purpose to create a monopoly, but was simply his prediction as to the result of the competition between them.

See Monopolies, Vol. 1, ¶ 2515.40.

Combinations and Conspiracies—Monopolies—Conspiracy to Restrain and Monopolize Local Newspaper Business—Proof of Conspiracy—Absence of Direct Evidence—Circumstantial Evidence.—Direct evidence of a conspiracy is not needed to show a violation of Sections 1 or 2 of the Sherman Act. However, where the circumstances relied upon are not only consistent with the conspiracy theory, but are also consistent with other and lawful purposes, then there is no violation. Thus, there was no violation where a newspaper, in trying to prove that a rival paper and a printers' union had conspired to restrain and monopolize the local newspaper business, relied upon circumstances that were equally consistent with "proper, legal, independent purposes and intentions" on the part of the rival paper and the union.

See Combinations and Conspiracies, Vol. 1, ¶ 2005.355; Monopolies, Vol. 1, ¶ 2520.30.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Interstate Commerce—Newspaper Business.—A Washington newspaper publisher was engaged in interstate commerce because (1) it purchased newsprint from sources outside the state, (2) national and international news was gathered and disseminated, (3) national advertising was sold and published, and (4) the paper was distributed by mail and other means outside the state.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.350.

Private Enforcement and Procedure—Suit for Civil Damages—Necessary Averments to State Cause of Action—Causal Relation Between Plaintiff's Injuries and Acts Complained of—Newspaper Rivalry.—A newspaper publisher, in a treble damage action charging a rival paper and a printers' union with conspiring to monopolize the local newspaper business on behalf of the rival paper, failed to show that any "slowing of its growth" was due to any conspiracy on the part of the defendants to drive it out of business and create a monopoly. Losses in advertising and circulation revenue were due to a strike or lockout occasioned by its wage dispute with the union and, also, to the competition afforded by the rival paper (which had suffered worse financial difficulties). At any rate, the plaintiff newspaper had been and continued to be the dominant paper in the area.

See Private Enforcement and Procedure, Vol. 2, ¶ 9009.600.

For the plaintiff: Carl A. Jonson (Johnson, Jonson & Inslee, Seattle, Wash.) and Howard M. Downs and Robert D. Raven (Morrison, Foerster, Holloway, Shuman & Clark, San Francisco, Calif.).

For the defendants: Joseph A. Barto (Lundin, Barto and Goucher, Seattle, Wash.) for Columbia Basin Publishers, Inc., Howard Parish and Associates, Inc., Howard W. Parish and James M. Bryce; Alfred J. Schweppe, Marion A. Marquis, and Fredric C. Tausend (McMicken, Rupp & Schweppe, Seattle, Wash.) for remaining defendants; and Sidney Dickstein (Dickstein, Shapiro & Galligan, New York, N. Y.) also appeared for International Typographical Union and Unitypo, Inc.

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Opinion

[*Treble Damage Action—"Fact" Case*]

W. D. MURRAY, District Judge [*In full text*]: The action was commenced in 1955. Defendants, in addition to those presently remaining in the case, were brought in and subsequently dismissed. Extensive pre-trial discovery procedures were undertaken by both sides. The trial commenced before the Court, sitting without a jury, on September 8, 1959, and consumed two months. A record of over 7,300 typewritten pages was compiled and over 500 exhibits were marked in evidence. During the trial much of the evidence was received over objection on reserved rulings, and several questions of law were presented. However, in considering the case after all the evidence was in and after able arguments by counsel for all parties, the Court has concluded that the case involves essentially a determination of the factual issues presented, and when that determination has been made, as it has, the law questions pass out of the case. In making the determination the Court has considered all of the evidence, including that which was received on reserved rulings.

[*Charge*]

Plaintiff brought this action under Sections 15 and 26, Title 15, U. S. C. A., charging defendants with combining and conspiring together for the purpose of destroying and driving out of business the *Tri-City Herald,* a daily newspaper published by plaintiff in the Tri-City area of the State of Washington, in order to create a monopoly for the *Columbia Basin News* in the daily newspaper business in that area, in violation of the anti-trust laws, and specifically Sections 1, 2, 13, 14 of Title 15, U. S. C.

[*Parties*]

Scott Publishing Company, the plaintiff herein, is a corporation organized under the laws of the State of Washington, on September 17, 1947, and since November, 1947, has been and still is engaged in the business of publishing the *Tri-City Herald,* a daily evening newspaper at Kennewick, Washington, and distributing such newspaper throughout the Tri-City area, as that area will be hereinafter more specifically referred to and described.

[*Interstate Commerce*]

In the publication of the *Tri-City Herald,* Scott Publishing Company is engaged in interstate commerce. Newsprint is purchased from sources outside the State of Washington, national and international news is gathered and disseminated; national as well as local advertising is sold and published, and the *Herald* is distributed by mail and other means outside of the State of Washington.

[*Background of Plaintiff*]

The principal founders, officers and stockholders of Scott Publishing Company are Robert F. Philip, who has been president of the corporation since its formation, and Glenn C. Lee, who has been Secretary-Treasurer since the inception of the corporation. Glenn C. Lee has been publisher of the *Tri-City Herald* and Philip has assisted in its management. Lee and Philip, though experienced businessmen in other fields, had no experience in the newspaper publishing business prior to their entering that field in the Tri-City area.

The Tri-City area conissts of the cities of Kennewick and Richland in Benton County, Washington, and the City of Pasco in Franklin County, Washington, and the area surrounding those three cities. Formerly Pasco and Kennewick were small farming communities on the Columbia River, and Richland was non-existent, but with the end of World War II and the advent of atomic energy, the Hanford Atomic Works was constructed and Richland was established on government land with government owned houses and buildings to house the workers at the Atomic Energy plant. In the fall of 1947, McNary Dam was constructed on the Columbia River at a point some 14 miles from Kennewick and additional dams were planned for the development of the Columbia Basin. Public power was available in the area and irrigation projects were established, all of which led to a substantial growth of the area in population and economic activity. By 1947, there was a population of around 50,000 in the Tri-City area, and its future economic potential seemed very great.

In 1947, Lee and Philip, who were then in the import-export business, became aware of the Tri-City area and its potential for future development and learned that the *Pasco Herald,* a weekly newspaper, job printing shop and office supply business in Pasco, Washington, was for sale. At about

the same time Lee and Philip became acquainted with one Hugh Scott, a man who had had some newspaper experience, and the three decided to form Scott Publishing Company, the plaintiff herein, and purchase the *Pasco Herald,* which they did, agreeing to pay the former owner a total of $80,000, plus the inventory. Scott Publishing Company took possession of the property on October 1, 1947. Scott ceased to be an officer and director of Scott Publishing Company in 1949.

Scott Publishing Company operated the job shop and office supply business and continued to publish the *Pasco Herald* as a weekly paper until November 13, 1947. The operation was a profitable one. The potential growth factors of the Tri-City area were such that Scott, Lee and Philip decided that a daily newspaper would be successful in the area, and within a matter of weeks after Scott Publishing Company took possession of the *Pasco Herald,* publication of a daily newspaper was planned, and on November 13, 1947, the first issue of a daily paper was published. Initially the paper was published 5 days a week, but in January, 1949, a Sunday issue was added, and ever since, the paper has been published six days a week, excluding Saturday. The name of the paper was changed from the *Pasco Herald* to the *Tri-City Herald* when daily publication commenced.

The conversion of the weekly *Pasco Herald* to the daily *Tri-City Herald* was almost an immediate success, but it raised serious problems for Scott Publishing Company. The expanded operation required more personnel of all kinds, the opening of additional offices in Kennewick and Richland, additional newsprint, which at the time was difficult to obtain. The plant and press were inadequate to handle the publication of a daily newspaper. Skilled mechanical workmen necessary for the expanded operation were not available locally and had to be recruited from all over the Pacific Northwest and even further afield. Distribution of the weekly *Herald* had been by mail from the single Pasco office and the conversion to a daily required the establishment of carrier organizations and offices in the three cities. And ever present was the need for sufficient capital to carry on the expanded operation.

Scott Publishing Company with great difficulty met and solved the problems. Personnel were recruited and trained, additional offices were opened, and in 1948, in the late summer, a larger press was obtained together with a building in Kennewick to house it and at that time the *Tri-City Herald* moved from Pasco to Kennewick. However the newsprint problem and the problem with respect to sufficient working capital remained.

[*Background of Defendant Newspaper*]

The defendant Howard W. Parish is a man who spent most of his life in the newspaper business, a substantial part of it in and around the Pacific Northwest. He has had experience in all phases of the newspaper business, but predominately in circulation and management. He formerly was publisher of the *Seattle Star,* a daily newspaper published in Seattle, Washington, until 1946, when it ceased publication. When the *Seattle Star* went out of business, Parish acquired a stock interest in The Craftsman Press, Inc., a large commercial printing establishment in Seattle and held the office of Secretary-Treasurer of that company.

Parish traveled throughout the State of Washington on business of The Craftsman Press, Inc., and became acquainted with the Tri-City area as a result of such travels. He acquired additional information concerning the Tri-City area by reading a report prepared by one Earl McCallum, an expert in the newspaper field with reference to the newspaper business in the Tri-City area. Furthermore, at some time prior to February, 1949, Scott Publishing Company had prepared a brochure advertising the Tri-City area and the *Tri-City Herald* which was to be used to attract national advertising. Because Scott Publishing Company was not equipped to print in color, and as the brochure was to be prepared in color, Scott Publishing Company had the printing done by The Craftsman Press, Inc., in Seattle, and Parish became familiar with the data contained in that brochure and likewise met Lee and Philip in connection with their newsprint problem and also in connection with the printing of the brochure in February, 1949. Parish also had acquired considerable information concerning the background of Lee and Philip and the Scott Publishing Company and the difficulties which they were encountering in the publication of the *Tri-City Herald* and particularly the financial problems with which they were faced.

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As a result of all this information Parish became interested in getting into the newspaper business in the Tri-City area. He acquired the financial backing of several substantial business men in Seattle and in April or May of 1949, he telephoned Philip and asked if Scott Publishing Company was interested in selling the *Tri-City Herald.* Philip informed him that they might be interested in selling if a price could be agreed upon. At that time the Scott Publishing Company was very much in need of additional working capital and Philip and Lee arranged a meeting with Parish at which they hoped to interest Parish in the purchase of stock in the Scott Publishing Company, or possibly sell him the *Tri-City Herald.*

At the meeting Parish informed Lee and Philip that he was not interested in purchasing a minority interest, but stated he was interested in purchasing the controlling interest or the entire property. Lee and Philip set the price at $410,000 for the entire company which Parish considered too high and he offered $250,000 and no agreement was reached.

As stated before, Parish was aware of the tremendous possibilities of the Tri-City area. He was also familiar with the background of Lee and Philip, their inexperience in the newspaper business in contrast to his own wide experience in that business. He was likewise familiar with the constant financial problems which Scott Publishing Company was continuously struggling with, whereas he felt that he, through his associates, had ample financial backing, and because of all of these factors which seemed to weigh so heavily in his favor and against Philip and Lee, he believed there was a golden opportunity for him in the newspaper business in the Tri-City area. At the meeting with Lee and Philip, when the purchase of the *Tri-City Herald* was discussed, Parish pointed out these things to Philip and Lee and stated that he would start a newspaper in the Tri-City area to compete with them and that they would end up by having to sell their newspaper to Parish at 5¢ on the dollar.

Thereafter, in August, 1949, the defendant Columbia Basin Publishers, Inc., was incorporated. The original incorporaters were Parish, the defendant James M. Bryce, who is Parish's son-in-law, and John X. Johnson, one of the Seattle business men associated with Parish, and who subsequently furnished the principal financial support of the Columbia Basin Publishers, Inc., in its early days, together with several other Seattle business men.

The Columbia Basin Publishers, Inc., commenced publication of the *Pasco News,* a weekly newspaper at Pasco in August, 1949. The circulation of the *Pasco News* was on a free distribution basis. The publication of the *Pasco News* on a weekly basis continued until November, 1949, when publication was stepped up to bi-weekly, and at that time acquisition of the facilities to publish a daily newspaper was commenced. As a weekly newspaper the *Pasco News* competed with the *Tri-City Herald* for advertising within the Tri-City area and particularly in Pasco. However, at no time before Columbia Basin Publishers, Inc., commenced publication of the daily *Columbia Basin News,* under the circumstances hereinafter set forth, had the *Pasco News,* either as a weekly or a bi-weekly, earned a profit.

[*Printers' Union*]

Prior to August, 1949, members of the Typographical Union in the Tri-City area had been under the jurisdiction of the local Typographical Union at Walla Walla, Washington, which is some 50 miles away from the Tri-City area. Because of this distance, members of the Typographical Union in the Tri-City area desired to form their own local and in August, 1949, the defendant Kennewick-Pasco Local 831 was chartered and affiliated with the International Typographical Union. At some time prior there had been a contract between the Typographical Union through the Walla Walla local with the predecessor of the Scott Publishing Company, but before Scott Publishing Company took over, that contract had expired and there was no contract concerning terms of employment between the Typographical Union and Scott Publishing Company.

[*Wage Dispute with Plaintiff Newspaper*]

After the formation and chartering of Local 831, and on December 2, 1949, Local 831 mailed notices to employers in the Tri-City area asking the commencement of collective bargaining negotiations. The employers notified were Scott Publishing Company, Columbia Basin Publishers, Inc., Husk Printing Company and Meverden Printing

Company, the latter two being commercial job printing shops. Lee, on behalf of the Scott Publishing Company, because of his personal feeling toward Parish, declined to join with the other employers in the area in meeting with the negotiating committee of Local 831. Nevertheless the other three employers in the area, after several meetings with the Scale Committee of Local 831, one of which was attended by one Art Schmidt, President of the Seattle Local of the International Typographical Union, and a Mr. Hudson of the Tacoma Local of the I. T. U., signed a contract fixing the scale for members of the I. T. U. at $90.00 a week for 38¾ hours work.

Originally the Union's demand was for $95.00 a week for 37½ hours work, which was the Seattle scale at that time, but this demand was compromised for the $90.00 figure and the 38¾ hours.

Thereafter Local 831 commenced negotiations with Scott Publishing Company. Not getting anywhere with the negotiations the Local Union requested assistance from the I. T. U. and special representatives of the President of the I. T. U., Whiting and Marvick, came into the area and participated in the negotiations. When the representatives of the I. T. U. appeared in the negotiations, Scott Publishing Company appealed to Pacific Northwest Newspaper Publishers Association for assistance in the negotiations and one D. S. Haines, Secretary of that Association joined in the negotiations on behalf of Scott Publishing Company.

The union people took the position that the only thing they could accept from Scott Publishing Company was the same contract which they had secured from the other employers in the area. Scott Publishing Company felt it could not pay the scale of $90.00 a week for 38¾ hours of work and likewise felt that certain provisions of the contract which had been signed by the other employers were illegal and therefore that it could not execute such a contract. At that time the wages paid by the Scott Publishing Company were $80.00 a week for 40 hours work. While the raise to $90.00 a week, which the Union demanded, was somewhat higher than was being paid in other comparable communities in the State of Washington, and the northwest, it was not an unreasonable demand for the Union to make upon Scott Publishing Company, particularly in view of the fact that the other employers in the area had agreed to such a wage. After having secured such a contract from the other employers, the Union could not in fairness to them have accepted anything less from Scott Publishing Company. There is no evidence that the other three employers did not enter such contract in good faith. As has been pointed out, Scott Publishing Company was given the opportunity to join with the other three employers in their negotiations with the Union, but had declined to do so, nor was there anything unreasonable in the Union's insistence upon a written contract with Scott Publishing Company, particularly in view of the fact that two employees of Scott Publishing Company, who had been active in the organization of Local 831, were discharged without apparent reason.

It likewise appears that in refusing to accept such contract Scott Publishing Company was acting in good faith. At the time of the negotiations the Tri-City area was in a depressed economic situation and it did not appear to Scott Publishing Company that it could afford to give the demanded increase without becoming bankrupt. Furthermore, Scott Publishing Company was advised by Mr. Haines that certain provisions of the contract demanded were illegal and subsequent litigation, many years later, concerning like provisions in other contracts, indicate at least that Mr. Haines was not unreasonable in his belief. At any rate the Court finds that both the Union representatives and the Scott Publishing Company negotiated in good faith on both sides but were unable to reach an agreement.

[*Strike or Lockout*]

When the negotiations broke down on March 3, 1950, a strike or lockout ensued. Whether the rupture of relations between the Scott Publishing Company and its employees is a strike or a lockout is not clear. The Local Union had taken a strike vote and had applied to the I. T. U. for strike sanction and had received the same. However, no date for a strike had been set and members of the Union on shift at the Scott Publishing Company, on the evening of March 3, 1950, on returning to work after lunch, found strangers performing their jobs. However, whether it was a strike or a lockout is immaterial in this case, because it is evident that whatever form it took there would have been a sever-

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ance of relations between the employer and employees when they failed to reach an agreement.

Before the strike or lockout occurred, it had become apparent to Scott Publishing Company that no agreement could be reached with the Local Union, and Scott Publishing Company, with the assistance of Mr. Haines of the Publishers Association, arranged to recruit non-union employees to produce the *Tri-City Herald* under strike conditions. Likewise teletypesetter equipment was furnished by the Publishers Association which permitted production of the paper with fewer skilled employees. When the strike or lockout occurred, publication of the *Tri-City Herald* continued by these means.

The fact that it was almost certain there would be a strike or lockout involving the *Tri-City Herald* was common knowledge in the Tri-City area before it occurred. Parish, Bryce and their associates in the Columbia Basin Publishers, Inc., were likewise aware of the strong possibility of labor trouble for Scott Publishing Company and the *Tri-City Herald.* As has been pointed out, Parish and Bryce and Columbia Basin Publishers, Inc., moved into the Tri-City area with the intention of eventually publishing a daily newspaper in competition with the *Tri-City Herald* and as early as the preceding November, had acquired sufficient plant facilities and personnel for that purpose. Therefore, when it became apparent that a strike or lockout was imminent at the *Tri-City Herald,* all that remained to be done by Columbia Basin Publishers, Inc., in order to start publication of a daily newspaper, was to complete arrangements that had already been started for features, comics and so forth for a daily newspaper. These arrangements were completed and on March 14, 1950, 11 days after the strike or lockout at the *Tri-City Herald* commenced, Columbia Basin Publishers, Inc., commenced publication of the *Columbia Basin News* as a morning daily newspaper 5 days a week, and this was subsequently increased to 6 days.

[*"Pressure" Exerted by Union*]

Almost immediately after the strike or lockout started at the *Tri-City Herald,* Local 831 commenced strike activities against the *Tri-City Herald.* Picket lines were established, attempts were made to induce both readers and advertisers of the *Tri-City Herald* to cease doing business with that paper, "Do Not Patronize" lists of merchants advertising in the *Tri-City Herald* were distributed, radio broadcasts were made; other unions in the area were induced to discourage their memberships from patronizing the *Tri-City Herald*—in short all the traditional means of exerting pressure against an employer involved in a labor dispute with organized labor was engaged in.

[*Competitive Struggle*]

With the appearance of the *Columbia Basin News* as a daily newspaper, a bitter competitive struggle commenced between the *News* and the *Herald,* and between the respective publishers, Columbia Basin Publishers, Inc., represented by Parish and Bryce, and Scott Publishing Company, represented by Lee and Philip. The *News,* being in the position of the newcomer and seeking to gain a foothold in the field against a thoroughly established paper (at that time circulation of the *Herald* was in excess of 12,000, and it had substantial amounts of local and national advertising) was required to undertake very expensive programs to build circulation. Circulation is the lifeblood of a newspaper because it is circulation that attracts advertising and it is from advertising that the principal revenue of a newspaper is derived. Special reduced subscription rates were offered, free distribution of the *News* over wide areas was accomplished, contests were run, delivery routes beyond the trading area of the Tri-City area were established, all in an effort to build circulation, and all of which was very costly, but very necessary and normal in the establishment of a new newspaper in an area occupied by an established paper.

[*Cooperation Between Union and Newspaper —Separate Purposes*]

The publishers of the *News* were likewise happy to take every advantage possible of the situation existing between Local 831 and the *Tri-City Herald.* The Union on the one hand was interested in exerting economic pressure against Scott Publishing Company by causing a loss of business and revenue in any and every way it could in order to force Scott Publishing Company to meet its demands for what it deemed a fair labor agreement, and Columbia Basin

Publishers, Inc., was interested in gaining all the business of Scott Publishing Company it could in order to establish its newspaper, and the two cooperated, not with the common objective of eliminating Scott Publishing Company from the field, but each with its own separate purpose.

[*Reduction of Advertising Rates*]

In the field of advertising Columbia Basin Publishers, Inc., at the beginning of the daily publication of the *Columbia Basin News*, established a rate card which proved to be unrealistic, and rates actually paid by advertisers during the year following commencement of the daily publication were generally below the rate indicated on the rate card. Because of the *News'* low circulation in the beginning relative to the circulation of the *Tri-City Herald*, it could not expect to charge and receive the same rates that the *Herald* received with its wider circulation. Again in the field of advertising the publishers of the *Columbia Basin News* were only too happy to take any advantage they could of the efforts of Local 831 to induce advertisers not to do business with the *Tri-City Herald*.

[*Alleged Conspiracy—Circumstantial Evidence*]

It is these circumstances outlined above upon which plaintiff relies to establish a conspiracy on the part of Parish, Bryce and the Columbia Basin Publishers, Inc., to drive Scott Publishing Company and the *Tri-City Herald* out of the newspaper business in the Tri-City area and to establish a monopoly for the Columbia Basin Publishers, Inc. There is no direct evidence of such a conspiracy and, of course, direct evidence is not needed. However, all of the evidence in the case up to this point, it seems to the Court, is at least as consistent with a reasonable good-faith attempt on the part of Parish to establish a competing newspaper in the Tri-City area as it is with the idea of a conspiracy to drive the *Tri-City Herald* out of business.

[*Right to Enter Market Held by Monopolist*]

Parish saw and was attracted to the Tri-City area by the same rosy picture of the future of the area that attracted Lee and Philip. He likewise saw Lee and Philip as inexperienced novices in the newspaper business, unfinanced and overexpanded. He considered himself an expert in the business and believed he had sufficient financial backing to establish a competing newspaper. The evidence shows that the establishment of a newspaper against a monopoly newspaper in a given area is an expensive proposition under any circumstances. Parish realized this and believed he could establish such a paper at a cost of $500,000.00. To hold that the fact of one entering a business under these circumstances is evidence of a conspiracy to violate the anti-trust laws is to thwart the very purpose of those laws and turn them into instruments for the protection of monopolies. Of course, it must have occurred to Parish that in the event he were successful in establishing his newspaper in the area, the result might be that the Scott Publishing Company would be forced out of business, but that is a normal, natural, everyday occurrence when inexperienced, unfinanced people are forced to meet experienced, adequately financed competition. Parish's statements to Lee and Philip, at the time he attempted to buy the *Tri-City Herald*, rather than indicating a purpose to violate the anti-trust laws and create a monopoly for himself were rather simply a prediction of what Parish believed would be the result of Lee and Philip attempting to compete with him in the newspaper business.

[*Circumstances Consistent with Lawful Purpose*]

Plaintiff also relies on the circumstances of the Columbia Basin Publishers, Inc., contracting with the Local to pay higher wages at a time when it was losing money, the strike or lockout against the *Tri-City Herald*, Columbia Basin Publishers, Inc., going daily at that time, again when it was losing money, and the cooperation between Local 831 and Columbia Basin Publishers, Inc., as being evidence of the conspiracy charged against Parish, Bryce and Columbia Basin Publishers, Inc., and of the Local joining in that conspiracy. While all of these circumstances would be consistent with plaintiff's theory of conspiracy if it were proved, they are likewise just as consistent with proper, legal, independent purposes and intentions on the part of Parish, Bryce and Columbia Basin Publishers, Inc., on the one hand and Local 831 on the other.

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There is no evidence that Parish or Bryce had anything to do with fixing the demands which Local 831 presented to publishers in the Tri-City area. Indeed, the evidence is that none of the Scale Committee or Officers of Local 831 were acquainted with Parish or Bryce at the time the demands were formulated. The demand for $95.00 for a 37½ hour week was fixed by the entire Union membership, and it was based upon the wages and hours then prevailing in Seattle. There is uncontradicted testimony, which the Court accepts, that normally and customarily in negotiations between typographical locals and employers in smaller communities the scale prevailing in metropolitan areas is interjected and discussed and bargained for by the local unions in the smaller communities, and is in some instances achieved. So, there was nothing unreasonable in the demands of Local 831.

Nor was there anything unreasonable or sinister in Columbia Basin Publishers, Inc., coming to terms with the Union. In the first place, the demand presented for $95.00 for a 37½ hour week was not met, but there was a compromise of $90.00 for 38¾ hours, so to that extent negotiations did take place. Perhaps, if Scott Publishing Company had chosen to join with the other employers in the area, including Columbia Basin Publishers, Inc., in negotiations with the Union, as it was invited to do, the presentation of such a united front by the employers would have resulted in further reducing the demands of the Union. Secondly, in view of Columbia Basin Publishers, Inc., and Parish's determination to get a daily newspaper started in the area, and their acceptance of the fact that they were bound to spend some considerable money in the process in any event, they no doubt considered it prudent in a business sense to come to terms with the Union in view of the highly unionized character of the area as shown by the evidence, and also in view of Parish's experience that newspapers usually fared badly in disputes with Unions.

The evidence shows that Parish used the strike or lockout at the *Tri-City Herald* as his signal to go into the daily publication of the *Columbia Basin News*. Again while this would be consistent with the purpose on the part of Parish to drive the *Tri-City Herald* out of business and to establish a monopoly in violation of the anti-trust laws, it is equally consistent with the purpose of starting a newspaper with the bona fide intention of competing. Parish, Bryce and Columbia Basin Publishers, Inc., were in the area for the avowed purpose of starting a daily newspaper in competition with the *Tri-City Herald*. Though they were still losing money in their bi-weekly publication, when they saw their competitor with a strike or lockout on his hands, it was the most natural thing in the world to choose that time to go daily, and it is also completely consistent with a bona fide attempt to establish a competing business enterprise.

As for the cooperation which was established between Local 831 and Columbia Basin Publishers, Inc., Parish and Bryce, that too was a perfectly natural result of the circumstances which existed at the time. Local 831 and its members understandably were delighted to have a fair newspaper started to compete with what they considered to be the unfair newspaper. Not only did it furnish employment for Local 831 members, but it furnished also an additional lever to be used in the Union's attempt to pry an agreement from the *Tri-City Herald*. The publishers of *Columbia Basin News* likewise welcomed any assistance they could obtain from Local 831 in their attempt to build circulation and advertising and to establish a daily newspaper. There was indeed cooperation between the two, but each acting for its own legal independent purpose.

[*Defendant's Financial Difficulties*]

After commencement of publication of the daily *Columbia Basin News* in March, 1950, and despite the assistance of labor unions in the area in furtherance of the strike or lockout against the *Tri-City Herald*, the losses of Columbia Basin Publishers, Inc., continued and increased. To some extent the losses were those normally to be expected in an attempt to establish a daily newspaper against existing competition. Not only was *Columbia Basin News* in competition circulation-wise with the *Tri-City Herald*, but because it was a morning daily newspaper, it encountered competition from metropolitan morning daily newspapers which were circulated in substantial numbers in the area, and this competition from the metropolitan papers was in part responsible for *Columbia Basin News'* high circula-

tion costs. It likewise appears from the record that the losses to some extent were the result of haphazard management. Parish, the experienced newspaper man, continued to reside in Seattle and continued his employment with The Craftsman Press, attempting to manage the *Columbia Basin News* from a distance. Later, in August of 1950, when an attorney for I.T.U. and Unitypo came to the area in connection with a loan, he reported that the minute book of Columbia Basin Publishers, Inc., was in proper form for the first few months, but had not thereafter been kept up, that Parish had no financial statement which he could submit; that no inventory of the physical properties had ever been made; that the books were in a most confused state; that it appeared that little or nothing had been entered since June of that year and that Parish had then in August put a new auditor in charge to try to bring some order out of the chaos existing.

Parish and his associates discovered that the Tri-City area was not the soft touch competition-wise that they had anticipated. Furthermore, the substantial financial backing which Parish had anticipated from his Seattle businessmen associates failed to materialize. The record shows that after their original investment, which was soon expended, that one John X. Johnson, a businessman of Seattle, was the only associate who contributed financial support to the *Columbia Basin News,* and his contributions were relatively small, two or three thousand dollars at a time in order to meet payrolls and other expenses, and even Johnson, prior to his death in July, 1950, was becoming reluctant to invest any more money in the venture.

[*Offer to Sell Out*]

By May of 1950, Parish inserted an ad in "Editor & Publisher", a trade journal, in an attempt to sell the *Columbia Basin News,* but without success. Later that summer, Bryce contacted Glenn Lee of Scott Publishing Company in an endeavor to interest him in purchasing the *Columbia Basin News,* again without success, although Lee went so far as to make an appraisal of the *Columbia Basin News'* plant. There was a subsequent meeting between Lee and Bryce, arranged by Dudley Brown, a Seattle newspaper man, at which Bryce attempted to sell the *Columbia Basin News* to Lee, but that attempt likewise resulted in failure when Bryce insisted that a condition of the sale would be that the contract between Columbia Basin Publishers, Inc., and the Local Union be honored.

These attempts to sell out are again not consistent with a purpose or intent to drive the *Tri-City Herald* out of business for the purpose of establishing a monopoly in the area.

[*Union's Financial Aid*]

The defendant International Typographical Union is a labor organization with its principal office at Indianapolis, Indiana, and having approximately 110,000 members in some 800 local unions throughout the United States and Canada, and as such is engaged in representing its members through local unions in their relationship with their employers. As part of its activities, it aids members engaged in a strike or lockout by granting funds to such members by way of special assistance and strike benefits. Funds are obtained through dues and assessments levied by the membership upon themselves.

The governing body of the I.T.U. is the Executive Council, consisting of the President, the first Vice-President, the second Vice-President, the third Vice-President and the Secretary-Treasurer. Such officers are elected by the membership every two years.

The defendants Woodruff Randolph, Don Hurd, Harold H. Clark, Charles M. Lyon and Joe Bailey were all members of the Executive Council during at least a part of the time here involved. The defendant Walter D. Marvick is a special representative of the President of the International Typographical Union in the State of Washington.

Faced frequently with the situation where its members became involved in a strike or lockout with the publisher of the only newspaper in a given area, the I.T.U. adopted the policy of either establishing a paper of its own to compete with the monopoly publisher, or rendering financial assistance where needed to a publisher whom the I.T.U. considered friendly to establish or maintain a competing newspaper. In furtherance of this policy in 1946, the I.T.U. formed the defendant Unitypo, Inc., as a corporation under the laws of the State of New York. The members of the Board of Directors of Unitypo, Inc., are the members of the Executive Council of the I.T.U., except for

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one, because of the requirements of the New York law that at least one director of a New York corporation be a resident of New York. The stock of Unitypo, Inc., is held by the members of the Executive Council of the I.T.U. in trust for the membership, again with the exception of the qualifying share held by the New York director. Funds for the operation of Unitypo, Inc., are supplied by I.T.U. from its so-called defense fund which in turn is raised by assessments on the members of I.T.U.

Since its inception, Unitypo, Inc., has started newspapers in various cities in the United States and Canada, where members of the I.T.U. became engaged in a strike or lockout with a monopoly publisher. It has likewise rendered encouragement and financial assistance to publishers considered friendly and who were competing with the publisher with whom I.T.U. was engaged in a strike or lockout. Where Unitypo, Inc., establishes a newspaper, it has been its policy to sell it to an independent publisher whenever the opportunity presents itself, and not to continue in the publishing business.

The defendant Howard Parish, from his experience in the newspaper business, was aware of the I.T.U. policy and Unitypo, Inc., and when the losses of the *Columbia Basin News* continued to mount and as financing became increasingly difficult to obtain, Parish obtained authority from the stockholders of Columbia Basin Publishers, Inc., to seek a loan of $25,000.00 from Unitypo, Inc. The resolution authorizing Parish on behalf of the Columbia Basin Publishers, Inc., to apply to Unitypo, Inc., for a loan was passed on June 15, 1950, but nothing was done to carry out the resolution until after the death of John X. Johnson in July, 1950.

In August, 1950, Parish called Unitypo, Inc., at Indianapolis, Indiana, by telephone requesting financial assistance. Upon receipt of the request one Clarence R. Martin, an attorney for Unitypo, Inc., and I. T. U., was sent into the State of Washington to investigate the situation. When Martin arrived in Seattle in August the financial situation of *Columbia Basin News* was critical. Martin arranged for an immediate $10,000.00 loan in the following manner through the Seattle First National Bank: the bank agreed to lend the $10,000.00 upon receipt of a note and chattel mortgage upon the *Columbia Basin News'* plant, which was immediately endorsed by the bank and assigned to Unitypo, Inc., which then reimbursed the bank. The assignment to Unitypo, Inc., of the note and chattel mortgage was not recorded. The reason for this round about way of getting the money from Unitypo, Inc., to Columbia Basin Publishers, Inc., and the secrecy which surrounded all transactions between Unitypo, Inc., and Columbia Basin Publishers, Inc., was the prior experience of Unitypo, Inc., and I.T.U. around the country of having the newspaper they sought to aid encounter advertisers' resistance when it became known that the Union was supporting the paper.

The losses continued and the $10,000.00 was soon expended and it became necessary to seek another loan from Unitypo, Inc. At that time Unitypo, Inc., sent a man out to the Tri-City area to appraise the plant and equipment of *Columbia Basin News* and Unitypo, Inc., agreed to purchase the plant and equipment for $25,000.00, which included the prior $10,000.00 loan, and lease it back to Columbia Basin Publishers, Inc., with an option to repurchase. This transaction was consummated on October 2, 1950. By November, 1950, Columbia Basin Publishers, Inc., was again in need of money and sought an additional loan from Unitypo, Inc. On November 30, 1950, Unitypo, Inc., made an additional $25,000.00 loan, and took as security a pledge of all of the stock of Columbia Basin Publishers, Inc. Losses continued and Unitypo, Inc., again in February, 1951, made an additional loan secured by the stock of Columbia Basin Publishers, Inc., and thereafter continued to make unsecured loans to Columbia Basin Publishers, Inc., and by 1954, the indebtedness of Columbia Basin Publishers, Inc., to Unitypo, Inc., had reached almost one-half million dollars. At that time Unitypo, Inc., made demand for payment of the loans made in 1950 and 1951, for which the stock of Columbia Basin Publishers, Inc., had been pledged as security, or in the alternative that the stock be issued to Unitypo, Inc. This latter was done, but Unitypo, Inc., almost immediately transferred the stock to Parish and Bryce, who in turn redeposited the stock with Unitypo, Inc., endorsed in blank as security for the then outstanding loans. The stock still stands in the name of Parish and Bryce on the records of the corporation.

Still the losses continued and by December 31, 1958, the indebtedness of Columbia Basin Publishers, Inc., to Unitypo, Inc., had reached $1,178,000.00 In addition, in 1952, Unitypo, Inc., caused to be organized the defendant Howard Parish and Associates, Inc., as a Washington corporation and provided the financing to this corporation to enable it to purchase and remodel a building which was thereafter leased and used as a plant and office by Columbia Basin Publishers, Inc. All of the stock of Howard Parish and Associates, Inc., except for qualifying shares, was held by Unitypo, Inc.

[*Union's Management of Newspaper*]

The overall management of *Columbia Basin News* was conducted through the years by Howard Parish until December 31, 1958. At that time the I. T. U. replaced Parish as manager of Columbia Basin News with Edward Byrne, who had formerly been publisher of I. T. U. and Unitypo, Inc., papers at Colorado Springs, Colorado, and Jamestown, New York. At the same time James Bryce and Charles Parker, who had been one of the original incorporators, resigned as directors and officers of Columbia Basin Publishers, Inc., and were succeeded by Byrne as Vice-President and director, and Frank Cummings as Secretary-Treasurer and director. Frank Cummings is also Secretary-Treasurer of Local 831 of I. T. U. Parish still remains as a director, but has nothing to do with the management and *Columbia Basin News* has in effect become an I. T. U. operated paper. Funds for the operation of the *News* are supplied by the I. T. U. in the form of special strike assistance to Local 831, which in turn delivers the funds to the *Columbia Basin News*. Since I. T. U. has taken over the management of the *Columbia Basin News* the amount of the losses has decreased, but nevertheless the newspaper continues to operate at a loss. From January 1, 1959, up to the date of trial, the deficits in the operation of the *Columbia Basin News*, which have been made up by the I. T. U. through special assistance to Local 831, total $40,000.00.

In the years after Unitypo, Inc., commenced financing *Columbia Basin News*, Parish and Bryce wrote many letters and reports to the Board of Directors of Unitypo, Inc., and the Executive Council of the I. T. U., reporting on the progress of *Columbia Basin News* and containing references to "driving Lee and the Scott Publishing Company to the wall", "forcing a merger", "beating Lee", and so on. Plaintiff regards these letters and reports as showing an intent and purpose on the part of Parish and Bryce to drive the *Tri-City Herald* out of business in order to create a monopoly for the *Columbia Basin News*, and as a communication of such intent to the I. T. U. and Unitypo, Inc. While again such communications would be consistent with such a purpose, if the purpose was otherwise shown to exist, they appear to the Court to be merely communications on the part of Parish and Bryce in the nature of a sales pitch to their financial angel in an effort to keep the money coming, and were no doubt received in that spirit by the I. T. U. and Unitypo, Inc. Because of the policy of I. T. U. above referred to, and the purposes for which Unitypo, Inc., was created, it is unlikely that such sales pitches were required in order to retain the financial support of the *Columbia Basin News* by Unitypo, Inc. The record shows that in other areas throughout the United States and Canada I. T. U. and Unitypo, Inc., have expended considerable sums for the purpose of keeping a competing newspaper in operation.

[*Lack of Unlawful Intent—"Slow" Financial Aid*]

A further indication of the lack of the intent and purpose on the part of Parish, Bryce and *Columbia Basin News* on the one hand and Unitypo, Inc., and I. T. U. on the other to destroy the *Tri-City Herald* so as to create a monopoly for *Columbia Basin News*, lies in the method in which the money was expended. While the $1,178,000.00 that has been spent by Unitypo, Inc., in support of the *Columbia Basin News* up to January 1, 1959, is a considerable amount of money, it was expended over a period of almost nine years in amounts sufficient to meet the operating deficits as they occurred. It would seem that if there was a purpose and intent to drive the *Tri-City Herald* out of the business and such a large amount of money was available for that purpose, success would be much more likely to be achieved by spending the money in a relatively short time to cut subscription rates and circulation rates to

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such a point that the *Tri-City Herald* would have been unable to compete.

[*No Offer to Buy Established Paper*]

Another indication of the absence of such intent, particularly on the part of I. T. U. and Unitypo, Inc., lies in the fact that when Clarence Martin, the I. T. U. attorney, initially came to the area to investigate the situation, he reported to the I. T. U. and Unitypo, Inc., "Parish does not believe he has Lee worn down enough yet to buy him out at a reasonable price, but is encouraged by Lee's having asked Bryce for a conference. (Lee probably wants to buy out the *Columbia Basin News*, but apparently neither Lee nor Parish can get money enough together to buy out the other)." Despite the tremendous financial resources of I. T. U. and Unitypo, Inc., no offer was ever made to furnish Parish or *Columbia Basin News* or anyone else with sufficient funds to buy out the *Tri-City Herald*, nor was a request for such ever made by Parish, Bryce or *Columbia Basin News*. Had the purpose and intent to create a monopoly in the area existed, it could have been realized by the purchase of the *Tri-City Herald* at a considerably lower figure than has been expended to date.

Likewise significant as to the intent and purpose of Unitypo, Inc., and I. T. U. was the question which was put to the Board of Directors and Executive Council each time they were requested to vote upon another loan for *Columbia Basin News*, which was in effect "shall we advance additional money to continue publication of the *Columbia Basin News?*"

[*Offer to Resume Wage Negotiations*]

The record also shows that periodically through the years, notices were sent by the Local Union of the I. T. U. to the *Tri-City Herald* offering to resume negotiations. Again such offers are not consistent with an intent to drive the *Tri-City Herald* out of business, because at any time Scott Publishing Company could have entered a contract with the Local Union and any damage being done to it competitive-wise, by virtue of the strike or lockout, would have come to an end.

[*No Unlawful Intent*]

In view of all these circumstances, the Court finds that the intent and purpose of Unitypo, Inc., and I. T. U., in first assisting financially the *Columbia Basin News* and later taking over its publication, was simply to keep in operation in the Tri-City area a newspaper to compete with the *Tri-City Herald*, and was not to drive the *Tri-City Herald* out of business for the purpose of establishing a monopoly. The Court further finds that the purpose and intent of Parish, Bryce and Columbia Basin Publishers, Inc., at all times was to establish a newspaper in competition with the *Tri-City Herald*, and that accepting whatever financial assistance Unitypo, Inc., or I. T. U. were willing to furnish is not inconsistent with that intent and purpose.

[*Advertising Rates Not Unreasonably Low*]

When *Columbia Basin News* commenced daily publication after the strike or lockout against *Tri-City Herald* began, a very bitter competitive struggle developed between the *News* and the *Herald*. As has been mentioned, the management of *Columbia Basin News* was very inept to say the least, whether because Parish, with all his experience in the newspaper business regarded Lee and Philip, the guiding lights of Scott Publishing Company, as unworthy competitors or otherwise, does not appear. In any event advertising rates were set and a rate card published which proved to be totally unrealistic considered in the light of the circulation of the *Columbia Basin News*. As a result it was found necessary to sell advertising at rates that were generally below those on the published rate card. Such rates, while lower than those advertised on the rate card, were not unreasonably low as compared to the advertising rates of *Tri-City Herald* when the circulation of the two newspapers was considered. Despite the fact that the rates initially established proved to be unrealistic, it was not until March 1, 1951, that the management of *Columbia Basin News* revised its rate cards and established rates more in accordance with reality. Thereafter the rates charged advertisers did not substantially deviate from the rates published on the rate card. Newspaper advertising rates are based on the amount of advertising done by the advertiser, the more advertising inches used, the lower is the rate per inch. After the establishment of the March 1, 1951, rate card, the only sales of advertising to advertisers at a rate lower than the minimum rate shown on the

rate card were to advertisers using more space than the maximum shown on the rate card and the reduction was relatively the same based on inches used as shown on the rate card.

[*"Combination" Advertising*]

In January, 1952, Columbia Basin Publishers, Inc., commenced the publication of a weekly free distribution newspaper known as the *Columbia Basin News' Shopper.* The *Shopper* contained little else other than advertising, but did have some editorial content. By the *Shopper, Columbia Basin News* attempted to provide blanket coverage of the area, that is they endeavored to see that every home in the Tri-Cities received either the *News* or the *Shopper,* and combination advertising in the *News* and the *Shopper* was sold upon that basis. The publication of such a free distribution advertising edition is not uncommon in the newspaper business.

C. C. Anderson Company, one of a national chain of stores, was the largest single advertiser in the area. Because of personal differences between the then manager of the C. C. Anderson store and Glenn Lee, the publisher of the *Tri-City Herald,* so long as there was another daily newspaper in the area, the manager of C. C. Anderson would not have placed any advertising in the *Tri-City Herald* and would have advertised in any event in the *Columbia Basin News* exclusively. Because the C. C. Anderson advertising was placed generally on Fridays and resulted in an unbalanced daily page production for the *Columbia Basin News,* Columbia Basin Publishers, Inc., agreed to give C. C. Anderson five years of free advertising in the *Shopper* in consideration of Anderson's advertising in the *Columbia Basin News* being spread over five days, and in consideration of the fact that C. C. Anderson was the largest single advertiser in the *Columbia Basin News.*

In any event the Court finds that none of the rates charged any advertiser by *Columbia Basin News* were unreasonably low as compared to the rates charged advertisers by the *Tri-City Herald* when considered in the light of the relative circulation of the two newspapers.

[*"Cooperative" Advertising—"Double" Bills*]

Another practice engaged in by *Columbia Basin News,* with respect to national cooperative advertising is complained of by plaintiff. In cooperative advertising, a national advertiser, either a manufacturer or distributor of a given product, will cooperate with a local retailer in local advertising. An advertisement will be inserted in a local newspaper advertising the product and the manufacturer or distributor will reimburse the local retailer who inserts the ad for a portion of the cost of the ad. In cooperative advertising *Columbia Basin News* would issue double bills, one bill to the local retail merchant at his contract rate, based on the number of inches of advertising that he used in the *Columbia Basin News,* and this was the bill which the local retail advertiser would actually pay to *Columbia Basin News. Columbia Basin News* issued a second bill to the local merchant to be submitted to the national advertiser for reimbursement at the open rate which in most instances would be higher than the local merchant's contract rate. In this way the local merchant would receive reimbursement for a higher proportion of the bill for the given ad than the national advertiser had agreed to pay.

[*Practices Not Unlawful—Competitive Purpose*]

However, as has been pointed out, there was a bitter competitive struggle between the *Columbia Basin News* and the *Tri-City Herald.* Almost all of the devices, including the cooperative advertising practice, the publication of the *Columbia Basin News' Shopper,* the giving of more favorable rates to larger advertisers, and the free distribution of newspapers, used by *Columbia Basin News* in this competitive struggle and of which plaintiff complains, were at one time or another throughout the period here in question used by the *Tri-City Herald* in this competitive struggle. In addition, *Tri-City Herald* used devices such as rebates to advertisers and payments of commissions to local advertising agencies on local display advertising to attract advertising, which were not used by *Columbia Basin News.* Plaintiff concedes that it engaged in some of the same practices as *Columbia Basin News,* but contends it has not done so to the same extent. The record bears this out, but it must be remembered that *Columbia Basin News* was in the position of the challenger seeking to become established in the field as against *Tri-City Herald,* already thoroughly established. Mention is made

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of the practices engaged in by the *Tri-City Herald* in the struggle, not because these practices would constitute a defense to *Columbia Basin News*' practices if they constituted a violation of the law, but merely to point up the fact that there was a bitter competitive struggle going on and that whatever was done by either party in that struggle was done for the purpose of competing and not pursuant to a conspiracy to monopolize.

[*Plaintiff's Losses—Causation*]

Immediately after the strike or lockout commenced at *Tri-City Herald* and *Columbia Basin News* went daily, the *Tri-City Herald* lost both advertising and circulation revenue. When the strike started, *Tri-City Herald's* costs increased by virtue of the high wages and overtime paid to the non-union labor imported to keep the paper in publication when the regular employees ceased their employment. However, as employees were trained and as the equipment which they had brought in was utilized, their costs returned to normal and below what they had been before the strike commenced. By September, 1950, cuts, which personnel who had remained on the job had voluntarily taken because of the financial problem created by the strike or lockout, were restored, and raises were granted officers the following year and the financial condition of the *Tri-City Herald* and Scott Publishing Company has continued to improve. Their growth has not been as rapid as it otherwise would have been, but any slowing of its growth has been due to the strike or lockout and also due to the competition afforded by *Columbia Basin News* and not to any conspiracy on the part of these defendants or any of them to drive the *Tri-City Herald* and Scott Publishing Company out of business and monopolize the newspaper publishing business in the Tri-City area. At any rate, the *Tri-City Herald* at all times material has been and continues to be the dominant newspaper in the Tri-City area.

[*No Exclusive Dealing Agreements*]

No advertising was sold in the *Columbia Basin News* or the *Columbia Basin News Shopper,* and no rates for advertising in either or both were fixed, upon any understanding or agreement that the advertiser would not advertise in the *Tri-City Herald* or any other advertising media in the area.

[*No Intent to Monopolize*]

The advertising and subscription rates of *Columbia Basin News* were not established at a level where they would tend to operate as a means or method to achieve a monopoly by excluding the *Tri-City Herald* from the newspaper publishing business in the Tri-City area and there was no intent on the part of the defendants, either individually or in combination to so exclude the *Tri-City Herald* from the newspaper publishing business in the Tri-City area.

[*Sherman Act*]

Section 1 of the Sherman Act (15 U. S. C. 1) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, is declared to be illegal; * * *."

Section 2 of the Sherman Act (15 U. S. C. 2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor. * * *."

[*Intent*]

Before there is a violation of these sections, there must be a contract, combination or conspiracy in restraint of trade, or a monopoly, or an attempt to monopolize or a combination or conspiracy to monopolize. If an actual restraint of trade results from a combination, or if monopoly is achieved by an individual acting alone or in combination with others, the intent is immaterial, or may be inferred. *U. S. v. Patten,* 226 U. S. 525; *U. S. v. Masonite Corp.* [1940-1943 TRADE CASES ¶ 56,209], 316 U. S. 265, 275; *U. S. v. Griffith* [1948-1949 TRADE CASES ¶ 62,246], 334 U. S. 100; *U. S. v. Columbia Steel Co., et al.* [1948-1949 TRADE CASES ¶ 62,260], 334 U. S. 495. However, where no restraint of trade or monopoly results from the acts and conduct complained of, then the acts or conduct complained of must be accompanied by a specific intent to restrain trade or monopolize before there is a violation of Sections 1 or 2. *Swift &*

Co. v. U. S., 196 U. S. 375, 396. *U. S. v. Columbia Steel Co., et al., supra,* at 525.

In this case, the evidence does not show either an actual restraint of trade or monopoly, or the specific intent on the part of any of the defendants, either individually or in combination, to restrain trade or create a monopoly in the daily newspaper business in the Tri-City area.

[*Robinson-Patman and Clayton Acts*]

Plaintiff also alleges violations of Section 2(a) of the Robinson-Patman Act (15 U. S. C. 13(a)), and Section 3 of the Clayton Act (15 U. S. C. 14), by defendants in the sale of advertising.

[*No Price Discrimination or Exclusive Dealing*]

Section 2(a) of the Robinson-Patman Act prohibits discrimination in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Section 3 of the Clayton Act makes it unlawful for any person engaged in commerce to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, for use, consumption or resale within the United States or any place within the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares or merchandise, machinery, supplies or other commodities of a competitor of the lessor or seller, where the effect of such lease, sale, or contract for sale may be to substantially lessen competition or tend to create a monopoly.

[*Effect on Competition*]

While there is considerable doubt in the Court's mind whether newspaper advertising is a "commodity" within the meaning of the Robinson-Patman Act, or "goods, wares, merchandise or other commodity" within the meaning of the Clayton Act, decision of that question is unnecessary in this case in view of the Court's finding that there were no price discriminations by *Columbia Basin News* in the sale of advertising which had the effect of lessening competition or tended to create a monopoly or injure, destroy or prevent competition; and that there were no sales of advertising, or prices fixed for advertising, upon any agreement or understanding that the purchaser would not advertise in the *Tri-City Herald.*

[*Judgment for Defendants*]

It is the conclusion of the Court that plaintiff shall recover nothing in this action and that judgment shall be entered in favor of defendants for their costs. This opinion constitutes the Court's findings of fact and conclusions of law in this case, and counsel for defendants are directed to prepare, serve on counsel for plaintiff, and lodge with the Clerk a form of judgment in accordance with this opinion, within 15 days from date of receipt of a copy of this opinion, and counsel for plaintiff is granted 15 days after service upon it of such form of judgment within which to lodge with the Clerk in writing any objections which it may have to the form of such judgment.

[¶ 69,590] In the Matter of Grand Jury Proceedings: Motion to Quash Subpoena Duces Tecum Served upon Johnson & Johnson.

In the United States District Court for the Southern District of New York. M. 11-188. Filed December 22, 1959.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Grand Jury Proceedings—Production of Records Under Subpoena *Duces Tecum*—Reasonableness of Government's Demands—Requiring Multiple Searches of Company's Files.—The Government, having caused the issuance of three prior subpoenas *duces tecum,* each of which necessitated a complete search of a company's files, is not entitled to a fourth

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subpoena that would require another such search of those files. Such multiplicity of demands would be justified if the material furnished in response to one demand gave a "lead" to other material which the Government could not have anticipated. Here, however, the new demand was based upon information received from a source independent of the company. It would be intolerable for the Government to issue a new subpoena every time its investigators discovered a complaint with respect to some newly discovered practice. Thus, the present subpoena was modified so as to eliminate the type of demand that asks for "all . . . correspondence . . . and all other writings of any kind . . . relative to . . .," but did not quash the demand for specifically described basic documents. Where such documents are sought, the element of burdensomeness of search is absent.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8021.700.

For the movant: Wyllys S. Newcomb and Royall, Koegel, Harris & Caskey, New York, N. Y.

For the Government: William J. Elkins, U. S. Court House, New York, N. Y.

Memorandum

[*Reasonableness of Subpoena*]

Dimock, District Judge [*In full text*]: This is a motion by a corporation known as Johnson & Johnson, hereinafter called the company, for an order quashing and vacating a Grand Jury subpoena *duces tecum* on the ground that it is unreasonable, unduly burdensome and oppressive and constitutes an abuse of the process of the courts and is an illegal search and seizure in violation of the Fourth Amendment of the Constitution of the United States and a violation of Rule 17(c) of the Federal Rules of Criminal Procedure. The subpoena in question is the fourth subpoena *duces tecum* served on the company since February 1958. The original subpoena was most exhaustive. It had eleven major subdivisions. As an example, subdivision 7 is quoted below:

> "VII. All correspondence, telegrams, memoranda, bulletins, policy letters, salesmen's reports, records of telephone conversations and conferences, inter-office communications, minutes of meetings of the Board of Directors or of any committee, and all other writings of any kind, written or received from January 1, 1950 to the date of service of this subpoena, in the possession or control of your company, its officers, directors, agents or representatives, relating to first-aid or baby toiletry articles and referring or relating to:
>
> (a) the discontinuance of sales by your company to any particular customer, or the contemplation of such a refusal;
>
> (b) the withholding or the contemplation of the withholding of a promotional discount or allowance by your company to particular customers;
>
> (c) the discontinuance or the contemplation of the discontinuance of a promotional allowance by your company to particular customers;
>
> (d) the lack of promotional activity of any of your products by particular customers of your company;
>
> (e) the purchase, or carrying or displaying of a competitive line or product by particular customers of your company;
>
> (f) the failure of particular customers to comply with any requirements of your company that would entitle such customers to a promotional discount or allowance;
>
> (g) the refusal or failure of particular customers or prospective customers to enter into a written contract or agreement with your company relative to the sale or distribution of first-aid and/or baby toiletry products, including any such contract or agreement relating to promotional discounts or allowances;
>
> (h) oral agreements between your company and particular customers relating to discounts and promotional allowances granted by your company.
>
> (i) Any requirement or policy of your company that its customers carry or purchase a minimum variety of your products, or any such requirement or policy relating to promotional discounts or allowances."

[*Required Search*]

The first subpoena *duces tecum* was followed by another with five subdivisions, again calling for all correspondence, *et cetera* on various subjects. The third subpoena had five subdivisions and again called for all correspondence on various subjects. Each of these subpoenas necessitated a search of the files of four regional sales offices, nineteen divisional sales offices and thirty-eight

managerial and executive offices, together with numerous files of the company's law department. Each search involved the examination of the contents of approximately 620 file drawers and in excess of 2,400,000 pieces of paper.

[*"Piecemeal" Demands—Justification*]

The company's principal complaint is that the piecemeal character of the demands upon it has rendered compliance with the subpoenas unduly burdensome. Unquestionably, unless this multiplicity of demands is justified by the fact that the material furnished in response to one demand gave a lead to other classes of material which the Government could not have anticipated, the case presents a picture of pure harassment. I shall proceed to consider whether such justification exists.

The general subject matter of the inquiry appeared to be a line of commerce concerned with "first-aid articles and baby toiletries". The Government makes no attempt to submit such justification with respect to this fourth subpoena except in the case of one its demands, that contained in paragraph 4. That paragraph reads as follows:

> "4. All contracts, agreements, correspondence, memoranda, minutes of meetings, and all other writings of any kind, written or received from January 1, 1950 to the date of service of this subpoena, in the possession or control of your company, its officers, directors, agents, or representatives, relative to the supplying of permanent display racks by your company, directly or indirectly, to retailers for their use in displaying first aid and baby toiletry articles, including those documents, relating or referring to any conditions, requirements, or suggested uses attendant to such permanent display racks."

In justification of this new demand the Government submits an affidavit stating that, from a source independent of the company, the Government learned "subsequent to the issuance of other subpoenas" that the company furnishes permanent display racks to some retailers and that it does so allegedly on certain restrictive conditions relative to the use of such racks. Under the circumstances, the explanation is insufficient. When it comes to the service of the fourth subpoena *duces tecum,* it is incumbent upon the Government to explain why it was necessary to cause the three earlier complete searches of the company's files before the information was received from a source independent of the company which indicated the desirability of a further complete search. The company is obviously the target or one of the targets of the investigation and, since the Government was not entitled to a complete discovery of the company's files for the purpose of determining whether there has been a violation of law, see Judge McGohey's opinion in *In the Matter of the Grand Jury Investigation (General Motors Corporation)* [1959 TRADE CASES ¶ 69,409], M-11-188, filed July 17, 1959, the investigation must have been based on complaints. It would be intolerable for the Government to issue a new subpoena *duces tecum* every time its investigators discovered a complaint with respect to some newly considered practice.

The real thrust of the Government's argument is not, however, justification for the requirement of a fourth search of all of the company's files. The Government places its principal reliance upon the claim that the second and third subpoenas did not and the fourth subpoena does not require a complete search of the company's files. With respect to this claim the Government can put forward nothing but inferences. These are met by affidavit that the searches were required with respect to the second and third subpoenas and will be required if the fourth subpoena remains in force. The Government's inferences are based upon its assumptions of what the company's filing system is. The company's statements are statements of fact and they are uncontradicted except insofar as the Government's inferences and assumptions do so.

[*Subpoena Modified*]

I am not disposed, however, to quash the entire subpoena. What has necessitated these three searches of these vast files is the type of demand that asks for "all * * * correspondence * * * and all other writings of any kind * * * relative to * * *". Where specifically described basic documents are wanted the element of burdensomeness of search is absent. While it is true that in many cases it would seem that the Government might have asked for some of these papers in one of the Grand Jury's earlier demands, that is not sufficient reason for excusing the company from an easily complied with requirement.

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Thus I require the company to comply with so much of paragraph 1 of the subpoena as seeks all patent licensing agreements, agreements assigning rights based on patents or patent applications and all other agreements relating to patents or patent applications, to which the company was a party, and which relate to first-aid or baby toiletry articles, including any of the elements thereof.

The company need not, however, produce any writings of a date more than ten years prior to the service of the subpoena except those of an executory character which are still in force. See *Application of Linen Supply Cos.*, D. C. S. D. N. Y. [1953 TRADE CASES ¶ 67,621], 15 F. R. D. 115.

Under paragraph 2 the company must produce all minutes of meetings held within ten years prior to the date of the service of the subpoena relating to the acquisition, or the attempted acquisition, by the company of the stocks or assets of any other company engaged in the manufacture, distribution, or selling of first-aid or baby toiletry articles.

In response to paragraph 3, the company must supply all minutes of meetings of the Board of Directors, executive boards, or any other board or committee of the company, and all surveys where the meeting was held or the survey written or received from January 1, 1950 to the date of the service of the subpoena, relating or referring to the importance of "facings" and "rack space" as factors in sales of merchandise.

Paragraph 4 of the subpoena has already been referred to. It opens a new subject, the supplying of permanent display racks to retailers for displaying first-aid and baby toiletry articles. I am not disposed to foreclose the subject simply because the demand is belated but I do not know how to give the Government anything under it without causing another complete search of the files. A requirement of the production of all contracts relating to this subject might well necessitate the production of thousands of writings gathered from the nineteen divisional sales offices. The company will merely be required, therefore, to produce minutes of meetings of the Board of Directors, executive boards, or any other board or committee of the company, relative to the supplying of such permanent display racks by the company directly or indirectly to retailers for their use in displaying first-aid and baby toiletry articles, including any conditions, requirements, or suggested uses attendant on such permanent display racks.

Paragraph 5 of the subpoena reads as follows:

> "5. Such documents in the possession or control of your company, its officers, directors, agents, or representatives, or, in lieu thereof, a certified statement prepared therefrom, as will show the number and nature of contents conducted by your company for salesmen employed by distributors or retailers of first aid and baby toiletry articles from January 1, 1956 to the date of service of this subpoena."

There has been no specific objection by the company to this paragraph and I therefore direct that it be complied with as it stands.

The subpoena *duces tecum* is modified in accordance with the foregoing.

[¶ 69,591] Marks Food Corporation, et al. v. Barbara Ann Baking Co., et al.

In the United States Court of Appeals for the Ninth Circuit. No. 16,095. Dated December 28, 1959; amended January 25, 1960.

Appeal from the United States District Court, Southern District of California, Central Division. HARRY C. WESTOVER, District Judge.

Sherman and Clayton Antitrust Acts

Private Enforcement and Procedure—Suit for Civil Damages—Trial of Cause—Separate Issues—Subject Matter Jurisdiction—Right to Jury Trial.—In a treble damage action, where the plaintiffs had demanded a jury trial and the plaintiffs and defendants had agreed that the issue of "subject matter jurisdiction" should be tried separately and ahead of other issues in the case, the trial court should not have assumed the jury function and decided that the plaintiffs failed to establish that the defendants' business was in or directly affected interstate trade or commerce. The trial court took from the jury the determina-

tion of the basic issue in the case; its assumption of the jury's prerogative was erroneous. While a trial court has the right to order separate trials for separate issues in the same case, the switching of a separated issue in a jury case from the jury to the court is not sanctioned. A safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue.

See Private Enforcement and Procedure, Vol. 2, ¶ 9014.

Combinations and Conspiracies—Interstate Trade or Commerce—Local Restraints—Effect on Interstate Commerce.—The dismissal of a retail grocers' treble damage action on the ground that they failed to establish that the defendants' business of producing and marketing bread was in or directly affected interstate trade or commerce was reversed. Any restraint which is unreasonable *per se*, such as the price fixing and the special discounts allegedly involved in the instant case, is actionable if it interferes with the natural flow of an appreciable amount of interstate commerce. "That wholly local business restraints can produce effects condemned by the Sherman Act is no longer open to question." A stipulation showed that large and continuous shipments of flour and bread-making machinery from out of state were received by the defendants, and that some flour used by the defendants was purchased directly and some was contracted for out of state.

See Combinations and Conspiracies, Vol. 1, ¶ 2035.153.

For the appellants: Alfred C. Ackerson, Los Angeles, Calif.

For the appellees: Samuel S. Stevens (Heller, Ehrman, White & McAuliffe, San Francisco, Calif.) for Langendorf United Bakeries, Inc. and Barbara Ann Baking Co.; Vernon Bettin and Dolley, Jessen & Painter, Los Angeles, Calif., for Croweat Baking Co.; Carl J. Schuck and Lawrence J. Larson (Overton, Lyman & Prince, Los Angeles, Calif.) for Barbara Ann Baking Co.; Francis G. Stapleton, John L. Cole, and Robert A. Holtzman (Loeb & Loeb, Los Angeles, Calif.) for Continental Baking Co.; Julian O. von Kalinowski and John J. Hanson (Gibson, Dunn & Crutcher, Los Angeles, Calif.) for Interstate Bakeries Corp., et al.

Before STEPHENS, BARNES, and JERTBERG, Circuit Judges.

[*Nature of Action*]

STEPHENS, Circuit Judge [*In full text*]: The plaintiffs in this case are several, but by no means all of the Los Angeles retail grocers who purchase bread for resale from defendants who make it. The plaintiffs are suing the defendants for treble damages alleging that defendants have conspired to violate and have violated United States anti-trust statutes, by acts tending to create a monopoly through the fixing of sales prices, giving special discounts and other discriminations against them. (The Sherman Act, §§ 1 and 2, Title 15, U. S. C. A.; the Robinson-Patman Act, § 13, Title 15, U. S. C. A; The Clayton Act, § 2, Title 13(a).)

[*Subject Matter Jurisdiction*]

A session of court with counsel was held preliminarily in which it was agreed that time could be saved by trying the issue of "subject matter jurisdiction" separately[1] and ahead of other issues in the case, and it was agreed that counsel would attempt the

[1] The court clearly possessed jurisdiction of the case which it recognized early in the proceedings, when it denied the defendants' first motion to dismiss the complaint. Jurisdiction depends upon facts pleaded, not facts proved. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 249; *Brewer v. Hoxie School District # 46*, 8th Cir., 238 F. 2d 91, 95-98; *Phelan v. Taitano*, 9th Cir., 233 F. 2d 117; and *West Coast Exploration Co. v. McKay*, DC Cir., 213 F. 2d 582.

The theory that the existence of an effect on interstate commerce is a jurisdictional fact, enabling the judge to determine the issue for himself—see e. g., *Gilbert v. David*, 235 U. S. 56; and *Stauffer v. Exley*, 9th Cir., 184 F. 2d 962,—will in practice deprive plaintiffs of their right to a jury trial. See *Beacon Theatres v. Westover*, 359 U. S. 500; *Bertha Bldg. Corp. v. National Theatres Corp.*, 2nd Cir. [1957 TRADE CASES ¶ 68,860], 248 F. 2d 833, cert. den. 356 U. S. 936; and *Ring v. Spina*, 2nd Cir. [1948-1949 TRADE CASES ¶ 62,224], 166 F. 2d 546. Anything which may appear in *Taylor v. Hubble*, 9th Cir., 188 F. 2d 106, should be read in the light of *Byrd v. Blue Ridge Elec. Co-op*, 356 U. S. 525.

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formulation of a written stipulation of fact relevant to this special issue. Such a stipulation was agreed to and the court accepted it. See reference to the stipulation regarding the alleged conspiracy in Footnote.[3] The defendants offered nothing in addition. The plaintiffs objected to going forward upon the ground that a jury should be empaneled. They had demanded a jury, the defendants had not. The court then ruled that, as a matter of law, the plaintiffs' case was not within the reach of the anti-trust statutes; or to put it in another way, defendants' businesses were neither in nor did they affect interstate commerce. Accordingly, after making full Findings of Fact and Conclusions of Law, the court "Ordered, Adjudged and Decreed:

1. That plaintiffs' complaint herein is dismissed for lack of jurisdiction over the subject matter thereof.

2. That defendants' counterclaim herein, and each of them, are dismissed for lack of jurisdiction over the subject matter thereof." Defendants were awarded costs.

[*Issues*]

The plaintiffs are appealing and contend that the judgment must be reversed because they had a clear constitutional right to a trial to court and jury on every issue of the case. Plaintiffs also claim the judgment must be reversed for another reason—that even if they are wrong and the court alone, without the aid of a jury, had a right to rule on the subject matter jurisdiction issue as a matter of law, the court's conclusions were not supported by either fact or law in holding that subject matter jurisdiction had not been shown.

[*Right to Jury Trial*]

In the consideration of these points, we must first note that the trial court in proper circumstances, has the right to order separate trials for separate issues in the same case, F. R. C. P. 42(b). We also assume that when this is done in a non-jury case or one in which a jury has been waived, the judge has the power and the duty to receive all proper evidence offered and determine the questions of law and fact which are involved in the separated issue or issues. The rule however, as it seems to us does not sanction the switching of the separated issue in a jury case from the jury to the judge. It may be that this can be done in cases where the very stating of the separated issue shows it to be so frivolous that but the one view is entertainable by reasonable minded persons. The issue in this case is not of that quality. It seems to us that a safe practice would be never to separate the subject matter jurisdiction issue for separate trial in cases where the factual merits of the case must be considered in deciding the separated issue.

Separate trials for the determination of diversity and venue may be resorted to very properly. See *Gilbert v. David*, 235 U. S. 56. Also see *Bertha Bldg. Corp. v. National Theatres Corp.*, 2nd Cir. [1957 TRADE CASES ¶ 68,860]; 248 F. 2d 833, cert. den. 356 U. S. 936, in which the statute of limitations is involved.

Mr. Justice Black in *Beacon Theatres v. Westover*, 359 U. S. 500 at 501 says, "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care," quoting from *Dimick v. Schiedt*, 293 U. S. 474-486 See *Byrd v. Blue Ridge Co-op*, 356 U. S. 525. The trial judge in our case was of the opinion and found from the written stipulation and concession by plaintiffs that defendants were not in interstate commerce and that (we quote from his opinion) "In the case at bar, after a full hearing on the question of the interstate commerce phase of the case, we are of the opinion that plaintiffs have failed to establish defendants' business of producing and marketing bread is in or directly affects trade and commerce among the several states as alleged in the complaint." Thus the court took from the jury the determination of the basic issue in the case. We hold that the judgment must be reversed because of the court's assumption of the jury's prerogative.

[3] The stipulation shows that large and continuous shipments of flour and some bread-making machinery from out of state are received by defendants, which flour becomes the basic ingredient of the bread manufactured by defendants. Some of such flour is purchased directly by the defendants and some is contracted for out of state through other wholesale dealers in flour. The damages prayed for are bottomed upon an alleged conspiracy by and between defendants to create a phase of monopoly in the bread market of the Los Angeles area.

[*Interstate Commerce*]

And whether we are right or wrong in this, we hold that the judgment must be reversed because the court was clearly wrong in the conclusions he arrived at upon the separate issue.

It is fair to the court to say that it was greatly influenced by our opinion and decision in the *Klor* case [1958 TRADE CASES ¶ 69,007] which was reversed by the Supreme Court. *Klor's Inc. v. Broadway-Hale Stores* [1959 TRADE CASES ¶ 69,316], 359 U. S. 207. In this cited case, it is held that any restraint which is unreasonable *per se*, such as the price fixing and the special discounts allegedly here involved is actionable if it interferes ". . . with the 'natural flow' of an appreciable amount of interstate commerce." This case was decided by the Supreme Court after the instant case was dismissed by Judge Westover, as was *Beacon Theatres v. Westover, supra.* In *United States v. Employing Plasterers' Assn.* [1954 TRADE CASES ¶ 67,692], 347 U. S. 186, the court stated, "That wholly local business restraints can produce effects condemned by the Sherman Act is no longer open to question." And see, *Las Vegas Merchant Plumbers' Assn. v. United States*, 9th Cir. [1954 TRADE CASES ¶ 67,673], 210 F. 2d 732. As the court said in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* [1948-1949 TRADE CASES ¶ 62,291], 334 U. S. 219 at 232, it is no longer necessary ". . . to search for some sharp point or line where interstate commerce ends and intrastate commerce begins. . . . [T]he exact location of this line makes no difference, if the forbidden effects flow across it to the injury of interstate commerce. . . ." See also *Northern Pac. R. R. Co. v. United States* [1956 TRADE CASES ¶ 68,691]; 356 U. S. 1, 5, and *United States v. McKesson & Robbins* [1956 TRADE CASES ¶ 68,368], 351 U. S. 305, 310. In *Klor's v. Broadway-Hale Stores, supra* at 213, the court stated:

> ". . . [T]he Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly,"' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' *International Salt Co. v. United States*, 332 U. S. 392, 396."

The judgment appealed from is reversed and the case is remanded for trial in accordance with this opinion.[3]

Reversed and Remanded.

[¶ 69,592] United States of America v. J. M. Huber Corporation and Western Newspaper Union.

United States of America v. American Smelting & Refining Co. and Western Newspaper Union.

In the United States District Court for the Southern District of New York. Cr. 159-149 and Cr. 159-150, respectively. Filed December 30, 1959.

Cases Nos. 1456 and 1457, respectively, in the Antitrust Division of the Dept. of Justice.

Sherman Antitrust Act

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Prior Consent Decree as Bar.—A consent decree entered in a civil suit brought by the United States, charging price fixing in violation of the Sherman Antitrust Act, would not constitute a bar to criminal prosecution under the same Act even if the issues were precisely the same.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8029.010.

Department of Justice Enforcement and Procedure—Consent Decrees—Bar to Criminal Proceedings.—A consent decree did not by implication prohibit the Government from instituting criminal proceedings for price fixing activities which the consent decree

[3] Of course discriminatory discounts illegal only under section 3 of the Robinson-Patman Act may not be the basis for damages in a private action.

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enjoined, by reason of the express reservation in the decree of the Government's rights to bring subsequent proceedings based upon other activities of the defendant, such as acquisition of competing interests.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8341.

Department of Justice Enforcement and Procedure—Criminal Prosecutions—Bill of Particulars.—The Government's opposition to requests for particulars as to identity of persons on the ground that "a conspirator knows with whom he conspires" was improper because it assumed the guilt of the defendant. Opposition to other requests on the ground that the particulars would involve a disclosure of the Government's case was held to be inappropriate in the normal antitrust case. Matters alleged in the indictment in general terms were ordered to be reduced to specifics with precision and completeness; also, the Government was ordered to give particulars as to the time period of the alleged agreements and concert of action, the effects of the alleged conspiracy, and the illegal acts claimed to have been committed within the judicial district. Motions for other particulars as to the effects of the alleged conspiracy, the identity of various acts or documents, persons, and instances of denial of opportunity to purchasers were denied; requests for repetitive particulars were also denied.

See Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8025.800.

For the plaintiff: Philip L. Roache, Jr., and Joseph J. O'Malley, Attorneys, Dept. of Justice.

For defendant Western Newspaper Union: Royall, Koegel, Harris & Caskey (Frederick W. P. Lorenzen, Paul Kerins, and David F. Dobbins of counsel), New York, N. Y.

Opinion

Motions to Dismiss Indictments

Dimock, District Judge [In full text]: Defendant, Western Newspaper Union, hereinafter WNU, moves to dismiss the indictment in each one of these cases. The only other defendants, J. M. Huber Corporation, in Cr. 159-149, and American Smelting & Refining Co., in Cr. 159-150, have pleaded *nolo contendere*, so that in each case the only remaining defendant is WNU.

Each indictment charges "an unlawful combination and conspiracy in restraint of * * * interstate trade and commerce in violation of section 1 of the Act of Congress of July 2, 1890, entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' as amended, 26 Stat. 209, 15 U. S. C. Section 1, commonly known as the Sherman Act."

The motions to dismiss are based upon the existence of a consent decree in the case of *United States of America v. Western Newspaper Union, et al.* [1953 Trade Cases ¶ 67,557], Civil No. 87-60, entered in this court on August 18, 1953. The worst that WNU can say about the indictments is a claim that the Government is now bringing criminal proceedings in which it seeks to convict WNU of a crime where the issue is the same as that determined adversely to WNU by the consent decree. It is doubtful whether this claim that the issue is the same as one determined by the consent decree can be supported but WNU argues that, under certain circumstances, the consent decree would constitute a bar even if the issues were not precisely the same as those created by the indictment. Since my conclusion is that even were the issues precisely the same the consent decree would not be a bar to criminal prosecution, I need consider no other question.

[*Civil and Criminal Remedies Concurrent*]

The Sherman Act plainly contemplates concurrent civil and criminal proceedings based upon the same state of facts. Section 1 makes contracts, combinations or conspiracies in restraint of trade misdemeanors and provides for their punishment. Section 2 makes monopolies and attempts to monopolize and combinations and conspiracies to monopolize misdemeanors and provides for their punishment. Section 4 provides for such civil proceedings as those in which the consent decree was entered. It gives jurisdiction to the District Courts to prevent and restrain violations of sections 1-7, and makes it the duty of the several United States Attorneys in their

respective districts under the direction of the Attorney General to institute proceedings in equity to prevent and restrain such violations. The Act bears no indication that Congress intended the civil and criminal remedies to be alternatives. Indeed, on the face of the Act, it appears that the remedies are complementary. No reason is suggested why conduct, which has been proved to violate the statute and thus merit an injunction against it, should by virtue of that injunction be absolved from criminal consequences despite the Government's ability to prove it by the requisite degree of proof for a criminal conviction.

[*Consent Decree No Bar*]

In what I have just said, I have dealt with the ordinary decree entered after trial. Certainly a consent decree such as that here relied upon as a bar would have no more or less conclusive effect.

This is evidently a case of first impression. It is settled that an existing judgment in a criminal case does not prevent the bringing of a subsequent civil case by the Government. See, as to a judgment of acquittal, *United States v. Real Estate Boards,* 339 U. S. 485, 493-94, and, as to conviction, *Local 167 v. United States* [1932-1939 TRADE CASES ¶ 55,043], 291 U. S. 293, and *United States v. National City Lines,* D. C. N. D. Ill. [1954 TRADE CASES ¶ 67,654], 118 F. Supp. 465. The Government need not rely upon the threat of a second criminal prosecution as a deterrent but may ask the Court for an injunction forbidding future violations. No reason is perceived why, when an injunction forbidding future violations has been obtained, the Government should not be allowed to press for punishment for past violations.

[*No Bar Implied by Terms of Decree*]

Defendant argues that the consent decree here involved by its terms prevents criminal prosecution. For this it relies on a provision of the consent decree that it shall not operate as a bar or estoppel against any suit or proceeding based upon any acquisition by any defendant of any of the capital stock, physical assets, business or good will of any person engaged in the manufacture, sale or distribution of printing supplies, printing machinery or printers' services. Defendant argues that the injunctive provisions of the consent decree deal solely with price fixing and that the subject matter of the indictment is similarly confined. He says that, by the express reservation of the Government's rights to bring proceedings based upon acquisition of competing interests, there is a negative implication that the Government may not bring a proceeding based upon price fixing. Passing the question of the propriety of an agreement by the Government not to prosecute for crime, the provision under consideration is not susceptible of that construction. The consent decree provides:

> "Now, Therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of all parties hereto, it is hereby
>
> "Ordered, Adjudged and Decreed, as follows:"

The only conclusions in the judgment are that the court has jurisdiction of the subject matter and of the parties and that the complaint states a cause of action against the defendants under section 2 of the Sherman Act. All of the other provisions are merely injunctive or disclaimers. A decree which disclaims any adjudication except that the court has jurisdiction of the controversy and of the parties and that the complaint states a cause of action under section 2 of the Sherman Act, is so far from operating as a bar or estoppel that a disclaimer of that effect as against any suit or proceeding based upon an acquisition of competing business interests must be regarded as no more than the result of an excess of caution. I have concluded above that under the statute the Government may, upon a basis of the same conduct in each case, obtain an injunction and after the injunction has been obtained institute a proceeding by indictment. The question now raised is whether this court in the consent decree by implication prohibited the institution of such criminal proceedings. The circumstances are simply too weak to support the implication of an injunction against the Government in a decree enjoining defendants. The motions to dismiss the indictments are denied.

Motions for Bills of Particulars

Defendant moves also for bills of particulars. The indictments in each case are substantially identical except that the in-

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dictment in No. 159-149 charges a combination by WNU with J. M. Huber Corporation in connection with the sale of ink and the indictment in No. 159-150 charges a combination of WNU with American Smelting & Refining Company in connection with the sale of typemetals. WNU is alleged to be in the business of selling both ink and typemetals. Since the indictments are substantially identical, *mutatis mutandis,* the demands for particulars are substantially identical except that the demand in the case involving the American Smelting & Refining Company seeks particulars in one respect not covered by the other demand. I shall therefore deal with the demand in that case, No. 159-150.

[*Conspiracy Not to Be Assumed*]

The Government strenuously opposes most of the requests. The principal ground of opposition is one which long ago ought to have been laid at rest. I quote an example: "It seems too obvious for argument that a conspirator knows with whom he conspires." I can do no better than to repeat the comment made by the then District Judge Whittaker in *United States v. Smith,* D. C. W. D. Mo., 16 F. R. D. 372, 375:

> "Not is it any answer to a motion for a bill of particulars for the government to say: 'The defendant knows what he did, and, therefore, has all the information necessary.' This argument could be valid only if the defendant be *presumed to be guilty.* . . . Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges.' "

It must never be forgotten that what is sought by a bill of particulars is not what actually happened but what the opponent claims happened.

[*Disclosure of Government's Case*]

Another objection urged throughout by the Government is that to furnish the particulars requested would involve a disclosure of the Government's case. It is true that, in the average criminal case where a defendant is fighting for his life or liberty against the charge that he has committed some crime of violence, to disclose the Government's case in advance might make it too easy for the defendant to concoct an alibi or a fictitious defense. That consideration, however, is rarely present in the normal antitrust case. The question is usually one as to the inferences to be drawn from conceded facts. Complicated matters like economic theories are more likely to be under consideration than the simple matter of whether the defendant was the man who struck the blow. The expense in time and money of antitrust cases has been a byword and from all sides the courts are being urged to simplify them. In the case at bar the Government has had access to all of the defendants' files in the course of the civil litigation that ended in the consent decree. There is no reason in the world why the Government should not with precision state exactly what it charges constituted the crime for which it now prosecutes the defendants. That is not to say that the rule against the requirement of the disclosure of the Government's evidence should be abandoned in this or in any other case nor is it to say that the courts should fashion a practice under which the defendant in a criminal case may demand that the Government answer interrogatories. Insofar, however, as matters are alleged in the indictment in general terms, those general terms must be reduced to specifics with precision and completeness.

With those general observations, I shall proceed to details.

What I have said leads to my granting of particulars in response to requests A(1) and A(3). Request A(2) deals only with the point which I have already resolved against defendant that it may not be prosecuted criminally for an offense which has been the basis of its consent to a decree against it. Accordingly the request is denied.

Paragraph 11 in the indictment reads as follows:

> "11. The aforesaid combination and conspiracy has consisted of a continuing agreement and concert of action between ASARCO, WNU, and other persons to the grand jury unknown, the substantial terms of which have been and are that they agree to fix, maintain and stabilize the selling prices at which typemetals are sold to ultimate consumers or users."

[*Identity of Persons*]

Request B(1) asks for the identity of those claimed to have performed acts "pur-

suant to the continuing agreement and concert of action" *et cetera.* This is certainly too broad and is disapproved. Defendant is being prosecuted for engaging in a combination and conspiracy, not for making sales pursuant to such a combination and conspiracy. The combination and conspiracy might be proved by evidence of acts attributable thereto but still the gist of the charge would be the combination and conspiracy. To require a statement of every act done which the Government claims was performed pursuant thereto might require the specification of thousands of orders for small amounts of typemetals.

[*Repetitive Requests*]

Requests B(2) and B(3) seek the usual details which would be required under the old practice in civil cases with respect to an agreement, *i.e.,* whether express or implied, whether in writing or oral, if in writing, a copy thereof, and if oral, the substance thereof, by whom and to whom spoken and the time and place of the conversation. Request B(4) asks for the substance of the continuing agreement insofar as it was claimed to be implied. Requests B(2), B(3) and this part of B(4) should be complied with and the answers given with particularity and detail. Indeed, if these requests are answered with particularity and detail, there will be no need to answer the succeeding requests numbers B(6), B(7), B(8), B(10) and B(12) and those requests are therefore denied not because they are improper but because to answer them would require a repetition of the material furnished pursuant to requests B(2), B(3), and part of B(4).

[*Identity of Acts or Documents*]

The last part of the request B(4) asks for the identity of the acts or documents from which the supposed implied continuing agreement is implied and asks the names of the persons who performed the acts and the dates of the occurrences. That seems to me a mere request for evidence. It seeks the circumstantial evidence from which the Government says that the continuing agreement should be implied. It need not be answered.

Request B(5) asks with respect to "concert of action" the same particulars as asked in the first part of B(4) above with respect to "continuing agreement". If anything different is meant by the two expressions the request is proper.

[*Time of Agreement and Action*]

Request B(9) would be proper except for the fact that it asks some details which will have been furnished pursuant to demands such as numbers B(2), B(3) and B(4). Therefore request B(9) is allowed only to the extent of requiring a statement of the time period in which the alleged continuing agreement and concert of action were operative in each geographical area.

Request B(11) does not seek an amplification of anything alleged in the indictment but is rather a substitute for the interrogatory practice which does not obtain in criminal cases and is denied.

[*Effects of Combination*]

Paragraph 13 of the indictment states the alleged effects of the combination and conspiracy. It states as such an effect that the prices at which typemetals are sold to ultimate consumers or users have been fixed and competition between the defendants has been suppressed and eliminated. Request C(1) begins by asking whether competition was suppressed by the establishment of uniform prices in any geographical area and, if so, it asks the Government to specify each such area, price and the time during which such price was in effect. Since the Government has chosen to allege this effect in the indictment, it must be assumed that it expects to prove the allegation. The allegation thus assumes importance and the requests in the first two sentences of C(1) are no more than those which will give an identifying description of the effects alleged and are therefore allowed. The balance of C(1), however, asks for matters which will be furnished under such requests as B(2), B(3) and B(4), or else seeks matters which could only be obtained by the non-permissible interrogatory method and need not be answered.

Requests C(2) and C(3) ask for details as to matters alleged in the indictments to which the defendant is entitled.

One of the allegations of paragraph 13 is subdivision (c) which says that one of the effects of the combination and conspiracy was that purchasers, ultimate consumers and users of typemetals have been denied the opportunity to purchase typemetals in

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a free and competitive market. In request C(4) defendant asks for a statement of each instance in which purchasers or ultimate consumers and users of ink have been denied such an opportunity. The indictment's allegation was an allegation only of a general condition. To ask for each manifestation of that general condition is absurd.

Paragraph 13 of the indictment states that it lists various restraints as effects of the combination and conspiracy "among others". Request C(5) asks whether there have been other restraints than those listed in paragraph 13 and, if so, asks a statement of the way in which they did restrain trade and commerce. As I have said, the allegation of the effects of the combination and conspiracy is an unnecessary one. Thus the use of the words "among others" does not indicate to me that the Government intends to offer evidence of effects other than the general ones alleged but rather that the Government does not wish to be understood as alleging that the listed effects were the only ones. Request C(5) need not be answered.

[*Acts Charged Within District*]

Paragraph 14 of the indictment alleges facts with respect to jurisdiction and venue. This is an important matter and defendant is entitled to have the particulars with respect to the connection of the acts charged with the Southern District of New York. The information required by request D(1) must be furnished.

Request D(2) is "State what illegal acts are claimed to have been committed by the defendants in the Southern District of New York and give the date of each such act". To answer such a broad request might lead far afield of anything which would be the subject of evidence so that the request should be amended and answer given to it in the amended form: "State the illegal acts committed by the defendants in the Southern District of New York as to which the Government will offer evidence and give the date of each such act."

In accordance with defendant's motions the court directs that, as to any items among the requests concerning which the Government shall state in its bill of particulars that its knowledge or information is incomplete, the Government shall set forth in its bill of particulars whatever knowledge or information it may have and shall furnish further particulars within ten days after it shall have obtained further knowledge or information and, in any event, not later than thirty days before the trial.

Settle order on notice.

[¶ 69,593] Limmat Corporation v. Dorosin Distributing Corporation.

In the New York Supreme Court, New York County, Special Term Part I. 142 N. Y. L. J. No. 125, p. 11. Dated December 30, 1959.

Clayton Antitrust Act

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Jurisdiction of State Courts.—A state court has no subject matter jurisdiction to give affirmative relief on a counterclaim alleging violation of the antitrust laws.

See Private Enforcement and Procedure, Vol. 2, ¶ 9047.50.

Private Enforcement and Procedure—Antitrust Law Violations as Defenses—Where Alleged Violation Is Collateral to Right Sued Upon.—Defenses based upon violations of the Clayton Act were stricken as insufficient in an action to recover the purchase price of goods sold.

See Private Enforcement and Procedure, Vol. 2, ¶ 9042.650.

MARKEWICH, Justice [*In full text*]: Motion to dismiss the first, second, and third counterclaims in the defendant's answer pursuant to Rule 109, subdivisions 4 and 5, Rules of Civil Practice, on the ground that each of the counterclaims is not one which may be properly interposed in the action and that each of the counterclaims does not state facts sufficient to constitute a cause of action is granted. None of these counterclaims show on their face that they existed prior to the assignment of the claim and on and before notice of the assignment. These facts are essential to a

valid counterclaim. The affidavit submitted by defendant has been disregarded as unavailable on motions under Rule 109, Rules of Civil Practice, attacking defenses and counterclaims for insufficiency on their face (*Levan v. Am. Safety Table Co.*, 222 App. Div. 110). The second and third counterclaims are defective on the face thereof on the further ground that they assert no rights against the plaintiff. Each is directed against others, not parties to the action. The statement in the memorandum of plaintiff is that no judgment is sought against plaintiff but only setoffs against its claim is ineffective in the face of the answer. The third counterclaim is insufficient and should be dismissed because a state court has no subject matter jurisdiction to give affirmative relief for alleged violations of the Clayton Act (U. S. Code, title 15, section 15). That branch of the motion to strike out the first, third, fourth, and fifth defenses pleaded in defendant's answer pursuant to Rule 109, subdivision 6, of the Rules of Civil Practice for insufficiency is granted. The first defense is predicated upon an alleged advance of $9,500. The word "advance" lacks legal significance and defendant should allege facts upon which a legal obligation can rest. The third, fourth, and fifth defenses based upon alleged violations of the Clayton Act are insufficient (*Bruce's Juices v. American Can Co.* [1946-1947 TRADE CASES ¶ 57,553], 330 U. S. 743; *American Woolen Co., Inc. v. Miller-Schulman Corp'n* [1954 TRADE CASES ¶ 67,895], 206 Misc. 1005). That branch of the motion that seeks to strike out all matter contained in paragraph 17 of the answer pursuant to Rule 103 of the Rules of Civil Practice is granted and the allegations are stricken as irrelevant and immaterial to the second defense of an alleged breach of warranty. Defendant may serve an amended answer within twenty days after service of a copy of this order with notice of entry.

[¶ 69,594] California League of Independent Insurance Producers; The Bach Company; J. B. Baldwin; Don C. Barnett; James P. Bennett & Co.; Beauchamp & Randall; Belknap & Belknap; Bender Insurance Agency; Fred R. Berbower & Son; The Blatz Company; H. M. Burgwald Company; Paul L. Byrne; C. E. Canfield & Son; Carmichael Insurance Agency; Chickering, Lane & Rowe; Milton R. Cheverton Company; H. L. Close; Lew Colby Insurance; Cook & Hubbard; Donald L. Curtice; DeBoer & Snapper Insurance Service; Deskins & Chase; Harold DeWitts & Company; Clarence L. Dickinson; Harold F. Drew; Eichelberger-Hobin, Inc.; Emslie & Lorenz; Arthur Garben; Gardena General Insurance Agency; Gateway Insurance Agency; W. B. Glassick Company; Robert Graper Insurance Agency; Hy Greenberg; Robert J. Grentner; Hackney & Wardhaugh; Lloyd E. Harrell Insurance Agency; Neal Harris Agency; Henry H. Hasty; Henry H. Helfman; Thomas J. Hoffpauir; Rex L. Hott; Bruce Holman Company; Humphreyville & Dahl; Hume Insurance Agency; Insurance Associates of Southern California; Thomas J. Jeffers; Kettner-Stafford Co.; E. M. Lash; Frank Lewin & Sons, Inc.; John R. Lusby Insurance Agency; C. F. Lynch; James J. McBride; Mrs. Eva Musto McNabb; Marks & Marks; Ted Mastos & Co.; Midway Insurance Agency; Moreali & Company; Russell N. Morris Insurance Agency; Clifford A. Mott; Mott Insurance Agency; Nash Insurance Agency; Nelson-Hooper Agency; House of Nelson; J. E. O'Connor; Charles Orlin; Gardner T. Palmer; Paso Robles Insurance Agency; Passick-Menzell Insurance Agency; Stephen F. Phelan Agency; Paul P. Phelps; Pleasant Hill Insurance Agency; Les Pritchard; Putnam & Weaver; Quality Insurance Agency; Harold Riches; James D. Robb; Lowell Rouse; Ryan, Rubendall & Cannon, Inc.; Jack R. Schweizer; Schroeter, White & Johnson; William F. Segerstrom; Harold M. Sharp; Shepperd Insurance Agency; George D. Mitchell; Redmond Insurance Agency; Ernest W. Schween; Claude V. Smith & Co.; Scott Valley Bank; F. M. Sizer; P. G. Sprigg Insurance Agency; Stephens Insurance Service; Julia W. Sullivan; Al Thornquist; Guy M. Turner & Associates; United Insurance Service; Van Vlack; Howard S. Vandeman; E. G. Vollman; Welsh & Sons; Elbe Westfall; Ken White Insurance; Ancil A. Wilson; Whitman & Erbes; Lawrence E. Wraith; and Zimmerman Insurance Agency v. Aetna Casualty and Surety Company, Fireman's Fund Indemnity Company, Great American Indemnity Company, Pacific Indemnity Company, Royal Indemnity Company, The Travelers Indemnity Company, and United Pacific Insurance Company.

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In the United States District Court for the Northern District of California, Southern Division. Civil No. 37934. Dated December 11, 1959.

Sherman Antitrust Act and McCarran Act

Combinations and Conspiracies—Fixing Prices in Insurance Industry—Antitrust Exemption Conferred by McCarran-Ferguson Act—Conspiracy Effectuated by "Boycott"—Refusal to Deal Except at Fixed Price.—The McCarran-Ferguson Act precludes a Sherman Act suit involving a state-regulated phase of the insurance industry unless the offending conduct constitutes "boycott, coercion, or intimidation." Where price fixing conspiracies are effectuated by such means, they are not within that antitrust exemption. Thus, an amended complaint charging insurance companies with concertedly decreasing the rate of commissions paid to automobile insurance agents, and with using "boycott, coercion or intimidation" to effectuate their "refusal to deal except at the agreed price," sufficiently stated a cause of action under the Sherman Act. There is no distinction between an *absolute* refusal to deal, or the inducement of others to refuse absolutely to deal, and a partial refusal to deal *except* at a fixed price.

See Combinations and Conspiracies, Vol. 1, ¶ 2263.

For the plaintiffs: Joseph L. Alioto, San Francisco, Calif.

For the defendants: McCutchen, Doyle, Brown & Enersen, San Francisco, Calif., for Aetna, Great American, Royal and Travelers; Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, Calif., for Fireman's Fund; Cooley, Crowley, Gaitner, Godward, Castro & Huddleson, San Francisco, Calif., for Pacific Indemnity; and Pillsbury, Madison & Sutro, San Francisco, Calif., for United Pacific.

For a prior decision of the U. S. District Court, Northern District of California, Southern Division, see 1959 Trade Cases ¶ 69,367.

Order Denying Motions Under F. R. C. P. 12(b)(1), 12(b)(6), 12(e), 12(f) and to Dismiss for Failure to Comply with Court Order

ALBERT C. WOLLENBERG, District Judge [*In full text*]: On May 20, 1959, this court granted defendants' motions under F. R. C. P. 12(b)(6) to dismiss the original complaint. The court held that § 2(b) of the McCarran Act [15 USCA § 1012(b)] precluded a Sherman Antitrust Act suit involving California insurance agents' commissions except on the narrow grounds stated in § 3 (b) of the McCarran Act [15 USCA § 1013(b)]. Thereafter, and within the time specified by the court, plaintiffs filed their amended complaint which now is the subject of the present motions. First the court will consider the motions under F. R. C. P. 12(b)(1) to dismiss for lack of jurisdiction over the subject matter.

[*Motions to Dismiss—Jurisdiction*]

The defendants contend that price-fixing conspiracies effectuated by the methods stated in § 3(b) of the McCarran Act are within the antitrust immunity provisions of § 2(b) of said Act. Section 3(b) precludes a Sherman Act suit involving a state-regulated phase of the insurance industry unless the offending conduct constitutes "boycott, coercion, or intimidation." 15 USCA § 1013(b). The defendants argue, among other things, that every price-fixing conspiracy necessarily involves economic pressures not to do business except at the agreed price. Defendants conclude, therefore, that Congress obviously did not intend § 3(b) to apply to what is necessarily involved in every price-fixing agreement. Plaintiffs, on the other hand, argue that the result urged by defendants is contrary to Congressional intent expressed in § 3(b), since it would give insurance companies federal antitrust immunity from price-fixing conspiracies effectuated by "boycott, coercion or intimidation."

The court recognizes that both contentions are extreme in result. Plaintiffs' position renders § 2(b) of the McCarran Act, which attempts to severely restrict application of the Sherman Act, meaningless. Defendants' theory renders § 3(b) largely ineffective. There is nothing in the legislative history to suggest the result urged by either plaintiffs or defendants. Thus, giving the wording of the statute its plain meaning, the court concludes that plaintiffs' interpretation is correct.

In addition, the defendants contend that the terms in § 3(b) are directed to a con-

certed *absolute* refusal or the inducement of others to refuse absolutely to deal. Thus, the defendants distinguish between an *absolute* refusal and a refusal *except* at a fixed price. The distinction is without substance. There is no reason to hold that § 3(b) withholds immunity in case of an actual total boycott, but grants antitrust immunity for a threatened total or partial boycott. Section 3(b) permits a Sherman Act suit in a state regulated phase of the insurance industry if conduct amounts to boycott, coercion or intimidation. These are the methods to effectuate the refusal to deal except at the agreed price.

Therefore, the motions under F. R. C. P. 12(b)(1) must be, and the same are hereby denied.

[*Motions to Dismiss—Sufficiency of Complaint*]

The court will now consider the motions addressed to the sufficiency of the amended complaint [F. R. C. P. 12(b)(6); 12(e); 12(f)] and its compliance with this court's previous order. The complaint sufficiently alleges a boycott. It alleges, inter alia, that the defendants (a) induced other insurance companies to refrain from doing business with plaintiffs except at the agreed commission and (b) conspired to refuse to do business except at said rates.

The motions under 12(b)(6), 12(e) and 12(f) are hereby denied.

The motions to dimiss for failure to comply with the court's previous order are hereby denied.

[¶ 69,595] Melard Manufacturing Corporation v. Chase Brass & Copper Co., Inc., The Chicago Faucet Company, et al.

In the United States District Court for the Northern District of Illinois, Eastern Division. No. 55 C 84. Filed December 31, 1959.

Sherman Antitrust Act

Combinations and Conspiracies—Patent Licensing—Tying Provisions.—Provisions in a patent licensing agreement requiring that a patented aerator be sold only in conjunction with a faucet and that it be exported only with the consent of the patentee were not illegal *per se;* consequently, summary judgment was denied.

See Combinations and Conspiracies, Vol. 1, ¶ 2013.500.

For the plaintiff: Will Freeman, W. M. Van Sciver, Norman Lettvin, and D. D. Allegretti, of Bair, Freeman and Molinare, Chicago, Ill.

For the defendants: Douglas C. Moir and Calvin Sawyier of Winston, Strawn, Smith & Patterson; Brown, Jackson, Boettcher & Dienner; Raymond E. Trafelet; and Merriam, Smith & Marshall (by Samuel B. Smith); all of Chicago, Ill.

Memorandum on Motion of Chicago Faucet Company for Summary Judgment on Counter-claim of Aghnides

Edwin A. Robson, District Judge: [*In full text*]: Chicago Faucet Company moves for summary judgment on the counterclaim of Aghnides on the ground that the License Agreement of January 1, 1945, contains provisions in violation of the antitrust laws in that they require the aerator licensed thereunder to be sold only in conjunction with a faucet and prohibit the exportation of aerators except with the consent of the patentee.

The court concludes that the motion for summary judgment is ill-founded because these license provisions are not illegal *per se.* They are not of the character heretofore condemned by the courts as unlawful tying agreements.[1] Nor is the instant restriction on the exportation of the aerator illegal *per se.*[2]

The motion for summary judgment is denied.

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[1] *International Salt Co. Inc. v. United States* [1946-1947 TRADE CASES ¶ 57,635], 332 U. S. 392 (1947); *Morton Salt Co. v. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488 (1941); *Mercoid Corp. v. Mid-Continent Co.* [1944-1945 TRADE CASES ¶ 57,201], 320 U. S. 661 (1943). Cf. *Vulcan Mfg. Co. v. Maytag Co.,* 73 F. 2d 136 (C. C. A. 8, 1934).

[2] *Brownell v. Ketcham Wire & Mfg. Co.* [1954 TRADE CASES ¶ 67,686], 211 F. 2d 121 (C. A. 9, 1954); *Elliott Co. v. Lagonda Mfg. Co.,* 205 Fed. 152 (D. C. Pa., 1913).

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